



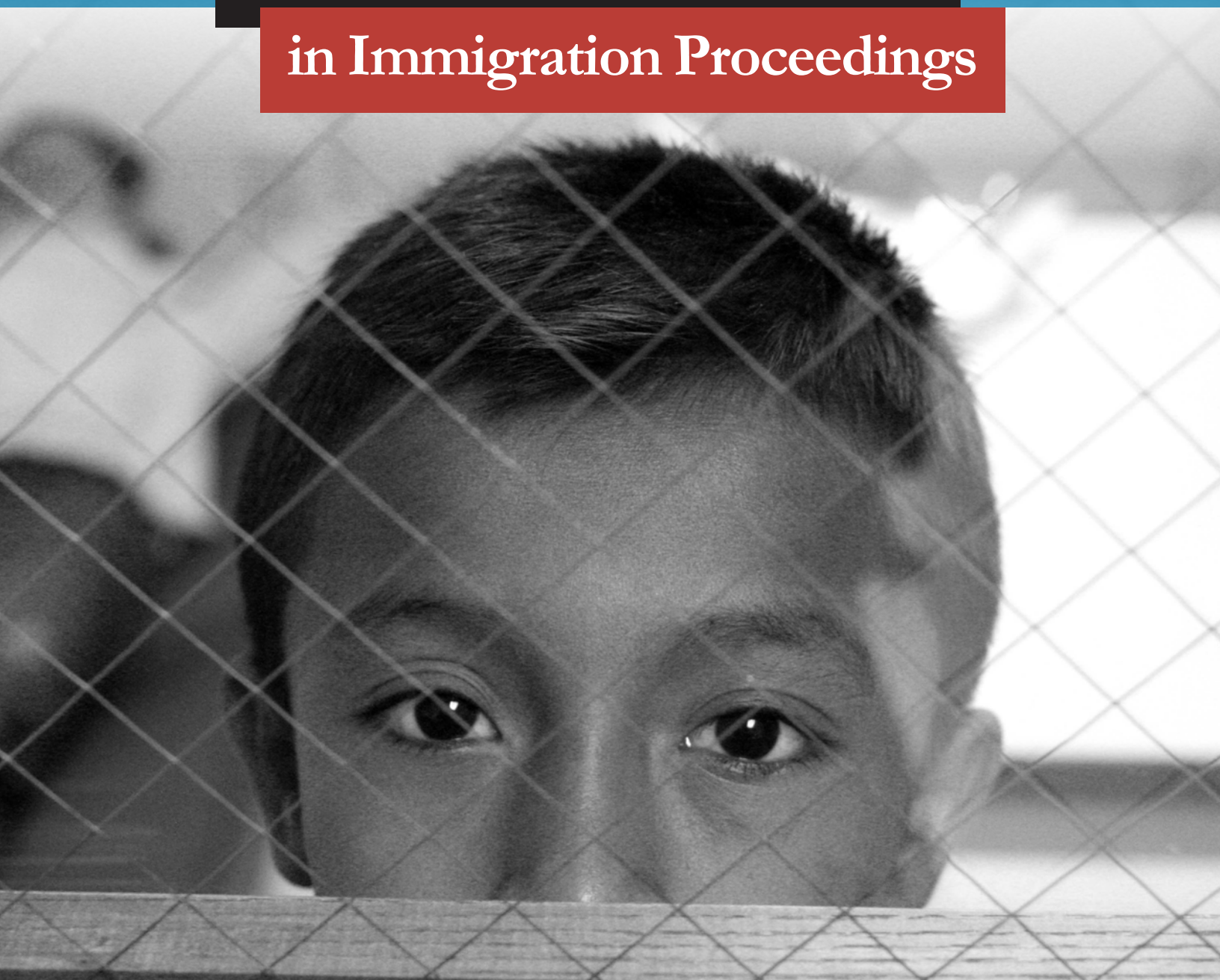
AMERICAN
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PRACTICE ADVISORY

Ethical Issues in

REPRESENTING CHILDREN

in Immigration Proceedings



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With the recent increase in the number of minors who are in removal proceedings, the lawyers representing them have raised many questions. This practice advisory provides a summary of ethical guidance on some of the more common questions that practitioners have raised. The practice advisory relies on the American Bar Association's Model Rules of Professional Conduct (Rules or Rule); practitioners must refer to the rules of professional conduct as adopted in their respective jurisdictions, since those are the rules they are bound to follow for the purposes of professional discipline. Further, in many states, there are special rules published about the obligations of attorneys representing children before that state's tribunals.

