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THE ETHICAL IMPLICATIONS OF DRAFTING A FORM I-864, AFFIDAVIT OF SUPPORT FOR A JOINT SPONSOR

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It is a pickle that every family immigration attorney has had to resolve. The young college couple with lots of love and zero income. The struggling first-generation American, petitioning for mom and dad. They are going to need I-864 Joint Sponsors,[1] and they have paid you to be their attorney. Do you help with the Joint Sponsor's I-864?

The pickle, of course, arises from the serious legal implications of signing the Form I-864. Your intending immigrant client will have a right to sue the Joint Sponsor for support if the need arises.[2] What, *if any* duties do you owe to the Joint Sponsor? Are you presented with a conflict of interest? Following recent amendments to the 864-series forms, the answers to these questions have become at once simpler and more frustrating. Starting October 6, 2015 attorneys are required to certify under penalty of perjury that they have an attorney-client relationship with any Joint Sponsor for whom the attorney drafts a Form I-864. In this article we suggest that either fully embrace their fiduciary duties to Joint Sponsors – a role that we believe is extremely problematic and best avoided – or else as a strict policy avoid drafting Joint Sponsor I-864s.

Who is a Sponsor? When it comes to your relationship to the Joint Sponsor, there are only two possibilities: she is either your client, or she is not. Period. Until this summer some attorneys believed that they could draft a Joint Sponsor's I-864 while simultaneously disclaiming an attorney-client relationship with that individual. For reasons explained below that is no longer possible.

If a Joint Sponsor is an attorney's client, the attorney must, among other duties, assess conflicts of interest.[3] But that duty is triggered *only* if there is an attorney-client relationship with the Joint Sponsor.[4] Many attorneys appear to take the approach advocated for by Lisa York in an AILA practice advisory.[5] Ms. York recommends providing the joint sponsor with a packet containing the Form I-864 and official instructions, along with a disclaimer "that explicitly states that I do not represent the Joint Sponsor."[6] While she would not draft the Form for the Joint Sponsor, she would check the Form for sufficiency and provide feedback if necessary via an intermediary.[7]

In reality, this completely hands-off approach often proves extremely difficult. Especially for firms serving populations with little formal education, successful completion of the technical I-864 can prove a true obstacle without assistance of an attorney. Hence, many practitioners feel the need to assist Joint

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[1] This article assumes familiarity with financial sponsorship under the Form I-864. A joint sponsor, of course, is a sponsor who is not the immigration petitioner. 8 C.F.R. § 213a.2(b)(1). *Joint Sponsor* and *Co-Sponsor* have the same meaning, though we use Joint Sponsor exclusively in this article. *Cf.* 9 FAM 40.41 N6.2(c).

[2] The right of the Form I-864 beneficiary to recover support from her Sponsor has been covered extensively by the first author of this article. *Cf.* Greg McLawsen, *The I-864 Affidavit of Support: An Intro to the Immigration Form You Must Learn to Love/Hate*, Vo 48. No. 4 ABA FAM. L. QUARTERLY 1 (Winter 2015) ("McLawsen 2015"); Greg McLawsen, *Suing on the I-864 Affidavit of Support*; March 2014 Update, 19 BENDER'S IMMIGR. BULL. 343 (Apr. 1, 2014); and Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 BENDER'S IMMIGR. BULL. 1943 (Dec. 15, 2012) ("McLawsen 2012") (discussing enforcement of the Form I-864 as a contract).

[3] ABA Model Rule 1.7(a)(1) & (2).

[4] ABA Model Rule 1.7(a) (". . .a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. . .").

[5] Doug Penn & Lisa York, *How to Ethically Handle an I-864 Joint Sponsor* (posted Nov. 7, 2012), AILA Doc No. 12080162.

[6] *Id.* at 2.

[7] *Id.* ("To avoid the appearance of representation, I never communicate with the joint sponsor directly").

