UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No: 03-2006 (EGS)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 27

Opinion 354

Providing Financial Assistance to Immigration Clients Through Lawyer's Execution of Affidavit of Support on Form I-864 as a Joint Sponsor

Lawyers in immigration matters may not execute an Affidavit of Support (U.S. Citizenship and Immigration Services Form I-864) on the immigrant's behalf as a joint–sponsor while continuing to represent the immigrant in the matter. Typically, a person who signs an Affidavit of Support agrees to support the immigrant at an annual income that is not less than 125 percent of the federal poverty level so that the immigrant will not become a public charge. The ensuing contractual obligations continue for years after the immigrant is admitted on the basis of the Affidavit of Support. The Affidavit of Support is a guarantee of financial assistance to a client. Such guarantees are generally prohibited by Rule 1.8(d). Because the obligations continue long after the completion of the immigration proceeding, the undertaking does not fit within the narrow safe harbor of Rule 1.8(d)(2), which allows, but does not require, financial support strictly necessary to sustain the client during a proceeding. An Affidavit of Support undertaking by a lawyer to a client is also fraught with peril under Rule 1.7 (b)(4) (conflicts of interest). Thus, a lawyer who wishes to serve as a joint sponsor for an immigration client by executing an Affidavit of Support on the immigrant's behalf must withdraw from the representation of that client before doing so.

Applicable Rules

- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.8(d) (Conflict of Interest: Advancing or Guaranteeing Financial Assistance to Client)
- Rule 1.16 (Declining or Terminating Representation)

Inquiry

In many immigration matters, federal law requires a U.S. relative who files an immigrant petition on behalf of an alien relative to sign an enforceable contract under which the sponsor agrees to maintain the sponsored immigrant at an annual income that is not less than 125 percent of the federal poverty line. That contract takes the form of an "Affidavit of Support" on U.S. Citizenship and Immigration Services ("USCIS") Form I-864, which also requires extensive financial disclosures to establish that the signer has the means to satisfy the obligations it imposes. If the U.S. relative does not have a sufficient level of income or assets, he or she may seek a joint sponsor to sign an Affidavit of Support on behalf of the intending immigrant. Those obligations assumed by the sponsor (the U.S. relative) or the joint sponsor (another person signing a Form I-864) may last for up to ten years and may be enforced against the sponsor(s) by the immigrant, by the federal government, by any state or political subdivision of a state, or by any other entity that provides any means-tested public benefit. By signing the Affidavit of Support, the sponsor

and the joint sponsor also agree to submit to the jurisdiction of any federal or state court for the purpose of enforcing those obligations. We have been asked whether the Rules of Professional Conduct permit a lawyer who is representing the prospective immigrant in the immigration matter to sign an Affidavit of Support as a cosponsor in support of the client's application, thereby undertaking significant and long-term financial obligations to the client.

Analysis

Under federal law, prospective immigrants who are "likely at any time to become public charges" are "inadmissible." 8 U.S.C. § 1182(a)(4) (2010). USCIS thus requires proof that intending immigrants will not require public support. For family-based and certain employment-based immigration applications, the required showing is made through the filing of an "Affidavit of Support" by one or more persons who are sponsoring the immigrant. 8 U.S.C. § 1182(a)(4)(C)(ii), 1182(a)(4)(D), 1183 (a) (2010).[1]

The Affidavit of Support[2] is an enforceable contract in which the signing sponsor "agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable." 8 U.S.C. § 1183(a)(1)(A).[3] This is a significant financial obligation, as illustrated by the following chart on USICS Form I-864P based on the 2009 Poverty Guidelines for the 48 Contiguous States and the District of Columbia:

Sponsor's Household Size	100% of Poverty Guidelines	125% of Poverty Line
	For sponsors on active duty in the U.S. Armed forces who are petitioning for their spouse or child	For all other sponsors
2	14,570	$18,212
3	18,310	$22,887
4	22,050	$27,562
5	25,790	$32,237
6	29,530	$36,912
7	33,270	$41,587
8	37,010	$46,262
	Add $3,740 for each additional person	Add $5,675 for each additional person

http://www.uscis.gov/files/form/i-864p.pdf (last visited January 7, 2010).[4]

The obligation "is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit." 8 U.S.C. § 1183(a)(1)(B). By signing the form, the sponsor also agrees to submit to the jurisdiction of "any federal or state court" for the purpose of enforcement of the obligations. 8 U.S.C. § 1183(a)(1)(C). Immigrants have successfully sued their sponsors to enforce these obligations.[5]

The sponsor must provide detailed information about the sponsor's own finances to show that he or she has the means to satisfy the support obligations. Should the immigrant ever apply for any means-tested public benefits, the sponsor's finances will be considered in determining whether the

immigrant qualifies for the support. The same requirements apply to a joint sponsor who signs an Affidavit of Support on behalf of an intending immigrant.

