

AILA Ethics Practice Advisory:

Ethical Considerations in Advising and Representing People Who May Benefit from the Immigration Accountability Executive Action

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AILA InfoNet Doc. No. 15011642. (Posted 1/16/15)

On November 20, 2014, President Obama announced a package of immigration reforms called the Immigration Accountability Executive Action (Executive Action). These reforms will influence all major parts of the immigration system, and will no doubt bring new clients to your door. And while you may get new clients, it is fundamental to be ethically aware when helping individuals and families get the quality legal advice and support they need. In this regard, the AILA National Ethics Committee has prepared this brief practice advisory identifying the ethical considerations in advising and representing clients who may benefit from these executive actions. The practice advisory relies on the American Bar Association's Model Rules (Rules or Rule), although practitioners must refer to the analog of the Rules in their relevant state bar ethical rules of professional conduct. This advisory outlines five key topics in a question and answer format—including informed consent, competence, fees, supervision and advertising—that a prudent immigration lawyer should be mindful of when considering representation.

1. INFORMED CONSENT

Q: What responsibilities does an attorney have when communicating information and explaining President Obama's executive actions, including the risk that the program may not be available or could be terminated in three years?

A: Proper communication and full disclosure to a client is the key to avoiding ethical pitfalls. With so much opposition to President Obama's executive actions, there is the possibility that they may never come to fruition. With that said, an attorney has the obligation to properly counsel a potential client. It is important for an attorney to communicate possible risks with a client so that the client can make an informed decision.

> In accordance with Rule 1.4 (Communication)
>
> A lawyer shall:
>
> (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> …
>
> (3) keep the client reasonably informed about the status of the matter;
>
> …
>
> (5)(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

An attorney must obtain "informed consent" from a potential client particularly if she will be accepting fees for work done in anticipation of implementation of each executive action. Rule 1.0(e) defines informed consent as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

When presented with the risks involved in retaining an attorney to begin working on his or her case, a client may decide to wait until there is more certainty that applications will be accepted, and processed by USCIS. Others may decide there is an advantage in starting work associated with the collection of documents and review of their histories in the United States, and may prefer to take the risk that they will not be able to submit an application until a later date. Furthermore, some potential clients may gain a sense of security in simply knowing that they have retained an attorney who will be available for them when the process begins and will keep them updated of the latest developments in the implementation of the executive actions.

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It is important for attorneys to realize their responsibilities, both to potential clients and to themselves. They are bound by applicable ethics rules[1] to provide adequate information to a potential client regarding the risks and potential pitfalls involved in performing any type of work on the client's behalf. It is important to consider the specific client when obtaining informed consent. It is the lawyer's responsibility to make sure that necessary steps are taken to truly inform the client, considering the client's level of sophistication.

Q: If USCIS will not start accepting applications for DAPA[2] until May 2015, when or how can one engage in limited representation to prepare clients' portfolios?

A: Before the forms are published and guidance is issued, a lawyer can still advise a client who is prima facie eligible for DAPA. While the lawyer may not be able to prepare an application if it has not yet been published, the client can still be advised regarding her eligibility under DAPA, such as proving continuous presence in the United States, or not falling under the categories that would render one an enforcement priority. For example, if the client was convicted of multiple misdemeanors that would potentially render her ineligible, it would behoove the lawyer to advise the client to make every possible effort to get some or all of them vacated or expunged.[3] As long as the potential client is apprised about the limited nature of the representation before the forms and further guidance are issued, it is potentially possible and even advisable to represent a client at this stage.[4] Once the forms and further guidance are issued and the filing date is established, the lawyer can represent the client more extensively with respect to the preparation and potential filing of the application.

The Connecticut Bar Association's Professional Ethics Committee addressed a similar question in 2012 when an attorney requested guidance on whether it was ethically appropriate to be retained and perform work for a client in anticipation of the enactment of the federal regulations pertaining to the I-601A Provisional Waiver.[5] Referencing Connecticut Rules of Professional Conduct 1.4 and 1.0 pertaining to client communication and informed consent, this opinion concluded that it was ethically appropriate so long as clients are fully informed of the costs, risks and potential benefits of preparing the case without a guarantee that the law will be enacted.[6]

The CT opinion clearly opens a door; attorneys may consider performing legal work in anticipation of the enactment of proposed guidance or rules so long as informed consent is obtained.