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Sponsors in order to keep their clients' cases moving forward. Anecdotally, it appears common for attorneys to offer some degree of direct assistance to Joint Sponsors in completing the Form I-864.[8]

Prior to the form revisions discussed below, it may have been possible to draft a Joint Sponsor I-864 while simultaneously disclaiming an attorney-client relationship with that individual.[9] A lawyer does not automatically become an individual's attorney merely by virtue of drafting a document for her signature. In litigation, for example, an attorney does not represent each witness for whom she drafts a declaration. We could term this the *Have-Your-Cake-And-Eat-It-Too* solution to Joint Sponsor I-864s: directly assist with drafting the I-864 while carefully disclaiming an attorney-client relationship. Certainly this is higher risk than the *Hands-Off* approach.[10] But the *Have-Your-Cake* approach offered attorneys a compromise solution that kept cases moving toward completion, while offering a feasible resolution of their relationship with Joint Sponsors. Unfortunately, this solution is no longer available because an attorney can no longer disclaim an attorney-client relationship if she drafts a Form I-864 for a Joint Sponsor.

The revisions and their import. The Form I-864 now requires the preparer to complete the following provision:

> □ I have requested the services of and consented to ____________________________
> who □ is □ is not an attorney or accredited representative, preparing this affidavit for me.[11]

The Form further requires the preparer, if an attorney or BIA-accredited representative, to complete the following:

> □ I am an attorney or accredited representative and *my representation of the sponsor in this case* □ extends □ does not extend beyond the preparation of this affidavit.
>
> **NOTE:** If you are an attorney or accredited representative whose representation extends beyond preparation of this affidavit, you must submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with this affidavit. [12]

The preparer further certifies under penalty of perjury that she "prepared this affidavit on behalf of, at the request of, and with the express consent of the sponsor."[13]

The Form I-864EZ contains both of the above provisions.[14] On the Form I-864A, both the Sponsor and the Household Member are required to certify whether she has consented to an attorney preparer, as

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[8] During conference presentations on the Form I-864, audience members have expressed this view to the first author of this article.
[9] *But see infra*, text accompanying notes 43 *et seq*. (discussing definition of representation under 8 C.F.R. § 1.2).
[10] Risks included the possibility that the attorney would ineffectively disclaim an attorney-client relationship with the Joint Sponsor. That risk was far from trivial, as it appears many attorneys used no written disclaimer, and relied solely on an oral explanation to the Joint Sponsor of the nature of their relationship.
[11] Form I-864, Affidavit of Support Under Section 213A of the Act (rev'd July 2, 2015), pg. 9, Part 8, Item 2, *available at* http://www.uscis.gov/i-864.
[12] Form I-864, page 11, Part 10, Item 7.b (emphasis added).
[13] Form I-864, page 11.
[14] Form I-864EZ, Affidavit of Support Under Section 213A of the INA (rev'd July 2, 2015), Page 4, Part 6, Item 2, and Page 6, Part 7, Item 7.b, *available at* http://www.uscis.gov/i-864ez.

quoted above.[15] Likewise, on the Form I-864A the preparer must certify the nature of her representation of the Sponsor and Household Member, as quoted above.[16]

The new certification by the Sponsor merely consents to the attorney "preparing this affidavit for me." Yet a new challenge is created by the certification of the preparer: that she has a "representation of the sponsor." *Representation*, of course, implies that an attorney preparer certifies, under penalty of perjury, that she has an attorney-client relationship with the Sponsor. This is the critical development: an attorney preparer *must* certify that she represents the sponsor, at least for purpose of preparing the form.

But – one may counter – the Forms allow an attorney to specify that the representation does not extend "beyond the preparation of [the] affidavit." While true, this misses the point. Prior to the current iterations of the I-864 forms, it may have been possible for an attorney to disclaim representation of a Joint Sponsor altogether. That is now no longer the case. Whether attorneys may effectively limit their representation of the Joint Sponsor is discussed below. But once the Sponsor becomes a client this triggers the duty to assess conflicts of interest, even for a limited representation. Regardless of the scope of representation, a client is a client.

Conflicts of interest between current clients are governed by ABA Model Rule 1.7(a):

> 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:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) 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.

A Joint Sponsor's interests are unlikely to be "directly adverse" to the attorney's' primary client since the two ought to share the goal of securing resident status for the primary client.[17] Generally an attorney may not rely on a boilerplate written disclaimer to verify that clients have non-adverse interests.[18] Rather, an attorney should actually consult with his second client – the Joint Sponsor. But most Joint Sponsors will

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[15] Form I-864A, Contract Between Sponsor and Household Member (rev'd July 2, 2015), Page 4, Part 5, Item 27 (sponsor's certification), and Page 5, Part 6, Item 2 (household member's certification), *available at* http://www.uscis.gov/i-864a.

