

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 465

April 15, 1991

Mutual informed written consent of both the alien - employee and his or her employer, is required for an attorney to represent the employee in filing on the employee's behalf an application for a permanent resident visa under the labor certification preference with the Immigration and Naturalization Service, because filing this application requires the attorney to disclose secrets of the employer.

ATTORNEY AND CLIENT -- REPRESENTATION OF CONFLICTING INTERESTS -- CONFIDENTIAL COMMUNICATIONS -- INFORMED CONSENT

AUTHORITIES CITED:

Cal. Rules of Prof. Conduct
3-310(A), 3-310(B), 3-310(D); Bus. & Prof.
Code § 6068(e); Krause v. Davis; 6 Cal.App.3d
484, 491, 85 Cal.Rptr. 846 (1970); People v.
Singh, 123 Cal.App. 365 (1932); LACBA Op.
Nos. 436, 389, 386; ABA Model Code DR 4-
101(A); ABA Model Rules, rule 1.6.

The Committee's opinion has been requested in connection with the following:

An attorney has been retained by an undocumented alien to obtain a permanent resident visa under the sixth preference (labor certification) under the new Immigration and Nationality Act ("Act"). The Act provides for civil, and potentially criminal, penalties for employers who knowingly employ undocumented aliens after November 6, 1986. 8 U.S.C. sections 1324a(a), 1324a(e)(4), 1324a(f). The initial step of the procedure for obtaining a permanent resident visa under the labor certification preference of the Act requires that the attorney represent both the alien and the employer. Because a subsequent step of the procedure requires the attorney to disclose to the Immigration & Naturalization Service information that the employer has employed an undocumented alien in violation of the Act, the interests of the alien and the employer appear to conflict. Thus, California Rules of Professional Conduct rules 3-310(B) and 3-310(D) require the attorney to disclose these conflicting interests to both the alien and the employer, and to obtain the mutual informed written consent of both the employee-alien and the employer before undertaking the representation.

FACTS

The Act establishes civil and criminal penalties for employers who employ undocumented aliens after the effective date of the Act, November 6, 1986. 8 U.S.C. section 1324a. The civil

penalties range from \$250 to \$10,000 for each undocumented alien for whom a violation is established. 8 U.S.C. section 1324a(e)(4). These civil penalties vary depending on whether the employer is a repeat offender. Criminal penalties also may be imposed in certain circumstances. 8 U.S.C. section 1324a(f). The Committee has been informed that generally, criminal penalties are not sought by the Immigration and Naturalization Service until a fourth offense by a given employer.

An undocumented alien who is already employed wishes to obtain a permanent resident visa under the labor certification preference. 8 U.S.C. section 1153(a)(6). The undocumented alien retains an attorney to represent him or her for this purpose.

The procedure established under the labor certification preference requires that an application be filed with the California Employment Development Department. This application is filed by the attorney in the name of the employer, and on behalf of the alien. This application contains a certification by the employer that there is a position available that cannot be filled by someone other than the undocumented alien. The application form itself reflects the attorney's representation of the employer. This application does not entail affirmative disclosure by the attorney to the Employment Development Department, or to the Immigration & Naturalization Service, whether the employer has employed the undocumented alien already. The Committee assumes that the attorney is not making a

misrepresentation to the California Employment Development Department when he files this application.

After the Employment Development Department issues the labor certificate to the employer, the second step of the process of obtaining a permanent resident visa entails filing a petition with the Immigration & Naturalization Service by the attorney on behalf of the alien. This petition requires the attorney to disclose where the alien is currently employed. This disclosure of the alien's current employment thus also constitutes disclosure to the Immigration & Naturalization Service that the employer has employed the undocumented alien in violation of 8 U.S.C. section 1324a, exposing the employer to the risk of civil and/or criminal penalties. Under the facts presented by this inquiry, the attorney has disclosed the conflict between the alien's interests and those of his employer to the alien. The attorney has inquired what, if any, ethical obligations he owes the employer.

DISCUSSION

California Rules of Professional Conduct, rule 3-310(B) states:

"A member shall not concurrently represent clients whose interests conflict, except with their informed written consent."

California Rules of Professional Conduct, rule 3-310(D) states:

"A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client."

Rule 3-310(A) requires prior mutual informed consent of "all affected clients" . . . "if a member has or had a relationship with another party interested in the representation." Without such prior, mutual informed written consent, Rule 3-310(A) bars the attorney from accepting or continuing the representation.

Business & Professions Code section 6068(e) requires an attorney ". . . to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This obligation to maintain client confidences and secrets continues even after termination of the representation. L.A. Ethics Opinion No. 389. Even a client's prior commission of a crime is a confidence that the attorney may not disclose. People v. Singh, 123 Cal.App. 365 (1932).

ABA Model Code DR 4-101(A) defines secrets of a client as information gained from the client in the course of the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or

would likely be detrimental to the client. ABA Model Rules, rule 1.6 goes further, requiring nondisclosure of "information relating to representation of a client."

