

FINDING THE “GOLDEN MEAN” IN DUAL REPRESENTATION

updated by Cyrus D. Mehta*

INTRODUCTION

When this article was first published, it generated considerable interest within the immigration bar.¹ This is a revision and update of the original article, which continues to further explore how best a lawyer can represent two or more clients through the “Golden Mean” approach.²

The practice of immigration law involves dual representation more so than other areas of legal practice because immigration lawyers tend to repre-

This article is based upon the articles, “Finding the ‘Golden Mean’ in Dual Representation—Updated,” Immigration Briefings, August 2006, © 2006 West, a Thomson business, and “Finding the ‘Golden Mean’ in Dual Representation,” *Immigration & Nationality Law Handbook 1* (2005–06 ed.). Copyright © 2005, American Immigration Lawyers Association (AILA), available from AILA Publications, 1-800-982-2839, www.ailapubs.org.

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The author thanks Michael D. Patrick and Mark J. Newman for reviewing the article, and his associate, Elizabeth T. Reichard, for her assistance.

¹ Cyrus D. Mehta, “Finding the ‘Golden Mean’ in Dual Representation,” *Immigration & Nationality Law Handbook 29* (AILA 2005–06 ed.); reprinted in *Selected Fundamentals of Immigration Law* (AILA 2005–06 ed.). The article has also been cited in Kristina K. Rost, “Ethical Dilemmas: A Never Ending Quandary,” 25-1 *AILA’s Immigration Law Today* 8, (Jan./Feb. 2006), and Nancy L. Cohen, “Ethical Issues in Immigration Law,” *AILA Business Immigration Ski Conference Handbook*, Feb. 4, 2006, available at www.aila.org. It was first discussed during an ethics panel, “Ethical Conflicts in Legal Representation,” comprising Mark Newman, Michael Patrick, and the author, at the 2005 AILA Annual Conference in Salt Lake City. The article was again discussed during an AILA teleconference, “Ethical Issues for the Business Practitioner,” on November 8, 2005, and during, “Ethical Issues in Employment and Family-Based Practice,” at the 8th Annual AILA New York Chapter Immigration Law Symposium, Dec. 8, 2005, New York.

² The writer was inspired by Aristotle’s Golden Mean. See Will Durant, “The Story of Philosophy: The Lives and Opinions of the Greater Philosophers” (1926).

sent employers and employees, as well as both the parties in a marriage. While the interests of both clients may initially coincide, making dual representation possible and convenient, these relationships can be fraught with conflict.

The “Golden Mean” is an effective way to deal with conflicts when an attorney represents multiple clients. Some attorneys attempt to avoid dual representation by assuming one of the parties, frequently the employer, to be the client. This is sometimes known as the “Simple Solution.”³ The “Golden Mean” approach is not an endorsement of the “Simple Solution;” rather it serves as a starting point for a discussion on how an attorney can realistically represent two clients with potentially differing interests. Most immigration attorneys assume the full responsibilities of dual representation, but may be compelled to withdraw from representing both parties in the event of even the slightest conflict.

The “Golden Mean” is a middle ground approach between the “Simple Solution” and full throttled dual representation, and provides ways in which an attorney can allocate how each party will be represented in advance, and even limit the representation of one party over the other so as to avoid any conflict. In the event of a conflict, the Golden Mean approach might still enable the attorney to continue to represent one party and not the other.

The author acknowledges that the Golden Mean approach is a novel approach to representing multiple clients, and there may be differing views on the best way to represent more than one client.

³ See generally, Bruce A. Hake, “Dual Representation in Immigration Practice,” *Ethics in a Brave New World* 28 (AILA 2004) (providing a general discussion of dual representation in immigration law and the problems stemming from adopting the “Simple Solution”). See also Tafapolsky and Chen, “When the Axe Falls: Ethical Guidance for Terminated Immigration Counsel,” 01-08 *Immigration Briefings* (Aug. 2001).

THE DIFFICULTY IN REPRESENTING TWO CLIENTS

Dual Representation Can Undermine the Duty of Loyalty and Confidentiality

Dual representation implicates two fundamental principles in the attorney-client relationship. The first is the attorney's duty of loyalty to a client.⁴ When an attorney represents multiple clients, he or she has to be loyal to each of them regardless of who pays the bill. The second is the attorney's duty of confidentiality toward a client. In the case of multiple representations, there cannot be secrets between the two clients.⁵ Any communication from one client to the attorney has to be revealed to the other, unless a specific and approvable consent is granted.

