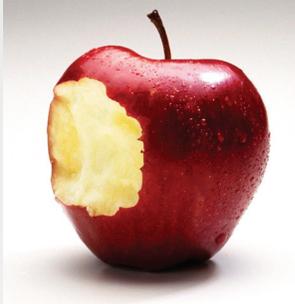




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“Bite Sized Ethics” FAQ Series

Advising Clients and Potential Clients on DACA

A Publication of the AILA National Ethics Committee

Can I ethically advise anyone to file for DACA at this time?

Despite President Trump’s near-daily message during his campaign that he wanted to terminate it, DACA still exists and you can still advise clients on the risks and benefits of applying. However, while there have always been inherent risks involved in applying for DACA, these risks are now heightened given the executive orders and memoranda issued by the new Trump administration that virtually strip all prosecutorial discretion from Department of Homeland Security employees. While DACA was a cornerstone of President Obama’s immigration policy, President Trump has both told DREAMers to “rest easy”¹ and faced pressure from his own hard-line supporters to end DACA.² This unpredictability makes it more difficult than ever to advise potential DACA applicants. DACA provides authorization to work and protection from deportation during a time of heightened enforcement, but it also requires disclosure of personal information and immigration status violations by those who would otherwise be enforcement targets.

Before filing any DACA application, be it an initial application or a renewal, you need to obtain informed consent from the client. Obtaining informed consent from your client requires identifying and advis-

ing them of the risks and benefits of submitting the application. Under the ABA Model Rules:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. ABA Model Rule (MR) 1.1 (Competence)

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. ABA Model Rule (MR) 1.4(b) (Communication)

In the DACA context, minimal competence requires staying up-to-date on current developments,³ announcements, and potentially even rumors, pertaining to DACA coming from Department of Homeland Security and the Trump Administration. Consider also conferring with colleagues about their recent experiences in applying for initial and renewal DACA, as well as Advance Parole for DACA holders.

Additionally, properly advising a client on DACA will require a thorough and detailed conversation with

1 <http://thehill.com/homenews/administration/329940-trump-dreamers-should-rest-easy>

2 <http://thehill.com/blogs/pundits-blog/immigration/326249-trump-should-fulfill-his-commitment-to-end-obamas-daca-amnesty>

3 Immigrant Legal Resource Center has a good, client-facing advisory on DACA applications post-election.

(See <https://www.ilrc.org/daca-current-status-and-options>).



your client and an analysis about eligibility for other immigration benefits, including removal defenses in case your client's DACA application is denied and the client is placed in removal proceedings. The more information about your client's situation that you have, the better you will be able to advise him or her about the risks and benefits of submitting a DACA application in this political environment. Your client should give you proper informed consent (preferably in writing) before you file the DACA application.

The parents of my 16-year-old client want me to file a new DACA application for him. What do I do?

First, remember that the minor, not his parents, is the client. Regardless of the parents' wishes or the fact that they are paying your legal fees, you will represent the minor in the DACA application and must obtain the required informed consent from him or her. ABA Model Rule 1.14 (Client with Diminished Capacity) states:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Don't assume that your teenaged client is incapable of making an informed decision about whether to file DACA. Assume instead that your client, when properly advised, is capable of making decisions about important matters. Meet with the client alone at least to explain risks and benefits and answer any questions he has. The client may also feel more comfortable disclosing facts that could lead to other forms of relief such as Special Immigrant Juvenile Status, asylum or a U visa.

My DACA client moved since her DACA was approved and hasn't updated her address with USCIS. She doesn't want to include her new address on the DACA renewal forms in case DACA is

cancelled. She wants to use a friend's address instead. Can I file without disclosing client's address?

Both you and your client are signing all DACA-related forms under penalty of perjury.

ABA Model Rule 1.2(d) states:

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."

Form I-821D requires the applicant to sign a statement that she understands that knowingly and willfully providing false information is a federal felony. Therefore you cannot prepare and file a DACA application that contains false information regarding the client's actual and current mailing *and* physical addresses, as required on the forms. In this case, while your client could use her friend's address as a mailing address, she cannot intentionally misrepresent her physical address.

The rules do not prohibit attorneys from advising clients about the legalities of and potential risks pertaining to filing an application that contains false information. The attorney should discuss the significant legal consequences of failing to provide DHS with notice of an address change. Failing to provide DHS with a notice of change of address is both a misdemeanor and a deportable offense. Additionally, if the client was already in removal proceedings, or if DHS decides to initiate removal proceedings by sending a "Notice to Appear" by mail to the client's last address, any failure to provide updated address information would lead directly to an "in absentia" removal order.

For additional guidance regarding ethical issues for lawyers representing DACA clients, see [Executive Order: Ethical Challenges for Immigration Lawyers under the Trump Administration](#).