Recognizing that claims of children in immigration court are raised in an adversarial setting, making special demands on all parties, the Executive Office for Immigration Review (EOIR) established special guidelines in 2007 for immigration court cases involving unaccompanied minor children.¹ Cases of children in removal proceedings also pose special ethical challenges for the lawyers involved, requiring careful consideration of the appropriate ethics rules.

What is the governing source of ethical guidance for representing minors before the immigration court or agencies?

The guiding rule is Rule 1.14—*Client with Diminished Capacity*, along with the corresponding version of the Rule as adopted in your jurisdiction. Under Rule 1.14, the lawyer must, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.² Children are considered to have diminished capacity because they may be unable to exercise mature judgment and to understand laws and the legal system. The diminished capacity of a child may be further exacerbated if the child has suffered trauma through sexual abuse or other forms of violence. In some cases, prolonged detention or separation from trusted adults during the journey to the United States may contribute to the child's inability to build trust with a legal advisor.

Rule 1.14(a) provides:

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* (emphasis added).

Comment 1 to Rule 1.14(a) is also instructive:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. *For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody* (emphasis added). So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

¹ See U.S. Department of Justice, Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Minor Children* (May 22, 2007).

² For further information, see ABA Formal Opinion 96-404, *Client Under a Disability* (1996); "Client with Diminished Capacity," from the *ABA/BNA Lawyers' Manual on Professional Conduct* (last updated in 2009); and the annotations to Rule 1.14 as they appear in the seventh edition of the *ABA Annotated Model Rules of Professional Conduct* (2011).

All other ethical rules and obligations that arise when a lawyer represents a client are also applicable when representing minors. These include, but are not limited to, the duty to provide competent representation (Rule 1.1 Competence), being diligent (Rule 1.3 Diligence), to communicate promptly with a client (Rule 1.4 Communication), to maintain client confidentiality (Rule 1.6 Confidentiality of Information), to handle conflicts of interest properly (Rule 1.7 Conflicts of Interest: Current Clients), to withdraw from representation when appropriate (Rule 1.16 Declining or Terminating Representation), and to bear a duty of candor to the tribunal (Rule 3.3 Candor Toward the Tribunal).

In addition to these ethical rules, a practitioner's conduct is also governed by the Federal Rules of Practitioner Conduct³ when the practitioner appears before the agencies responsible for immigration within the U.S. Department of Homeland Security (DHS) as well as the U.S. Department of Justice's Executive Office for Immigration Review. Although there is no comparable provision to Rule 1.14 in 8 C.F.R. § 1003.102, the practitioner must be mindful of sanctions for failing to provide competent representation (8 C.F.R. § 1003.102(o)), failing to act with reasonable diligence and promptness (8 C.F.R. § 1003.102(q)), and failing to maintain communication with the client during the client-lawyer relationship (8 C.F.R. § 1003.102(r)).

Many of these cases will require the attorney for the child to assist the child in securing a state court appointed "guardian" or "custodian."⁴ With respect to special immigrant juvenile (SIJ) cases in family courts, Rule 1.14 and related ethical rules will govern, although the federal rules under 8 C.F.R. § 1003.102 will not be applicable. The attorney representing a child in family court must be mindful of that state court's own ethical rules or guidelines.⁵

Which state rules of professional conduct govern when the tribunal is in one place and the attorney need not be admitted in that jurisdiction to practice there?

Take the very possible situation of an attorney admitted in Maryland, representing a child who lives in Washington, DC, whose case is being heard in the immigration court in Arlington, VA.

ABA Model Rule 8.5 provides guidance in this area. Rule 8.5 addresses two important issues, disciplinary authority and choice of law and states as follows:

Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

Rule 8.5(b)(1) states:

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

³ 8 Code of Federal Regulations (C.F.R.) § 1003.102.