Yet, dual representation is permitted unless there is a present conflict of interest. Even if there is a conflict of interest, Model Rule 1.7 provides:

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 in the same litigation or another proceeding before the tribunal; and each affected client gives informed consent, confirmed in writing.⁶

Each Party Being Represented by a Separate Attorney is Impractical

It would seem to be ideal for each party to be represented by a different attorney. Both the employer and employee could have a separate attorney during the nonimmigrant visa process and permanent residency. While this could be an ideal scenario, it is difficult in practice in the immigration law context because of the common purpose and overlapping relationships of the parties. For example, in the context of family immigration, it would not make sense for the husband and wife, or parent and child, to have separate attorneys when their interests virtually coincide.⁷

Even in employment-based immigration, where the conflict is inherent at the outset, the interests of the employer and employee generally coincide. For instance, the employer wishes to sponsor a foreign national employee to work in the United States on an H-1B visa. Both employer and employee share the same objective, even though they realize that the employment may be "at will," and may be terminated at any time. The employer is willing to comply with its obligations with respect to paying the required wage and other obligations of the Labor Con-

⁴ ABA's Model Rules of Professional Conduct (Model Rules) mandate that the lawyer "exercise independent professional judgment and render candid advice." Model Rule 2.1 (2002). *See also Smoot v. Lund*, 369 P.2d 933 (Utah 1962) ("[w]here an attorney is hired solely to represent the interests of a client, his fiduciary duty is of the highest order and he must not represent interests adverse to those of the client").

⁵ Model Rule 1.6 prohibits a lawyer from revealing 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 one of the exceptions in the Model Rules. Model Rule 1.6 (2002).

⁶ California is one such state that requires consent in writing. *See Cal. Rules of Prof. Conduct R. 3-310(C)* (2005). Not all states require the consent to be in writing, but it is always advisable to obtain consent communicated by writing to both clients. Also, not all conflicts are waivable. In New York, for example, "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 simultaneous representation and the advantages and risks involved." NY Code of Prof. Responsibility DR 5-101(C).

⁷ Yet, there may be situations when one relative may wish to keep secret from the other relative certain things, such as the facts surrounding a prior criminal conviction, which must be disclosed on an immigration form.

dition Application (LCA) underlying the H-1B visa, including advising the employee of his or her rights under the H-1B visa program. It would be impractical and probably unnecessary for this foreign national employee, who may still be overseas, to retain a separate attorney to advise him or her on the H-1B visa process.

The Potential for Conflict When One Client Has Greater Contact With the Attorney Over the Other Client

Even if an attorney is able to safely assume dual representation, he or she is almost always approached (and often retained) by one of the parties first, and often remains in greater contact with one client over the other. The prior article termed this the "primary client syndrome," but the term "primary client" will no longer be used as it can suggest unintended prioritization and has the potential to cause confusion.⁸

Under the Golden Mean approach, the attorney is expected to represent both clients, irrespective of who contacted him or her, with the same zeal and vigor within the parameters of the representation. Experience teaches us, however, that the client with more contact, in addition to paying the attorney's fees, also discloses information that it expects the attorney to keep confidential from the other party. Such a client usually possess a greater expectation of loyalty from the attorney despite the fact that the attorney is representing both parties and is required to be loyal to both.

For example, an employer-client may retain the attorney to represent it in obtaining an assortment of work visas for its employees and pay substantial legal fees each month. If the employer-client prefers not to sponsor its employees for permanent residency, but to transfer them to its overseas parent company after their nonimmigrant visa statuses come to an end, the employer client may not want this information given to its employees. Nor would such an employer desire its immigration attorney to advise employees on permanent residency options. If an employee of the employer-client wishes to consider leaving and explore visa options with other employers, the employer-client surely does not want

its attorney to be advising employees on this matter either.

In such a situation, the employer is the client that enjoys more contact with the attorney. Despite the existence of such a relationship, the interests of both the employer and employee will initially coincide when the visa petition is filed and the employee begins work. If this employee wishes to inquire about "portability,"⁹ or wishes to explore permanent residency options, however, the attorney will be faced with a potential conflict of interest. If the attorney cannot resolve the conflict, he or she may no longer be able to represent the foreign national employee. Worse still, the attorney may have to reveal this information to the employer as both clients in a dual representation situation are owed the same loyalty and there are usually no secrets between them, unless specifically agreed to at the outset of the representation.¹⁰

Despite this conflict, the attorney may still want to continue to represent the corporate client even if the employment of the foreign national is terminated. The attorney has a duty to advise the employer to properly effectuate the termination in order to prevent the employer from liability for "benching" this employee.¹¹ Thus, the attorney would need to withdraw the H-1B petition on behalf of the employer to properly evidence the termination. If the departing H-1B employee complains to the Department of Labor (DOL) alleging an LCA violation, the

⁸ The term "primary client" was used in *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977) (holding that there was no conflict between former client and current or "primary" client where former client had no expectation that information would be kept secret from the primary client).

