

Ethical and Practical Considerations in EB-5 Representation

By Carolyn S. Lee and Stephen Yale-Loehr*

The EB-5 immigrant investor green card category has blossomed from uncertain terrain to a boutique subspecialty in immigration practice. This article discusses ethical considerations and rules of professional responsibility involved in handling an EB-5 case. I look at a hypothetical case based on common facts and run through the relevant ethical issues viewed from the American Bar Association (ABA) Model Rules of Professional Conduct (“Model Rules”), upon which forty-seven states base their professional conduct rules.

Hypothetical

Assume an attorney, Gilda Goodheart, an immigration lawyer in New York, has a British E-2 client, Nigel Heartburn. Nigel has lived in Orlando, Florida for six years developing his construction business. The E-2 enterprise is jointly owned and operated with his wife, Verity. Neither has a bachelor’s degree, although they have built a multimillion-dollar business. The couple has about \$3 million in jointly held liquid assets. They have a nineteen-year-old daughter, Poppy, who wants to attend a U.S. university. The whole family considers Florida their home and want U.S. permanent residency. Their E-2 visas expire in four months. Their E-2 I-94 cards expire in twelve months.

Gilda has analyzed the Heartburns’ immigrant visa options. She has concluded that a labor certification application sponsored by the E-2 enterprise would not likely survive an audit because Nigel and Verity own 100% of the E-2 enterprise. It would be difficult to establish that a job that either Nigel or Verity holds in the company is truly open to qualified U.S. workers and not subject to undue influence. Gilda also does not like this approach because Nigel would be in the EB-3 skilled worker category, which has a green card backlog of five years even if the PERM survived an audit. Gilda has also considered the EB-1-3 multinational manager category, but neither Nigel nor Verity has the required twelve months’ experience abroad with a foreign affiliate. Gilda has concluded that perhaps the EB-5 category might be the best path toward a green card, but she has never done an EB-5 case.

Gilda is an experienced immigration lawyer. She is a member of the American Immigration Lawyers Association (AILA). She knows that there was an EB-5 crackdown in the late 1990s in which many investors were stranded, unable to obtain unconditional U.S. permanent residency. Being a prudent lawyer who wants to protect her practice, Gilda has never touched the area.

As far as the clients go, Gilda knows that Nigel and Verity’s nineteen-year-old daughter, Poppy, will age out soon. Given how long the immigrant visa process is generally, Gilda feels she needs to point her clients in the right direction soon to preserve Poppy’s green card eligibility through her parents. She knows the names of a few lawyers known to specialize in EB-5s. What should Gilda do? How is she bound to handle this situation under the applicable ethical rules?

Ethical Analysis

The initial ethical consideration is a lawyer’s duty of competence. The ABA’s Model Rules of Professional Conduct’s first rule states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The relevant considerations include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. Under the ABA Model Rules, competence includes the ability to discern when an undertaking requires specialized knowledge or experience that the lawyer does not have.

Under New York's Disciplinary Rules, the same rule is stated, in part:

A lawyer shall not:

- (1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.

Under the ethical guidelines above, Gilda has three options. First, she can gain the EB-5 related legal knowledge and skill to competently represent the Heartburns herself. Second, she can refer the matter to an established EB-5 attorney. Third, she can associate or consult with an established EB-5 attorney.

Gilda decides that it would be impractical for her to become competent enough in EB-5 law to handle the case for the Heartburns herself. She knows the names of one or two EB-5 lawyers specializing in this area, but she doesn't know whether she ought to start with them individually, or whether there is a central resource she can consult before contacting a particular attorney. She wants to know whether the EB-5 category would be even feasible for the client before discussing the matter with Nigel. Naturally, Gilda has some misgivings about contacting another immigration attorney. She has represented Nigel for six years, and while she wants the clients to reach their goals in the most efficient way possible, she does not want to lose her clients to another immigration firm. She wonders whether she can stay involved, and if so, in what capacity and how.

Here, the issues are practical. The first question is: How does Gilda find a competent EB-5 attorney? She can consult the following sources:

AILA EB-5 Committee or Mentor: She can contact either AILA national staff members, a member of the AILA EB-5 committee, or an AILA EB-5 mentor.

