



# MCLE SELF-STUDY

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## CAUTION!

### Immigration Ethics Under the Trump Administration

by Cynthia Tyler

To say that the Trump Administration's immigration policies represent a change from those of the Obama Administration is an understatement. President Trump has accused parents of abusing protections for vulnerable unaccompanied minor children, he has tried to impose restrictions on travel (the "Muslim Ban") and sought funds for a border wall. These actions, alone, create ethical quandaries for immigration attorneys deciding how to advise their clients. Further, on September 5, 2017, Mr. Trump announced the end of the Deferred Action for Childhood Arrivals ("DACA") program, which provides around 800,000 undocumented immigrants who came to this country as young children to remain in the United States with a work permit.<sup>1</sup> The situation is further complicated by the fact that those currently in the DACA program will have differing ending dates for their protection, depending on the dates of their DACA applications. Under the Trump Administration, the first of those protected by DACA will be eligible for deportation in March 2018, giving Congress a short window in which to pass a bill with new protections.<sup>2</sup>

In October 2017, the White House sent a letter to Congress setting forth the "immigration principles" that the Trump Administration will require to be included in any bill to benefit DACA recipients.<sup>3</sup> Thus, any protections for DACA recipients are tied to hard line immigration reform including "the construction of a border wall, changes to federal law to make it much harder for people to seek asylum in the US, to make the E-Verify employment verification system mandatory, and to prevent US citizens and permanent residents from bringing over family members other than spouses and minor children as immigrants to the US."<sup>4</sup> Further, the letter calls for change of the immigration system from a family-based and employment-based system to a merit-based system.<sup>5</sup> Essentially, the position of the Trump Administration is that protection for DACA recipients must include full scale immigration reform, and it must be done in the next six months in order to continue the protections to all DACA recipients.<sup>6</sup>

Against this background, Congress is now considering proposed legislation to benefit DACA recipients, such as the DREAM Act (a bi-partisan bill which would provide a path to citizenship for DACA recipients<sup>7</sup>), the Succeed Act (a Republican sponsored bill that provides a 15-year path to citizenship with restrictions on sponsoring family members<sup>8</sup>), and the BRIDGE Act (a bi-partisan bill that would provide a path to protected status, but not citizenship, for up to three years.<sup>9</sup>) None of these proposed bills include the sweeping immigration reforms included in the Trump Administration's letter and so none of these bills can be viewed in isolation, given the Trump Administration's direction on what it will require before it signs anything into law.<sup>10</sup>

Further complicating the immigration attorney's ability to ethically practice law and advise their clients is the fact that the Trump Administration has openly attacked those very ethics. By way of background, when the Trump Administration took office, the immigration courts were facing a "backlog" of over 600,000 cases.<sup>11</sup> This backlog was due in part to the fact that President Obama had focused the immigration system on recent arrivals and criminals, but a crisis in Central America forced higher numbers of asylum seekers and unaccompanied minors to flee, and those cases were prioritized in the Executive Office of Immigration Review (commonly known as immigration court). However, when Attorney General Jeff Sessions recently addressed the Executive Office for Immigration Review, he blamed the backlog on "dirty immigration lawyers" presenting false asylum claims and giving "magic words" to applicants.<sup>12</sup> The Trump Administration's attack on immigration attorneys makes it even more imperative that they continue to act in the most ethical manner possible, while their new policies create ambiguities that make it difficult to do so. With all of this in mind, the immigration attorney must be ever mindful of their ethical obligations, both for the protection of their clients and themselves.

Immigration attorneys have multiple ethics codes to follow, both at the state and federal levels. At the state level, attor- ►

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neys must always be mindful of the California Rules of Professional Conduct as well as the laws of the state that bars them (if not the same). At the federal level, the Board of Immigration Appeals may discipline attorneys independently of the State Bar under the Code of Federal Regulations rules beginning at 8 CFR § 1003.101 if the attorney practices in Immigration Court or before the Board of Immigration Appeals.<sup>13</sup>

Below are just a few of the California ethics rules that need to be reviewed to navigate the new immigration policies enacted by the Trump Administration.

## Duty of Competence

**California Rule of Professional Conduct 3-110** states that “a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Competence is defined as “diligence, learning and skill, and sufficient mental, emotional, and physical ability reasonably necessary to represent in a matter.”<sup>14</sup> The rule allows an attorney to work with another attorney or learn the area of law to become competent.<sup>15</sup>

Providing competent representation right now requires that immigration attorneys keep abreast of the changing landscape of immigration law- knowing not just what the law is right now, but also what bills are winding their way through Congress and what potential changes are on the horizon. This is particularly important with this administration because the entire focus of the immigration policies is diametrically opposed to that of the previous administration. For example, during the Obama Administration, an immigrant who had been in the United States many years without permission, and was not a criminal, might not be a priority for deportation. However, now that same person is a priority for deportation and so the advice may be different.