⁹ Subject to certain conditions, §214(n) of the Immigration and Nationality Act (INA) allows a nonimmigrant in H-1B status to accept new employment upon filing by the prospective employer of a new petition on behalf of such a foreign national.

¹⁰ *But see Hake, supra* note 3, at 35, citing D.C. Bar Opinion 296 (Feb. 15, 2000), available at www.dcbbar.org, which holds that the mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another. The lawyer, however, is expected to withdraw from representing both parties, in the absence of a prior arrangement to deal with the conflict, and the lawyer can also engage in a "noisy" withdrawal if the inability to disclose the confidence will be harmful to the other client.

¹¹ An employer must continue to pay the H-1B employee who is not performing work unless there is termination of employment. Section 655.731(c)(7)(i) of 20 Code of Federal Regulations (CFR). One indicia of termination of employment is for the employer to withdraw the H-1B petition.

employer would likely ask this attorney to represent it in any investigation.¹²

The flipside of this situation is not uncommon. The attorney may be first contacted by the employee,¹³ who expects the attorney to look after his or her best interests in obtaining the nonimmigrant visa and advising on the best options for permanent residency. For instance, if the employer wishes to pursue a conservative strategy toward permanent residency, the foreign national client would still expect the attorney to pursue, or at least advocate, a more aggressive one. The attorney can represent the employer so long as the latter cooperates with the employee in seeking out the optimum immigration solutions. However, if the employee, who is more in contact with the attorney than the employer, now wishes to leave this employer for an employer more likely to assist with permanent residency,¹⁴ the attorney will have a conflict. In the event that the employee leaves, he or she will likely expect the attorney to continue the representation with a new employer.¹⁵

¹² In the event of such an investigation, DOL never discloses the source of the complaint and audits all of the employer's LCAs.

¹³ Note that if a foreign national advances the attorney fees with respect to the preparation and filing of the LCA and H-1B petition, DOL will likely reduce that amount from the salary if the employer is audited. See 20 CFR §655.731(c)(9)(iii)(C). If the deduction falls below the required wage which the employer is obligated to pay under the LCA, it would constitute a violation for the employer. Two commentators have suggested that when an employer has filed an LCA stating it is paying the required wage minus the attorney fees, it could constitute a misrepresentation of a material fact, resulting in both ethical and criminal consequences for the attorney. See Naomi Schorr and Stephen Yale-Loehr, "Corporate Cuts: Reductions in Pay and Hours for Nonimmigrants," *Bender's Immigr. Bull.* (Apr. 15, 2002).

¹⁴ If a foreign national is already employed by the employer, the employer cannot require experience gained on the job as a job requirement unless the employee gained the experience while working for the employer in a position not substantially comparable to the position for which certification is sought. 20 CFR §656.17(i)(3).

¹⁵ Under Disciplinary Rule 5-108 of the New York Code of Professional Responsibility, the lawyer cannot 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." This may be an issue because if the employee moves to a competing entity, it may adversely affect the former employer. Although the employee's work does not per se involve immigration matters, it may adversely affect the former employer. It would be advisable

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Even if the objectives of both clients initially coincide, the existence of a client who has more contact with the attorney leads to a greater likelihood for conflict.

THE SIMPLE SOLUTION

Many lawyers attempt to avoid these pitfalls of dual representation by adopting the Simple Solution, which involves viewing the employer as the sole client. In an H-1B petition, for example, the forms are exclusively signed by the employer as well as the Form G-28, Notice of Appearance.¹⁶

This solution unfortunately, may not be so *simple* because a lawyer-client relationship can start so long as there is an expectation that an individual is being represented.¹⁷ An express contract is not required, nor is payment of fees.¹⁸ The immigration attorney is bound to come into contact with the non-citizen employee during the preparation of the application and

for the attorney to obtain consent in advance that he or she would continue to represent this employee in the event that the employment was terminated. See *infra*, note 40.

¹⁶ For a useful discussion on affirmative steps to avoid or limit representation of the foreign national client, see Kristina K. Rost, "Managing Ethical Conflicts in Business Practice," *Immigration & Nationality Law Handbook* 38 (AILA 2006–07 ed.).