AILA publications, listservs, and web sources: Gilda can read AILA publications and the websites of the particular member attorneys listed on the EB-5 committee. She can also join the AILA EB-5 listserv. She can see whether one particular attorney strikes her as someone she trusts and wants to deal with.

Using the above, Gilda has identified an EB-5 attorney with sterling EB-5 credentials: Casey Liao-Gooding. But Gilda first wants to consult with Casey to see whether an EB-5 green card is even possible for Nigel and what role, if any, Gilda might appropriately play.

At this point Gilda has two options. She can either contact Casey herself or point her clients directly to Casey. Gilda does not personally know Casey, and she wants to stay involved to the extent that she feels it is in her client's best interest as well as potentially her own in keeping the client. Accordingly, Gilda emails Casey, sets out the preliminary facts, and asks whether she might have an initial phone consultation with Casey about her client's EB-5 prospects.

Casey responds to Gilda's email with a list of EB-5 articles and materials Gilda can read before the consultation. Casey also includes a questionnaire that Casey can have her clients complete to assist Casey assess the feasibility of an EB-5 application. Gilda has the initial phone consultation with Casey and discovers that indeed the EB-5 category might work quite well for the Heartburns. She learns that Nigel has two options. He may either apply through his own E-2 company or commit his investment funds in a designated EB-5 regional center where he is not required to actively manage and direct the enterprise. Casey explains that to obtain an EB-5 green card through their own company, they must invest \$1 million, since their enterprise is in an urban low-unemployment part of Florida. Moreover, they must create ten jobs directly. By contrast, if the Heartburns invest in an EB-5 regional center, they may have to invest only \$500,000, since many regional center projects are in rural or high-unemployment areas. Moreover, in a regional center the investor satisfies the job creation requirements by showing that ten qualifying jobs will be created either directly or indirectly. Gilda also learns that to protect the Heartburns' daughter from aging out of derivative immigration benefits, the EB-5 petition must be filed before she turns twenty-one years old.

Gilda also learns, much to her surprise, that an individual referring an investor to a particular regional center often receives a referral fee from the regional center. Gilda asks whether Casey would be entitled to

the referral fee and is informed that as a matter of policy, Casey and her law firm decline all referral fees when representing a client in an EB-5 case so as to leave no doubt about the attorney's undivided loyalty to the client. Gilda learns that other attorneys have concluded that they violate no ethical rule by retaining the referral fee.

Gilda asks Casey whether ethical rules might prohibit her from retaining a referral fee. This question touches on two ethical rules.

The first rule cautions attorneys against conflicts of interest. ABA Model Rule 1.7 sets out the basic rule:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

the representation of one client will be directly adverse to another client; or
there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer*.

The Comments to Model Rule 1.7 make it clear that a lawyer must not permit his or her own interests to have an adverse effect on representation. Specifically, the Comments state:

[A] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

The conflicts rule in New York is set out in Disciplinary Rule (DR) 5-101:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

A prudent lawyer will also want to avoid even the potential appearance of a conflict of interest. In New York, an attorney may not place himself in a position where a potential conflicting interest may, even inadvertently, affect or create the appearance of affecting his personal judgment or duty of undivided loyalty to clients.

So Gilda must ask herself: Under what circumstances can I take the referral fee from an EB-5 regional center? Under the ABA Model Rule, if there is a risk that Gilda's personal interest in the referral fee will materially limit or impair her representation of the Heartburns, Gilda should not. How can Gilda both preserve her loyalty to her client and with a free conscience retain the referral fee?

One clear way is to take the referral fee and not represent the client in the EB-5 case. This is easy for Gilda because she has already decided she cannot competently represent Nigel in an EB-5 case and has begun consulting with a recognized EB-5 lawyer. But how does this work mechanically and can she still stay involved without preparing and filing the EB-5 petition?

