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US IMMIGRATION & NATIONALITY LAW

THE ETHICAL ROLE OF A LAWYER UNDER A TRUMP ADMINISTRATION

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Ever since Donald Trump won the election, many immigrants have justifiably become fearful. During his election campaign, Trump engaged in harsh rhetoric against immigrants. He said he would build a wall and deport 2 to 3 million immigrants with criminal records. Trump also promised that he would rescind President Obama's deferred action program for young people, known as Deferred Action for Childhood Arrivals (DACA), who arrived in the United States prior to the age of 16 and are out of status. There are also proposals of banning immigrants from certain countries or areas, as well as engaging in extreme vetting of people from Muslim countries as well as reviving the registration program.

The role of the immigration lawyer has become ever more important since Trump winning the election, and the prospects for increased immigration enforcement after January 20, 2017 when Trump is President. While Trump has softened some of his harsh rhetoric since the election, many of his advisors are in favor of strong enforcement such as Jeff Sessions who will be the Attorney General and other immigration hardliners such as Kris Kobach and Stephen Miller. Hence, the fear is palpable, and immigration lawyers have been inundated with calls from worried clients.

Undocumented immigrants fearful of a new enforcement machine will rely on the immigration lawyer to advise them on how they can remain in the country, especially if they have US citizen children. In the event that DACA is rescinded, although there is an ameliorative legislative proposal whose outcome is uncertain, DACA recipients may want to know whether they can change their address, which would be different from the address that was provided in the application. Similarly, even lawful permanent residents with a criminal records

and who are vulnerable to deportation may ask the same question of the lawyer. Employers will want to know whether they can continue to hire a DACA employee if the program will be rescinded. A DACA employee will want to know whether she can continue working for the employer if the employer does not realize that the work authorization has expired.

What are the lawyer's ethical obligations when advising a client fearful of a Trump presidency? A lawyer is under a duty to vigorously represent the client. According to Rule 1.3 of the ABA Model Rules of Professional Conduct, "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 1 to Rule 1.3 provides, "A lawyer should ...take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." On the other hand, a lawyer can only represent her client within the bounds of the law. Under Model Rule 1.2(d), "A lawyer shall not counsel a client to engage or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law."

The key issue is whether counseling an unauthorized immigrant to remain in the U.S., even indirectly (such as by advising of future immigration benefits), is potentially in violation of Model Rule 1.2(d) or its analog under state bar ethics rules.

While practitioners must ascertain the precise language of the analog of Model Rule 1.2(d) in their own states, one can argue that overstaying a visa is neither "criminal" nor "fraudulent" conduct. Even while an entry without inspection (EWI) might be a misdemeanor under INA §275, it is no longer a continuing criminal violation to remain in the U.S. after the EWI. Although being unlawfully present in the U.S. may be an infraction under civil immigration statutes, it is not criminal or fraudulent, and given the paradoxical situation in our immigration system where an undocumented noncitizen can eternally hope to gain legal status (such as if a US citizen child turns 21 or if the individual is placed in removal and obtains cancellation of removal), a lawyer ought not to be sanctioned under Model Rule 1.2(d) or its state analog with respect to advising individuals who are not in status in the U.S.

Of course, the most prudent approach is to refrain from expressly advising or encouraging a client to remain in the U.S. in violation of the law; and instead, present both the adverse consequences and potential benefits to the client if he or she chooses to remain in the United States in violation of the law. In fact, adopting such an approach becomes imperative when remaining in the U.S., in certain circumstances, does constitute criminal conduct. For instance, failure to depart after a removal order pursuant to INA 237 (a) within 90 days under INA §243 renders such conduct a criminal felony. Even here there is an exception at INA §243(a)(2), which provides: "It is not in violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody." Moreover, there are provisions that allow a person who received a final removal order many years ago to reopen if the government consents to such reopening and there is available relief against deportation. *See* 8 C.F.R. § 1003.2(c)(3)(iii); 8 C.F.R. § 1003.23(b)(4)(iv).