The extent to which a lawyer can obtain informed consent depends a great deal on what legal work he will be doing, as well as the sophistication of the individual client. The Connecticut opinion dealt with proposed regulations that would essentially change a procedure (filing an I-601 waiver while the immigrant is in the U.S., as opposed to abroad), not the substance of the law. Here too, the executive actions, especially as they relate to DAPA and the expansion of DACA, allow eligible applicants to apply for deferred action, which already exists in the law. Moreover, the proposed executive actions are modeled on the 2012 DACA program, and thus practitioners have gained experience and developed expertise in this area. It is possible, therefore, to anticipate the types of evidence that will be acceptable for eligibility under the new DAPA and expanded DACA executive action programs. The services that a lawyer may provide that may benefit a client in advance of more specific forms and guidance include consultations about the status and contents of the proposed rules, Freedom of Information Act (FOIA) requests, FBI fingerprint checks, review of criminal background to see if anything can be

[1] Lawyers should carefully analyze Rule 8.5 (or the equivalent) to determine which jurisdictions' rules apply to any given case.
[2] One of the major components of the executive actions is what has come to be known as the Deferred Action for Parents Accountability (DAPA) program, which allows a non-citizen under certain conditions to apply for deferred action if she is the parent of a US citizen or permanent resident child.
[3] Expungements are generally insufficient for immigration purposes. However, the existing Deferred Action for Childhood Arrivals (DACA) policy recognizes them in certain circumstances. At the time of this writing, it is unclear whether an expungement will suffice under DAPA policy or the expanded DACA policy.
[4] Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."
[5] Informal Opinion 2012-04. Work Performed in Anticipation of New Federal Regulation. Connecticut Bar Association Professional Ethics Committee, May 9, 2012.
[6] We refer readers to a prior AILA ethics advisory entitled *Can a Lawyer Ethically Represent a Client in Anticipation of Potential Immigration Reform Legislation?* by Megan Moore and Cyrus Mehta, AILA InfoNet Doc. No. 1310090 (posted 10/9/13), which commented on the CT bar opinion in the context of proposed Comprehensive Immigration Reform legislation and from which the AILA Ethics Committee liberally draws upon for this advisory.

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vacated or expunged, obtaining police reports and court records, and advising on biographical and other documents to gather.

On the other hand, other proposed policies under the executive actions, especially as they pertain to high skilled business and workers, are more undefined at present. One example is the proposed use of parole for talented and promising foreign entrepreneurs.[7] The more undefined and unknown the substance of the law, the more difficult it will be to present a potential client with the information that he needs to give for informed consent. At minimum, informed consent for legal work in anticipation of proposed law or regulations would require specific acknowledgement that the work will be based on a prospective venture. The client will need to acknowledge his understanding that the executive action may not take effect, that the work will be done regardless of whether there are new rules, and that some or all of the work may have been completed in vain depending on the final details of the announced executive actions. Whether a client wishes to proceed now or later will depend on a number of factors. For instance, a business client may be more willing to take an economic risk by retaining a lawyer than will a client with a family-based petition. Likewise, an individual client who may have difficulties in gathering evidence, such as birth certificates or proof of entry into the United States, may feel that it is well worth it to retain an attorney prior to the implementation of the executive actions so as to be ready to file when the relevant policy takes effect.

Even if informed consent is obtained, it may not be possible to manage a demanding client's expectations of the likelihood of the proposed policies taking effect or being finalized in the way they were originally described. In these cases, the informed consent may have little practical meaning. Consider the potential misunderstandings, and the expectations that automatically arise when money is exchanged. If the executive actions do not take effect, or if it changes substantively over the course of the "representation in anticipation," the attorney could face a barrage of complaints and requests for refunds.

Additionally consider your reputation. While you and your client may understand informed consent, if word travels within a community that you have taken money from someone before the executive actions take effect, your reputation may be damaged. A cost-benefit analysis is appropriate here, along with an assessment of whether the client will likely benefit from this representation in anticipation of the new guidance or rules, even if the new policy never materializes. Lawyers should assume the role of teacher so that clients, prospective clients, and the public at large can make truly informed decisions on the timing of when to seek legal assistance.

2. COMPETENCE

Q. My firm has been receiving numerous phone calls every day pursuant to the President's executive actions. I am scheduling about 20 consultations per day. I am feeling overwhelmed by the volume and want to make sure I can handle these cases.

A: It is important to provide both competent and diligent representation of clients. If an attorney takes on an excessive caseload, she runs the risk of violating Rule 1.1 (Competence) and Rule 1.3 (Diligence). By doing so, the lawyer also can violate her duties of proper communication under Rule 1.4 (Communication).

