

# New York State Bar Association

## Committee on Professional Ethics

OPINION 761 – 2/12/03

Topic: Conflicts of Interest; Husband and Wife; Joint Representation

Digest: A lawyer who accepts employment on behalf of a husband to represent him in obtaining permanent residency status for his wife may not concurrently or thereafter represent the wife in seeking residency based on the alleged abuse of the husband; lawyer could pursue wife's residency petition if engagement is structured as a representation of the wife only or as a joint representation with a prospective conflict waiver.

Code: DR 4-101(A), (B), DR 5-105(A), (C), (D), DR 5-107(A), (B), DR 5-108(A); DR 7-101(A).

### QUESTION

(1) Where a lawyer represents or previously represented an individual in applying for legal permanent resident status for his wife, which has not been granted, is it ethically permissible to represent the wife in obtaining such status based on the current or former client's alleged spousal abuse?

(2) Can a lawyer ethically represent the husband and wife jointly or the wife alone in obtaining legal permanent resident status for the wife where her spouse must file the petition?

### FACTS

The inquirer is an attorney at a firm handling immigration matters for indigent individuals. Often the firm represents the husband, who is married to a non-citizen, in filing an I-130 petition to obtain legal residence (LPR status) for his wife.<sup>1</sup> The

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<sup>1</sup> For purposes of this opinion, we will refer to the original client as the husband.

Immigration and Naturalization Service (INS) takes approximately seven to ten years to process such petitions. Once the petition is granted, the non-citizen spouse files an I-485 petition. There is often a long delay after the I-130 petition has been granted before the I-485 petition can be filed. After an I-130 petition has been granted, the law firm generally writes to the client “closing out the case” and giving him information on how to follow the case. At some point during this sequence, the wife of the petitioner approaches the lawyer and informs the lawyer that the husband has abused her. Such abuse can serve as the basis for the wife to file a “self-petition” (an I-360) to obtain LPR status, which does not require participation by the husband.

An I-360 self-petition is considered confidential except for law enforcement purposes. If the husband is a non-citizen, i.e. in LPR status, a domestic violence offense can be a deportable offense.

## **ANALYSIS**

### *Question 1*

It is unclear whether the current and former representations were joint representations or representations of the husband only. In some cases, the firm had discussions with both spouses but in many cases there was no contact with the wife. Nevertheless, the lawyer’s ability to represent the wife of a current or former client does not turn on whether it was a joint representation.

The conflicts rules of the New York Code of Professional Responsibility (the “Code”) vary depending on whether a person for whom a lawyer provided legal representation is a current client or a former client.

With respect to *current clients*, DR 5-105(A) provides:

A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent provided in DR 5-105(C).

“Differing interests” is defined in the definitions section of the Code:

“Differing interests” include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. As noted in the Restatement of the Law Governing Lawyers, unless all affected clients consent, a lawyer may not represent two or more clients in a matter if there is a substantial risk that the lawyer’s representation of one or more

of the clients would be materially and adversely affected by the lawyer's duties to another client in the matter. *Restatement (Third) of the Law Governing Lawyers* §§ 128, 130 (2000).

Because the interests of the husband and wife are now clearly differing, the Committee does not believe that the inquirer can continue with the representation of either spouse or take on the wife as a new client. The allegations that the wife will be required to make in the self-petition regarding the other spouse's conduct would be prejudicial to the husband's interests. For example, the information could be used by the INS for law enforcement purposes, including criminal prosecution or deportation.

In a joint representation all confidences and secrets are deemed to be shared absent agreement of the co-clients to the contrary. Thus, the lawyer would be obliged to share with both clients any information received from either client that is relevant to the subject matter of the joint representation. If a lawyer receives from one of the co-clients relevant information that the lawyer is unable to share, the joint representation must be terminated and the lawyer must withdraw from the representation of both clients. It is not sufficient for the attorney to end his or her representation of one client after a conflict has developed. Anything less than complete withdrawal from the matter would result in a violation of an attorney's fiduciary obligation to preserve the client's confidences and pursue the client's interests vigorously. *See In re H. Children*, 160 Misc.2d 298, 608 N.Y.S.2d 784 (1994).

The result is the same if only the husband is the current client of the lawyer. The interests of the two clients would clearly be differing within the meaning of the Code. Further, DR 7-102(A)(3) prohibits a lawyer from prejudicing or damaging the client during the course of the professional relationship, an inevitable consequence of the acceptance of the representation of the wife. Additionally, the allegation of spousal abuse is clearly relevant to both representations, yet the lawyer would not be permitted to disclose this information to the husband because it is protected as a confidence or secret of the wife under DR 4-101(A) and (B).

DR 5-105(C) permits a lawyer to represent multiple clients with differing interests "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." This is not a practical solution in this situation. It would be impossible to obtain the husband's informed consent to representation of the wife without explaining the nature of the representation. That would require the lawyer to reveal that the wife has informed the lawyer of the alleged abuse, putting the wife in potential danger. The wife should not be asked to consent under DR 4-101(C)(1) to the disclosure of this confidential information, thus making it impossible to obtain the husband's informed consent.

After the I-130 petition has been granted, the law firm closes the case and treats the husband as a former client. With respect to *former clients*, DR 5-108 provides

. . . [A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. 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.