¹⁷ For a trenchant criticism of the Simple Solution, see B. Hake, *supra* note 3. Hake argues that the prohibition against giving advice to nonclients destroys the Simple Solution theory, and cites D.C. Rule 4.3 which, in part, provides that a lawyer cannot give advice to the unrepresented person other than the advice to secure counsel. Model Rule 4.3, upon which D.C. Rule 4.3 is based, states: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

¹⁸ The lawyer-client relationship exists even before representation commences or is contracted. The Florida Bar Association has held that that "representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced." FL. Bar Op. 78-4 (1978). Model Rule 1.18 provides that even if the actual representation does not ensue, a lawyer "shall not use or reveal information learned in a consultation" from a prospective client.

this individual may develop a belief that he or she is represented by the attorney. Even if the attorney expressly states that he or she is only representing the employer, such a disclaimer may prove ineffective if the attorney also provides advice to the foreign national during the process, knowing that he or she is not being separately represented. Such advice is bound to be given when the foreign national applies for a visa at a U.S. consulate, as well as subsequently, with respect to maintaining status in the United States.

The Simple Solution becomes even more untenable when the lawyer represents the employer in the permanent residence process. A labor certification application requires both the employer's and employee's signature. There is a good deal of interaction with the foreign national employee during this process. Moreover, after approval of the labor certification, the employer files the Form I-140, Immigrant Visa Petition, and the foreign national employee files the Form I-485, Application to Adjust Status to Permanent Residence. The latter application belongs solely to the foreign national. If the Form G-28 is signed by the attorney and the foreign national indicating that the attorney is the foreign national's representative, it will be difficult, if not contradictory, for the attorney to assert that he or she is only representing the employer.

Finally, the Simple Solution is impossible to adopt in the reverse, *i.e.*, regarding only the foreign national as the client. The employer is the petitioner. It would be impossible for an attorney to claim that he or she is not representing the employer if the employer is being advised about preparing and filing the petition or application package.

On the other hand, a recent New York State Bar opinion seems to support the Simple Solution by indicating that an attorney can structure the relationship in such a way that the wife is considered the sole client from the outset on an I-130 petition and not the citizen husband who is sponsoring her.¹⁹ Although the petitioning husband signs off on the I-130 petition, this opinion allows the noncitizen 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 that his or her 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 fil-

ing a battered spouse self-petition (Form I-360), the attorney would be under no obligation to reveal this information to the citizen husband. Notwithstanding this opinion, it would be difficult for an attorney to avoid considering the citizen husband as the client because U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to sign a Form G-28 in petition proceedings.²⁰

A Colorado District Court also supported a version of the Simple Solution in *DerKevorkian v. Lionbridge Technologies Inc.*²¹ There, the court held that in order to establish the attorney-client relationship with the employee, there must be a showing that the person sought and received legal advice from the attorney concerning the legal consequences of the person's past or contemplated action.²² In this case, the plaintiff's employer retained the services of an attorney and her firm to handle plaintiff's green card application. It was not possible to start the process until plaintiff's "work visa" (presumably an H-1B visa) was amended to reflect her new position. However, plaintiff's employer was not willing to pay the higher prevailing wage as determined by the State Workforce Agency. As no application for permanent residency had been filed before the expiration of her H-1B visas status, plaintiff sued her employer for, *inter alia*, breach of contract and fiduciary duty, and the attorney for legal malpractice. The court granted the attorney's summary motion to dismiss on the ground that there was no attorney-client relationship. The court accepted the attorney's deposition testimony stating that she was not the plaintiff's lawyer until she was asked by the employer to represent the plaintiff if the decision had been made to apply for a green card. Until that event, when the attorney would have represented both the employer and the plaintiff, her only client was the employer.²³

Thus, in *DerKevorkian v. Lionbridge*, the outcome might have been different if the attorney had filed a petition or application on behalf of the em-

¹⁹ NY State Bar Op. 761 (2003), available at www.nysba.org.

²⁰ NY State Bar Op. 761 (2003).

²¹ *DerKevorkian v. Lionbridge Technologies Inc.*, 2006 WL 197320 (D. Colo. 2006), motion for new trial denied, 2006 WL 898142 (D. Colo. 2006).

²² The District Court, applying Colorado law, primarily relied on *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998) to determine whether an attorney-client relationship existed or not.