[16] *Id.* Page 7, Part 8, Item 7.b. Note that the preparer must answer the conjunctive question of whether her representations "of the household member *and* sponsor" extend beyond preparation of the I-864A. It's unclear how a preparer should answer this query if her scope of representation for one, but not the other, extends beyond preparation of the I-864A. The best approach would appear to be an explanation in Part 9 Additional Information.

[17] ABA Model Rule 1.7(a)(1). By referring to the "primary client" we do not suggest that such individual is 'more' of a client to whom greater duties are owed. *Cf* . Bruce Hake, *Advance Conflict Waivers are Unethical in Immigration Practice — Debunking Mehta's ``Golden Mean','* 12-11 BENDER'S IMMIGR. BULL. 01 (2007), *text accompanying* note 23 (attacking the proposition that a lawyer may subordinate duties owed to one client to a "primary" client).

[18] Washington State Ethics Op. 2064 (2004), *available at* http://bit.ly/1VKdak7 (". . . under [Washington State] RPC 1.7, the lawyer must make a judgment that the representation being undertaken 'will not be adversely affected.' This responsibility on the lawyer cannot be waived in advance and the lawyer must continuously assess his representation of clients with potentially conflicted interests.").

be analogous to scenarios sanctioned by ethics boards. A South Carolina opinion, for example, advises that an attorney may represent the purchaser and seller in a real estate transaction:

> If the attorney is employed simply for the purpose of performing the ministerial acts associated with "closing the deal," and he is neither expected nor required to render legal advice to either party in connection with the transaction, no conflict of interest appears and Rule 1.7 does not appear to be implicated.[19]

As in the real estate transaction, a lawyer may seek to limit his involvement to the ministerial act of completing a rule-compliant I-864 for the Joint Sponsor, and in doing so may avoid "directly adverse" interests.[20]

A trickier query is whether there is a "significant risk" that representation of the Joint Sponsor will "be materially limited by the lawyer's responsibilities" to her intending immigrant client.[21] As summarized by the Tennessee ethics board, this inquiry turns on the likelihood that a future conflict will arise:

> The critical questions are: *what is the likelihood that a difference in interests will eventuate* and, if it does, *will it 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.[22]

> I-864 beneficiaries can, and most certainly do, sue their sponsors for the support promised under the Affidavit.[23] Yet it appears to be exceedingly rare for I-864 beneficiaries to enforce their support rights against a Joint Sponsor or Household Member. We are aware of only two reported decisions in which a Household Member was sued for I-864 support,[24] and of no case involving a judgment against a Joint Sponsor.[25] Likewise, should the intending immigrant receive means-tested public benefits during the sponsorship period, a government agency could theoretically sue a Joint Sponsor or Household Member for the cost of those benefits. But we are aware of no jurisdiction in the United States where agencies are actively pursuing I-864 Sponsors of any designation. Albeit that it is unlikely the intending immigrant will take legal action to recover

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[19] South Carolina Ethics Op. 91-30 (1991), *available at* http://bit.ly/1LEqyBC..

[20] For a discussion of limitations on the scope of representation please see below.

[21] ABA Model Rule 1.7(a)(2). *Cf.* ABA Model Rule 1.7, cmt. 8 ("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.").

[22] Tennessee Ethics Op. 2013-F-157 (2013) (emphasis added), *available at* http://bit.ly/1LEqFNn.

[23] McLawsen 2015, *supra* note 2; McLawsen 2014, *supra* note 2; McLawsen 2012, *supra* note 2 (all discussing cases involving enforcement of I-864 support against sponsors). These enforcement actions commonly, though not always, arise in conjunction with divorce proceedings. The I-864 beneficiary also has standing to prosecute her claims in a state or federal civil action.

[24] *Panchal v. Panchal*, 2013 IL App (4th) 120532-U, No. 4-12-0532, 2013 Ill. App. LEXIS 1864, at *11 (Ill. App. Ct. 4th Dist. 2013); *Liepe v. Liepe*, Civil No. 12–00040 (RBK/JS), 2012 U.S. Dist. LEXIS 174246 (D.N.J. Dec. 10, 2012).

[25] *But see County of San Bernardino Child Support Division v. Gross*, E054457, 2013 Cal. App. LEXIS 5156 (Cal. App. 4th Dist. July 23, 2013) (noting prior trial court order "confirming that, despite the divorce proceedings, the [joint sponsor's I-864] was enforceable").

