

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2022-4
Issued November 17, 2022**

FACTS

The inquiring attorney represents a client who filed an application to adjust his immigration status. As part of that application, the client asked his now former employer to provide him with a third-party affidavit of support, which the employer did.

The inquiring attorney, who filed the application some time ago, recently received a telephone call and email from his/her client's former employer. The former employer advised that he no longer wishes to allow his affidavit to be used in support of the client's application. Given the client's family circumstances, this affidavit is a necessary element for him to qualify for an adjustment of status. Without this former employer's affidavit, or another third party being willing to provide an affidavit of support, the client's application will be denied.

The inquiring attorney advises that it is permissible for an individual to withdraw an affidavit of support if he or she notifies the U.S. Citizenship and Immigration Services ("USCIS") before the applicant's status is adjusted to lawful permanent resident. The attorney also advises that the application for adjustment will not be granted until after a personal interview of his/her client, which has not yet taken place.

ISSUE PRESENTED

The inquiring attorney asks whether he/she owes any obligation to his/her client's former employer to withdraw the affidavit of support given that he/she does not represent him and withdrawing the affidavit would be adverse to his/her client's interest.

The attorney also queries whether he/she is under an obligation, *at the present time*, to notify USCIS that the former employer no longer wishes to allow the affidavit to be used in support of his/her client's application. The attorney indicates that he/she does intend to notify USCIS of this fact at the personal interview.

OPINION

In accordance with the Rules of Professional Conduct, the inquiring attorney is required to promptly notify USCIS that the client's former employer wishes to withdraw the affidavit.

REASONING

This presents a situation in which the inquiring attorney's obligation to the client is at odds with his/her obligation of candor to the tribunal. Rule 3.3 of the Rules of Professional Conduct governs a lawyer's obligations of candor toward the tribunal. Section (a)(1) states: "A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement

of material fact or law previously made to the tribunal by the lawyer.” Moreover, “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” Rule 3.3 Comment [3]. Additionally, a lawyer may not offer evidence the lawyer knows to be false. See Rule 3.3(a)(3). See In re Schiff, 677 A.2d 422 (R.I.1996) (lawyer suspended for filing a false affidavit in violation of Rule 3.3).

The inquiring attorney has unique knowledge of a critical fact not known to USCIS, namely that his/her client is now without a required element of a successful adjustment of status application. The inquiring attorney owes a duty of candor to USCIS and his/her silence as to the former employer’s desire to withdraw the affidavit could be viewed as a misrepresentation on which he/she wishes USCIS to rely. As the affidavit can no longer properly serve as a basis to support the client’s application, the inquiring attorney has a responsibility to expeditiously advise USCIS of this fact. See also Rule 3.4 (placing limits on an attorney’s conduct regarding access to evidence, obedience to the tribunal, and statements to the tribunal).

Rule 3.1 entitled “Meritorious Claims and Contentions” also applies. It states in pertinent part: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Here, the inquiring attorney concedes that the client’s application as presently filed is subject to denial without the former employer’s affidavit. The inquiring attorney has a duty not to pursue relief that he/she knows there is no legal or factual basis for.

It is the Panel’s opinion that in failing to promptly notify USCIS that the former employer wishes to withdraw his affidavit, the inquiring attorney is ignoring his/her obligation of candor to the tribunal as well as the obligation not to pursue an unmeritorious claim.