

# EB 5 Attorney Ethics: Bar Rules Explained

A comprehensive guide from EB5 Attorneys

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EB 5 attorneys operate under strict ethical obligations imposed by state bar rules and the ABA Model Rules of Professional Conduct. These rules govern how attorneys handle conflicts of interest, maintain client confidentiality, set fees, advertise their services, and ensure competent representation. Understanding these obligations helps you recognize when an attorney is meeting their ethical duties and when they are falling short.

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## The Ethical Framework Governing EB 5 Attorneys

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Every attorney licensed in the United States is bound by the professional conduct rules of the state(s) where they are admitted to practice. Most states have adopted some version of the ABA Model Rules of Professional Conduct, though specific provisions vary. The Model Rules establish minimum standards for attorney behavior across several areas directly relevant to EB 5 practice. The most relevant rules for EB 5 clients include: Model Rule 1.1 (Competence), requiring attorneys to provide competent representation through the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation; Model Rule 1.3 (Diligence), requiring attorneys to act with reasonable diligence and promptness; Model Rule 1.4 (Communication), requiring attorneys to keep clients reasonably informed and promptly respond to reasonable requests for information; Model Rule 1.5 (Fees), requiring fees to be reasonable and communicated clearly; Model Rule 1.6 (Confidentiality), requiring attorneys to maintain the confidentiality of client information; Model Rule 1.7 (Conflict of Interest, Current Clients), prohibiting representation where a concurrent conflict of interest exists unless specific conditions are met; Model Rule 1.8 (Conflict of Interest, Specific Rules), addressing business transactions with clients, third party payment, and other specific conflict scenarios; and Model Rule 7.1 through 7.3 (Advertising and Solicitation), regulating how attorneys market their services. These rules are not abstract principles. They carry enforcement mechanisms through state bar disciplinary processes, and violations can result in sanctions ranging from private admonitions to disbarment.

## Conflicts of Interest: The Central Ethical Issue in EB 5

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Conflicts of interest are the most prevalent ethical issue in EB 5 practice because of the multi party nature of EB 5 transactions. A typical EB 5 investment involves several distinct parties with potentially divergent interests: the investor (who wants permanent residence and return of their capital), the regional center (which wants to raise capital and maintain its USCIS designation), the new commercial enterprise (the entity that receives the investment), the job creating entity (the business that creates the required jobs), and sometimes immigration agents, migration brokers, or financial intermediaries who facilitated the introduction. Under ABA Model Rule 1.7, a concurrent conflict of interest exists when the representation of one client will be directly adverse to another client, or when there is a significant risk that the representation of one client will be materially limited by the attorney's responsibilities to another client, a former client, a third person, or by a personal interest of the attorney. In EB 5 practice, the most common conflict scenario is dual representation: the same attorney or law firm representing both the investor and the regional center. The investor's interest is in having a properly structured, legally compliant investment that will result in I 526E approval and eventual permanent residence. The regional center's interest is in raising sufficient capital to fund the project. When a project has structural weaknesses, compliance issues, or job creation risks, an attorney representing both sides cannot simultaneously advise the investor to be cautious and advise the regional center that the offering is sound. Even when dual representation is disclosed and consented to, the inherent tension can compromise the quality of advice the investor receives. The EB 5 Reform and Integrity Act of 2022 added new provisions under INA Section 203(b)(5)(H)(i) that address fund administration and conflict management, reflecting Congress's recognition that investor protection requires attention to structural conflicts in the EB 5 ecosystem.