The ethical lawyer must also be a competent lawyer who is capable of analyzing all the nuances and contours of statutory and regulatory provisions. Even if the DACA program is cancelled, the employment authorization document (EAD) is not unless the government specifically revokes it pursuant to 8 CFR 274a.14(b), and only after the EAD recipient has been given an opportunity to respond through a Notice of Intent to Revoke. Thus, a lawyer can ethically advise that an unexpired EAD still authorizes the DACA recipient to work in the US, and for the employer to continue to employ this person. In the event that a DACA client's employment authorization has expired, but the employer is not being represented by the same lawyer as the DACA client, this lawyer is under no obligation to alert the employer if it did not notice the expiration of the employment authorization. The employer may be subject to employer sanctions for continuing to employ an unauthorized worker while the DACA client is in any event amenable to deportation whether he is working or not.

Lawyers should also be exploring for alternative opportunities for DACA recipients under immigration law. If they have a legal basis for permanent residence, they should explore it, such as through marriage to a US citizen spouse or through some other green card sponsorship basis. Even if they cannot adjust status in the US if they previously entered without inspection, they can leave on advance parole and return without triggering the 3 or 10 year bar, which would provide a basis for eligibility to adjust status as an immediate

relative of a US citizen. Alternatively, they can take advantage of the provisional waiver rule, which allows one to waive based on extreme hardship to a qualifying relative the 3 or 10 year bars in advance of the departure from the US in order to process the immigrant visa at the US consulate. These suggestions are by no means exhaustive and may not be accomplished by January 20, 2017 when Trump takes office, so DACA recipients must consult with advocacy organizations and attorneys to fully explore all their options.

A lawful permanent resident who may have a criminal conviction cannot be immediately removed from the United States. He is first subject to removal hearing and must be served with a Notice to Appear. Not all criminal conduct results in removal. Even if a criminal conviction is considered a crime involving moral turpitude or an aggravated felony, it should be carefully considered if such a characterization can be contested under the categorical approach. This approach, best exemplified in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) and *Descamps v. United States*, 133 S. Ct. 2276 (2013), requires identification of the minimum prosecuted conduct that violates the criminal statute rather than the conduct of the respondent in removal proceedings.

Permanent residents are in a rush to file for naturalization, but the lawyer must carefully review the client's history to ensure that nothing comes up during the naturalization process that could trigger some ground of removability, such as an improperly obtained green card or a criminal conviction. If the client still wants to take the risk of applying for naturalization, the lawyer must also determine if there are grounds for a waiver in removal proceedings, and should also advise that it is likely that discretionary waivers may be less readily granted within a bureaucracy that is oriented towards enforcement rather than grating immigration benefits.

It may be an exercise in futility for the lawyer to advise a client to move residence so as to avoid detection, even when the client is not being actively pursued and there is no outstanding warrant. If the DHS wishes to initiate removal proceedings, it can do so by serving the Notice to Appear by mail. It would be better if the undocumented immigrant received the NTA at the last known address that the government has rather than not receiving such an NTA and being subjected to an in absentia removal order. While an in absentia order can be reopened for lack of notice, it is time consuming, stressful and the results are uncertain. In any event, an AR-11 has to be filed whenever a person changes address. If a person with a removal order reports that she is being

pursued by ICE agents, it would be ethically problematic for the lawyer to advise this person to evade ICE agents by changing address. Remaining in the US after a removal order is a felony under INA 243 and a lawyer should not be advising a client to engage in criminal conduct, although a lawyer could, if applicable, advise such a client on ways to overcome the removal order or to seek a stay of removal or apply for other prosecutorial discretion remedies such as an order of supervision. It would be clearly unethical for a lawyer to advise a client who is facing ongoing removal proceedings to not honor hearing dates as it would lead to a removal order in absentia, and the lawyer will be held responsible for providing ineffective assistance to her client.

