Guidance for 1 March 2022 Code of Conduct for registered migration agents

1. Initial consultations and service agreements (Sections 42 and 43)

Registered Migration Agents (RMAs) have raised a number of questions concerning the operation of sections 42 and 43 of the 1 March 2022 Code of Conduct (1 March Code) for registered migration agents, with particular focus on what constitutes an "initial consultation" and in what circumstances a service agreement is, or is not needed.

In particular, RMAs have sought guidance on the following matters:

(a) Whether existing practices of some RMAs, such as following up an initial consultation without having a service agreement in place, is permissible under the 1 March Code if the purpose of the further contact is to:

- obtain passports and contact details of all secondary applicants to be included in the service agreement; or
- obtain further information to finalise the service agreement; or
- provide further advice following research to enable the potential client to make a decision to engage the services of the RMA.

(b) Whether approaches from a potential client to an RMA by phone, email or social media involving simple questions and answers and where there has been no detailed assessment, would be considered an initial consultation under s.43 of the 1 March Code and as such require any further contact to be undertaken under a signed service agreement.

Guidance

Section 42 of the 1 March Code provides that, subject to section 43, an RMA must not give immigration assistance to a client unless a service agreement is in force. Section 43 provides an exception and allows for an RMA to give the type of immigration assistance mentioned in paragraphs 276(1)(b), (2)(b) or (2A)(b) of the *Migration Act 1958* (the Migration Act) at an 'initial consultation' without a service agreement being in force. Subsection 43(4) makes it clear that only the first consultation between an RMA and a client or a potential client is an initial consultation, and if the consultation consists of a series of sessions conducted on more than one day, sessions conducted on a day after the first day are taken not to be part of an *initial consultation*.

As an RMA will be prevented from providing any further immigration assistance to a potential client after the initial consultation (until such time as the service agreement is in force), it is necessary to determine what constitutes an initial consultation. The Explanatory Statement offers some guidance on initial consultations and states:

> An initial consultation would generally be an opportunity for an agent to find out the potential client's circumstances, and to advise what they would be able to do for the potential client, including steps, costs, etc. Generally, the agent would not at this point need to be satisfied of the identity of the potential client, as communication with the Department or review authorities would generally only occur after a service agreement has been entered into. An initial consultation would be a single consultation where the agent would normally find out the facts of the potential client's situation and would either give the client basic advice or would outline processes and costs for the potential client.

This means that if an RMA meets with a potential client and considers the potential client's circumstances with a view to determining whether or not they might provide immigration assistance to the client, this would constitute an initial consultation. This would be the case regardless of whether any immigration assistance was provided during that consultation. It would therefore be necessary to put a service agreement in place before providing further immigration assistance to the client at a subsequent meeting. It follows that a practice of providing immigration assistance following research at a subsequent meeting would not be permissible.

This, however, does not rule out a subsequent meeting to obtain further information or to take further instructions from the client. Section 43 was not intended to prevent an RMA from communicating with a prospective client to clarify information for the purpose of formulating an appropriate service agreement. As such, it would be reasonable for an RMA to follow up with a client following a session for administrative purposes to:

- obtain passports and contact details of all secondary applicants to be included in the service agreement
- obtain further information to finalise the service agreement.

Contacting clients for administrative purposes such as the two points listed above would not be immigration assistance and as such would not be impacted by clauses 42 and 43 of the 1 March Code.

Another example of circumstances where it would be reasonable to follow up with a client following an initial consultation could be an RMA seeking to confirm how many dependents a client has (e.g. where perhaps husband and wife attend the initial appointment, but there is confusion about how many children are to be included in the application). However, it would not be reasonable for an RMA to start drafting applications or submitting documents on behalf of clients before a service agreement is in place.

RMAs should use their professional judgement, taking into account the requirements of the 1 March Code and the circumstances of the case, as to when to create a service agreement.

RMAs should not seek to rely on the provision as a means by which to avoid their obligations under the 1 March Code to provide a service agreement.

2. Consumer Guide (sections 38 and 42)

RMAs have raised questions about when the Consumer Guide should be provided in accordance with the 1 March Code. In particular, guidance has been sought on whether it is acceptable for RMAs to provide a copy of the Consumer Guide with the service agreement or whether they are expected to provide a copy of the guide at an earlier time.

Guidance

Section 38 provides that an RMA must not give immigration assistance unless a copy of the Consumer Guide has been given to the client. Paragraph 42(3)(d) provides that a service agreement – which must be in place before immigration assistance is provided to a client (except in the circumstances in section 43) – must include a statement that a copy of the Consumer Guide has been given to the client.

When these two provisions are read together, it is clear that immigration assistance, whether at an initial consultation or otherwise, may not be given to a client until after the client has been provided with the Consumer Guide. Whether or not it would breach the 1 March Code to provide the Consumer Guide with the service agreement would therefore depend on whether immigration assistance was provided (at an initial consultation) prior to the service agreement being entered into.

Best practice would be to provide the Consumer Guide to the client/potential client at the earliest reasonable opportunity.

3. Client money (sections 10, 50)

RMAs have sought guidance about what responsibilities an RMA who is an employee or contractor has over the handling of client monies under the 1 March Code.

Guidance

Section 10 of the 1 March Code defines 'client money' as being an amount (including a fee or disbursement) that a responsible migration agent, or member of the business of a responsible migration agent, receives from a client for work or services performed, or to be performed, under a service agreement.

Section 50 of the 1 March Code provides that a responsible migration agent must ensure certain requirements are complied with in relation to client money that is received by the agent or by a member of the agent's business. These responsibilities include ensuring client money is paid into an account in a financial institution, and that only client money is paid into that account.

