CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

ETHICAL OBLIGATIONS OF THE ATTORNEY TO SAFEGUARD INFORMATION ABOUT A CLIENT'S WHEREABOUTS WITH A REMOVAL ORDER UNDER TRUMP 2.0

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The recent reelection of Donald Trump is likely to usher in a new era of enhanced immigration scrutiny and enforcement. This shift raises a number of ethical questions and concerns for immigration lawyers. One such issue is whether immigration lawyers would be required to provide law enforcement or a government entity with the contact information, such as last known address or phone number, of one of their clients if asked, especially if the client has an outstanding removal order. Lawyers must be prepared to handle such a demand for information from the government especially since Trump has promised to deport 15 million noncitizens. Among those who can be expelled from the country without removal proceedings are noncitizens who have outstanding removal orders.

Although INA § 243 imposes criminal sanctions upon a noncitizen who fails to depart the United States within 90 days following a final order of removal, an attorney may not be required to cooperate with DHS or other agencies by providing a noncitizen's whereabouts. An attorney should not advise the client to evade apprehension, but, at the same time, the attorney has an ethical obligation under state analogues to ABA Model Rule 1.6 to not reveal information relating to representation of a client without the client's consent. There are several exceptions to the confidentiality obligation under ABA Model Rule 1.6 and we highlight the New York Rules of Professional Conduct at Rule 1.6(b), which proves that "a lawyer may reveal information relating to the

representation of a client to the extent the lawyer reasonably believes necessary":

> *1) to prevent reasonably certain death or substantial bodily harm;*
> *2) to prevent the client from committing a crime;*
> *3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;*
> *4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;*
> *5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or*
> *6) when permitted or required under these Rules or to comply with other law or court order."*

Therefore, under NY Rule 1.6(b)(2) the lawyer may reveal information "to prevent the client from committing a crime." The client who has an outstanding order of removal and who has not left the US will potentially be committing a crime under INA § 243. Since disclosure under 1.6(b)(2) is not a mandatory obligation, it behooves an attorney to follow ABA Model Rule 1.2(d) and its relevant state analogue if advising a client who has an outstanding removal order:

> *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 a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*

Under Model Rule 1.2(d) a lawyer may discuss the legal consequences of any proposed course of conduct while not advising the client to evade apprehension and can also advise on all the contours and exceptions set forth in this provision. INA § 243(a)(2) contains the following exception: "It is not a

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." Thus, it would be well within the scope of a lawyer's duties to advise a client of all relief they can obtain from an order of removal such as filing a motion to reopen or reconsider. Furthermore, there are several classes of noncitizens who are authorized to remain in the US notwithstanding a removal order such as recipients of the Deferred Action for Childhood Arrival (DACA) program or applicants who have applied for and been granted Temporary Protected Status. Those with outstanding removal orders can also remain in the US if they have received a stay or removal or are under supervised release.

The other oft cited exception to Model Rule 1.6 is Rule 1.6(b)(6) which permits the attorney to reveal confidential information to "comply with other law or a court order." What if the lawyer is asked by ICE agents to reveal the current or former client's address? The authors are of the opinion that the lawyer is still bound by Rule 1.6 and should not reveal the client's information so readily.

New York's analogous Rule 1.6(b)(6) has been exhaustively interpreted in New York, N.Y. City Bar Opinion 2017-5. This opinion concerns a lawyer's duty to protect clients' confidential information from unauthorized disclosure during the analogous scenario of a crossing at the U.S. border, provides guidance on this question. This opinion addresses the question of what "an attorney's ethical obligations with regard to the protection of confidential information prior to crossing a U.S. border, during border searches and thereafter?" The opinion provides the following analysis:

> *Rule 1.6(a) prohibits attorneys from knowingly disclosing "confidential information" or using such information to the disadvantage of the client, for the lawyer's own advantage, or for the advantage of a third person, unless the client gives informed consent or implied authorization or the disclosure is permitted by Rule 1.6(b). Rule 1.6(b), in turn, permits, but does not require, an attorney to use or disclose confidential information in specified exceptional circumstances, of which only 1.6(b)(6) is relevant to the above-described border-search scenario.*
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> *Rule 1.6(b)(6) permits an attorney to "reveal or use" confidential information to the extent the attorney "reasonably believes necessary . . . when permitted or required .. . to comply with other law or court order."*