⁴ State terminology varies. Any child living in undocumented status can materially benefit from the appointment of a legal guardian or custodian under state law. The state court documents assist the child in a variety of important areas such as school enrollment, qualifying for health insurance, clarity about who can make decisions for the child, and so on. If litigation should later arise about the appropriate residence and custodians for the child, seeking a state court determination helps protect the child and the adults who are caring for the child in the United States. In New York, a parent may petition to serve as the legal guardian of a child and undocumented parents are not disqualified from this process. See, e.g., *Matter of Marisol N.H.*, 2014 N.Y. App. Div. LEXIS 656.

⁵ A comparison of state pro hac vice rules can be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/prohac_ad-min_rules_authcheckdam.pdf. Again, many state courts that address family issues may also have special guidance on the scope of representation and the role of the attorney for the child. See, e.g., <http://www.courts.state.ny.us/ad3/OAC/2008CustodyStandards.pdf>.

In the above example, the lawyer may be subject to the disciplinary authority of Maryland, Virginia, or Washington, DC. According to Rule 8.5(b)(1), the Virginia rules would apply in disciplinary proceedings in each jurisdiction, as Virginia is where the immigration court is located.⁶ Although the lawyer may be subject to the disciplinary authority of any of the three jurisdictions, the rules of only one state apply. As a practical matter, though, the rules of professional conduct in the state where the lawyer is admitted will generally govern, as the lawyer's appearance at immigration or family court located in another state may be too tangential for that state's disciplinary authority to also review the lawyer's conduct, although technically that state may also do so under Rule 8.5. Most important, where the lawyer is practicing before DHS and EOIR, the professional responsibility rules under 8 C.F.R. § 1003.102 will become applicable regardless of where he or she may be admitted because it is those rules that govern a lawyer's conduct before these federal bodies.

Are there any special rules regarding communications with children?

As the lawyer is expected (as far as is reasonably practicable) to maintain a normal lawyer-client relationship with a minor, the rules regarding communicating with clients under Rule 1.4 are applicable. However, a lawyer may have a heightened duty to communicate with a client with diminished capacity to allow him or her to make informed decisions about the objectives of the representation.⁷

Rule 1.4 provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

On the one hand, lawyers should not assume that children lack capacity to make decisions or participate meaningfully in case preparation. The ABA Commission on Immigration, in establishing its 2004 standards for legal representation of unaccompanied children, explained that: "The Rule does not presume that children below a certain age lack competence to determine their wishes in litigation. Competence is contextual and incremental, and may also be intermittent."⁸ With respect to explaining the matter that is the subject of the lawyer's representation to a child client, Comment 6 to Rule 1.4 is instructive:

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

Attorneys should research the law in their state to see if case law or statute creates a presumption of competence for a minor.⁹

⁶ This analysis is made on the assumption that all jurisdictions potentially involved have adopted the ABA Model Rules, an unlikely scenario. Since the rules of each jurisdiction are likely different, the actual analysis may be more complex.

⁷ See, e.g., *In re K.G.F.*, 29 P.3d 485 (Mont. 2001); *Restatement (Third) of the Law Governing Lawyers* § 24 cmt. C (2000) (when client with diminished capacity is capable of understanding and communicating, lawyer should maintain flow of information and consultation as much as circumstances allow; lawyer should take reasonable steps to elicit client's views on decisions necessary to representation).

⁸ See *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, ABA Commission on Immigration, August 2004.

⁹ In New York, for example, a child over 14 is entitled to petition directly for the appointment of a guardian. See *Surrogate's Court Procedure Act* § 1703.

On the other hand, Comment 3 to Rule 1.14 recognizes that a client with diminished capacity may wish to have family members or other persons participate in discussions with the lawyer, and the presence of such persons may generally not affect the attorney-client privilege. Still, the lawyer is required to keep the client's interest, not the family member's, foremost when making decisions on behalf of the client.

It is important that the attorney remember that there are very real differences between a child and an adult. The appearance of maturity may not be an indicator as to whether the child is competent to make the same decisions as an adult. The level of maturity may be in response to trauma at a young age. Children may also not be able to fully understand the nuances of the law or the long-term consequences, although they may say that they do. Using child-centered techniques, such as having the child explain to the attorney what the child thinks the consequences of a decision will be, is crucial to making sure the child understands.