The key is for Gilda to initiate contact with the regional centers and log herself in as the referrer. Gilda should not get involved in the client's decision-making process as to which regional center is chosen, or whether a regional center is chosen at all. Doing so would expose Gilda to a later accusation that she directed the client to a regional center for her own financial gain, rather than from her undivided loyalty to the client and his best interests. As to whether Nigel ought to invest in his own enterprise or to invest in a regional center, that question should be up to him following his own consultation with Casey. Moreover, Nigel's decision to invest in one regional center versus other regional centers should turn largely on purely business considerations that Casey will explicitly not advise on, as business, tax, and other non-EB-5 related considerations are outside Casey's competence. In this way, Gilda keeps herself insulated from both the possibility of steering Nigel toward her own financial gain and any perception of

impropriety. If Nigel decides to invest in a regional center offering a referral fee, Gilda will get the referral fee without having had any role in influencing Nigel to invest there.

Can Gilda remain involved in some limited capacity without conflict? Yes. The conflicts rule bars representation where there is significant risk of the attorney materially limiting herself in advancing the client's interest due to the attorney's personal interest. In other words, the referral fee may impair Gilda's representation of her client by Gilda consciously or unconsciously steering her client toward a particular regional center investment. This could constitute a "material limitation" under ABA Model Rule 1.7, particularly if the client would actually have been better served, in hindsight of course, choosing a different route. Different routes may include investing in his own enterprise, investing in another regional center, or obtaining permanent residency outside the EB-5 framework altogether. However, Gilda is free to exercise her judgment in carving out representation that does not include any EB-5 issues. Gilda already researched other immigrant visa options for the Heartburns before turning to the EB-5. She knows that there is no good employment-based or family-based immigration option. She has decided to carve out the EB-5 portion of her client's needs to the EB-5 specialist, both for lack of competence and to preserve her ability to retain the referral fee if the client chooses a regional center with a referral fee program.

Casey informs Gilda that Gilda can file the adjustment application or handle the Heartburns' consular processing after the EB-5 petition has been approved. The EB-5 petition, made on Form I-526, is an immigrant visa petition, just like Form I-140 or Form I-130. Currently, there is no concurrent adjustment processing for the Form I-526. Accordingly, the application for admission to permanent residency is entirely separate from the EB-5 filing. Moreover, Gilda will have fuller knowledge of the Heartburns' prior immigration history, which can help in preparing the adjustment or consular processing applications. Accordingly, Gilda can fully handle this piece of the Heartburns' permanent residency process without breaching competency or conflicts rules.

The Form I-829 filing (Petition by Entrepreneur to Remove Conditions) two years later, however, should be handled by a competent EB-5 attorney, preferably the one who filed the I-526 petition. This filing includes evidence that shows that the investment has been maintained during the two-year conditional period and that the required number of jobs have been created. Upon admission as U.S. permanent resident, either by adjustment or consular processing, the EB-5 investor is a Conditional Permanent Resident (CPR). Two years after becoming a CPR, the CPR must file the Form I-829 to remove the conditions. The process is analogous to the filing of a Form I-751 by a U.S. citizen and CPR spouse. After successful removal of the conditions, Gilda can again re-assume representing the Heartburns if they later want to apply for naturalization.

Gilda wonders whether Casey has considered taking the referral fees herself. Casey informs Gilda that some EB-5 attorneys do retain the referral fee, but that she has concluded after her own research into applicable ethics rules that even if a conflict could be avoided, she would rather avoid any appearance of impropriety. Casey informs Gilda that in New York, where she practices, lawyers are duty bound to avoid not only the fact but also the appearance of impropriety. Casey tells Gilda that because she represents so many EB-5 clients, she wants to keep her practice free from any possible taint of conflict of interest.

Gilda likes all she heard from her consultation with Casey and feels she can confidently recommend Casey to Nigel. Gilda now wonders whether any benefit is gained by retaining Casey herself, or whether Nigel should establish the attorney-client relationship directly with Casey.

Gilda's contemplation of associating with Casey rather than stepping out of the EB-5 representation altogether implicates ethical rules governing fee agreements between lawyers practicing in different firms. Model Rule 1.5(e) states:

- A division of a fee between lawyers who are not in the same firm may be made only if:
 - the division is in proportion to the services performed by each lawyer or if each lawyer assumes joint responsibility for the representation;
 - the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - the total fee is reasonable.