²³ *DerKevorkian v. Lionbridge Technologies Inc.*, 2006 WL 197320 (D. Colo. 2006) at 12.

ployer and the plaintiff. Regardless, in this context, the court was unimpressed by plaintiff's claim that she had contacted the attorney's assistant on three occasions to find out the status of her case and by the fact that there existed an unfiled and unsigned notice of entry of appearance. On the other hand, the court held that the plaintiff had adequately stated a claim against her employer for breach of contract and promissory estoppel, since the employer had agreed to support her in an application for labor certification and she had detrimentally relied on the employer's promise to sponsor her for permanent residency. Plaintiff also properly stated a claim for breach of fiduciary duty, as the employer promised to sponsor the plaintiff and "took complete control over the process," but as the plaintiff alleged, her employer and attorney "failed to properly communicate with her during the process and, in fact, withheld information from her."²⁴

Similarly, in an administrative decision of the Office of the Chief Administrative Hearing Officer (OCAHO) involving a disqualification motion due to an alleged conflict of interest, *Santiglia v. Sun Microsystems, Inc.*,²⁵ Santiglia sought to disqualify the attorney and the law firm from representing Sun Microsystems in a pro se complaint alleging discrimination under 8 U.S. Code (USC) §1324b, when his job was eliminated as part of a reduction in force. OCAHO held that Santiglia had presented no evidence that the attorney and the firm represented the "foreign worker clients" in the filing of the LCAs, as prospective workers are not eligible to file these applications on their own behalf (citing 20 Code of Federal Regulations (CFR) §655.700). In this matter, too, the issue revolved around the filing of LCAs, rather than the actual filing of H-1B petitions, and the OCAHO decision stated that any applications signed by the attorney on behalf of the foreign national workers, as alleged by Santiglia, were not part of the record.

While both *DerKevorkian v. Lionbridge* and *Santiglia v. Sun Microsystems* seem to support the Simple Solution, the facts in both the cases, along with the evidence in the record, involved preparatory

work as opposed to a full-fledged representation with respect to an H-1B or permanent residency application. Furthermore, by not granting the employer's summary motion to dismiss in its entirety in *DerKevorkian v. Lionbridge*, the court was suggesting that a foreign national worker could have an interest in the permanent residency process, thereby somewhat diluting the Simple Solution approach successfully taken by the attorney in that case.

THE "GOLDEN MEAN" APPROACH

While the Simple Solution risks failure if the non-client seeks to establish an attorney-client relationship, it is also difficult for a lawyer to undertake full representation of both parties without considering the potential problems in the event of a conflict and the limits to representation so as to avoid a conflict. After all, the very notion of dual representation results in an inherent limitation of representation as it implicates the attorney's cardinal duties of loyalty and confidentiality towards each client. The Golden Mean approach also envisages dual representation, but it requires the attorney to thoughtfully limit representation of one of the parties, if necessary, or obtain advance waivers to future conflicts. Under the Golden Mean, an attorney may be able to successfully terminate the dual representation and opt for the Simple Solution, too.

While complete representation of both parties is more realistic in the context of a family-based application,²⁶ it may not be so practical in an employer-

²⁴ *Id.* at 7.

²⁵ Case No. 03B00008; 2004 WL 768659 (OCAHO), 9 OCAHO 1104. See also *Guy Santiglia v. Sun Microsystems, Inc.* Case No. 03-076 (ARB July 29, 2005) (finding that there was no substantial or willful violation of posting or public access requirements and thus company was not subject to civil monetary fines).

²⁶ However, if there is marital discord, it may be more difficult to continue to represent either both the parties or one of the parties. If, for example, an attorney represented a couple in a marriage-based immigration petition, the couple ultimately divorced, and the immigrant spouse asked the attorney to represent him or her in an I-751 waiver, the attorney should probably obtain the other spouse's consent before proceeding. See e.g., *Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999) (lawyer representing husband and wife jointly in business matters should have obtained wife's consent before representing husband in dissolution). If the wife is pursuing other actions, such as a protection order against her husband, the attorney would have to withdraw totally from representing both parties. Even under such an eventuality, the lawyer of one joint client need not reveal the sensitive and confidential information about the other client. 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 NY City Bar Op. 1999-7 (1999), available at www.nybar.org, one co-client cannot use the lawyer as a weapon against the other co-client in the event of a dispute as the lawyer continues to

employee representation where potential conflict is inherent, if not obvious, at the outset.

Limited Representation of One of the Parties and Advance Waivers

The Golden Mean approach requires the attorney to think through in advance of the representation the potential conflicts that may arise during the course of the representation. After envisaging the potential conflicts, the attorney may be able to limit the representation of one of the clients, while still vigorously and zealously representing both clients. If the client has been fully apprised of the potential future conflict, the attorney may also be able to withdraw from representation in the event of the actual occurrence of the conflict. If the parameters of the representation of both clients, including the limitations, are set forth and consented to in advance, a disgruntled client may have less of a legal basis and incentive to sue the attorney for legal malpractice.²⁷

In a situation where the attorney has more contact with the employer, it could be disclosed that the representation of the foreign national employee is limited to the obtaining of the H-1B petition, and there would be no further representation once the H-1B petition has been obtained on behalf of the foreign national employee. The disclosure could also include that the moment the foreign national employee wishes to consider options outside the H-1B employment or beyond H-1B status, he or she would need to engage separate counsel. Furthermore, if the foreign national's employment was terminated, the disclosure could also include the fact that the attorney would cease to represent him or her but could take adequate measures to continue to represent the employer in this regard, including withdrawal of the H-1B petition or other employer-based petitions,²⁸ as well as represent the employer in unrelated matters.

owe a duty to the co-client of confidentiality and loyalty. *See also* D.C. Bar Opinion 296, *supra* note 10.

