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MEMORANDUM

FROM: Catherine Weiss, Sarah Scott

TO: The Vera Institute of Justice

DATE: June 11, 2018

SUBJECT: Ethical Obligations in Representing Children Without Capacity in Immigration Proceedings

Introduction

In the wake of a recent decision by the Department of Homeland Security to separate parents and children when families are apprehended at the border, scores of very young children have been designated as "unaccompanied" and placed in their own removal proceedings. Unlike others designated as unaccompanied, these children crossed the border with their parents or other adult family members, only to be forcibly separated from their families by Customs and Border Protection agents. In these circumstances, there is a special imperative to achieve family reunification where safe and possible, and a lower likelihood that the child is estranged or at risk from the parent.

It is our understanding that more than 100 children five-years-old and younger have been charged with removability and are now in transitional foster care programs in New York and around the country. Given the continuing arrival and separation of families, the numbers are growing every day. Serious issues have arisen about whether and how lawyers can represent these children given their inability or limited ability to direct their representation. This memorandum discusses ethical concerns stemming from the representation of separated children

who lack legal decision-making capacity because of age, cognitive impairment, or other circumstances. The memo also offers possible solutions.

Issues Presented

What options are available to attorneys who seek to represent children in immigration proceedings, when the child is extremely young or otherwise cannot direct his or her own representation? May, and should, the lawyer contact the child's parents or other close relatives and rely on their direction? May, and should, the lawyer petition to have a guardian or child advocate appointed to help determine and serve the best interests of the child? If these steps fail, may, and should, the lawyer in effect act as both guardian and counsel, investigating the child's best interests and then pursuing them?

Short Answers

American Bar Association ["ABA"] Model Rule 1.14 requires that attorneys representing clients with diminished capacity, including very young, disabled, or traumatized children, maintain a normal attorney-client relationship to the extent possible. Despite this aspirational mandate, very young children are generally not able to communicate their desires or protect their own interests. This memorandum discusses the responsibilities of an attorney representing a separated child without decision-making capacity and advocates strongly in favor of a four-step process. First, the lawyer should engage the child as a client. This engagement enables communication with the child to assess his or her capacity and to involve the child in decision-making about his or her case to the extent possible. Second, the lawyer should make every reasonable effort to contact the child's parents or other responsible family members, who in most circumstances are the appropriate individuals to direct litigation in the best interest of the child.

Third, in cases where the parents or other close relatives are unreachable, or where evidence suggests that the child's family members cannot or will not make decisions in the best interest of the child, the lawyer should petition for a guardian ad litem or child advocate pursuant to Model Rule 1.14(b), to allow the attorney to protect her most vulnerable clients and provide the best representation possible. Fourth, if the court declines to appoint a guardian ad litem or child advocate, and none is available, the lawyer should proceed under Model Rule 1.14(b) to take "necessary protective action" to ascertain and advance the client's best interests.

Legal Analysis

A. Engaging the Client with Diminished Capacity

Model Rule 1.14 anticipates that lawyers will represent clients with diminished capacity. *See* Rule 1.14(a).[1] In the context of providing immigration representation to children in federal custody, it may be necessary to agree to represent a child and to file an appearance of counsel (an E-28 or G-28 Form) even to gain access to the child. Thus, a lawyer may engage a child as a client before fully understanding the child's capacity or legal needs. Rule 1.14 permits the representation to proceed in this fashion.

As more fully explained below, the Rule encourages the lawyer, insofar as possible, to maintain a normal client-lawyer relationship with child clients, communicating in a way that allows the child to express his or her wishes as to initiating (and continuing) the representation. Rule 1.14 thus authorizes an attorney to engage with a minor client who has less than full

[1] All citations in this memo are to the Model Rules. Because each state's version of the Rules of Professional Conduct differs from the Model Rules to varying degrees, attorneys should refer to the RPCs for their jurisdiction for more specific guidance.

capacity but can still understand and direct the representation. (See below for guidance on determining capacity.)

Even when a child lacks such capacity, however, the Rule authorizes engagement. In an emergent situation, Rule 1.14 permits an attorney to take legal action even on behalf of a "person with seriously diminished capacity" who is "unable to establish a lawyer-client relationship or to make express considered judgments about the matter." Rule 1.14, Comment 9. A lawyer may undertake such representation when: (1) "the health, safety or a financial interest of [the person] is threatened with imminent and irreparable harm," (2) "the person or another acting in good faith on that person's behalf has consulted with the lawyer," and (3) "the lawyer reasonably believes that the person has no other lawyer, agent or other representative available." *Id.* A very young or otherwise incapacitated child, separated from his or her family and in removal proceedings, may satisfy these criteria; Rule 1.14 authorizes a lawyer to undertake representation of a client in these circumstances. The Comments further direct the lawyer to "take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken." Rule 1.14, Comment 10.