It is important for the lawyer to keep current with changes in the law, policies and implementation of the program. It is also critical to properly analyze the facts of each case and have procedures in place within the office for proper preparation of forms for submission to the government. In addition, the lawyer needs to be able to have the time to communicate about a client's case in a manner that is reasonable and be available to the client for questions that may arise during representation.

If a lawyer takes on too many cases, several things may happen. First, the lawyer may not be able to devote the time necessary to analyze and prepare each case. Intake may be rushed and there can be a lack of attention to detail. The lawyer may rely too heavily on support staff to perform duties the attorney should handle. By taking

[7] See Memorandum from Jeh Charles Johnson, DHS Secretary entitled "Policies Supporting U.S. High Skilled Businesses and Workers," dated November 20, 2014, available on AILA InfoNet Doc. No. 14112009 (posted 11/20/2014).

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excessive clients, the lawyer may not even know her clients. In addition, the lawyer may experience burnout or fatigue, which would render her unable to adequately perform the duties as an advocate for her clients.

It is advised that the lawyer have procedures in place within the office for taking cases. There should be a limit to the number of consultations in the office each day, making sure that the attorney has the necessary time to devote to each case as well as maintaining a balanced schedule to prevent burnout. The safest course is to estimate the time required to complete each case and schedule the time for lawyers and staff to do the work once they are hired.

The lawyer could also have a referral system in place whereby excess client calls are sent to another respected colleague, or could consider expanding staff, if appropriate.

Q: I am an immigration lawyer and handle primarily asylum and family-based cases. The new programs seem like a new area of immigration law for me. How can I maintain my competence to practice in this new area?

A: The policies under the executive actions are new to many experienced practitioners. In order to maintain competency, it is important to do your homework! First, you can refer to the AILA resources for Administrative Reform 2014. Second, attend a CLE that outlines the new provisions under the program. Third, if there is a pro bono workshop offered in your geographic area, then you should go to the training program and assist people in the clinic. Often, these workshops or clinics provide comprehensive yet plain language handouts and other resources. Finally, you can organize some brown bag lunches in your chapter and talk about the President's executive actions with your colleagues.

The most important thing to remember is that you want to be competent under Rule 1.1 when analyzing cases. You want to know all the provisions thoroughly so that you can take a client's facts and make sure he or she qualifies for relief. You do not want to inadvertently expose someone with a criminal record or someone who does not otherwise qualify, which could have the devastating consequence of removal.

Q. I have been licensed for less than a year. So far, I have practiced in several areas of law, including a few immigration matters. The President's executive actions seem like a good opportunity for me to get my feet wet with more immigration cases. Do I have anything to worry about?

A. Taking immigration cases only to apply for relief under the executive actions puts an attorney at risk of violating Rule 1.1.

Immigration law is vast and complex. The attorney needs to be able to understand their client's case in the larger context of the law. If a client comes to you for help to apply for a particular executive action, you need to be able to provide them with the potential risks and benefits of moving forward. In order to do so, you need to be able to identify all potential problems and issues with their case. You would also need to be able to identify other forms of relief for which they might qualify and be able to advise on which avenue of relief is better for their individual circumstance. It is important to keep in mind that most relief under the President's new policy is temporary and does not grant legal status. A client might be very upset to later learn that he or she could have applied for something more permanent had she only been aware of it. You will not be able to do this by reading just one memorandum issued by USCIS on Executive Action.

To meet your duty of competence, and to protect your clients, take steps to educate yourself about all aspects of immigration law. First, if you are not yet a member of AILA, consider joining. For a general overview of immigration law (and to get an understanding of how complex immigration law can be), read Richard Boswell's Essentials of Immigration Law, and consult AILA for further continuing legal education opportunities. In addition, seeking the help of a mentor, utilizing AILA's many resources, including the InfoNet Message Center, and participating in your local Chapter meetings, are just a few ways that you can learn the law and keep abreast of the changes to it.

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3. FEES

Q. What are the ethical considerations that must be taken into account when setting a fee?

A. The President's Immigration Accountability Executive Action contains proposals that will take time to implement, but the proposals are already detailed enough for millions of immigrants to begin gathering documents to prove their identity, relationships, and continuous residence, and to adjust strategies based on new enforcement priorities if they have pending cases. Potential clients are already contacting attorneys for representation. Attorneys need to be aware of the relevant rules regarding the permissible scope of their services and appropriate fees.