In Opinion No. 386, this Committee considered the meaning of "secret" as used in Business & Professions Code section 6068(e), and adopted the definition of "secret" set forth in ABA Model Code DR 4-101(A). This Committee concluded that this definition of secret applied even to information an attorney learns from third parties.

In Opinion No. 436, this Committee concluded that if information falls within the definition of secret within the meaning of Business & Professions Code section 6068(e), and ABA DR 4-101(A), an attorney may not disclose that information without the informed written consent of his client.

It is given in the inquiry that an attorney-client relationship exists between the undocumented alien and the attorney. It also appears from the facts given, that an attorney-client relationship arose between the attorney and the alien's employer. California Evidence Code section 951 defines a client as: ". . . a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity . . ."

Even if the employer does not initiate the consultation with the attorney, the employer's agreement to assist the alien employee by filing the application for labor certification through the alien's attorney, appears also to constitute agreement by the employer to representation by the alien's attorney, at least for purpose of filing of the application for labor certification. This application is filed with the Employment Development Department in the employer's name, with the attorney appearing on the application as the employer's counsel.

The employer's implicit agreement to employ the alien's attorney for the purpose of filing the application for labor certification appears to be a retention of the attorney for the purpose of securing legal service in the attorney's professional capacity within the meaning of Evidence Code section 951. An attorney-client relationship thus appears to arise between the attorney and the employer at least for the purposes of the filing of the application for labor certification. This result obtains irrespective of whether the employer pays the attorneys fees or not.

CONCLUSION

When applied to these facts, these precedents impose a duty on the attorney to obtain the mutual, informed written consent of the alien and the employer before undertaking the representation. Mutual, informed written consent of both the alien and the

employer is required even if the professional relationship between the attorney and the employer terminates after the Employment Development Department issues the labor certification, but before the attorney's filing of the alien's petition with the Immigration & Naturalization Service. This is because the attorney's filing of the petition with the Immigration & Naturalization Service involves disclosure of a former client's (i.e. the employer's) secret. California Rules of Professional Conduct, rules 3-310(A), 3-310(D); Business & Professions Code section 6068(e); ABA DR 4-101(A); and LA Ethics Opinions Nos. 436, 396 and 389.

The employment information that the attorney must disclose on the alien's behalf to the Immigration & Naturalization Service on the petition for a permanent resident visa appears rather clearly to fall within this Committee's adopted definitions of secret. The employment information that must be disclosed to the Immigration & Naturalization Service on the alien's petition clearly relates to the attorney's former representation of the employer. California Rules of Professional Conduct, rule 3-310(A); L.A. Ethics Opinion No. 436. The employment information that the attorney must disclose to the Immigration & Naturalization Service is material to the attorney's representation of the undocumented alien. Rule 3-310(D). Absent this information, the alien's petition for a permanent resident visa is subject to denial. Further, the alien's sole basis for applying for a permanent resident visa under the labor certification preference is that he or she is "capable of

performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. section 1153(a)(6). Thus, the materiality of the information that must be disclosed is facially plain.

The employment information that the attorney must disclose on the alien's petition also clearly has the potential of being detrimental to the employer, by exposing the employer to the risk of civil, or potentially criminal, penalties should the Immigration & Naturalization Service choose to prosecute the employer based on the information disclosed on the alien's petition. ABA DR 4-101(A); L.A. Ethics Opinion No. 386. Thus, disclosure of this information clearly may conflict with the employer's interests.

As such, the attorney must obtain the informed written consent of both the undocumented alien and of the employer before undertaking the representation of either. If the employer refuses to give informed written consent to the representation, and a professional relationship has arisen between the employer and the attorney, then the attorney may not proceed to file the petition for a permanent resident visa on behalf of the alien, because doing so would require disclosing secrets of the former client employer.

It appears that the undocumented alien and the employer must frequently agree to work in concert before any attorney becomes

involved. Once an attorney does become involved under the facts presented, the inherent conflict must be recognized. The attorney's ethical obligations to each must be discharged, even if in some cases, doing so may cause the employer to refuse to assist in the initial step of obtaining the labor certification, and in others, to compel the alien to retain a second attorney to file the petition with the Immigration & Naturalization Service.

In order to discharge these ethical obligations, the attorney must inform both the undocumented alien-employee and the employer of the potential penalties which may be imposed on each as a result of the application process, and must obtain the written consent of each before undertaking the representation. At minimum, the attorney must inform the undocumented alien-employee of the conflict of his or her interests with those of the employer, and of the potential penalties to which the employer may be subjected. The attorney must, at minimum, inform the employer of the disclosures that must be made to the Immigration and Naturalization Service, and of the potential penalties to which the employer may be subjected, and how the disclosures required by the application process create a conflict in interest between the alien and the employer. The attorney must inform both the employer and the employee of the ethical limitations on dual representation of such conflicting interests and must obtain the informed, written consent of each.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as are set forth in the questions submitted.