> *Comment to Rule 1.6 recognizes that this exception permits the disclosure of a client's confidential information insofar as reasonably necessary to respond to an order by a "governmental entity claiming authority pursuant to . . . law to compel disclosure." The exception applies even when the validity of the relevant law or court order, or its application, is subject to legal challenge, although, in ordinary circumstances, compliance is not "reasonably necessary" until any available legal challenge has proven unsuccessful. See Rule 1.6, cmt. ("Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason.").*
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> *In general, disclosure of clients' confidential information is not "reasonably necessary" to comply with law or a court order if there are reasonable, lawful alternatives to disclosure. Even when disclosure is reasonably necessary, the attorney must take reasonably available measures to limit the extent of disclosure. See, e.g., ABA Formal Op. 10-456 (July 14, 2010). For example, compliance with a subpoena or court order to disclose confidential information is not "reasonably necessary" until the attorney or the attorney's client (or former client) has asserted any available non-frivolous claim of attorney-client privilege. See, e.g., NYCBA Formal Op. 2005-3 (March 2005). Likewise, a lawyer must ordinarily test a government agency's request for client confidential information made under color of law. See, e.g., NYCBA Formal Op. 1986-5 (July 1986) ("f presented with a request by a governmental authority for production of information pertaining to escrow accounts when a client is a target of an investigation, a lawyer must, unless the client has consented to disclosure, decline to furnish such information on the ground either that it is protected by the attorney-client privilege or that it has been gained in the course of a confidential relationship. . . . If disclosure is compelled , it will not breach a lawyer's ethical obligation with respect to his client's confidences or secrets.").*
>
> *At the same time, attorneys need not assume unreasonable burdens or suffer significant harms in seeking to test a law or court order. See, e.g., NYSBA Ethics Op. 945 (Nov. 7, 2012) (indicating that "when the law*

> *governing potential disclosure is unclear, a lawyer need not risk violating a legal or ethical obligation, but may disclose client confidences to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt")...*
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> *The opinion concludes that "attorneys need not assume unreasonable burdens or suffer significant harms in seeking to test a law or court order", guidance that can readily be applied to lawyers facing demands for client information under the Trump administration.*

Nebraska Ethics Advisory Opinion for Lawyers No. 90-2 similarly addressed the question of whether an attorney may "ethically inform the U.S. Marshal's office of the client's location?" The opinion concluded that:

> *Generally, an attorney may not reveal the whereabouts of a former client where such information was received during the course of and in furtherance of the professional relationship. However, the attorney may ethically divulge the whereabouts of the client where the attorney determines that it is the intention of the client to commit a crime in the future, the attorney has obtained the consent of the client to make the disclosure, or the attorney is required by law or a court order to do so. Under the Disciplinary Rules, it is not mandatory that the attorney disclose such information.*

The question of what attorney's obligations to reveal the client's address when withdrawing as attorney in Immigration Court or before the Board of Immigration Appeals are also arises. Similarly, must an attorney withdraw from representing a client who is evading immigration enforcement? The EOIR Practice Manual requires that the withdrawing attorney, among other things, "reveal the last known address of the respondent." The BIA Practice Manual also includes a similar requirement. Can the attorney make a motion to withdraw without revealing the client's last known address assuming that the attorney knows about the client's whereabouts? Would this lead to a denial of the motion to withdraw?

DC Bar Op. 266 citing *Matter of Rosales* (BIA Interim Decision No. 3064) advises that the lawyer is given a choice, which is 1) to withdraw unconditionally, the

lawyer must disclose the client's last known address; or 2) if the lawyer does not provide this information, the withdrawal will be granted only conditionally, i.e the lawyer must continue to accept service on his client's behalf." NY State Bar Ethics Opinion 529 concludes that "a lawyer should not be required to withdraw from representation merely because his client refuses to surrender to the authorities…The lawyer is free to continue to give legal advice to the client and to represent him before the authorities, as long as the does nothing to aid the client to escape trial." Similarly, N.Y. City Bar Formal Opinion 1999-02 affirms that a lawyer may continue representing a fugitive client, so long as the continued representation does not result in violation of a Disciplinary Rule.

While at one level a noncitizen who is in violation of removal order may be viewed as a fugitive, they should be viewed differently from criminal defendants who have evaded arrest or jumped bail. Noncitizens in violation of a removal order, as explained above, have the ability to reopen the order or may request permission to remain in the US, and apply for work authorization, even when there is an underlying removal order. Therefore, lawyers representing individuals in violation of removal orders have additional ethical responsibilities, including the duty of competence under Model Rule 1.1, such as evaluating whether they can reopen the order or can seek permission to remain in the US. Moreover, ethics opinions guiding lawyers representing fugitives in the criminal justice system may not always be directly applicable to lawyers representing noncitizens who have violated a removal order as the latter may be able to seek relief.

Our blog is only the starting point to aid lawyers if required by Trump administration officials to reveal a client's whereabouts and is by no means an exhaustive coverage of this complex and evolving area. We will be sure to post updates as we notice developments in this area as we seek to legally and ethically protect our clients entering a new era of heightened immigration enforcement under the Trump administration.

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