²⁷ *See, e.g., Lunn v. Fragomen, Del Rey, Bernsen and Loewy*, 2006 WL 492098 (S.D. Tex. 2006) (granting law firm's motion for summary judgment to dismiss the case because the foreign national client impliedly consented to disclosure of confidential information about criminal conviction to employer, ultimately leading to his dismissal from the job).

²⁸ In such a situation, the foreign national employee must be advised to seek independent counsel as withdrawal, or discontinuation in the processing, of an H-1B petition, labor certification or I-140 petition would deprive the foreign national of certain benefits under the American Competitiveness in the 21st Century Act (AC21) that he or she could

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In the opposite situation, where the employee has more contact with the attorney, the attorney may be able to disclose this to the employer and confirm that the attorney's representation of the employer will be limited to a particular visa petition or application. The attorney may also want to disclose that should his or her client exercise options with different employers, or through other provisions of the law, the attorney will continue to represent the foreign national employee in this regard. Finally, the employer client could consent in advance that embarrassing personal information of the employee and derivative family members, such as past criminal convictions or health issues, need not be disclosed to the employer.

Ethical Basis for Limited Representation

Attorneys are strongly advised to review their state ethics rules to determine to what extent the representation of one party can be restricted during dual representation.

Model Rule 1.2(c) provides the source for limited representation:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

The following extract from an opinion in 2001 from the Committee on Professional and Judicial Ethics of the New York City Bar is also worth noting:

We conclude that a representation may be limited to eliminate adversity and avoid a conflict of interest, as long as the lawyer's representation of the client is not so restricted that renders her counsel inadequate and the client for whom the lawyer will provide the limited representation consents to the limitation. In obtaining consent from the client, the lawyer must adequately dis-

exercise through another employer. The lack of a pending labor certification could deprive the foreign national of a 7th-year H-1B extension with another employer. AC21 §106. The withdrawal of the H-1B petition prior to a new employer filing another H-1B petition would deprive the foreign national of his or her ability to "port" to that employer, INA §214(n), and the withdrawal of the I-140 petition, prior to the 180th day of the pendency of an adjustment application would deprive the foreign national of his or her ability to continue to process permanent residency even if he or she finds a same or similar job with another employer. INA §204(j).

close the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that separate counsel may need to be retained, which could result in additional expense, and delay or complicate the rendition of legal services.²⁹

Ethical Basis for Advance Waivers

On May 11, 2005, the American Bar Association issued Formal Opinion 05-436 stating:

The Model Rules contemplate that a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest. General and open-ended consent is more likely to be effective when given by a client that is an experienced user of legal services, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. Rule 1.7, as amended in February 2002, permits a lawyer to obtain effective informed consent to a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment. Formal Opinion 93-372 (Waiver of Future Conflicts of Interest) (footnote omitted) therefore is withdrawn.³⁰

²⁹ NY City Bar Op. 2001-3 (2001). In California, if a formal representation agreement limits the attorney's service to a specific matter, the attorney has no duty to go beyond that limitation. Los Angeles County Bar Op. 476 (1994). California also indicates that an attorney may not represent two clients with potentially adverse interests unless there has been full disclosure of the adverse representation and the clients have consented to the representation in writing. *See also* Los Angeles County Bar Op. 395 (1982). An attorney, however, cannot represent two clients with actually conflicting interests in related matters even if there is client consent to the joint representation. *Id.* But *see* NY City Bar Op. 2001-2 (2001), which suggests that a law firm may "represent multiple clients of the firm in a single transaction where those clients have differing interests" so long as the "disinterested lawyer" test of DR 5-105 (C) is satisfied.