> support from a Joint Sponsor, the magnitude of those claims is substantial. The Joint Sponsor, of course, stands to be on the hook for years of support at 125% of the Federal Poverty Guidelines, currently $14,712 annually for a household size of one.[26]

The following thought experiment may be helpful. In Scenario (1) a close friend of yours seeks your advice about whether he should execute, as Joint Sponsor, an I-864. The I-130 petitioner is a student of his who married a Canadian woman last week following a bachelor's party in Las Vegas. In Scenario (2) the facts are the same, but you represent the young lovebirds and the Joint Sponsor isn't a friend. We suspect that an attorney's interactions with the Joint Sponsor in these two scenarios would be revealingly different. In Scenario 1, the attorney would stress the serious financial liabilities of the I-864, and would probably present them in a way that would tend to discourage the individual from agreeing to be a sponsor. In Scenario 2, the attorney is duty-bound to advance the lovebirds' immigration case. The attorney will recite the legal implications of the I-864 when communicating with the would-be Joint Sponsor, but we suspect the tenor of this interaction is markedly different than Scenario 1. While a cold statistical calculation under Model Rule 1.7(a)(2) may indicate the absence of a current conflict, we believe the opposite conclusion is revealed if practitioners reflect on how they actually interact with Joint Sponsors.

Is a G-28 required? As an aside, there will likely be confusion going forward as to whether an attorney must file a G-28 if she prepares a Form I-864 for a Joint Sponsor. The Form I-864 itself provides that an attorney must file a Form G-28 if her "representation [of the sponsor] extends *beyond* preparation of this affidavit."[27] Yet puzzlingly, the official instructions to the Form I-864 state that a preparer must *always* submit a Form G-28 for the sponsor, that is, regardless of how the preparer has answered the above item.[28] The operative paragraph of the instructions does not differentiate between primary and joint sponsors.[29] The official instructions to the Form G-28 instruct that it must be filed whenever a person" acts in a *representative capacity*."[30] Since the Form I-864 requires the attorney to certify that she represents the sponsor, at least in some scope, the safest reading appears to be that a Form G-28 must be filed for any joint sponsor for whom the attorney prepares a Form I-864. Note that repeated failure to file a required Form G-28 may, by itself, subject a practitioner to DHS discipline.[31]

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[26] *See Annual Update of the HHS Poverty Guidelines*, 80 Fed. Reg. 3236 (Jan. 22, 2015) (setting forth 2015 Poverty Guidelines).
[27] Form I-864, page 11, Part 10, Item 7.b (emphasis added). *See* Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative (rev'd Mar. 4, 2015), *available at* http://www.uscis.gov/g-28.
[28] Instructions for Form I-864, page 10 ("If the person who helped you prepare your affidavit is an attorney or accredited representative, he or she must also submit a completed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, along with your affidavit."). *See also* Instructions for Form I-864A, Page 6 (same), Instructions for Form I-864EZ, Page 7 (same).
[29] *Id.* ("This section must contain the signature of the person who completed your affidavit, if other than you, the sponsor. . .").
[30] Instructions for Notice of Entry of Appearance as Attorney of Accredited Representative (rev'd Mar. 4, 2015), Pg. 1. *Cf.* 8 C.F.R. § 292.4(1).(a)
[31] USCIS, *Statement of Intent Regarding Filing Requirement for Attorneys and Accredited Representatives Participating in Group Assistance Events* (rev'd Feb. 28, 2011) (". . .a practitioner who consistently violates the requirement to file a Form G-28 may be subject to disciplinary sanctions under DHS professional conduct regulations. . .") *available at* http://1.usa.gov/1NAwhXD.

Solutions. With the new forms, there are at least three ways that lawyers can approach preparation of Joint Sponsor I-864s. Each has its own benefits and risks.