The analogous rule in New York is DR 2-107, which states in relevant part:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm unless:

The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

The division is in proportion to the services performed by each lawyer or, by writing given the client, each lawyer assumes joint responsibility for the representation.

The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

These rules make it clear that first, the client has to be informed of the other lawyer or firm involved in the case. Second, the fee split has to reflect in proportion the services provided by the two lawyers, or the lawyers have to be jointly responsible. Joint responsibility means that the lawyers are ethically obligated to accept vicarious liability for malpractice during the course of representation.

In our hypothetical, this means that if Gilda chooses to remain involved in the EB-5 case, she has to inform Nigel that an attorney from a different firm, Casey, will be also engaged, and obtain Nigel's consent. The fee split has to reflect work performed on the case by both Gilda and Casey. In a pure EB-5 case where only the I-526 petition is prepared, Gilda's portion of the fee would be quite small. The alternative is for Gilda to take a greater portion of the total fee, but then she would be required to assume joint responsibility for the EB-5 work under these ethics rules. A way for Gilda to circumvent the joint responsibility rule might be to include adjustment or consular processing in the scope of representation. This way, she could claim the fee attributable to preparing the adjustment or immigrant visa application. Alternatively, Gilda could separate these matters and step back to represent the client for adjustment or consular processing after Casey completes the EB-5 work.

In addition to the regulation of fee-splitting arrangements between lawyers, to the extent that Gilda remains formally involved in the EB-5 case, Gilda establishes herself as formally interested and involved in the EB-5 case. In doing so, Gilda may be holding herself out to her client as handling, at least in part or as co-counsel, the EB-5 matter. This, in turn, raises the competence issue as well as the conflict issue in the case of regional center referrals. Alternatively, Gilda can step out of the EB-5 matter altogether and allow Nigel to engage Casey directly, logging in the referrals with regional centers and being available to both the Heartburns and Casey as needed on non-EB-5 immigration issues. Gilda's receipt of regional center referral fees does not implicate the general prohibition against fee splitting with non-attorneys because Gilda is not receiving any legal fees associated with EB-5 representation, and she is not forwarding that fee to a non-lawyer. Rather, she's on the receiving end.

In the course of the consultation, Gilda learns that there are travel issues that require careful consideration in advising her clients. Under the State Department's Foreign Affairs Manual, for example, the consulates will not issue an E visa if an applicant intends to remain in the United States to adjust status. Accordingly, Gilda learns that it will be important for her to advise the Heartburns to provide Casey with full nonimmigrant visa details and travel plans for the next 12 months.

Conclusion

Gilda is a prudent attorney who focuses on protecting her clients and her practice. She concludes that she can direct them to a competent EB-5 attorney while continuing to be the Heartburns' primary immigration attorney for the rest of their immigration needs. She learns that she might stand to gain unexpected financial rewards without having to undertake any EB-5 representation, which comes as no small relief given the area's complexity and disquieting past.

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See generally MODEL RULES OF PROFESSIONAL CONDUCT (2006) [hereinafter MODEL RULES]. The New York Disciplinary Rules of the Code of Professional Responsibility, the California Rules of Professional Conduct, and the Maine Code of Professional Responsibility are not based on the ABA Model Rules of Professional Conduct.

See Stephen Yale-Loehr, *Congress Helps Stranded Immigrant Investors*, 7 Bender's Immigr. Bull. 1306 (Nov. 1, 2002), also available at <http://www.millermayer.com/new/bibeb5bill.html> (last visited Aug. 22, 2008).

MODEL RULES, *supra* note 1, at Rule 1:1.

See MODEL RULES, *supra* note 1, Rule 1:1 cmt.

See, e.g., Attorney Grievance Comm'n v. Brown, 517 A.2d 1111 (Md. 1986) ("If a general practitioner plunges into a field in which he or she is not competent, . . . the Code demands that discipline be imposed [and the] new Rule 1.1 (Competence) is consistent with [these old] standards"); *In re* Disciplinary Action against Kaszynski, 620 N.W.2d 708 (Minn. 2001) (lawyer's ignorance of immigration law and procedures and failure to supply documentation required to support clients' claims for relief put clients in danger of deportation); *In re* Richmond's Case, 872 A.2d 1023 (N.H. 2005) ("Rule 1.1 mandates that a general practitioner . . . identify areas in which the lawyer is not competent").