## Dual Representation: Representing Both Investor and Regional Center

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Dual representation in EB 5 is technically permissible under ABA Model Rule 1.7(b) if four conditions are met: the attorney reasonably believes they can 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 in the same proceeding; and each affected client gives informed consent, confirmed in writing. In practice, these conditions are difficult to satisfy genuinely in EB 5 cases. An attorney who prepares the offering documents for a regional center and also represents investors in that offering may have difficulty providing an independent assessment of the project's strengths and weaknesses. If the project encounters problems (construction delays, insufficient job creation, financial underperformance), the attorney's obligation to the regional center client conflicts directly with the duty to advise the investor client about risks and available remedies. Some EB 5 attorneys manage this conflict by representing the regional center for securities and corporate matters while referring investors to independent counsel for I 526E petition preparation. Others represent investors but do not represent the regional center. The least protective arrangement for investors is when a single attorney or firm represents both the regional center and all investors in the offering. If your attorney represents both you and the regional center, insist on a clear written disclosure of the conflict. Understand that the attorney's advice may be influenced, even unconsciously, by their relationship with the regional center. Consider whether independent representation would better serve your interests, particularly if the investment amount represents a significant portion of your wealth.

## Fee Sharing and Referral Fee Prohibitions

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ABA Model Rule 5.4(a) generally prohibits attorneys from sharing legal fees with non lawyers. ABA Model Rule 1.5(e) permits fee sharing between lawyers in different firms only under specific conditions: the division is proportional to the services performed by each lawyer (or each lawyer assumes joint responsibility); the client agrees in writing to the arrangement; and the total fee is reasonable. These rules are directly relevant to EB 5 practice because of the referral networks that connect investors with attorneys. In many EB 5 markets, particularly for investors from China, India, the Middle East, and other regions, immigration agents, migration consultants, or brokers play a role in connecting investors with regional centers and attorneys. If an attorney pays a referral fee to a non lawyer agent for sending the investor to the attorney, that payment may violate the fee sharing prohibition. The ethical concern is that referral fees create incentives for the referring party to direct clients to the highest paying attorney rather than the most competent one, and they create financial relationships that can compromise the attorney's independence. Some attorneys structure referral relationships as marketing fees or consulting arrangements to avoid the appearance of prohibited fee sharing, but the substance of the arrangement matters more than the label. If you were referred to your EB 5 attorney by an agent, broker, or migration consultant, ask the attorney directly: Do you pay any fee, commission, or compensation to the person or company that referred me? Is the person or company that referred me an attorney? If payment is made to a non attorney, the arrangement may violate the ethical rules, and it should prompt you to question whether the referral was made in your best interest or for financial reasons.

## Duty of Competence: What EB 5 Clients Should Expect

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ABA Model Rule 1.1 requires that an attorney provide competent representation, defined as the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. In the EB 5 context, competent representation requires the attorney to understand: the statutory requirements of INA Section 203(b)(5) and implementing regulations at 8 CFR 204.6; the EB 5 Reform and Integrity Act of 2022 and its provisions regarding regional center compliance, fund administration, and investor protections; USCIS adjudication standards and current policy guidance for I 526E petitions; source of funds documentation requirements, including the ability to work with financial records from the investor's country of origin; the economics of job creation analysis and the methodologies USCIS accepts; TEA designation requirements and the process for demonstrating that a project qualifies; securities law implications of EB 5 offerings, at least to the extent necessary to identify issues that require specialist securities counsel; and the I 829 process for removing conditions on permanent residence. An attorney who takes on an EB 5 case without this foundational knowledge is arguably violating the duty of competence. Model Rule 1.1 Comment 2 notes that a lawyer can provide competent representation in a new field through necessary study, but EB 5 cases involve too much client capital and too many technical requirements for an attorney to learn on the job at the client's expense. If your attorney demonstrates unfamiliarity with basic EB 5 concepts, current USCIS processing times, or the regulatory requirements applicable to your case, that is a competence issue. You should not be educating your attorney about the program; they should be educating you.