Attorneys must also be sensitive to how the mind of an adolescent works, especially if he or she has undergone trauma. Scientific data show that adolescents can make risky decisions, as they lack the development in the frontal cortex to make the same rational decisions as adults.¹⁰

It is therefore critical that the attorney always keep the child's competence in mind when communicating and use techniques that are uniquely suited to dealing with children.¹¹

Pursuant to 8 C.F.R. § 1003.102(r), regarding an attorney's duty to maintain communication with a client, "[i]t is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands." If the attorney cannot speak the language of the child client, it is imperative that the interpreter be fluent in the child's language and dialect to ensure that attorney-client communications meet the standard of adequate communication.

What do you do about engagement letters with minors? At what age are engagement letters required/advisable/useless?

There is no minimum age regarding a child's ability to comprehend and sign an engagement letter. The lawyer must make a determination on a case-by-case basis. In some cases involving pro bono representation, where the child is very young and there is no adult representative, it may be preferable not to have an engagement agreement with the child but to advise the child verbally in such a way that the child will understand the nature of the matter. The effectiveness of an engagement letter may involve legal issues that are beyond the scope of the ethics rules. A contractual arrangement with a minor who is unable to comprehend its significance may be found to be unenforceable and voidable as a matter of law.¹²

If the child's adult representative enters into an engagement on behalf of the child, the lawyer must make clear that the child is the client and the adult is executing the engagement on behalf of the child. There may be situations where both the adult and the child can become clients, but the lawyer must be careful to ascertain that there are no conflicts of interest (refer to Rule 1.7).

With respect to immigration applications that request benefits, under 8 C.F.R. § 103.2(a)(2) a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian, certifies under penalty of perjury that all evidence submitted with the application for the immigration benefit is true and correct.¹³

¹⁰ See *Nature Neuroscience* 15(9): 1184-91 (Sept. 2012).

¹¹ An excellent guide on how to communicate with minors can be found in Chapter 1 of *Representing Unaccompanied Children: Training Manual for KIND Pro Bono Attorneys*, published by Kids in Need of Defense and available at <http://www.supportkind.org/en/about-us/resources/manual>.

¹² See Restatement Second, Contracts §12 (1981).

¹³ Under INA Section 101 (b)(1), a "child" is an "unmarried person under 21 years of age." Under 8 C.F.R. § 1236.3, a juvenile is defined as "an alien under the age of 18." The regulations also use the word "minor" when describing aliens under 14 years of age, yet do not precisely define this term. 8 C.F.R. § 1236.2. It is important to keep these legal definitions in mind when working with minors

When should a lawyer representing a minor seek to appoint a guardian or guardian ad litem in order to go forward in the removal proceeding?

Rule 1.14 authorizes a lawyer to take reasonably protective action when a client is at risk of harm, by either consulting with individuals or entities, or, in appropriate cases, seeking the appointment of a guardian or guardian ad litem (GAL).¹⁴ The lawyer may be impliedly authorized to reveal information protected by Rule 1.6, but only to the extent reasonably necessary to protect the client's interests.

The attorney must generally be mindful of following the wishes of the child client even when in the opinion of the attorney it may not be in the child's best interests. As stated in *Representing Unaccompanied Children: Training Manual for KIND Pro Bono Attorneys*:¹⁵

Every attorney-client relationship is client driven. This is true in the case of child clients as well. You may not be accustomed to dealing with children as clients. It is important to remember that your role is to advocate for what the child wants, even if what the child wants is not, in your opinion, the most appropriate decision. The child has the right to participate in the entire process of her case. It is important to ensure that the child understands that she has some control, such as, over where to sit, when to take breaks or what to talk about first. This child-centered approach not only increases the child's feelings of security and control, but also contributes to the self-empowerment of the child.

There may be circumstances, however, when a lawyer will have to seek out a third party to determine how best to proceed if the child's wishes are in direct opposition to what the lawyer believes are in the child's best interests. It may also be necessary to seek an appointment of a GAL under such circumstances. The Convention on the Rights of the Child mandates that, in all legal actions, the best interest of the child shall be a primary consideration in making decisions for that child.¹⁶ A lawyer may not be qualified to determine the child's best interests, and therefore should seek the help of qualified third parties, including a GAL.