B. Representing the Client with Diminished Capacity

Model Rule 1.14 directs the lawyer to treat child clients with the respect due any client and to take their wishes into account whenever possible.

> 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.

Rule 1.14(a). Thus, "as far as reasonably possible" an attorney should consult with her child client and make every effort to understand and be guided by his or her wishes. The official comments to the Rule add further clarification:

> 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.

Rule 1.14, Comment 1.

The obligation to maintain a regular relationship with a child "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." ABA Formal Opinion 96-404, *Client Under a Disability* (1996). The ABA Commission on Immigration reiterates this point in its guidance for lawyers representing unaccompanied children: "The Attorney shall ensure that the Child participates in the Immigration Investigation and EOIR Proceedings to the greatest extent possible, taking into account the Child's age, intellectual, social and emotional development, maturity, level of education, ability to communicate, and personal circumstances." ABA Comm'n on Immigration, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, Part V.A.1.a. (August 2004)

["*Standards*"].[2] Whenever possible, the lawyer should advocate for the child's "expressed wishes." *Id.*, Part V.A.1.b.

Therefore, even when dealing with a child as young as five years old, an attorney should make her best efforts to explain the legal proceedings to her client and to understand and advocate for the child's stated goals and wishes. For example, if a child says that he or she wants to be with his or her parents, the lawyer should make every effort to reunify the child with the parents, absent evidence that the parents present some danger to the child. The lawyer should allow the child to direct the representation or parts of the representation, to the child's capability.

C. Determining the Capacity of a Child Client

It may be obvious that a child has diminished capacity (*e.g.*, the child is too young to make informed and voluntary legal decisions, is nonverbal, or has a severe disability). The child's capacity is not always clear, however, and in that circumstance an attorney may need additional guidance. The ABA has set out a test that lawyers can use to determine a client's capacity. Factors to consider include:

1. the client's ability to articulate the reasoning leading to a decision;
2. the variability of client's state of mind and his/her ability to appreciate the consequences of a decision;
3. the substantive fairness of the client's decision;
4. the consistency of the client's decisions with the known long-term commitments and values of the client.

[2] *Available at* https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

Rule 1.14, Comment 6. More specifically, The ABA Commission on Immigration sets out factors for use in assessing the competence of an unaccompanied child:

> 1. Ability to make decisions including: the ability to understand information relevant to the specific definitions at issue; the ability to appreciate one's situation with respect to the legal decisions to be made; the ability to think rationally about alternative courses of action; and the ability to express a choice among alternatives.
>
> 2. Legal ability, including functional abilities, understanding of the legal process, the ability to assist his Attorney in support of his claim, and the ability to participate in the hearing.
>
> 3. Intellectual, social and emotional development, considering such factors as age, interest, interaction with peers, psychosocial judgment, and cognitive maturity.

Standards, Part VIII.C.1.b.[3]

An attorney who is uncertain about her client's capacity should carefully consider the factors above and determine whether intervention is necessary to protect the child's interests. If the attorney is assured that her client is not capable of directing the representation and requires assistance, an attorney should take the necessary protective measures to ensure that the child receives adequate representation.

D. Protective Measures Generally

When an attorney reasonably believes that the client has diminished capacity and is "at risk of substantial physical, financial or other harm," the attorney may take "reasonably

[3] *See also* Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?*, 16 J. AM. ACAD. MATRIM. LAW. 481, 485 (2000); M. Aryah Somers, Practice Advisory, *Children in Immigration Proceedings: Concepts of Capacity and Mental Competency*, at 8-9, 11 (Nov. 2014), //www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_uac_docs_vera_institute_somers_concepts_of_capacity_competency_11_2014.authcheckdam.pdf; *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 FORDHAM L. REV. 1339 (Mar. 1996).

necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Rule 1.14(b). Pursuant to subsection (b), protective measures can include

> consulting with family members, . . . professional services, . . . 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 decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

Rule 1.14, Comment 5.

Although Rule 1.14(b) is written to permit, rather than require, a lawyer to take protective measures ("[T]he lawyer *may* take reasonably necessary protective action.") (emphasis added), such measures are a necessity when a client is incapacitated, preverbal, or otherwise unable to direct his or her own representation. A lawyer representing a very young or otherwise incapacitated child must take steps such as "consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian," Rule 1.14(b), in order to ascertain the child's interests and pursue them appropriately.