## Client Confidentiality in EB 5 Cases

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ABA Model Rule 1.6 imposes a duty of confidentiality that protects all information relating to the representation. This duty extends beyond attorney client privilege (which protects communications made for the purpose of obtaining legal advice) to cover all information the attorney obtains about the client during the representation, regardless of the source. In EB 5 cases, confidentiality is particularly important because the attorney receives highly sensitive personal and financial information: tax returns, bank account details, business records, immigration history, family information, and investment records. The confidentiality duty means the attorney cannot disclose this information to third parties without the client's informed consent. Specific confidentiality issues that arise in EB 5 practice include: disclosure to the regional center. Your attorney should not share your personal financial details with the regional center beyond what is necessary for the investment transaction. If your attorney represents both you and the regional center (a dual representation scenario), confidentiality protections are weakened because information shared with the attorney in either capacity may not be protected from the other client. Disclosure to co investors. In pooled EB 5 investments, multiple investors invest in the same project. Your attorney should not share your personal information with other investors or their attorneys without your consent. Disclosure to immigration agents or referral sources. If you were referred by a migration agent, your attorney should not report back to the agent about your case status or personal details without your explicit authorization. Information security. Your attorney should maintain reasonable safeguards to protect your information from unauthorized access, including secure file storage, encrypted communications for sensitive materials, and policies governing staff access to client files.

## Advertising and Marketing Restrictions

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ABA Model Rules 7.1 through 7.3 govern attorney advertising and solicitation. Model Rule 7.1 prohibits false or misleading communications about the attorney or the attorney's services. In EB 5 practice, advertising violations are common enough to warrant attention. Claims to watch for include: guarantees of approval. No attorney can guarantee USCIS approval of an I 526E petition. A guarantee of outcome is inherently misleading and violates Model Rule 7.1. Inflated approval rate claims. An attorney who claims a "99% approval rate" without context (sample size, time period, case types) may be making a misleading statement. If the attorney has filed 10 petitions and 9 were approved, the claim is technically accurate but potentially misleading about the attorney's depth of experience. Misleading specialization claims. Most states do not certify immigration law specializations, so claims of being a "certified EB 5 specialist" may be misleading unless a recognized certifying body has issued the certification. The State Bar of California, for example, does not certify specialists in immigration law. Use of client success stories. Testimonials and case results are permitted in most jurisdictions but must include appropriate disclaimers noting that past results do not guarantee future outcomes. Implied government affiliations. Any suggestion that the attorney has a special relationship with USCIS, the Department of State, or any government agency is misleading and prohibited. If you encounter advertising that seems too good to be true, it probably is. Verify specific claims using the methods described in our guide on evaluating an EB 5 attorney's track record.

## How to File a Bar Complaint

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If you believe your EB 5 attorney has violated their ethical obligations, you have the right to file a complaint with the state bar association where the attorney is licensed. Bar complaints are an important accountability mechanism, and the process is designed to be accessible to the public, including non citizens. To file a complaint: identify the state(s) where your attorney is admitted to practice (this information is usually available on the attorney's website or through the state bar's online directory); visit the state bar's website and locate the attorney discipline or complaint section; most state bars provide an online complaint form and instructions in English; describe the conduct you believe violated the ethical rules, including dates, specific facts, and any supporting documents; submit the complaint. The state bar will assign a case number and investigate. Bar investigations are confidential. The attorney will be notified of the complaint and given an opportunity to respond. The bar will investigate and determine whether the evidence supports a finding of misconduct. Possible outcomes range from dismissal of the complaint (if the bar finds no violation) to informal admonition, formal reprimand, suspension, or disbarment (for serious or repeated violations). Important considerations: filing a bar complaint does not provide you with financial compensation. If you suffered financial harm due to attorney malpractice, you may need to pursue a separate malpractice claim through the civil courts. Bar complaints focus on ethical violations and attorney discipline, not on making the client whole financially. That said, filing a bar complaint creates a public record (for most dispositions) that helps protect future clients from the same attorney. Additionally, if your attorney stole or misappropriated client funds, many state bars maintain a Client Protection Fund that may provide partial reimbursement.