While resorting to the appointment of a guardian may appear to be an obvious step on behalf of a child client who is unable to comprehend the nature of the proceedings or consent to the representation, it may also be a traumatic and expensive process, and it may undermine the autonomy that the client is required to have under Rule 1.14. According to Comment 7 to Rule 1.14, "In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."

There is no direct authority in the Immigration and Nationality Act (INA) or regulations for an immigration judge to appoint a GAL in a removal proceeding. Although there is no independent court role for a GAL or related social service, the EOIR guidelines seem to encourage their use, recognizing that if those services are available they have the potential to increase a child's understanding of the proceeding and improve the child's communication with his or her lawyer.¹⁷

¹⁴ Comment [5] to Rule 1.14: If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

¹⁵ *Supra*, at fn 10.

¹⁶ *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 10, art. 24, S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967) [ICESCR]: (every child has "the right to such measures of protection as are required by his status as a minor"). *See also*, UN Human Rights Committee, General Comment 17, ¶ 2 (stating that the International Covenant on Civil and Political Rights requires that states adopt "special measures to protect children" to ensure that they enjoy all of the rights provided in the Covenant). *See also*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

¹⁷ U.S. Department of Justice, Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Minor Children* (May 22, 2007).

It has also been suggested that immigration judges may have authority to grant motions for the appointment of a GAL pursuant to 8 C.F.R. § 1003.10(b), which authorizes them to take any action that is “appropriate and necessary” to resolve the cases before them.¹⁸ There is anecdotal evidence that some immigration judges have appointed GALs under this broad authority.¹⁹ If an immigration judge refuses to appoint a guardian, the attorney may wish to consider seeking appointment of a guardian with broader authority in state court, keeping in mind the guidance under Rule 1.14 that a lawyer must consider the least restrictive protective action on behalf of the client. If a child has also been involved in juvenile court dependency proceedings, through which the state court might have appointed a GAL, the state court GAL may be able to serve as the GAL in immigration proceedings.

Finally, the attorney should be mindful that EOIR has issued guidelines to provide enhanced procedural protection to unrepresented detained respondents with mental disorders, including appointment of counsel, and these guidelines ought to apply equally to children.²⁰ Therefore, an attorney representing a minor must ensure that a child client’s rights are adequately protected in immigration court under applicable policy guidelines.

Are there any other circumstances when an attorney should seek appointment of a guardian?

There are other reasons why the attorney may want to seek appointment of a custodian or guardian for the immigrant child. Many school districts require proof of a legal custodial arrangement before allowing the child to register in the school district. Children will not be able to obtain a passport unless both parents consent to the issuance. If a child is not living in a two-parent household, the state court order appointing a single parent as custodian or guardian or the appointment of a third person as the custodian or guardian can help the child obtain needed identity documents.

Related to these general needs of protection is the prerequisite finding in SIJ petitions that the child is “dependent” on a family court. This element of the statute is satisfied when the state court proceeding to appoint a custodian or guardian takes place for purposes other than solely to secure the SIJ finding. As this advisory has noted, there are many other reasons why an attorney would want to secure the appointment of a legal guardian or custodian.

How do I deal with conflicts of interest?

Conflicts of interest may arise where the interests of the parent or the guardian are not aligned with those of the child. The child may have been brought to the immigration removal proceeding by his or her “sponsor.” The Office of Refugee Resettlement Children Services Division uses the term “sponsor” when releasing children from detention. There has been no official state court or federal proceeding that appointed the sponsor as a legal guardian. The sponsor is given direction to pursue legal custody or guardianship in the courts of the state of the child’s residence. Immigration counsel is usually retained or agrees to represent the child after a meeting with the sponsor and child. In some cases, a child is released to a parent. Occasionally, it is the parent who may have engaged or may be currently engaged in abuse or neglect.

It is always advisable for the attorney to identify who the client is, and as much as is practicable, to represent only the child. A lawyer has a duty to represent a child according to the lawyer’s professional judgment, and is allowed to pursue a position that is independent of the parent’s position or the custodian or guardian’s.²¹ If the attorney must represent both the child and another adult, the attorney must be mindful of Rule 1.7, which provides:

¹⁸ See Legal Action Center Practice Advisory, *Representing Clients With Mental Competency Issues Under Matter of M–A–M–*, November 30, 2011.