For reasons similar to those applicable to current clients, however, the lawyer could not represent the wife in filing a self-petition even where the husband is a former client. First, under DR 5-108, the filing of an I-130 petition for the husband on behalf of the wife and the filing of a self-petition by the wife are substantially related matters.<sup>2</sup> The goal of both representations (and both petitions) is to obtain LPR status for the wife. Although different facts must be stated in the I-360 petition (i.e. the abuse), one of the central issues in both petitions is the validity of the marriage. In this respect the wife's interests are materially adverse to the interests of the former client. Thus, the attorney could not ethically undertake representation of the wife with respect to a self-petition because her interests in that petition are materially adverse to those of her husband, the former client.

DR 5-108(A) provides that the lawyer can represent a new client in the same or a substantially related matter where the new client's interests are materially adverse to the interests of the former client provided there is consent of the former client "after full disclosure." For the same reasons stated above with respect to a simultaneous adverse representation, we do not believe that the circumstances here would permit the lawyer to obtain the husband's consent.

Because the lawyer could not represent the wife where the husband is a current or former client, all other lawyers at the firm are similarly disqualified. DR 5-105(D).

### *Question 2*

The inquirer asks whether the potential conflict may be avoided by structuring the engagement as a representation of the wife only or as a joint representation.

### *Wife as Client*

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<sup>2</sup> See N.Y. State 723 (1999), which contains an extensive discussion of what constitutes a "substantially related matter." As that opinion notes, factors that would tend to show that the matters were substantially related would include an identity of issues in the two matters or a significant overlap of the contested facts. The most important factor, however, is whether the moving lawyer could have obtained confidences and secrets in the former representation that could be used against the former client in the current representation.

It is the Committee's opinion that the law firm could structure the relationship so that the wife is considered the sole client from the outset.

An attorney-client relationship generally is entered into when a person contracts with a lawyer for legal services. A contract for legal services need not be explicit; if an attorney leads an individual to reasonably believe that a lawyer-client relationship exists, then such a relationship indeed exists. Restatement (Third) of The Law Governing Lawyers §14 (2000). In ambiguous relationships, the burden is on the lawyer to "clearly and affirmatively *negative* the existence of a client-lawyer relationship." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 2.5 (3d ed. 2001). When an individual contacts a lawyer to provide services for the spouse's benefit, the determination of whether that person is a client depends on the reasonable expectations and understandings of the layperson. The wife may be the sole client so long as the lawyer explains to both the husband and the wife that the wife is the sole client and his loyalties are to the wife alone. In addition the lawyer should explain to the husband that the communications from the husband to the lawyer, if any, would not be confidential and may be communicated to the wife but communications from the wife to the lawyer will be held in confidence and will not be communicated to the husband.

The ability of the lawyer to represent only the wife is not affected by the fact that it is her husband who is the petitioner for LPR status for his wife. It is the wife whose residency status is at stake, and who is the real party in interest. It is often the case that a lawyer will need the assistance of a third-party, non-client to carry out the objectives of the representation. For example, where a client requires the signature of a guarantor, whether on a lease or in connection with an extension of credit, the guarantor does not become a client by virtue of signing the contract. Furthermore, the fact that the non-client spouse could thwart the objective of the representation—LPR status for the wife—by refusing to sponsor the wife does not alter our conclusion. Similar consequences occur whenever action by a third party on behalf of the client is necessary to effectuate the client's legal objectives.

The fact that the husband pays the fee for filing the petition with the INS does not undermine the attorney-client relationship with the wife. Fees and expenses (including legal fees) are often paid by third parties such as a parent, a borrower or a purchaser. The Code prohibits a lawyer, however, from allowing a third person that pays the lawyer's fee from interfering with both the lawyer's exercise of independent professional judgment on behalf of the client and the lawyer's duty to maintain the confidences and secrets of the client. DR 5-107(B).<sup>3</sup> It also provides that a lawyer may accept compensation for legal services from someone other than the client only with the

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<sup>3</sup> See also EC 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. . . .[T]he desires of a third person should [not] be permitted to dilute the lawyer's loyalty to the client.")

consent of the client after full disclosure. DR 5-107(A); see N.Y. State 721 (1999) (full disclosure of all material facts and circumstances required).

In sum, it is ethically permissible for the lawyer to structure the relationship so that the wife is the sole client with respect to the INS petition for legal permanent residence status. Where the lawyer is approached initially by the husband/petitioning spouse, the lawyer must make clear that the wife, and not the husband, is the client.

### *Joint Representation*

As noted above, an 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.

## **CONCLUSION**

A lawyer who has undertaken to represent a husband in obtaining legal permanent residency status for his wife may not thereafter represent the wife in seeking

residency status based on alleged spousal abuse. This disabling conflict could be avoided by structuring the engagement as a representation of the wife only, notwithstanding that the husband is the petitioner and may pay for the legal services. Alternatively, the lawyer could represent the wife in seeking permanent residency based on the alleged abuse of her husband if the original engagement was structured as a joint representation with the parties' agreement that not all information acquired during the course of the representation would be shared with both co-clients, and if the parties provided a prospective conflict waiver that contemplated the situation presented and permitted the lawyer to withdraw from the representation of the husband and to continue to represent the wife.

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