E. Involvement of a Child's Family Members

Very young children "may wish to have family members or other persons participate in discussions with the lawyer." Rule 1.14, Comment 3. When a child expresses the desire to have his or her parents or other close relatives involved, the lawyer must make every reasonable effort to reach them. Similarly, where the child is preverbal, the lawyer should look to the parents or

other close family members who may be willing and able to direct the litigation in the best interests of the child. Indeed, the ABA *Standards* explicitly adopt "a presumption that release from a Detention Facility and family reunification are in the best interests of the Child and that a Child should be so reunified and/or so released." *Standards*, Part VI.A.1. Thus, absent evidence that the family poses a risk to the child, the lawyer should work toward reunification.

The relevant case law supports this proposition, identifying a parent as the child's natural guardian and decision-maker in legal proceedings. Approving an immigration regulation that gave parents primacy among individuals to whom children in custody might be released, the Supreme Court wrote: "The list begins with parents, whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children." *Reno v. Flores*, 507 U.S. 292, 310 (1993). Likewise, the Court has held that the Due Process Clause entitles parents, as well as their children, to notice of the child's right to counsel in delinquency proceedings. *In re Gault*, 387 U.S. 1, 41 (1967). Other authorities echo this sentiment:

> Because children by nature generally lack the capacity to make decisions based on their own long-term best interests, and because state laws reflect that fact, someone else often must make decisions on behalf of a child which will be, in the view of the decisionmaker, in that particular child's best interests. That role has traditionally been the parents' right and obligation.

Jonathan O. Hafen, *Children's Rights and Legal Representation – The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 424 (1993); *see also* Robyn Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for*

Minors, 75 CAL. L. REV. 681, 683 & N.14 (1987) ("The normal presumption is that parents will function as substitute decisionmakers for their minor children.").[4]

Thus, an attorney for a child who lacks capacity should take all reasonable steps to locate the child's parents or closest responsible family members to determine whether those persons can reunify with the child and/or direct the litigation in the best interests of the child. Efforts to reach the parents or other family members should be guided by the lawyer's duty of diligence under Model Rule 1.3. This Rule instructs a lawyer to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Rule 1.3, Comment 1. A lawyer's best efforts to consult responsible family members may include contacting them in immigration detention, in their home countries, or wherever they may be found.

Of course, participation from family members may be impossible if they are unreachable, unavailable, uninterested, unwilling, or unable to advocate for the child's best interests. In that case, appointment of a guardian or child advocate may be necessary.

F. Seeking the Appointment of a Guardian ad Litem ["GAL"] or Child Advocate

Model Rule 1.14(b)'s instruction to take protective action permits the attorney to file a petition for guardianship after determining that a child lacks decision-making capacity and has no parent or other close family member willing and able to direct the representation. The ABA Commission on Immigration goes even further, advocating that a child advocate be appointed for

[4] The rights of parents to make decisions about and for their children will depend, however, on the scope of their involvement in their children's lives. *See Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (holding that an unwed father has no due process right to be notified before an adoption unless he has a "significant custodial, personal, or financial relationship" with his child).

all unaccompanied children in federal custody and facing removal proceedings. *Standards*, Part III.I. ("In order to ensure that the Child's best interests are identified, expressed and advocated at all times, an Advocate for Child Protection shall be appointed not later than 72 hours after the Custodial Agency assumes Custody of such Child.").

While Rule 1.14(b) allows an attorney to file a petition for appointment of a guardian to protect the child's interests, the ABA has concluded that "nothing in the rule suggests that the lawyer may represent a third party in taking such action, and after considerable analysis, the Committee concludes that a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client." ABA Formal Op. 96-404. The attorney may, however, "support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment." ABA Formal Op. 96-404.[5]

The question, then, is whether a lawyer representing a child in immigration proceedings can successfully petition for the appointment of a guardian or child advocate. No case or regulation explicitly authorizes an immigration court to appoint a guardian. More problematic still, recent guidance by the Department of Justice ["DOJ"] to the immigration courts on managing matters involving children states:

> Neither the INA [Immigration and Nationality Act] nor the regulations permit Immigration Judges to appoint a legal representative or a guardian ad litem.

