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Professional Ethics Committee

Approved: June 18, 2014

INFORMAL OPINION 2014-05

PRIOR WORK CONFLICT OF INTEREST AND REIMBURSING FILING FEES

You have asked this Committee's opinion regarding (1) whether a potential conflict of interest requires your withdrawal of representation or merely a disclosure to the client of the potential conflict and relevant facts; and (2) whether you can reimburse the client the cost of filing fees she has paid in the proceeding.

You represent a client for the purpose of obtaining a Green Card. You (or a non-lawyer in your firm) made a mistake in connection with part of the Green Card application, on what is called an I-130 petition, when a hand written petition, signed by your client, rather than a typed petition was submitted with United States Citizenship and Immigration Service ("USCIS"). The handwritten petition indicated that a previously submitted I-130 petition was approved when, in fact, it was revoked. The handwritten, signed I-130 petition was approved. Two years later, at a final adjustment hearing, it was discovered that the handwritten I-130 petition incorrectly reported that the previous I-130 petition had been "approved" when it should have been reported as having been "revoked." As a result, the Trial Counsel for the Department of Homeland Security ("DHS") had the I-130 petition sent back for a review. The Immigration Court closed your client's file without prejudice to reopening it once the resubmitted I-130 petition is approved or revoked.

After learning of the mistake, you promptly met with your client in your office and explained to her, in her own language, the mistake you had made. You also provided her with a written letter explaining the error and the potential consequences of the mistake. The client signed the letter. You also advised her to speak to other attorneys to confirm your explanation. You apologized to the Trial Counsel for DHS twice and asked that there be no negative inference to your client. You have offered to refund your client's legal fees which amount to \$1,000.00. Additionally, your client has paid approximately \$2,500.00 in filing fees to USCIS, which you would like to reimburse. Your client wishes to continue with you as her lawyer.

I. Prior Work Conflict

The first issue presented is whether your error or your firm's error creates a potential or actual conflict under the Rules of Professional Conduct. This scenario is often called a "prior work" conflict. See Mark A. Dubois and James F. Sullivan, *Connecticut Legal Ethics & Malpractice* (2013) at 55-56. Per Rule 1.7(a)(2), the conflict issue is whether, if you continue the representation, "there is a significant risk that the representation . . . will be materially limited by" your personal interests, in this case your desire to mitigate your malpractice exposure. As the authors of the commentary to Rule 1.7 note:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

On the facts presented, we see no indication that your continued representation of the client presents such a risk or would affect your ability to properly represent your client. Any steps you take to advance your client's I-130 petition will have the secondary effect of mitigating your firm's malpractice exposure. Further, your conduct does not reflect any action that could be construed as an attempt to mitigate your malpractice exposure at the expense of your client's interests. To the contrary, you have promptly and candidly admitted the mistake to both the client and Trial Counsel for DHS. You have taken steps to correct the mistake and asked that the mistake be attributed to you and not to your client. You have taken the additional step of providing your client with a written letter explaining the error and the potential consequences of the mistake. See Rule 1.4 of the Rules of Professional Conduct.

We see no indication that your mistake has interfered with or will interfere with your professional judgment or that you will fail to pursue appropriate courses of action on your clients' behalf. Accordingly, the Committee is of the opinion that you may continue your representation of your clients. If, however, upon reflection, you assess that there is a significant risk that you would take actions to cause your client's I-130 petition to be denied for reasons other than your mistake, thereby limiting your firm's malpractice exposure, there would be a clear conflict of interest under Rule 1.7(a)(2), requiring your withdrawal from representing the client.

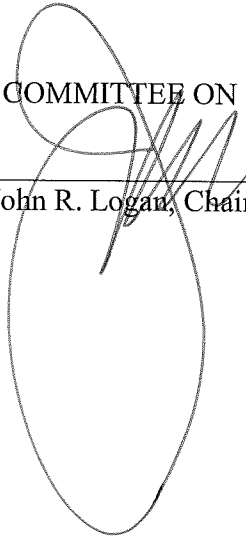
II. Reimbursing the Filing Fees

As to the second aspect of your inquiry, the Rules of Professional Conduct do not prohibit you from reimbursing the filing fees your client has paid over the past five years. Rule 1.8(e) of the Rules of Professional Conduct prohibits financial assistance to a client. On these facts, however, reimbursing the filing fees is not "financial assistance" within the meaning of

Rule 1.8 (e) because here the reimbursement is restitution and so falls outside the prohibition of Rule 1.8.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
John R. Logan, Chair

A handwritten signature in black ink, appearing to be 'John R. Logan', is written over a horizontal line. The signature is stylized and somewhat cursive. Below the signature, there is a large, empty oval shape, possibly a placeholder for a stamp or seal.