The immigration lawyer must also be mindful of potential criminal penalties that can be applied for providing advice to a person who is unauthorized to remain in the United States. There exists a relatively untested provision under INA 274(a)(1)(A)(iv) which criminally penalizes any person who:

> "encourages or induces an alien to come to, enter, or reside in the United States in knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law"

This provision, which involves encouraging someone to reside in the US in violation of law, is a companion to other related criminal provisions such as "brings to" or "smuggling" (INA 274(a)(1)(A)(i)), "transportation" (INA 274(a)(1)(A)(ii)), and "harboring" (INA 274(a)(1)(A)(iii)). While these three provisions relating to smuggling, transportation and harboring are discrete and Congress intended to cover distinct groups of wrongdoers, *see US v. Lopez*, 590 F.3d 1238 (11th Cir. 2009) the "encouraging" provision is more broad based and could potentially apply to a person who encourages an undocumented person who is already residing in the United States to do so in violation of the law. In *U.S. v. Oloyede*, 982 F.2d 133 (4th Cir. 1992), a lawyer was convicted under a predecessor of this provision for representing persons at the former INS who were sold false social security and employment documents by a co-conspirator. Although these facts in *U.S. v. Oloyede* are rather egregious and would not usually apply to ethical lawyers, the following extract from the Fourth Circuit decision is worth noting:

> Appellants maintain that Section 1324(a)(1)(D) is solely directed to acts bringing aliens into the country. However, the plain language states,

> "knowing that residence *is* or will be in violation of the law." (Emphasis supplied). Because the use of the verb "is" clearly connotes the present status of the illegal aliens' residence in this case within the United States, it can only be understood to apply expressly to actions directed towards illegal aliens already in this country.

To the best of this author's knowledge, the "encouraging" provision has never been applied to a lawyer providing routine advice to an unauthorized immigrant who desires to continue to remain in the United States in hope for a remedy in the future, such as a US citizen child turning 21 in a few years, that would enable her to adjust status in the United States or in the hope that the law may change to his benefit. However, it is important to know that such a provision of this sort does exist and could be applied more broadly by an administration that has an enforcement mindset. In the event of overzealous prosecution, a lawyer who carefully remains within the confines of ABA Model Rule 1.2(d) would have a good defense. Comment 9 to Model Rule 1.2(d) is a golden nugget, which summarizes the delicate balance that the attorney ought to strike when representing a client who may be undocumented but who has potential relief in the future:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Finally, when immigrants are frightened and vulnerable, they will seek desperate measures such as applying for political asylum. The filing of a political asylum application enables the individual to remain in the United States and even apply for work authorization if the application has been pending for 150 days or more. If there is a meritorious claim for asylum, a lawyer ought to pursue it on behalf of the client, after the client has been informed, and provided consent, about the risks. There is a possibility that the claim, if not granted at the affirmative level, could be referred before an Immigration Judge in removal proceedings. If the client is unable to win before

an Immigration Judge, he or she would end up with a final removal order. If the asylum claim is filed after one year, and the exceptions to filing after one year cannot be met, there is an even greater chance that the application will be referred into removal proceedings. For a claim to be meritorious the lawyer must ascertain whether the client can provide a detailed statement regarding his claim to asylum and there is a sufficient nexus on one of the protected grounds. Even if there is a precedent decision against a particular ground for an asylum claim, the lawyer must ask whether there are good faith grounds to seek a reversal of the adverse precedent decision.

The standard for what constitutes a meritorious claim is provided in ABA Rule 3.1:

> 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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Thus, even if the ultimate objective of filing an asylum application is to ultimately seek cancellation of removal, the asylum claim must still be meritorious. It behooves the ethical practitioner to refer to recent AILA resources, namely, Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Nonpermanent Resident and Nine Ethical Questions to Consider before Filing Asylum Claims to Pursue COR.

Last and not the least, however sympathetic the circumstances may be, the ethical lawyer should never assist in filing an application knowing that it contains a false statement of fact or law. Although there are clear rules, ABA Model Rule 3.3 and 8 CFR 1003.103(c), that expressly prohibit such conduct, the lawyer could also be implicated under federal criminal provisions such as 18 USC 1001, 18 USC 371 and 18 USC 1546.