[5] Moreover, once a guardian has been appointed, there is no prohibition against jointly representing the child and the guardian, assuming that the guardian's and the child's interests are aligned and the guardian is prepared to advocate for the child's best interests. *See* ABA Formal Op. 96-404, p. 5. If the attorney intends to represent both the guardian and child, "any expectation the lawyer may have of future employment" by the putative guardian must be disclosed to the court. *Id.*

> Nevertheless, all Immigration Judges are required to provide a list of *pro bono* legal service providers in accordance with 8 C.F.R. § 1240.10(a)(2) and should encourage the use of appropriate *pro bono* resources, consistent with applicable ethical principles.

U.S. DOJ, Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Dec. 20, 2017, at III.C., https://www.justice.gov/eoir/file/oppm17-03/download ["OPPM"].

This is not, however, the final word. The OPPM states that it is intended to "provide[] guidance for adjudicating cases involving any unmarried individual under the age of 18." *Id.* at I. "It is not intended," however, "to limit the discretion of an Immigration Judge" nor to "mandat[e] a particular outcome in any specific case." *Id.*; *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) ("It is doubtful that an internal agency memorandum of this sort [i.e., the OPPM] could confer substantive legal benefits upon aliens or bind the INS.") The reasons for an immigration judge to appoint a guardian or child advocate in certain cases are so compelling that they should overcome the non-binding guidance offered in the OPPM.

Federal laws and regulations grant an array of rights to immigration respondents in general, and unaccompanied children or incompetent respondents in particular. These rights may be significantly impaired unless a guardian or advocate is appointed. In such cases, an immigration court should appoint a guardian, notwithstanding the contrary guidance in the OPPM, to ensure that the court is protecting the child's rights under the immigration laws and regulations.

First, there is a statutory right to private counsel. The INA guarantees to all immigration respondents "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." 8 U.S.C. § 1229a(b)(4)(A); *accord* 8 U.S.C. § 1362. The Trafficking Victims Protection Reauthorization Act reinforces this right for unaccompanied immigrant children in federal custody:

> The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. § 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

8 U.S.C. § 1232(c)(5). Thus, the government is required to take steps to secure counsel for unaccompanied children, although not to pay for such counsel. *See Jie Lin v. Ashcroft*, 377 F.3d 1024, 1034 (9th Cir. 2004) ("Absent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel.").

Second, the INA guarantees certain basic due process rights to immigrants in proceedings. All immigration respondents must be afforded "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B).

Third, the law offers special protections for respondents who lack capacity. If an immigrant's "mental incompetency" makes it "impracticable" for the immigrant to be "present at

the proceeding," the Attorney General must prescribe safeguards to protect the immigrant. 8 U.S.C. § 1229a(b)(3). The regulations issued in response to this mandate provide:

> When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

8 C.F.R. § 1240.4. In fact, under the regulations, an Immigration Judge may not accept an admission of removability from "an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend." 8 C.F.R. § 1240.10(c). The relevant case law instructs immigration courts examining the competency of a respondent to consider "whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Matter of M-A-M, Respondent*, 21 I. & N. Dec. 474, 484 (B.I.A. 2011).

When a separated child lacks the capacity to direct his or her own legal representation, and no parent or close family member is available to direct the representation in accordance with the child's best interest, appointment of a GAL or child advocate[6] is necessary to enable the child to exercise his or her rights as an immigration respondent. From an ethics standpoint, it is the best practice for the roles of the child's lawyer and GAL to be distinct. *See Lawyer-Client*

[6] Pursuant to TVPRA, the Secretary of Health and Human Services is authorized to "appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children." 8 U.S.C. § 1232(c)(6)(A).

Relationship: Client with Diminished Capacity: Hybrid Role of Lawyer-GAL, ABA/BNA Lawyers' Manual on Professional Conduct 31:612 ("This hybrid role . . . can place the lawyer in a difficult position because the duties of a GAL at times conflict with a lawyer's duties under the rules of professional conduct, a circumstance that has engendered a fair amount of controversy about the propriety of lawyers' acting in this dual capacity, especially when children are involved.").[7] The lawyer's primary obligation is to ascertain and follow the client's wishes to the greatest extent possible. This is the case when a client is competent, Rule 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."), and it remains the case when a client has diminished capacity, Rule 1.14(a) ("[T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."). In contrast, it is the duty of the GAL or child advocate "to ensure that the Child's best interests are identified, expressed, and advocated." *Standards*, Part III.I; *see also* 8 U.S.C. § 1232(c)(6)(A) ("A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child.")