Any discussion of appropriate fees begins with Rule 1.5 and the specific version of this rule in the states where attorneys practice.[8] While the directives contain enough detail to begin taking steps to prepare for applications and to advise clients of the parameters of the potential programs, the attorney needs to be very cautious about charging fees to file applications before they can actually be submitted. The client must be fully informed about the costs, risks, and benefits of starting a case or even preparing for one before guidance and regulations are implemented.

The governing standard of reasonableness applies to all fees regardless of the payment arrangement. Rule 1.5(a) prohibits lawyers from charging or collecting an unreasonable fee or an unreasonable expense. No single factor controls the reasonableness of a fee, and a fee that appears reasonable at the outset of a case may become unreasonable based on later events. Whether the attorney follows an hourly billing arrangement or uses a flat fee as an alternative billing method, the attorney should prepare a representation agreement or engagement letter that clearly explains the basis for the legal charge and ensures the client understands the billing approach being used. It is recommended to use plain language in the engagement letter and avoid legalese that clients may not understand. An attorney pursuing a new form of relief or gathering documents in anticipation of preparing a case may prefer to use hourly billing before issuance of the specific guidelines or regulations. The representation agreement regarding hourly billing should clearly disclose the legal services to be billed, listing hourly rates for attorneys or legal assistants involved in the case. Another alternative arrangement is to set a minimum flat fee to be charged, with language that explains the lowest amount the fee will be once the agreed upon services are provided while at the same time allowing for additional fees to be charged if more work than normal is required on a particular case. Again, the key is making sure clients understand exactly what billing structure is being used and how it works.

Flat fees that represent a reasonable alternative to hourly billing are especially common in immigration matters, but flat fees may present challenges for representation in anticipation of executive action where the attorney lacks experience in the specific matter or complete knowledge of the adjudication standards. A flat fee represents an element of shared risk; attorneys agree they may need to do more work than planned without additional compensation and clients agree they may need to pay more than what they would otherwise pay through an hourly billing arrangement. It may be advisable to set forth your refund policy in your engagement letter if you charge flat or minimum fees.

As an advance fee for future services, a flat fee raises two ethical questions. First, do attorneys place flat fees in trust accounts? Second, if the fees are placed in operating accounts (not into a trust account), are they refundable? While there may be some debate on using trust funds for flat fee payments,[9] flat fees paid in advance are always refundable if the agreed-upon legal services are not provided. The prohibition against non-refundable fees[10] protects clients from a common flat fee scenario when an attorney considers a flat fee as earned upon receipt, does little or no work, and then refuses to refund any portion of the fee if the client terminates the representation or the attorney fails to complete the agreed upon services. Non-refundable fees

[8] Analyze Rule 8.5 (or the equivalent) for each state that has rules that could potentially apply.

[9] For example, New York requires a lawyer to deposit advance retainer fees in the lawyer's operating account, unless the lawyer and client have agreed that the lawyer may deposit them in the lawyer's trust account. See N.Y. State 816 (2007); Simon's New York Rules of Professional Conduct Annotated, 2014 Edition, p. 789. See also, *In Re: Mance*, 980 A.2d 1196 (D.C. 2009).

[10] Some states, such as South Carolina, continue to allow lawyers to designate fees as "nonrefundable," provided that certain specific guidelines are followed. However, no fee is completely nonrefundable, and the practice of labelling fees as nonrefundable is increasingly frowned upon. See Rule 1.16.

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impair a client's ability to choose or discharge a lawyer. Flat fees are necessarily unreasonable if the attorney performs no services.

Many flat fees are structured to be paid in stages based on the process to be completed for the case. Other practice pointers for attorneys in charging flat fees include the following:

- Use a written representation agreement or engagement letter;
- Clarify the scope of representation and specific services covered;
- Never describe the fee as non-refundable;
- Determine if your jurisdiction allows flat fees to be treated as attorney property;[11]
- If you place the fees in your operating account, treat them as potentially refundable; and
- Consider holding flat fees in a trust account until earned.

Q. What should the attorney do in anticipation of representing clients in response to the executive actions and what should the attorney be aware of in fee arrangements with those clients?

A. It should be pointed out that the President issued several policy directives that are legally binding to federal agencies such as USCIS. The administration has spent time and resources outlining what measures are to come. However, to date, there has not been an exact outline of how or when they will be implemented. Nonetheless, many people have already contacted immigration attorneys to determine if they are eligible for benefits and exactly what benefits are available, and enough information is available for attorneys to begin advising clients on the parameters of the program and the documents needed to qualify. Attorneys must engage in their own due diligence as to what is available by reading the latest information available from government agencies involved and from AILA and other reliable organizations.