³⁰ *See* Alice E. Brown, "Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?" 19 *Geo. J. Legal Ethics* 567 (advocating that other standards should accompany advance waivers that would mitigate concerns such as harm it can bring to the

continued

More recently, on February 17, 2006, the New York City Bar's Committee on Professional and Judicial Ethics opined that a law firm may ethically request a client to waive future conflicts, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, if appropriate disclosure is made and the client is in a position to understand the relevant implications, advantages and risks so that a client can make an informed decision whether to consent or not.³¹ Furthermore, in order for an advance waiver to be effective, a disinterested lawyer must also be able to determine that the lawyer can competently represent the interests of all affected clients.³² The opinion also endorses the concept of "blanket" or "open-ended" advance waivers with respect to sophisticated clients under narrowly qualified circumstances.³³

It is noted that the New York City Bar opinions have been issued in the context of large corporate clients seeking different law firms in different jurisdictions and different areas of the law. However, the basic underpinning of these opinions can also be useful to the practice of immigration law, which is that a client's choice of counsel is a fundamental right that has been recognized by the New York Court of Appeals in *Levine v. Levine*, 56 N.Y.2d 42 (1982). In *Levine*, the court approved a single lawyer representing both the husband and wife to a marital separation agreement, and held that the potentially adverse parties had a right to retain the same lawyer provided "there has been full disclosure between the parties, not only of all the relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity."³⁴

lawyer-client relationship, the firm as a whole, and the integrity of the legal profession).

³¹ NY City Bar Op. 2006-1 (2006); *See also* *Visa USA Inc. v. First Data Corporation*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003) (holding that law firm not automatically disqualified from representing two adverse clients as use of prospective waiver to future conflict was proper when client was a knowledgeable and sophisticated user of legal services and knowingly consented to future conflict).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 48.

Advance Waivers and Limited Representation in Immigration Law Practice

In immigration practice, too, two clients are entitled to retain a single attorney to represent them. Under what circumstances can the attorney limit representation of one of the parties in order to minimize potential conflict in the future?

In N.Y. State Bar Op. 761 (2003) involving a noncitizen wife who was the beneficiary of an I-130 petition, the opinion envisaged the possibility of the relationship being structured in such a way that the lawyer may only represent the wife and not the husband, akin to the Simple Solution.³⁵ Thus, if the wife was later being abused and wanted to file an I-360 self-petition as a battered spouse, the attorney would be under no obligation to inform the husband so long as the husband was previously notified that the wife was the sole client and that communications from the wife to the lawyer would not be related to the husband.

More interestingly, the opinion also envisaged a situation, similar to the Golden Mean approach, which is extracted below:

[A]n attorney generally will be required to withdraw from representation of both parties when a conflict develops between jointly represented clients. In addition, the attorney must share all material information relating to the representation with the co-clients.

On establishing the attorney-client relationship, the co-clients may consent to an alternative arrangement. The co-clients may specifically agree that the lawyer will not share confidential information if requested by the client providing the information. *See* Restatement (Third) of the Law Governing Lawyers §75, cmt. D (2000) ("Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients.") For example, if the lawyer initially obtained such an agreement, the lawyer would not be obliged to share with the husband the wife's statement to the lawyer that her husband was abusing her. The clients could also agree that in the event of a conflict, the lawyer will continue to represent only one of the jointly represented clients, such as the wife. *Id.* §122, illus. 8.

A client's consent to future conflicts is "subject to special scrutiny." *Id.* §122, cmt.d. 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 it was given." ABA Formal Op. 372 (1993). A prospective waiver of a future conflict is more likely to be effective where the attorney has identified the potentially adverse party and the nature of the conflict. *Id.* In the circumstances under consideration here, the attorney knows, based on past practice, that a conflict is most likely to arise when the wife informs the attorney confidentially that her husband has abused her. Thus, it is unlikely that the advance waiver permitting the attorney to terminate the representation of the husband and continue representation of the wife would be effective unless the husband understood that a possible future conflict would include an allegation of abuse that would support a self-petition by the wife.

In the above example, it would have been difficult for the attorney to effectively obtain an advance waiver to opt out of the representation of the husband when he started abusing his wife, unless this specific conflict could have been related to the husband at the outset. However, it is possible for an attorney to envisage more predictable conflict situations, and thus be able to effectively limit the representation of one of the clients, as well as limit the disclosure of confidential information.³⁶

For instance, a foreign national client who has more contact with the attorney may want the attorney to keep confidential from the employer any indication that he or she might also be looking at sponsorship possibilities from other employers. Conversely, where the employer client has greater contact with the attorney, the employer may instruct the attorney to withhold information about a possible lay-off to the foreign national employee. The employer may also want to keep confidential certain financial information of the company or the results

³⁶ The fact that a lawyer possesses confidences or secrets that might be relevant to the matter with respect to the other client which the lawyer is unable to disclose cannot without more create a conflict of interest barring the dual representation. The critical question is whether the representation of either client would be impaired. *See* NY City Bar Op. 2005-02 (2005).

