CASE STUDY 6:
WORKING WITH TRADITIONAL LAWYERS

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I. SCENARIO # 1: ICE CHECK-INS

A community organization runs an accompaniment program, sending organizers and allies to go with a person who has an Immigration and Customs Enforcement ("ICE") check-in. ICE[1] check-ins are like appointments with a parole officer—a government official is supposed to review the case and make sure the person is complying with the terms of their order of supervision. However, these check-ins are extremely high risk. Increasingly, individuals who have fully complied with their orders of supervision are arrested without warning or explanation. Others are suddenly given a few months to buy a ticket to self-deport. And many are also put on an ankle monitor that tracks their every move and has even more cumbersome reporting requirements. Arrest, detention, and deportation are always a real risk, even for persons with extremely sympathetic circumstances, such as a breastfeeding mother and her baby who is a U.S. citizen.

The community organization's accompaniment program uses the presence of allies and media to reduce the risk of arrest during the check-ins. Oftentimes, the person additionally has a private immigration

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† The scenarios discussed in this case study are hypothetical and not based on any specific client or case. Details are offered for the benefit of the discussion and based on a collection of experiences in the practice of movement lawyers across the country.

1. *See* Ron Nixon & Linda Qiu, *What Is ICE and Why Do Critics Want to Abolish It?*, N.Y. TIMES (July 3, 2018), https://www.nytimes.com/2018/07/03/us/politics/fact-check-ice-immigration-abolish.html ("ICE stands for Immigration and Customs Enforcement, an agency within the Department of Homeland Security."); *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, https://www.ice.gov (last visited Nov. 10, 2018) (providing information about ICE).

lawyer that may represent them on an immigration application or in immigration court, but that lawyer is not present for check-ins.

The person who is required to check in with ICE wants the support of the community organization and allies and wants ICE to discuss the case with organizers and allies to try to negotiate more time and the best outcome of the check-in (avoiding arrest and as much time as possible). However, ICE will not discuss the case or even listen to the appeal of members of the community unless there is a lawyer present who represents the person (and has documents signed to that effect). Representation documents in immigration matters allow the lawyer to define the scope of their representation—as being for a single application, a single matter, or for all immigration matters.

The community organization asks their lawyer to be present during these check-ins to resolve this issue. That lawyer tries to contact the private immigration lawyer to coordinate representation, but rarely succeeds. She often emails and calls the immigration lawyer, but messages are not returned. Private immigration lawyers typically work in solo practice or small firms with high caseloads—they rarely accompany clients to check-ins and are often difficult to reach for both clients and colleagues.

II. SCENARIO # 2: PLEA NEGOTIATIONS

Several individuals facing criminal felony illegal re-entry charges are represented in those criminal proceedings by the appropriate public defender office. Under *Padilla v. Kentucky*,[2] all criminal defense lawyers must advise their clients of possible immigration consequences to criminal convictions, but many criminal defense lawyers are not familiar with the labyrinthine immigration laws.[3] These individuals seek separate, pro bono immigration representation from a local community organization with expertise in creative immigration defense strategies for civil rights defenders. These strategies have successfully achieved immigration relief in the past, even in difficult cases, but the public defender (and even many immigration lawyers) are not familiar with some of these novel strategies.

The individual's goal is to avoid transfer to immigration authorities that would likely result in deportation. They fled violence in their home country and have family members in the U.S. Being deported would both put their lives in peril and also have the devastating consequence of separating them from their families, potentially forever.

2. 559 U.S. 356 (2010).
3. *Id.* at 367-69.

In pursuit of this goal, the community organization publicly pressures the U.S. Attorney to drop the re-entry charges. Instead of dropping the charges, the U.S. Attorney offers to allow the individuals to plead guilty to a reduced charge of misdemeanor illegal entry. The clients do not want to accept the plea to misdemeanor illegal entry if it will result in transfer to immigration and ask the community organization and their lawyer to continue the public pressure and push for a result that will avoid deportation.

The public defenders representing the clients strongly urge the clients, who are detained, to accept the deal because the public defenders believe there is no way to avoid transfer to immigration. When the clients reject the plea, the public defender attacks the community organization, blaming it for "manipulating" the clients and giving false hope of avoiding transfer to immigration. The public defender claims the lawyer for the community organization is interfering with the public defender's representation in the criminal case.

III. ANALYSIS

Both of these scenarios implicate the ethical obligations of a lawyer representing a person who is concurrently represented by another attorney. In each scenario, a single client is represented by two lawyers: a movement lawyer and a traditional lawyer. The ethical challenge involves properly defining the boundaries of representation.

A. Scenario # 1 Challenges

Scenario 1 presents a logistical challenge to communication between a movement lawyer and a traditional lawyer: to effectively advocate for the person at the ICE check-in, the organization lawyer needs to enter into a lawyer-client relationship with the person, but the organization lawyer cannot reach the person's immigration lawyer in enough time to gain the immigration lawyer's consent.