(1) Hands Off. As has always been the case, the safest approach is to steadfastly refuse contact with the Joint Sponsor. As proposed by Ms. York, the intending immigrant client or I-130 petitioner can be provided with the required forms and official instructions, along with guidelines for who would qualify as a Joint Sponsor and what information is needed for the I-864. If the Joint Sponsor requires assistance to complete the Form, she can seek that assistance from another attorney. Practitioners may find it helpful to arrange reciprocal referral arrangements with a colleague, where each agrees to offer I-864 services to each other's Joint Sponsors at a predetermined rate. Alternatively, or additionally, the firm can provide DIY instructions to the Joint Sponsor, via the clients. To avoid inadvertently giving legal advice through those instructions it would be preferable to have them drafted by a third party. [32] For this reason we have made available on our website a downloadable step-by-step guide to completing the Form I-864 which is freely available.[33]

Undoubtedly the *Hands Off* approach will sometimes be vexing. Clients will vent that they are not getting the service 'that they paid for' and case progress will be slowed.[34] The terse answer to this is that nobody said lawyering was easy, and sometimes ethical obligations lead to inconvenience.[35] But it is also unclear that the *Hands Off* approach will take any longer, or cost the client any more, than if the attorney drafts the Joint Sponsor's Form. Most attorneys likely know a colleague of equal ability and comparable cost. Why should it be more expensive, or take longer, for the second attorney to prepare the Joint Sponsor I-864 than for the first? This seems especially true if the first attorney has the referral arranged on a standby basis to smooth logistics. Indeed, if this economic supposition is accurate, we might wonder if attorneys want to keep Joint Sponsor drafting, at least in part, simply to avoid losing the business.

(2) Limited Representation. Alternatively, an attorney may choose to embrace representation of the Joint Sponsor, but seek to limit as narrowly as possible the scope of that representation.[36] (Recall it is not possible to disclaim representation altogether). On this approach, the scope of representation would be designed to include preparation of the Form and not one iota more.

Under Model Rule 1.2(c) "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[37] A common use of a limited scope representation, of course, is to deliver "unbundled" legal services, such as where an attorney

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[32] We owe this point to our respected AILA-Washington colleague, Robert Gibbs of Gibbs Houston Pauw.
[33] Navigate to www.pugetsoundlegal.net → News, then select "I-864" from the topics menu.

[34] This particular issue could be at least partially alleviated by: (1) ensuring clients are screened at intake and advised as to whether they will need a Joint Sponsor; and (2) ensuring that the letter of engagement clearly states that work for Joint Sponsors is not included in the legal fee.
[35] This observation has been made by the exceedingly helpful and not remotely terse Jeanne Marie Clavere, ethics advisory counsel at the Washington State Bar Association.
[36] This approach had been advocated to the authors by our respected AILA-Washington colleague, Jay Gairson.
[37] *Cf*. Washington State Ethics Op. 1987 (2002), *available at* http://bit.ly/1WSu3pT (limited scope representation should be commenced only "after consultation and a full disclosure of the material facts") (last visited October 8, 2015).

represents a family law client in only a portion of a divorce case.[38] To take the *Limited Representation* approach, the attorney must cleave very finely the scope of representation, telling the Joint Sponsor: "I am preparing this contract for you, as your attorney, but am not going to advise you about the wisdom of signing it."

Note that some may believe that completing an I-864 is merely "filling out a form" rather than drafting a contract. We believe that view is profoundly misguided. Once completed and executed, the Form I-864 is a contract, and an attorney preparing the form is therefore drafting a contract.[39] Under 8 C.F.R. § 1.2 legal *representation* includes engaging in *practice*, which means: "preparation or filing of any brief or *other document*, paper, application, or petition on behalf of another person or client before or with DHS." Moreover, at least in Washington State it is *per se* the practice of law to commercially "draft" or "complete" an immigration form for another.[40] We note the extreme irony of attorneys minimizing their role in drafting I-864s as merely "filling out forms." As a profession we have aggressively pursued unauthorized immigration practitioners on the view that they are engaged in the unauthorized practice of law.[41] The *notarios*, however, insist that they merely help clients "fill out forms."[42] We cannot have it both ways. If *notaries* engage in the unauthorized practice of law by drafting immigration law instruments, attorneys need to own up to their duties when they draft the same.

At the very least, an attorney taking the *Limited Representation* approach would need to advise the Sponsor that she would not be advising the Joint Sponsor about the consequences of signing the Form that she was preparing as that Joint Sponsor's attorney. Moreover, limited scope representation must be "reasonable under the circumstances."[43] Under this vague imperative, is it reasonable to prepare a contract with potentially life-long financial obligations for a client, without offering advice about what those consequences are? Perhaps that is reasonable, but we do not plan to be in the situation of defending the position.