¹⁹ Although the Trafficking Victims Protection Reauthorization Act authorized the Department of Health and Human Services to appoint an independent child advocate who would look out for the best interests of “trafficking victims and other vulnerable unaccompanied alien children,” see 8 U.S.C. §1232(a)(6), they are seldom appointed and only on a discretionary basis.

²⁰ See Phase I of *Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, available at <https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf>.

²¹ See, e.g., Conn. Ethics Op. 97-35 (1997).

a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Based on Rule 1.7, a lawyer may represent multiple clients, even if there is a potential conflict of interest, as long as the lawyer can provide competent and diligent representation to each affected client, and each affected client gives informed consent in writing. If the lawyer is unable to meet this standard, then the lawyer should not take on the representation of both clients. A lawyer may be able to get informed consent from a client with diminished capacity regarding potential conflicts of interest, but this may require heightened vigilance and a more detailed explanation of the concerns. If a lawyer is unable to get such consent from a client with diminished capacity, then a lawyer is unable to satisfy the consent requirement under Rule 1.7(b)(4).²²

There are also unique concerns when representing a child in obtaining SIJ status. In guardianship or custody proceedings in family court, the petitioner seeking guardianship or a custodial order and the child will be represented by separate attorneys. Because of the potential for conflict if the hearing is contested, family court judges often insist on separate attorneys. The court normally appoints a lawyer for the child, known as a law guardian; in some states the attorney is called the "attorney for the child."

There are some attorneys who appear on behalf of the adult petitioner in family court and later will represent the child in the immigration proceeding. . This is only feasible as long as there is no irreconcilable conflict of interest between the guardian and the child. The attorney should pay heed to Rule 1.7(b) to ensure, among other things, that he or she can provide competent and diligent representation when filing the I-360 *Petition for Amerasian, Widow(er), or Special Immigrant* on behalf of the child to obtain permanent residence as a SIJ after having represented the guardian in family court. Even if the guardian ceases to be the attorney's client during the immigration proceeding, Rule 1.9 imposes duties toward former clients, too.²³ Of course, if there are separate attorneys representing the guardian in the family court proceeding and the child in the immigration proceeding, there would be no concern about conflicts of interest and this is recommended as the best practice.²⁴

²² See, e.g., N.Y. State Bar [Ethics Opinion 836](#) (2010) See also Illinois State Bar Association Opinion No. 91-17 holding that a public defender's office could not represent both the parent and the child in neglect proceedings and that the child was too young to consent to dual representation but would allow separate attorneys within the system if the practices were sufficiently insulated. For a useful discussion of ethical issues in Children's cases see William Wesley Patton, *Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers* (Cambridge University Press 2006).

²³ ABA Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

²⁴ If the same attorney is involved in the family court and immigration proceeding, it is important that the attorney becomes competent under Rule 1.1 in both these areas of practice and procedure.

In the event that a conflict arises after the representation has commenced and the lawyer is forced to withdraw, the lawyer must refer to Rule 1.16 relating to withdrawal of representation. The withdrawal must be accomplished without material adverse effects on the interests of the client (Rule 1.16(b)(1)). Even if the withdrawal is because of an ethical ground, the lawyer must take reasonable steps to protect a client's interests (Rule 1.16(c)). Generally, a lawyer's withdrawal from representing a client with diminished responsibility, without safeguarding the client's interests, will be disfavored.²⁵

Conclusion

Although the ethical rules governing a lawyer's conduct with respect to the representation of minors are far from clear, they should not serve as obstacles to the overriding goal of providing the needed representation.

Paragraph 14 of the Scope section of the Model Rules states that "The Rules of Professional Conduct are 'rules of reason.' They should be interpreted with reference to the purposes of legal representation and of the law itself."

While attorneys may need to bring in new tools to ensure that children understand the proceeding to the best of their ability, as well as get fair treatment, the representation should be rewarding since it can make a significant impact on a young person's life.

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²⁵ See ABA Ethics Op. 96-404(1996).