³⁵ *Supra*, note 17.

of a recruitment effort in connection with a labor certification application. These situations may be more predictable, and it would be possible for the attorney to structure the representation so as to limit disclosure of confidential information in advance of the representation and obtain the requisite consent of both parties.

Below is language that could serve as a starting point for drafting notice to both parties of the dual representation and also indicating the limited representation that the attorney would provide one client, which in this example is the employee:

I have been retained by ABC Corp. to represent both ABC Corp and you in obtaining your H-1B visa and lawful permanent residency. This letter confirms my discussion with you about my undertaking joint representation of you and ABC Corp in your _____ immigration matter.

While separate legal representation is always advisable, ABC Corp and you have consented to my jointly representing your common interests, which is limited to the above matters. If there is a mutual objective, as is the case here, one lawyer can coordinate and communicate better among two or more clients, handle the matter more efficiently and lower total expenses. However, if ABC Corp. and you later get into a dispute with each other, neither will be able to claim the attorney-client privilege against the other regarding communications with me.

As I have an equal duty of loyalty between each client, information bearing on your matter will be shared between you and ABC Corp. You understand and agree that anything you tell or reveal to me, I may share with ABC Corp.

In addition, since my contact with ABC Corp. has been and continues to be extensive, you agree that I may have to keep certain information about ABC Corp. confidential. Information that I may keep confidential would include financial information about ABC Corp. or certain personnel policies/decisions that might impact your employment. I will follow ABC's direction with respect to the immigration strategies it wishes to pursue in relation to your employment. If at any point of time a conflict arises that would not make it possible for me to represent you jointly with ABC Corp., you would need to seek independent counsel. However, you also agree that in the event of such a conflict I may continue to represent ABC Corp. In the event of your termination, I will no

longer be able to represent you and may take appropriate measures, such as withdrawal of any petitions or applications that ABC Corp. may have filed on your behalf. In such a situation, you should seek independent counsel as the withdrawal or lack of employer support for certain applications/petitions may restrict your ability to obtain certain immigration benefits with a new employer.

If you wish to discuss this further, please do not hesitate to contact me.

In the event that the foreign national employee is the attorney's main contact, the language in the above letter may be reversed to reflect the situation. If there is a conflict, the attorney may continue to represent that employee and not the employer, if this arrangement has already been consented to by both the clients at the outset.

Notwithstanding an attorney's ability to limit the scope of the representation, some conflicts, whether concurrent or in the future, are non-consentable, especially if the attorney cannot reasonably conclude that he or she will be able to provide competent and diligent representation.³⁷ The consent of the parties with respect to the limited scope of representation must be informed to ensure that the affected individual is aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict may adversely affect his or her interests.³⁸ It is preferable to obtain the informed consent of the client in writing, although many jurisdictions, including New York, do not require written consent. This writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following oral consent.³⁹

At times, it may be impossible to make disclosure to obtain the necessary consent such as in the case of the future abuse of one spouse towards the

³⁷ See Model Rule 1.7(b)(1). See e.g., Disciplinary Rule 5-105(A) of the Ohio Code for Professional Responsibility, which requires a lawyer to "decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment." New York requires a fictional "disinterested lawyer" to believe that the attorney can still continue the representation in the event of a conflict. See NY Code of Prof. Responsibility DR 5-101(C).

³⁸ See Model Rule 1.7 cmt. 18. A sophisticated corporate client may require less information to make an informed consent as compared to a foreign national client.

³⁹ See Model Rule 1.7 cmt. 20.

other spouse. Also, an employee client may not permit the lawyer to disclose, or even hint, to the employer that he or she is considering or may consider permanent residency possibilities through another employer, especially if the current employer does not have a program to sponsor foreign national employees for permanent residency. The lawyer thus would be unable to properly ask the employer to consent to this arrangement and would be precluded from representing this employee with regard to a permanent residency application through another employer.⁴⁰

advance of the representation. Of course, the scope of the engagement cannot be so limited as to render the representation inadequate and the parties must properly consent to the limited nature of the engagement, and understand the consequences of the limitations. In the event that the conflict becomes so grave that it is impossible to continue with the dual representation, a prior arrangement seeking an advance waiver would enable the attorney to continue to represent the principal client while the other party client seeks independent counsel.

CONCLUSION

Limiting the scope of engagement of one client over the other, whenever ethically possible, may facilitate more effective dual representation. The Golden Mean approach allows the attorney and both clients to be aware of potential conflict scenarios in

⁴⁰ On the other hand, it would be easier for the employee to disclose to the employer that the attorney would continue to representation in the event that his or her employment with this employer was terminated.