



Professional Ethics Committee

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INFORMAL OPINION 2012 – 04

**WORK PERFORMED IN ANTICIPATION OF
NEW FEDERAL REGULATION**

You have asked whether it is ethically appropriate to be retained and perform work for a client in anticipation of enactment of a proposed federal regulation. The proposed changes to the regulation would likely benefit your potential clients, but you are aware that those changes might not be enacted. Changes to federal regulation follow the regulatory process and can take months from the proposal date to be enacted.

Your question arises from a Notice of Intent, dated January 9, 2012, published by the Secretary of Homeland Security, to modify the current filing and adjudication process relating to immediate relative visa applications and the waivers of inadmissibility filed in connection with said visa applications. Waivers of inadmissibility for immediate relative visa applications are filed when a United States citizen is seeking to gain legal immigration status for a spouse, parent or child who has illegally remained in the United States over 180 days. Immediate relatives must leave the United States in order to go to his or her overseas abroad immigrant visa interview. This act can trigger the inadmissibility ground that requires the immediate relative to seek a waiver. Currently, many immediate relatives who would otherwise qualify for an immigrant visa are reluctant to leave the United States because it will trigger the above referenced inadmissibility ground of having been illegally in the United States for more than 180 days. The immediate relative then has to wait outside the United States for the duration of the visa application and waiver of inadmissibility application processes, sometimes taking well over a year. Under the proposed regulation, the immediate relative could apply for the provisional waiver while he or she is still in the United States. If the immediate relative qualifies for the provisional waiver, their time spent outside the United States, away from their spouse or parent or child, is greatly reduced, as is the uncertainty of the outcome of the waiver of inadmissibility process. You believe that by having the application for waiver, in itself a time consuming job, fully prepared by the time the proposed regulation is enacted and becomes effective, your clients will essentially be at the front of the queue and receive the fastest results from U.S. Citizenship and Immigration Services – a substantial potential benefit.

You raise the question of whether and how an attorney can comply with the Rules of Professional Conduct when faced with this situation. The relevant issues are addressed by Rule 1.4 addressing “communication” and Rule 1.0 (f) defining “informed consent”. Simply stated, as in all representations, an attorney must provide to his or her client, or prospective client, sufficient information and explanation to permit the client to make informed decisions about the representation.

Rule 1.4 Communication provides:

(a) 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(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.

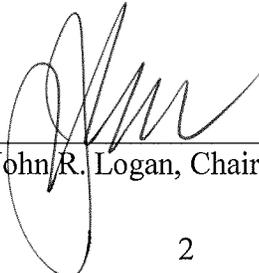
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.0 Terminology defines “informed consent” for purposes of the Rules:

(f) "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.

It is ethically appropriate to represent a client and provide legal services based on a proposed regulation that may or may not be enacted if the client fully understands the costs, risks and potential benefits of preparing the case knowing that the eventual enactment is uncertain. Your concern over an ethical misstep in being retained by prospective clients before the regulation is finalized can be adequately addressed by providing them with sufficient information about the current state of the law, the beneficial effects that the proposed regulations may have if enacted, the burdens and costs of proceeding in advance of enactment and the likely impact if the proposed regulation is not enacted. Presumably the particular circumstances of each prospective client will affect the discussion of some or all of these topics. After fully explaining the matter, you must obtain the client’s informed consent in order proceed.

THE COMMITTEE ON PROFESSIONAL ETHICS

By  _____
John R. Logan, Chair