N.Y. DISCIPLINARY RULE (McKinney 2003) [hereinafter DR] 6-101; 22 NYCRR § 1200.30; see also *Degen v. Steinbrink*, 202 A.D. 477, 195 N.Y.S. 810 (1st Dep't 1922) (if the attorney is not competent to skillfully and properly perform the work, he should not undertake the service) *aff'd*, 236 N.Y. 669 (1923).

A list of designated EB-5 regional centers is printed as an appendix to Stephen Yale-Loehr & Carolyn S. Lee, *EB-5 Immigrant Investors*, in AILA Immigration & Nationality Law Handbook 63 (2008-09 ed.). The list is also available at <http://www.millermayer.com/resources/immigrant/eb5.html> (last visited Aug. 22, 2008). Not all of those regional centers are active, however. For a list of currently active regional centers as of October 2007, see <http://www.aila.org/Content/default.aspx?docid=23812> (AILA InfoNet Document No. 07110870) See also <http://www.iiusa.org> (last visited Aug. 22, 2008).

MODEL RULES, *supra* note 1, at Rule 1.7 (emphasis added). Note that the rule sets out a framework for undertaking work notwithstanding the existence of a conflict. Paragraph (b) reads:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

the representation is not prohibited by law;

the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

each affected client gives informed consent, confirmed in writing.

See MODEL RULES, *supra* note 1, at Rule 1.7 cmt 10.

22 NYCRR § 1200.20; see, e.g., Ethics Opinion of the Bar Assoc. of Nassau County 92-35 (1992) (an attorney may not accept a referral fee from a licensed general contractor, or licensed public adjuster, where she has represented, or intends to represent the referred party in any matter referring at all to the referral).

See, e.g., *Death v. Salem*, 111 A.D.2d 778, 490 N.Y.S.2d 526 (2d Dep't 1985).

See DR 9-101; 22 NYCRR § 1200.45. While the rule as stated appears to limit the appearance of impropriety primarily to former or present government employees migrating to or from private practice and to a lawyer related to opposing counsel, the rule has been construed more broadly; see, e.g., *Poli v. Gara*, 117 A.D.2d 786, 499 N.Y.S.2d 112 (2d Dep't 1986); *Flushing Sav. Bank v. FSB Properties, Inc.*, 105 A.D.2d 829, 482 N.Y.S.2d 29 (2d Dep't 1984).

See MODEL RULES, *supra* note 1, at Rule 1.5(e).
22 NYCRR § 1200.12.

See *Aiello v. Adar*, 193 Misc.2d 649, 750 N.Y.S.2d 457 (N.Y. Sup. Ct. 2002); see also MODEL RULES, *supra* note 1, at Rule 1.5(e) cmt 7 (“Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.”).

Ethics rules also prohibit lawyers from sharing fees with nonlawyers. See MODEL RULES, *supra* note 1, at Rule 5.4; see also DR 3-102; 22 NYCRR § 1200.17. The policy behind this prohibition is preservation of lawyers’ independent judgment. Comments to Model Rule 5.4 state: “These limitations are to protect the lawyer’s professional independence of judgment. Where someone ... recommends employment of the lawyer, that arrangement does not modify the lawyer’s obligation to the client.” For this reason, Casey could not pay, for example, a financial consulting firm for referring EB-5 clients. Casey is also bound by specific ethics rules prohibiting compensation for recommendations. See DR 2-103; 22 NYCRR § 1200.08, the relevant portion of which states:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client[.]

An exception to this rule includes fee splitting with another attorney as regulated by DR 2-107.

See 9 U.S. Dep’t of State, 9 Foreign Affairs Manual § 41.51 n.15, the relevant portion of which states:

an applicant might be a beneficiary of an immigrant visa petition filed on his or her behalf. However, the alien might satisfy the consular officer that his and/or her intent is to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status.