Where a contractor or employee RMA does not deal with client money, their responsibility under the 1 March Code would extend only as far as being satisfied that the business they were employed by, or contracted to, had a system in place to appropriately handle client money. Responsibility for the mishandling of client money would depend on all the circumstances of the matter.

4. Responsible Migration Agent (section 12)

Guidance has been sought about when, and in what circumstances, an RMA providing mentoring to a newly registered migration agent, may enliven s12 and be considered to be a "responsible migration agent" in relation to that matter. Examples of mentoring scenarios in question include:

- providing a response to a question appearing on a social media/online forum
- answering phone calls
- providing detailed assistance with a specific visa application, sponsorship or nomination.

In the above scenarios, the mentor may never know the name of the applicants unless specific assistance is provided and may not charge a fee.

Guidance

The definition of 'responsible migration agent' is provided in s12 of the 1 March Code, which provides:

> Each of the following is a ***responsible migration agent*** in relation to a service agreement:
>
> (a) each migration agent who gives, or has given, immigration assistance under the agreement;
>
> (b) if no immigration assistance has yet been given under the agreement—each migration agent who signs the agreement.

The Explanatory Statement provides some guidance around the meaning of 'responsible migration agent' and states:

> Certain provisions of the Code of Conduct refer to a responsible migration agent and it is particularly relevant in relation to service agreements. For example, see section 45 below (Duty to ensure work or services specified in service agreements are completed); and Division 3 of Part 3, concerning duties of responsible migration agents in relation to fees and disbursements. The effect of these and similar provisions is to make clear that the relevant duties are imposed individually on all migration agents who are responsible migration agents in relation to a particular service agreement and not only on any one particular migration agent. That is, any migration agent who has been involved in a client's matter is a responsible migration agent. Even an agent who gives input toward a matter would be a responsible migration agent, despite not having signed the relevant service agreement.

Whether or not a mentor would be considered a responsible migration agent would depend on whether or not the mentor was actually providing immigration assistance to the client, or simply providing guidance to the newly registered migration agent who was providing immigration assistance. RMAs should be aware that if, in the role of 'mentor', immigration assistance is provided directly to the client, the mentor would fall within the definition of responsible migration agent.

In relation to the mentoring examples provided, such as an RMA providing a response to a general question on a social media/online forum, or over the phone, in general, these are unlikely to enliven s12. If however an RMA assists another RMA in detail with a particular application for a particular client (that is, they aren't just answering generic questions, but are working in detail on a specific visa application for a specific client) then s12 may reasonably be enlivened. In this situation, the assisting RMA would become a responsible migration agent because they are essentially giving immigration assistance under the service agreement.

5. Reasonable steps in determining if a document is false or misleading (Section 20(3))

RMAs have sought guidance on reasonable steps that an RMA should take to determine whether or not a document is false or misleading.

Guidance

Subsection 20(3) of the 1 March Code provides that an RMA must not give a government official a document that the migration agent suspects, or reasonably ought to suspect, (but does not know) is false or misleading, unless the agent:

(a) discloses to the government official that the agent suspects that the document is false or misleading; or

(b) has taken all reasonable steps to determine whether the document is false or misleading.

What steps would be reasonable for an RMA to take to determine if a document is false or misleading would depend on all of the circumstances of the case. "Reasonable" is a relative term and all relevant circumstances must be considered to determine what would constitute reasonable steps for an RMA to take. The ordinary meaning of the term "reasonable" is simply "rational; not irrational, absurd or ridiculous".

As such, OMARA considers that the steps taken by an RMA to determine whether a document is false or misleading will depend on the circumstances and must be reasonable in relation to those circumstances.

For example, if a document was received from a person purportedly representing a sponsor for a work visa and the document contained incorrect details about the company name, the RMA reasonably ought to suspect that the document may be false or misleading. The reasonable steps in such a situation might be to contact the employer directly and ask about the document.

6. Reasonable steps to verify the origin of third party documents (section 20(6))

RMAs have sought guidance on reasonable steps that an RMA should take to verify the origin of third party documents. In particular, questions were raised about the need to engage, for example, document fraud experts, as RMAs considered this to be excessive and were concerned it would place unreasonable costs on clients. It was also noted that RMAs collate many third party documents (e.g. employment references, relationship statements etc.) and it would seem unreasonable for an RMA to have to contact them all.

Guidance

Subsection 20(6) provides that an RMA must not state to a government official that a particular document originated from a specified person other than the agent or a client of the agent, unless the agent has taken all reasonable steps to verify the origin of the document.

Again, what would constitute a reasonable step will depend on all the circumstances. It should be noted that in this circumstance, there is no requirement for the RMA to have suspicions about the origin of the document in order for the obligation to be enlivened.

Using the previous example, if a client of the RMA provides the agent with a document and states that the document has come from the intended sponsor, it may be reasonable to confirm with the sponsor that they provided the document to the client.

Further, it might be that an RMA makes a phone call, or sends and receives an email, to/from a third party confirming the authenticity of a document provided for a sponsorship or visa, or, that they check in with the sponsoring employer that the documents are genuine.

It would not be necessary for an RMA to engage a fraud expert. It was not the intention of these provisions to have RMAs verify the authenticity of documents. Rather, it is expected that RMAs will exercise common sense, due diligence and the “reasonable person” test.

For example, in relation to employer sponsored applications, both temporary and permanent, an RMA may be approached by a visa applicant (employee) with the required documents already organised for both the nomination and the visa application. In this situation, the RMA has two clients (employer and visa applicant) and there are two applications (nomination and visa). The RMA will therefore be expected to verify with each client the documents that have been provided in respect of their applications. In this situation it is important that the RMA contact the employer to verify their instructions, confirm they intend to sponsor the visa applicant and that they have provided the documents for the nomination application.