(3) Non-Limited Representation + Waiver. A third and final approach to working with Joint Sponsors is to presume that the scope of representation – whether by design or imputation – will exceed mere

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[38] *Cf.* ABA Standing Committee on the Delivery of Legal Services, Ethics Opinions, www.bit.ly/1K48cDZ (last visited Sep. 12, 2015) (collecting opinions on unbundled of legal services).
[39] Note the analogs in other practice areas that rely in part on "forms" to practice law. Many family law pleadings, for example, start with mandatory forms promulgated by a state authority. Likewise, many estate planning lawyers may begin drafting a will by using a commercial form. But in both cases the attorney is responsible for the resulting legal instrument as though she had drafted it from whole cloth.
[40] Under Washington State law, it is a violation of the Consumer Protection Act (CPA) for a nonlawyer to engage, *inter alia*, in "[s]electing, *drafting*, *or completing* legal documents affecting the legal rights of another in an immigration matter. RCW 19.154.20(2)(g) (emphasis added).
[41] American Immigration Lawyers Association (AILA), Section on Anti-Notario Fraud, http://www.stopnotariofraud.org/ (last visited 09/16/2015). Our colleagues, Deborah Niedermeyer and Manny Rios recently received the top award from Washington State Bar Association for their pioneering civil lawsuit against a *notario*. 2015 WSBA Annual Awards Banquet, Sept. 17, http://www.wsba.org/News-and-Events/Awards (last visited Sep. 18, 2005).
[42] The authors of this article are currently litigating a Consumer Protection Act case against a *notario* who prepared a family-based adjustment application for a customer who was ineligible for the benefit. The act of completing the forms was *per se* a violation of Washington law. Why should we feel it is any less momentous for a lawyer to engage in such drafting?
[43] ABA Model Rule 1.2, cmt. [7].

preparation of the Form. In other words, the attorney accepts that her duties include more than merely completing the Form in a rule-compliant manner. On this approach, the attorney accepts that her scope of representations includes a holistic duty to advise the Joint Sponsor about the consequences of executing the I-864.

As described above, we believe the attorney must assume that a representation of this nature involves a current conflict of interest. That being the case, the attorney may represent the Joint Sponsor on this analysis only if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
>
> (3) 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
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> (4) each affected client gives informed consent, confirmed in writing.[44]

Prong (4) presents a minor headache for the attorney, but is probably accomplishable. The attorney would have to articulate in writing to both primary client and Joint Sponsor the nature of the conflict as she understands it.[45] In essence, the attorney would need to explain to the Joint Sponsor that she is incentivized to downplay the consequences of signing the form.[46] To the primary client, the attorney would need to explain that her advice to the Joint Sponsor could lead the individual to refuse signing the Form I-864.

Under Prong (1) the attorney would need to hold the belief that she can advance the case of her intending immigrant client while simultaneously protecting the interests of the Joint Sponsor. We believe this is suspect for precisely the same reason that there is a current conflict of interest under Model Rule 1.7(a): the attorney will be incentivized to downplay the risks of signing the Form I-864 in order to advance the case of her intending immigrant client.

Furthermore, we do not believe an attorney may avoid the above prohibition by securing a "waiver" of the conflict by the Joint Sponsor. Bruce Hake has long argued – in the context of employment-based immigration – that advance conflict waivers are per se unethical.[47] An attorney's ethical duties cannot be avoided or diminished by contract, except as provided for within the ethical rules themselves. The sole means of continuing a joint representation with a current conflict of interest is through meeting the four prongs of Model Rule 1.7(b).

Conclusion. Joint Sponsor I-864s present immigration attorneys with an inconvenient tension between expediency and ethical adherence. Attorneys have long waivered on whether to draft such documents, but

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[44] ABA Model Rule 1.7(b).
[45] *Cf.* ABA Model Rule 1(e) (defining informed consent).
[46] "Informed consent," in this context, requires the attorney to explain that "the material advantages and disadvantages" of the proposed joint representation. ABA Model Rule 1, cmt. [6].
[47] *Cf.*, Hake, *supra* note 21, Bruce A. Hake, *Dual Representation in Immigration Practice: The Simple Solution Is the Wrong Solution*, 5 GEO. IMMIGR. L.J. 581–639 (Fall 1991). *But see*, Cyrus Mehta, *Finding The "Golden Mean" In Dual Representation — Updated*, 06-8 IMMIGR. BRIEFINGS (Aug. 2006) (arguing contra).

we respectfully submit that the recent form revisions tip the balance in favor of a single conclusion: we should all get out of the business of drafting Joint Sponsor I-864s.