The most salient ethical question posed by Scenario 1 is whether it is ethically permissible for the movement lawyer to enter into a client-lawyer relationship when the client is already represented by an immigration attorney.

Rule 4.2 of the ABA's Model Rules of Professional Conduct, which is sometimes called the "no contact" rule, states that:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has

> the consent of the other lawyer or is authorized to do so by law or a court order.[4]

The purpose of this rule, as explained in the comments following the rule, is to contribute to the "proper functioning of the legal system by protecting a person who has chosen to be represented by counsel from overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."[5]

The primary focus of Rule 4.2 is the regulation of a lawyer's contact with clients represented on the opposing side of the same matter.[6] For example, the rule prohibits a lawyer who is representing one spouse in a divorce from communicating directly with the other spouse about matters relating to the divorce. Instead, the rule requires the lawyer to direct all communication about the subject matter of the representation through the other spouse's lawyer.[7] However, the rule is phrased broadly. Its terms do not limit its application to clients on the opposing side of the same matter, and the comments reiterate that the rule applies to "any person who is represented by counsel concerning the matter to which the communication relates."[8]

It is important to note that, despite the deference to client decision-making reflected in other places in the Model Rules,[9] the prohibition about communicating with represented clients is paternalistic in nature.[10] It applies "even though the represented person initiates or consents to the communication."[11] Once a lawyer learns that the person is represented by another lawyer on the matter, the lawyer "must immediately terminate communication with a person"[12] whether or not the person desires to continue the communication.

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4. MODEL RULES PROF'L OF CONDUCT r. 4.2 (AM. BAR ASS'N 2018). *See generally* § 4-11.3 *Communications with a Represented Person, in* GREGORY C. SISK ET AL. LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (2018).

5. MODEL RULES PROF'L OF CONDUCT r. 4.2 cmt. 1.

6. *Id*. r. 4.2.

7. *See id.*

8. *Id.* r. 4.2 cmt. 2.

9. For example, Model Rule 1.2(a), discussed in more detail below, states the general rule that the lawyer "shall abide" by the client's decisions with respect to the objectives of representation and "confers upon the client the ultimate authority to determine the purposes to be served by legal representation." *Id.* r. 1.2(a) cmt. 1. Further, with respect to conflicts of interest, clients may consent to most types of conflicts of interest as long as they are properly advised and give informed consent, confirmed in writing. *See id*. r. 1.7(b), 1.9(a).

10. SISK, *supra* note 4, at 665.

11. MODEL RULES PROF'L OF CONDUCT r. 4.2 cmt. 3.

12. *Id.*

Given the strict and paternalistic nature of the "no-contact" rule, the question raised in Scenario 1 is how to ethically proceed in the absence of the requisite consent from the client's immigration lawyer. There are three possibilities implicit in the language of the rule, which are explained more fully in the comments.

First, the rule applies only when the lawyer has "actual knowledge of the fact of the representation."[13] The community organization lawyer's inability to reach the client's immigration lawyer might open the door for an argument that, because the community organizer has been unable to verify representation, the lawyer lacks actual knowledge of the representation. However, the rule anticipates this type of evasion and addresses it in a comment, saying that actual knowledge can be inferred from the circumstances and that a "lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."[14]

Second, the rule does not prohibit a lawyer from advising a client about the subject matter of representation if the lawyer is not otherwise representing the client in the matter.[15] If the community organization could advocate for the client outside of the context of officially representing the client, the organization could proceed without the need to gain the immigration lawyer's consent. In Scenario 1, this avenue is foreclosed by the ICE requirement that the advocate be documented as an official legal representative. However, we mention this possibility because non-legal advocacy might provide a useful way of resolving similar ethical difficulties in other types of movement support activity.

Third, the rule does not prohibit communications "concerning matters outside the representation."[16] A lawyer may communicate with a represented person about "matters outside the scope of the representation."[17] If representation at the ICE check-in can be defined as sufficiently limited in scope as to be a "different matter" than the client's underlying immigration claims, it would be possible to proceed with limited-scope representation at the ICE check-in, even in the absence of the immigration lawyer's explicit consent.

Rule 1.2(c) permits a lawyer to enter into a limited scope arrangement with a client as long as "the limitation is reasonable under the circumstances and the client gives informed consent."[18] A limited

13. *Id.* cmt. 8.
14. *Id.*
15. *Id.* cmt. 4.
16. *Id.*
17. *Id.*
18. *Id.* r. 1.2(c).

scope agreement to represent the client at the ICE check-in could satisfy the ICE requirement of documentation of the client-lawyer relationship, opening the flow of information that the community organization and allies need to support and advocate for the client at the check-in.