The affidavit becomes enforceable against the sponsor(s) when the immigrant is admitted to the United States pursuant to the requested change in status. It expires only when the immigrant (1) becomes a U.S. citizen; (2)dies or permanently departs from the United States; or (3) is credited 40 quarters (or ten years) of work for Social Security purposes.[6]

Typically, the immigrant's sponsor is a spouse or another close relative (*e.g.*, a parent or sibling) who can submit an immigrant petition on behalf of the intending immigrant. However, if that sponsor lacks the financial means to make the necessary showing, a "joint sponsor" may be enlisted to undertake the required support obligation. Our Committee has been asked whether the lawyer who is representing the immigrant with respect to the requested change of status from nonimmigrant to U.S. permanent resident ("green card") status may also act as the immigrant's joint sponsor by executing an Affidavit of Support on the immigrant's behalf.

We assume that a lawyer would consider doing so only in extraordinary circumstances. The lawyer's own financial resources limit the lawyer's ability to do this. Moreover, each outstanding Affidavit of Support executed by the lawyer further limits the lawyer's ability to sponsor others for immigration to the United States, including the lawyer's own family members. Liability under the affidavit years after its signing could adversely affect the lawyer's ongoing ability to provide for the lawyer's personal and family needs.

Historically, lawyer conduct rules in many jurisdictions either prohibited or placed strict limitations on a lawyer's ability to provide or guarantee financial assistance to a client.[7] The Affidavit of Support's guarantee to support the client at 125 percent of the federal poverty level is difficult to reconcile with such rules.

The District of Columbia has been more permissive in this area than some other jurisdictions. Rule 1.8(d) provides as follows:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
>
> > (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and
> >
> > (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

Comment [9] to Rule 1.8 explains the rule's history and its intended scope:

> Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

The District of Columbia's approach is more permissive than that of some other jurisdictions because it allows, but does not require, minimum payments necessary to sustain the client during the litigation or administrative proceeding.[8] Jurisdictions with more restrictive rules have disciplined lawyers for violations despite assertions that the payments were motivated by humanitarian concerns. *See, e.g., Mississippi Bar v. Shaw*, 919 So.2d 51 (Miss. 2005); *Mississippi Bar v. Attorney HH,* 671 So. 2d 1293 (Miss. 1996); *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (Va. 1988).[9]

While more permissive than similar rules elsewhere, the District of Columbia's Rule 1.8(d) does have limits. The Affidavit of Support is a guarantee of financial assistance to the client. Rule 1.8(d) thus prohibits its execution by the client's lawyer unless the undertaking fits within one of the two exceptions at Rule 1.8 (d)(1) and (d)(2). The exception at 1.8(d)(1) is not available because the Affidavit of Support does not involve the expenses of litigation or administrative proceedings.

Nor do the substantial and long-lasting support obligations imposed by the Affidavit of Support fit within the narrow confines of the Rule 1.8(d)(2) exception for "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." This exception is limited to payments which are "strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses." Rule 1.8 cmt. [9]. Its purpose "is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement." *Id*. It does not extend to offering "financial payments beyond those... necessary to sustain the

client until the litigation is completed." *Id.*

The Affidavit of Support requires the sponsor to guarantee financial assistance to the immigrant for years after a change of status is granted. Because the guarantee extends far beyond the duration of the subject matter of the representation – the immigration application – the Rule 1.8(d)(2) exception does not apply. A financial guarantee that extends long after a proceeding does not meet the during-the-proceeding limitation that the comments to Rule 1.8 make clear.[10]

Moreover, such an undertaking to a client is fraught with peril under another provision of the Rules of Professional Conduct: A lawyer has a conflict of interest under Rule 1.7(b)(4) if "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." The significant financial obligations imposed by the Affidavit of Support can create exactly the kind of conflict addressed by this rule. A lawyer who has second thoughts or a change in financial circumstances, for example, may have an incentive to sabotage the client's immigration application so that the lawyer's support obligations never can take effect.

In addition, the circumstances that lead a lawyer to consider undertaking such extraordinary obligations on behalf of a particular client may suggest the presence of a different kind of personal interest conflict. Most rational lawyers would not – and financially, could not–undertake obligations like those imposed by the Affidavit of Support for any client. The fact that a lawyer would consider such an extraordinary undertaking for a particular, special client should cause the lawyer to question whether he or she can maintain the professional distance necessary to represent the client effectively and dispassionately.[11]

While conflicts under Rule 1.7(b)(4) can be waived under certain circumstances,[12] the enforceability of such a waiver from an individual immigration client in these circumstances is doubtful. *See generally* Rule 1.7 cmts. [28]-[29] (addressing elements of informed consent).