## Rule Against Advising the Violation of Law & The Duty of Candor

**California Rule of Professional Conduct 3-210** states that attorneys “shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.”<sup>16</sup> Rule 5-200, states an attorney “shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.”<sup>17</sup> The Regulations provide that an asylum claim is frivolous if any of its material elements are deliberately fabricated.<sup>18</sup>

As always, it is crucial for immigration attorneys to know exactly what laws have changed and what that means

for their clients, particularly in an atmosphere where the Trump Administration has already started to paint immigration attorneys as unethical and “dirty” and has accused them of filing false asylum applications. It is always a violation to file a false asylum application, but these rules are especially important in light of Attorney General Sessions’ recent comments to the immigration judges. Attorneys should carefully review immigration applications and ensure that everything is true and correct.

Additionally, knowing that some of their clients, who were previously protected, may now be in danger of deportation makes these rules even more relevant. For example, now that DACA has ended and its future is uncertain, a lawyer should not expressly counsel DACA recipients to move to a new address and not file a change of address as required.<sup>19</sup> Not only would this advice violate the Rules of Professional Conduct, but the client may be harmed by their eventual order of deportation in absentia, as they are more likely not receive the notice of their hearing and fail to appear.

## Duty to Avoid Conflicts of Interest

**California Rule of Professional Conduct 3-310** states that an attorney cannot accept representation where “the interests of the clients potentially conflict” or continue representation when “the interests of the clients actually conflict” or represent a client whose interests are adverse to a former client.<sup>20</sup> Sometimes, an attorney may get written informed consent, but there are times when this is not sufficient.

This is particularly important now because the Trump Administration’s emphasis on “smuggling” parents who bring their children to the United States has created new potential (and actual) conflicts of interests.<sup>21</sup> For instance, if parties are in state court to seek custody and Special Immigrant Juvenile Status findings, it may be best to refer the parent or child out to have separate legal advice so as to avoid any potential conflict of interest that may arise between the children and their parents.<sup>22</sup>

## Duty to Avoid Assisting in the Unauthorized Practice of Law and Prohibition on Unconscionable Legal Fees

**California Rule of Professional Conduct 1-300** advises against aiding in the unauthorized practice of law.<sup>23</sup> For immigration attorneys, this can become relevant with regard to the use of “notarios.” In some countries, a “notario” is also a licensed attorney. However, in the United States, a “notario” is not authorized to practice law or to represent clients. That important difference might be lost, however, on clients coming from countries where they are used to working with notarios, and who are desperate for help with their immigration status. ►

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Sometimes, notarios will hold themselves out as immigration practitioners and say they can help an immigrant. This can obviously damage the client's case or cause permanent harm if anything is filed improperly. As many people are undocumented or unsure how to proceed with their cases, they may be looking anywhere for help. The uncertainty and fear created by the policies and actions of the Trump Administration with regard to immigration can make people even more desperate than they were before, making them more vulnerable to notarios, who have also been known to charge excessive fees for filing cases<sup>24</sup> (which is something else that attorneys should look out for as Rule 4-200 prohibits illegal or unconscionable fees). Thus, because of potential harm to clients, an attorney may not work with a notario and should caution against the use of notarios by clients.

In summary, the changing landscape of immigration law in America under the Trump Administration has not only lead to increased uncertainty and fear in the immigrant community, it has created a number of conflicts and issues, both for immigration attorneys and their clients. The potential for ethical violations now exists in places that were previously settled. Attorneys should take care to stay abreast of the most current status of the immigration laws and should review the risks of different strategies with clients in order to avoid harms and ethics violations due to the policy changes of the Trump Administration.

## About the Author

*Cynthia Tyler is the principal attorney at Law Office of Cynthia Tyler, which serves clients all over the Bay Area. The focus of her law office is on immigration law, including family-based, employment-based, and humanitarian immigration.*

<sup>1</sup> Michael D. Shear and Julie Hirschfeld Davis, Trump Moves to End DACA and Calls on Congress to Act, NYTimes, September 5, 2017, available at [https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?\\_r=0](https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?_r=0)

<sup>2</sup> *Id.*

<sup>3</sup> President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, White House, Office of the Press Secretary, October 8, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/10/08/president-donald-j-trumps-letter-house-and-senate-leaders-immigration>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See White House to Congress: we'll legalize DACA recipients if you crack down on most other immigrants, VOX.com, October 8, 2017, available at <https://www.vox.com/2017/10/8/16445472/trump-immigration-principles>

<sup>7</sup> DREAM Act 2017 Summary and Answers to Frequently Asked Questions, NILC, July 24, 2017, available at <https://www.nilc.org/issues/immigration-reform-and-executive-actions/dreamact/dream-act-2017-summary-and-faq/>

<sup>8</sup> GOP senators unveil new 'Dreamers' bill, Politico, September 25, 2017, available at <https://www.politico.com/story/2017/09/25/dreamers-republican-new-bill-243100>

<sup>9</sup> FAQ: The BRIDGE Act, NILC, April 6, 2017, available at <https://www.nilc.org/issues/daca/faq-bridge-act/>

<sup>10</sup> Letter to the House and Senate, *supra*.