A lawyer representing a child who lacks both capacity and close family members will depend on a GAL or child advocate to assess and express the child's best interests, while the lawyer continues to explore the child's wishes insofar as possible. Without the assistance of a GAL or child advocate, the lawyer may lack the guidance she needs to provide effective representation to an incapacitated and parentless child, with the result that the child may be

[7] *Available at* http://lawyersmanual.bna.com/morc/3302/split_display.adp?fedfid=15770679&vname=mopcref31&wsn=500266857&searchid=31579185&doctypeid=1&type=score&mode=doc&split=0&scm=3302&pg=0.

denied his or her statutory right to counsel in removal proceedings. *See* 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362; 8 U.S.C. § 1232(c)(5). A denial of the right to counsel, in turn, defeats any hope of giving the child "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B). The appointment of a guardian or advocate is therefore the lynchpin that allows the child to be appropriately represented and protected in removal proceedings.

In a recent decision, the Ninth Circuit declined to hold as a matter of constitutional due process that all minors are entitled to court-appointed counsel in removal proceedings. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018). The court recognized, however, that "if we had determined that the risk of erroneous deprivation of C.J.'s right to a full and fair hearing absent court-appointed counsel was a virtual certainty—then we might have been compelled to award such relief to C.J." *Id.* at 1145.[8] Here, a child without capacity and without a family member to speak for him or her will certainly be deprived of a fair hearing unless counsel appears on the child's behalf, and the lawyer in many cases will require guidance from a guardian or advocate in order to represent the child effectively.

Thus a lawyer representing a child who lacks capacity and has no family member to speak for him or her should petition the immigration court to appoint a guardian or child advocate to investigate and assess the child's best interests. So long as legal conflicts do not

[8] *See also id.* at 1151 ("The opinion does not hold, or even discuss, whether the Due Process Clause mandates counsel for unaccompanied minors. That is a different question that could lead to a different answer.") (Owens, J., concurring).

arise between the child client and the appointed guardian or advocate, the lawyer may rely on the guardian or advocate to direct the representation of the child. Rule 1.14, Comment 4.

G. Proceeding Without the Assistance of Family Members or a Guardian or Child Advocate

If the court refuses to appoint a GAL or advocate, and none is available, the lawyer is put in a troubling position. Her choices are to seek permission to withdraw from representing the child or to continue the representation in a hybrid lawyer-GAL role. Neither option is satisfactory, although the second is better.

Withdrawal is problematic for a variety of reasons. First, the court may deny an application to withdraw, requiring the attorney to continue her representation of the child. Rule 1.16(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."). Second, Model Rule 1.16 counsels against withdrawal when it would have "a material adverse effect on the interests of the client." Rule 1.16(b)(1). Especially with respect to a client with diminished capacity, the "discharge may be seriously adverse to the client's interests." *Id.*, Comment 6. Indeed, it is difficult to conceive of a scenario in which withdrawal would not prejudice the interests of an incapacitated minor client proceeding without the help of responsible family members.

Alternatively, the attorney may assume the dual roles of lawyer and GAL. The ABA recognizes that in "the most exigent of circumstances" an attorney may act as a guardian for her incompetent client, "where immediate and irreparable harm will result from the slightest delay." ABA Formal Op. 96-404. An incapacitated child in immigration proceedings without representation is certainly at risk of "immediate and irreparable harm." When "the person is

unable to establish a client-lawyer relationship or to make express considered judgments about the matter," Model Rule 1.14 grants attorneys the authority to determine the best interests of the incapacitated client and proceed on that basis. *See* Rule 1.14, comment 9. Moreover, the comments to Model Rule 1.14 make clear that an attorney may "consult with support groups, professional services . . . or other individuals or entities that have the ability to protect the client." Rule 1.14, comment 5.

Faced with the choice between withdrawing from the representation and compromising the client or continuing the representation and advocating for the perceived best interests of a vulnerable client, using any and all protective measures available, the attorney should continue the representation.

Conclusion

ABA Model Rule 1.14 requires an attorney to respect a child's wishes and to allow the child to direct the representation to the extent possible. When the child cannot adequately protect his or her own interests, however, the attorney must seek the assistance of a third party to direct the representation. A parent or other responsible family member is usually in the best position to speak for the best interests of the child, and a lawyer has a duty to take all reasonable steps to locate and consult with such a person. If no parent or other responsible family member can or will speak for the child, the lawyer should petition the immigration court for the appointment of a guardian or child advocate to ascertain and advocate for the child's best interest. Assuming no legal conflict arises between the child client and the parent, guardian, or advocate, the lawyer may then rely on that person to direct the representation of the child. In the

event that the court denies the attorney's petition for appointment of a guardian, the attorney should continue the representation in the difficult, but in these circumstances permissible, hybrid role of lawyer and GAL, using all available protective measures to ascertain and advocate for the best interest of the child.