However, the strategy of using limited scope representation agreements in situations like Scenario 1 is far from perfect. The primary drawback is that the client's need for advocacy and legal advice may not stay neatly separated into the boxes of the "ICE check-in matter" and the "underlying immigration matter." Information learned at the ICE check-in may raise questions, present choices, or flag issues in the underlying immigration matter. To ethically comply with the boundaries set by the limited scope agreement, the organization lawyer may need to limit legal advice in ways that feel artificial or unresponsive to the client's needs.

The better practice would be to locate the immigration lawyer and gain their consent to communicate with the client about the client's immigration matters so that the client can receive the support of the community organization in tandem with the individual representation by their immigration attorney.

B. Scenario # 2 Challenges

Scenario 2 pushes the challenge of communication with a traditional lawyer a step further and highlights the deeper tension that may exist between the perspectives and goals of traditional and movement lawyers. In particular, the lawyers' perspectives on what is best for the client in Scenario 2 are influenced by their sense of what is possible. The public defender, assuming that nothing can be done to avoid transfer to immigration, perceives the U.S. Attorney's offer to reduce the felony charges to a misdemeanor as the best possible course of action for the client. This perspective is firmly situated with a traditional client-centered model of lawyering in which the lawyer advises an individual client about how to choose from a static menu of options available in the existing legal landscape.[19]

The movement lawyer views the situation through a framework of collective action, in which lawyers, organizers, and clients collaborate to bring pressure for change in the legal landscape.[20] The movement lawyer sees the client's menu of options as dynamic, rather than static, and strives to create alternatives that will resolve the client's criminal charges without the inevitability of transfer to immigration and

19. Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 368-71 (2008).

20. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689-95 (2017).

likely deportation.

Ethically speaking, the traditional lawyer and the movement lawyer share an obligation to allow the client to choose which path to follow. According to the Model Rules, the ethical way to resolve a stand-off would be to fully inform the client about the risks and potential benefits of various possible courses of action and defer to the client's choice about what to do.[21] Rule 1.2(a) says that a lawyer "shall abide by a client's decisions concerning the objectives of representation,"[22] and the comments clarify that the rule "confers upon the client the ultimate authority to determine the purposes to be served by the legal representation."[23]

However, implementing deference to client preferences after fully informative counseling about options is a difficult goal to achieve, especially when the lawyers disagree about the range of possible options and likely outcomes. Lawyers' characterizations of possible outcomes in the legal system tend to be heavily influential in the client's decision-making process and particularly difficult for clients to assess independently.[24]

Although the public defender leveled the charge of manipulation against the movement lawyer, the reality is that lawyers across all types of practice influence their clients' decision-making—intentionally or unintentionally. Non-movement lawyers more easily critique social movement lawyers for manipulating their clients because social justice movements by their nature empower, educate, and support persons in connecting their individual situations to collective goals. However, this kind of critique overlooks the reality that most clients also come to traditional lawyers without settled views about what they want to accomplish; their objectives are often fluid and are likely to "emerge from and change during the course of the representation."[25] Even lawyers who desire to present options objectively may unintentionally shade their presentation of options in ways that influence their clients'

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21. *See* MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 2018) (defining "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct").

22. *Id.* r. 1.2(a).

23. *Id.* cmt. 1.

24. *See* AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 85-107 (Oxford Univ. Press 1995) (discussing how lawyers in divorce cases manipulate their presentation of what is legally possible).

25. STEPHEN ELLMANN ET. AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 13 (2009).

decisions.[26] And, lawyers are subject to the same cognitive biases as any persons, making them vulnerable to crediting evidence that supports their pre-existing viewpoints or serves their own ends.[27] In short, while issues of accountability in social justice movement lawyering are important and complex,[28] they are not unique to movement lawyers.

In the case that formed the basis for Scenario 2, the community organization and its immigration lawyer were eventually able to negotiate a way to avoid immigration detention and deportation by having the clients plead to misdemeanor charges and be sentenced to time served, thus releasing them to the community. But along the way, the community organization's lawyer was accused of interfering with the public defenders' representation of the clients in criminal proceedings, and the clients were interrogated in open court about the nature of the movement lawyers' representation.

Scenario 2 highlights the need for social movement lawyers to ensure that their clients are realistically assessing the potential benefits and risks of participation in the movement campaign. This is not because movement lawyers are more likely to manipulate their clients, but because they are more vulnerable to charges of manipulation by non-movement lawyers. However, movement lawyers are also well-situated to respond to potential charges of manipulation and undue influence. The strategies of social movements rely on building collaborations, partnering with diverse constituencies, amplifying the voices of those affected by social injustice, and grounding advocacy in the needs of those they seek to serve.

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26. *See generally, e.g.*, William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

27. *See generally* Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783 (2003). For example, the cognitive biases of the public defender most likely resulted in the lawyer having a sincere—though misplaced—belief that the movement lawyer had unfairly manipulated the client into refusing a plea deal because that was the easiest way for the public defender to explain the client's seemingly irrational decision within the public defender's more traditional view of the legal system.

28. For more comprehensive discussion of accountability of lawyers and other social movement leaders, see Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 1992-2000 (2017).