## Red Flags That Suggest Ethical Violations

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While you may not be able to identify every ethical violation in real time, certain warning signs should prompt further investigation or consultation with another attorney. The attorney asks you to sign blank forms or documents you have not reviewed. The attorney pressures you to invest in a specific project without discussing alternatives or risks. The attorney refuses to provide copies of your filed petition and supporting documents. The attorney does not provide a written retainer agreement or fee disclosure. The attorney tells you not to consult with any other attorney about your case. The attorney deposits your investment funds into their own operating account rather than an escrow account or the new commercial enterprise's account. The attorney makes promises about case outcomes or timelines that seem unrealistic. The attorney has a financial interest in the regional center or project and has not disclosed it. The attorney is unresponsive to your communications for extended periods without explanation. The attorney files documents without your review or approval. Each of these behaviors may indicate a violation of one or more of the ethical rules discussed in this guide. If you observe any of these patterns, seek a second opinion from an independent EB 5 attorney and consider whether a bar complaint is appropriate. For a more detailed discussion of warning signs, see our guide on EB 5 attorney red flags.

## Frequently Asked Questions

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### 1. Can my EB 5 attorney represent both me and the regional center?

Technically yes, if the attorney discloses the conflict and obtains your informed written consent under ABA Model Rule 1.7(b). However, dual representation creates inherent tensions that can compromise the independence of the advice you receive. When the attorney represents the regional center and also represents you, their obligation to the regional center may limit their willingness to flag risks with the project. Many experienced practitioners recommend retaining independent counsel who has no relationship with the regional center.

### 2. What should I do if I think my EB 5 attorney violated ethical rules?

First, document the specific conduct that concerns you, including dates, communications, and any evidence. Then consult with an independent EB 5 attorney for a second opinion on whether the conduct constitutes an ethical violation. If the independent attorney confirms your concern, you may file a bar complaint with the state bar where the attorney is licensed. If you suffered financial harm, you may also have a malpractice claim that should be evaluated by a legal malpractice attorney.

### 3. Does my EB 5 attorney have to carry malpractice insurance?

Requirements vary by state. Most states do not mandate malpractice insurance for attorneys, though some (such as Oregon and Idaho) do. Regardless of the legal requirement, an EB 5 attorney handling cases involving investments of \$800,000 or more should carry adequate professional liability coverage. Ask your attorney directly whether they maintain malpractice insurance and what the coverage limits are. The absence of insurance is not an ethical violation in most states, but it may indicate a lack of professional precaution.

### 4. Can my attorney share my personal financial information with the regional center?

Under ABA Model Rule 1.6, your attorney may not disclose confidential information without your informed consent. However, some information sharing with the regional center may be necessary for the investment transaction (such as subscription agreements and accredited investor verifications). Your attorney should explain what information will be shared, with whom, and why, and should obtain your consent before making any disclosures. Be especially cautious if your attorney represents both you and the regional center, as confidentiality protections may be weaker in that arrangement.

## **5. Is it an ethical violation if my attorney guarantees my I 526E will be approved?**

Yes. Under ABA Model Rule 7.1, an attorney may not make false or misleading communications about their services. No attorney can guarantee the outcome of any USCIS adjudication. If your attorney guarantees approval, this is both a misleading statement and a warning sign about the attorney's judgment. Competent attorneys explain the strengths of your case, identify potential risks, and describe their approach to maximizing the likelihood of approval, but they do not promise specific results.

## **6. What is the ABA Model Rules' position on attorney referral fees in EB 5?**

ABA Model Rule 5.4(a) generally prohibits fee sharing between attorneys and non lawyers. ABA Model Rule 1.5(e) allows fee division between attorneys in different firms only if the division is proportional to services rendered (or both attorneys assume joint responsibility), the client consents in writing, and the total fee is reasonable. If a non attorney agent or broker receives payment from your attorney for referring you, this likely violates the fee sharing prohibition and should raise questions about whether the referral was made in your interest or for financial reasons.

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**Disclaimer:** This guide is provided for general informational purposes only and does not constitute legal advice. Every immigration case is unique. Consult a qualified immigration attorney for advice specific to your circumstances.

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