<sup>11</sup> Immigration Court Backlog Tool, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/)

<sup>12</sup> Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, Justice News, October 12, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

<sup>13</sup> See 8 CFR 1003.101.

<sup>14</sup> See California Rules of Professional Conduct 3-110. This rule corresponds to ABA Rule 1.1. A failure to provide competent representation is a ground for discipline under 8 CFR § 1003.102(o).

<sup>15</sup> *Id.*

<sup>16</sup> See California Rules of Professional Conduct 3-210; see also Model ABA Rule 1.2(d), which states a lawyer "shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent."

<sup>17</sup> See California Rules of Professional Conduct 5-200; see also 8 CFR § 1003.102(c), stating it is a violation for an attorney who "knowingly or with reckless disregard makes a false statement of material fact or law."

<sup>18</sup> See 8 CFR § 1208.20.

<sup>19</sup> Respondents in immigration court are required to keep the court apprised of their current address at all times. Applicants and petitioners before USCIS also must notify of changes in their address.

<sup>20</sup> See California Rules of Professional Conduct 3-310.

<sup>21</sup> Public Counsel, Catholic Legal Immigration Network, Inc., Practice Advisory: Working with Child Clients and Their Family Members in Light of the Trump Administration's Focus on "Smugglers," July 2017, available at <https://cliniclegal.org/resources/working-child-clients-and-their-family-members-light-trump-administrations-focus-smugglers>

<sup>22</sup> *Id.*

<sup>23</sup> See California Rules of Professional Responsibility 1-300; see also 8 CFR § 1003.102(m), prohibiting any practitioner from assisting another in the unauthorized practice of law.

<sup>24</sup> See California Rules of Professional Responsibility 4-200. ▶

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## MCLE SELF-STUDY TEST

- 1 President Trump's letter to Congress in October, 2017 indicated he would:
  - a. Consider giving all DACA recipients US citizenship immediately
  - b. Consider a path to permanent residence for DACA recipients in exchange for drastic changes to our immigration system and an increase in border security
  - c. Consider a path to permanent residence for DACA recipients in exchange for an overhaul of the Affordable Care Act.
  - d. Not consider reinstating DACA under any circumstances.
- 2 California ethics rules don't apply to immigration attorneys practicing in immigration law in California.  
 True  False
- 3 Attorneys practicing in Immigration Court should also know the rules in 8 CFR §1003.101-102.  
 True  False
- 4 Attorneys have a duty of competence, meaning they must act diligently, and have sufficient learning and skill, and have the mental, emotional and physical ability to undertake the legal task.  
 True  False
- 5 Attorneys may counsel a client to break the law, and to go on the run to evade capture if they are being pursued by immigration authorities.  
 True  False
- 6 Attorneys may give clients magic words and false facts to help them apply for asylum.  
 True  False
- 7 Attorneys should not represent two clients in immigration law that have opposing interests, such that they harm each other's cases or put each other at risk.  
 True  False
- 8 Notarios may work with attorneys to represent immigration clients because a notario is a licensed professional.  
 True  False
- 9 An attorney may be disciplined by the Board of Immigration Appeals for failure to follow the ethics rules.  
 True  False
- 10 The ethics rules in the Code of Federal Regulations apply to attorneys practicing before the Board of Immigration Appeals and the Immigration Courts nationally.  
 True  False

*Continued on next page ►*

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# MCLE SELF-STUDY

## Caution! Immigration Ethics Under the Trump Administration MCLE SELF-STUDY TEST (CONTINUED)

- 11 All of the following is currently proposed DACA legislation in Congress except:
- a. The DREAM Act
  - b. The LIFE Act
  - c. The BRIDGE Act
  - d. The Succeed Act
- 12 A parent who brought their child here and is accused of smuggling should consult separate counsel when pursuing custody in state court.
- True  False
- 13 Due to policy changes, a person who, under the Obama administration might not have been targeted for deportation, may now be targeted under the Trump administration.
- True  False

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Answer the test questions, choosing the one best answer to each question. Mail this Self-Study and your payment\* (\$30 per credit hour for CCCBA members/\$45 per credit hour for non-members) to CCCBA at the address below. **\*The fee is waived for 2017 MCLE Spectacular guests with full-day registration.** (ID# 10771)

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