The Committee recognizes that a sponsor's execution of an Affidavit of Support on behalf of an intending immigrant is an act of extraordinary generosity and selflessness. This opinion should not be read to prohibit lawyers from engaging in such acts where their financial means and their relationships with particular immigrants enable and incline them to do so. Where a lawyer wishes to do so for a client in an immigration matter, however, the lawyer must first withdraw from that representation[13] and refer the client to other counsel. *See* Rule 1.16(a)(1).[14]

The other counsel to whom the matter is referred must not be in the same firm as the withdrawing lawyer. Under Rule 1.8(j), "while lawyers are associated in a firm, a prohibition [under Rule 1.8(d)] that applies to any one of them shall apply to all of them." This means that an individual attorney's disqualification on financial-support-to-client grounds is imputed to all other attorneys in the same law firm.[15]

This opinion does not address the situation in which the lawyer is also married or closely related to the intending immigrant, acting as the immigrant's primary sponsor, and required by law

to execute an Affidavit of Support on the immigrant's behalf. Although we have not been asked to – and do not – reach a conclusion on that question, we note that, in other contexts, the Rules of Professional Conduct permit lawyers to provide services for close family members that would be prohibited for unrelated clients. See Rule 1.8(b).[16]

Conclusion

The District of Columbia's Rules of Professional Conduct do not permit a lawyer to execute an Affidavit of Support (USCIS Form I-864) as a joint sponsor on behalf of an immigration client. Lawyers who wish to sponsor an immigrant client by executing such an affidavit must withdraw from the representation before doing so.

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[1] This Committee does not opine on questions of law outside of the Rules of Professional Conduct. The ethical question presented in this inquiry, however, demands a contextual understanding of certain requirements that arise under substantive immigration law. The accompanying discussion of immigration law reflects the Committee's understanding of relevant law for the sole purpose of analyzing the issues presented under the Rules of Professional Conduct.

[2] The form and its instructions are available at http://www.uscis.gov/files/form/i-864.pdf.

[3] Sponsors who are on active duty in the U.S. military and who are sponsoring a spouse or minor child need only show the ability to support at 100% of the federal poverty guidelines. However, that accommodation does not apply to joint or substitute sponsors.

[4] According to the instructions to Form I-864, the "household size" includes the signing sponsor, any spouse, any dependent children under the age of 21, any other dependents listed on the sponsor's most recent federal include tax return, all persons being sponsored in the affidavit of support, and any immigrants previously sponsored through an affidavit of support whom the signing sponsor is still obligated to support.

[5] *See, e.g.*, *Younis v. Farooqi*, 597 F. Supp. 2d 552 (D.Md. 2009) (awarding summary judgment to immigrant in her Form I-864-based claim against her former husband).

[6] According to the form's instructions, "intending immigrants may be able to secure credit for work performed by a spouse during marriage and by their parent(s) while the immigrants were under 18 years of age."

[7] For example, DR 5-103(B) of the ABA's former Model Code of Professional Responsibility provided that "[w]hile representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

[8] *Accord Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) ("If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount. We do not believe any bar disciplinary rule can or should contemplate depriving poor people from access to the court so as effectively to assert their claim.")

[9] "There is an unmistakable undercurrent in Shea's argument

to the effect that DR 5-103(B) is not really that important. The suggestion is that it prevents attorneys from being helpful and compassionate to clients who find themselves in dire financial straits during the course of litigation. The question which lurks below the surface of Shea's arguments is this: Why can't a lawyer help a client who needs financial help so long as the client pays the money back from the proceeds of the litigation? The short answer to that question is that the disciplinary rule says that such conduct is improper. The broader answer is that the rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients." *Shea*, 236 Va. at 444-45, 374 S.E.2d at 64.

[10] The Affidavit of Support's financial guarantees are extraordinary in both their magnitude and duration. The fact that a particular financial commitment or guarantee by the lawyer might extend briefly beyond the duration of a litigation or administrative proceeding does not necessarily render that commitment or guarantee impermissible under Rule 1.8(d). For example, a lawyer whose impoverished client needs housing while awaiting a trial in three months could justify paying for a six-month lease on the client's behalf if no shorter term lease is available at a reasonable price.

[11] For an extreme example of a personal interest conflict of this nature, *see* the discussion of sexual relations between lawyer and client at Comments [37] and [38] to Rule 1.7.

[12] Rule 1.7(c) provides that such conflicts can be waived if:
(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

[13] To avoid a violation of Rule 1.8(d), the lawyer must withdraw from the immigration matter as well as from any other representations of the client with respect to contemplated or pending litigation or administrative proceedings. In addition, withdrawal from representations of the client in matters that do not involve litigation or administrative proceedings may be required to avoid a violation of Rule 1.7(b)(4).

[14] Rule 1.16(a)(1) provides that "[e]xcept as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:... the representation will result in violation of the Rules of Professional Conduct or other law...." Rule 1.16(c) requires lawyers to comply with applicable law regarding notice to or permission of a tribunal when terminating a representation before that tribunal.

[15] Rule 1.10(a)(1) provides a separate imputation rule for conflicts arising only under Rule 1.7(b)(4). Such conflicts are imputed to other lawyers in the same firm unless the particular lawyer's disqualifying interest "does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm." We need not consider whether that exemption from imputation might ever be satisfied in this context because Rule 1.8(j) does not contain a similar provision.

[16] Rule 1.8(b) prohibits lawyers from preparing wills or other instruments that give the lawyer (or a relative of the lawyer) any substantial gift from a client "except where the client is related to the donee." For the purposes of this rule, "related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship."

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