



THE ETHICAL ROLE OF THE ATTORNEY UNDER ALABAMA'S ANTI-IMMIGRANT LAW

Posted on November 12, 2011 by Cyrus Mehta

By [Cyrus D. Mehta](#)

Alabama's immigration law, HB 56, is aimed at making life miserable for unlawfully present immigrants, and is intended to drive them out of the state. The law criminalizes a person's very existence in Alabama. Many portions of the law have been enjoined pending appeal by the 11th Circuit Court of Appeals in *USA v. Alabama*, 2011 WL 4863957 (C.A 11 (Ala.)), although some very troubling provisions still remain and have taken effect.

What is the role of the attorney in advising non-citizens who may be committing crimes in Alabama by virtue of simply being alive in Alabama? At this point in time, Section 30, which is very much in effect, makes it a felony for an alien not lawfully present in the United States to enter into a "business transaction" with the State of Alabama or any political subdivision thereof. Although "business transactions" may be thought of as activities such as renewing a license or commercial activities with the government, it already appears to be going beyond these activities and can apply to any dealings with state or local governments. A powerful IPC Report highlighting Section 30's impact, [Turning Off The Water](#), gives the example of an Alabama probate court putting out a notice that all individuals conducting business transactions with it must provide proof of US citizenship or that they are lawfully present in the US. Hence, a woman unlawfully present in the US who is applying to change her name after divorce from her abusive husband may be committing a felony under Section 30. The IPC Report also states that the town of Allgood, Alabama, has interpreted this provision to require all water customers to provide an Alabama driver's license or Alabama picture ID in order to keep current water service.

Alabama Power has asked for proof of lawful presence when a family tried to get electricity reconnected.

Model Rule 1.2(d), which has its analog under state bar rules, provides, "A lawyer shall not counsel a client to engage or assist a client, in conduct that the lawyer knows to be 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."

Does this mean that an attorney cannot advise a client who is unlawfully present to apply for the probate of her deceased husband's will? Must an attorney thus advise an unlawfully present parent of three US citizen children to no longer contract with an Alabama utility for water and electricity in her modest dwelling? There are other provisions that also criminalize the person's very being but have been temporarily blocked. Section 11(a) makes it a misdemeanor for an unauthorized alien to apply for, solicit, or perform any kind of work. Section 13(a)(2) makes it unlawful to encourage an unlawful alien to come to Alabama. Thus, an immigration attorney who represents a US citizen living in Alabama temporarily for work related reason, and who wants to sponsor his unlawfully present spouse living in Tennessee for a green card, may violate Section 13 if the attorney encourages her clients to live together in Alabama in order to strengthen their case to further establish that the marriage is bona fide.

Some provisions were not blocked before the law took effect. For instance, Judge Blackburn in the lower district court decision, *USA v. Alabama*, 2011 WL 4469941 (N.D. Ala.) did not enjoin Section 10, which criminalizes one who fails to carry a registration document and who is in the US unlawfully. Section 10 was enjoined only on October 14, 2011 by the 11th Circuit Court of Appeals and was effective from September 30, 2011 until October 14, 2011. An attorney may have represented an unlawfully present client who had no registration documents, but who was eligible for asylum, and it took time to prepare and file a solid asylum application. If this attorney, even if outside Alabama, in the course of the representation logically advised the client to remain in Alabama in violation of Section 10 while it was in effect, would he or she have breached an ethical rule?

Sections 5 and 6 state that government officials including "an officer of a court"

cannot block the enforcement of immigration laws by “limiting communication between its officers and federal immigration officials.” Because “an officer of the court” could include an attorney, this might require attorneys to reveal information about their clients to immigration officials, if demanded by government officials. This provision has already [stirred consternation among local attorneys](#), and the President of the Morgan County Bar Association has predicted that there will be many lawyers who will challenge this provision before turning client information in to the government. Clearly, Sections 5 and 6 breach the Sixth Amendment right to counsel as the essence of this right is the ability to have privacy of communication with counsel. *See U.S. v. Rosner*, 485 F.2d 1213 (2d Cir. 1975). Even outside the criminal context, the same analogy applies to Sections 5 and 6. Federal statutes and regulations provide a right to counsel in removal proceedings, INA § 240(b)(4)(A), 8 C.F.R. § 1003.16(b), 8 C.F.R. § 1240.3, and any Alabama attacks on lawyer-client confidentiality would most certainly be a violation on the Supremacy Clause.

An ethical argument can be made that a lawyer may represent unlawfully present non-citizen clients in Alabama if they can ultimately seek an immigration benefit under federal law. For instance, a person who is unlawfully present is not driven out of the US under federal law, unlike Alabama, but has a right to appear before an Immigration Judge in a § 240 removal proceeding. As indicated in my [prior blog](#) on the ethical role of the lawyer in advising undocumented clients, under federal law, being unlawfully present is generally an infraction under civil immigration statutes. This individual may seek various forms of relief in removal, including cancellation of removal under INA § 240A or adjustment of status under § 245. He or she may still be considered unlawfully present under federal law, but can apply for work authorization, while pursuing relief applications, even if they have been denied in the first instance and are being appealed in federal court. Even a person who has an outstanding order of removal may seek to apply for an administrative stay of removal or supervised release as well as apply for work authorization. While this unlawfully present individual legitimately pursues relief and is permitted to work, his or her existence in Alabama is criminalized and is not allowed to contract with the state for electricity and water. Further examples of how Alabama’s, and even Arizona’s, anti-immigrant laws absurdly conflict with federal law are amplified in David Isaacson’s [blogs](#). A lawyer, after discussion the consequences of various courses of conduct, may permit a client to disobey

a law if the lawyer in good faith believes that this law will ultimately be held unconstitutional. Arizona's law, SB 1070, which contain many similarly ridiculous provisions that conflict with federal law, has been enjoined as unconstitutional in *USA v. Arizona*, 641 F.3d 399 (9th Cir. 2011). A law that is ultimately held to be unconstitutional is no law at all. Of course, the lawyer bears some risk if the law's constitutionality is ultimately upheld, but it may also be possible, that under federal law his or her client may have obtained permanent residency after being unlawfully present, or at least been granted permission to remain in the US to pursue applications for immigration benefits.