A best practice is to create a standard questionnaire for clients to complete in order to save time and to ensure all relevant information is included. A good way to start in this endeavor is to use the particular immigration form as a guide for developing the questionnaire. At the same time, don't forget to analyze the prospective client's eligibility for other forms of relief as well. Firms tempted to use non-lawyers for screening prospective clients should take care not to engage or aid in the unauthorized practice of law.

An attorney should schedule an initial interview, complete the questionnaire with the client and make a list of all supporting documents needed. There will likely be documents or proof missing that could be obtained from the government. The attorney should make sure that a FOIA is available because in some circumstances DHS may not comply, claiming that the individual is a "fugitive," especially when there is an existing removal order that has been violated after the issuance of a bag and baggage order.[12]

Additionally, many clients claim not to remember when or if they have ever been arrested. Some do not really remember, while others may not totally understand the term "arrest." Thus, it is good practice for the attorney to do a records check with both local authorities for each location the client has ever lived in the U.S. and to consider an FBI records check. If attorneys are unfamiliar with the process, then they should learn how to do these checks before being retained by the first client. Reliance on the memory of the client is the easy way, but not always the best course of action. To be prepared is the best course of action.

As in most immigration matters, written documents are vital to the case. The attorney should inspect all documents the client presents and be willing to help the client in compiling missing or incomplete documentation.

[11] As noted, some states, such as New York, allow a wide range of upfront fees to be deposited directly into the operating account. This may even be the default. In accordance with the applicable rules, clarify in the engagement letter whether the deposited fees will be treated as attorney property (put directly into the operating account) or client property (deposited into the trust account until earned).
[12] However, it is only in the rare cases that a FOIA may not be available under the fugitive disentitlement doctrine. It is also hoped that the DHS will comply once the purpose of the request is stated in Form G-639, which is to assist in the preparation of a DAPA or DACA application under which the applicant should no longer be considered a fugitive.

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4. SUPERVISION

Q: With the coming implementation of the President's executive actions, are there any ethical considerations stemming from the utilization of non-lawyer legal assistants?

A: Yes. It is likely that many law firms will experience an increase in the volume of cases stemming from these actions, and that most firms will be heavily relying on non-lawyer legal assistants to process increased caseloads. Under these circumstances:

- Immigration attorneys have an ethical duty to diligently supervise and review the work product of non-lawyer legal assistants,
- Attorneys should make sure that non-lawyer legal assistants are thoroughly advised and trained concerning the protection of client confidences,
- Attorneys should check applicable ethics rules and advisories on the use of paralegal services prior to engaging their services,[13]
- Attorneys should take steps to prevent the unauthorized practice of law by non-lawyer legal assistants,[14] and
- Attorneys should make sure that non-lawyer legal assistants are not engaging in case solicitation.

See the American Bar Association (ABA) Model Guidelines for the Utilization of Legal Assistant Services. These Guidelines were adopted by the ABA House of Delegates in 1991 and are generally governed by Rule 5.3:

> A lawyer is responsible for all of the professional actions of a legal assistant performing legal assistant services at the lawyer's direction and should take reasonable measures to ensure that the legal assistant's conduct is consistent with the lawyer's obligations under the ABA Model Rules of Professional Conduct;
>
> A lawyer must maintain responsibility for the work product of the legal assistant and cannot permit the legal assistant to conduct any activities prohibited by statute, court rule, administrative rule or regulation, or controlling authority;
>
> A lawyer may not delegate to a legal assistant the ability to establish the attorney-client relationship, establishment of fees, or legal opinions;
>
> A lawyer must ensure that the legal assistant makes all parties involved in the process (client, court, etc.) aware that the legal assistant is not licensed to practice law;
>
> The lawyer must ensure that the legal assistant maintains all client confidences;
>
> The lawyer may include a charge for the work performed by a legal assistant in charging legal services; and
>
> The lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business, nor can the legal assistant's compensation be contingent, by advance agreement, upon the profitability of the lawyer's practice.[15]

Without question, the use of non-attorneys to solicit clients is forbidden, as is the sharing of fees with non-attorneys. A better approach, if staffing is a concern, would be to engage the services of independent translators and paralegals, paying an hourly rate for work done under supervision. Also, an attorney should refuse offers from non-attorneys to review completed forms without meeting the client. Charging to review a form prepared by another can be done ethically, but it may not be the best practice unless the terms of the engagement are set forth explicitly. The attorney should be careful not to become a preparer unwittingly. Also note that the attorney as the preparer of the application must acknowledge this fact, and must also have submitted Form G-28, Notice of Entry of Appearance as Attorney or Representative pursuant to 8 C.F.R. 1003.102(t).

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[13] The New York City Bar Association has issued a good opinion on this practice. See Formal Opinion 2006-3 (August 2006), http://www2.nycbar.org/Ethics/eth2006.htm.

[14] This includes taking care to ensure that any screening process does not cross the line into non-lawyers providing legal advice.

[15] Rule 5.3 ABA Model Rules of Professional Conduct.

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It should be clear that any sharing of fees with a non-attorney is not permitted. An attorney cannot receive or pay a fee to a non-attorney. Receiving payment from another lawyer for a referral is an area of concern, but if done within state rules may be possible. The attorney should still be cautious about these arrangements.

Q: In order to achieve efficiencies and in order to meet what may prove to be a temporary spike in volume, some law firms are likely to utilize outside, independent contractor, attorneys to assist in preparation of Executive Action applications. Are there any special ethical considerations stemming from the "out-sourcing" or sub-contracting of legal services?

A: Certainly the same considerations apply to the utilization of attorney sub-contractors. The immigration attorney, who has the immediate client-attorney relationship, is ultimately responsible for the quality of the work product performed by any sub-contracted attorney. The principal attorney should take steps to assure that the sub-contractor is fully informed of all pertinent ethical requirements and that safeguards are in place to assure ethical compliance by the sub-contractor.[16] Some of these safeguards may consist of:

- Contract provisions which require the sub-contractor to maintain client confidences;
- Documented instructions to the sub-contractor, demonstrating the principal firm's communications to the sub-contractor, concerning ethical obligations;
- Documented oversight of the sub-contractor's activities, to assure competency and ethical compliance; and due diligence to assure that a sub-contractor has not been the subject of disciplinary action.

5. ATTORNEY ADVERTISING

Q. Can I advertise that I will be taking consultations related to the new executive actions, including the deferred action memos for DAPA and expanded DACA eligibility?

A. Yes, an attorney may advertise[17] that he or she is taking initial consultations. However, the marketing must not be false or misleading because of a material misrepresentation or omission of fact. Guidance can be found in attorney state rules, many of which are based on Rule 7.1:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

An attorney should not mislead potential clients by advertising that he is taking consultations and doing filings in advance of having the ability to do filings—because the procedures are not yet in place. Instead, the attorney may want to issue warnings that anyone who states that they are taking fees for doing filings at this time should be treated with caution.

To avoid misleading advertising, an attorney should state that the consultations are only for limited purposes, for example giving information, conducting strategy for a removal case, or assisting a client to prepare for a filing when the programs are in place. The lawyer may advertise services related to readying the documents mentioned by the USCIS.gov website (e.g., identity documents, proof of relationship to a U.S. citizen or permanent resident (DAPA), and proof of living in the United States for the statutory periods). Organizing criminal records, if any, can also be discussed.

Certainly, an attorney can do more traditional legal marketing by disseminating legal information.[18] They can update potential clients on the programs via their websites, mass mailing solicitations (marked "Attorney Advertising," if required by their state), and through traditional media outlets and social media.

[16] For more on this, see ABA Standing Committee on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).
[17] Check the applicable rules and keep in mind that advertising outside the jurisdictions in which you are licensed may result in your being subject to the jurisdiction of other states, though you are not licensed there. South Carolina, for example, has an advertising rule in addition to those in its Rules of Professional Conduct. See SCACR 418.
[18] *See eg.,* MRPC Rule 7.2(a).

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Q. Can I offer my services to anyone that I think could use them?

A. Though it is tempting to try to be helpful and offer legal services to someone that an attorney meets at an informational meeting hosted by a non-profit, church organization, on the street, at a social occasion, or anywhere else, the attorney should resist. Rule 7.3 provides with limited exceptions:

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain …

If the attorney is not approached for assistance first and the individual is not a close friend or relative, or existing client, he must not advertise his immigration legal services in person or through a rapid exchange on social media (via real time electronic communication). This type of behavior is deemed "direct solicitation" and is considered likely to take advantage of a vulnerable party.

This practice advisory is written by the AILA National Ethics Committee, Cyrus D. Mehta, Chair and published by the AILA Practice & Professionalism Center. Readers should consult the Rules of Professional Conduct applicable to their situation, and not rely solely on the content of this advisory.

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