

MEMORANDUM

FROM: Catherine Weiss, Sarah Scott
TO: The Vera Institute of Justice
DATE: December 13, 2018
SUBJECT: Ethical Concerns When Representing Underage Children in Immigration Proceedings Whose Interests Diverge from Their Parents'

Introduction

When an attorney represents an underage client in immigration proceedings, conflicts may arise between the wishes of the minor and his or her parent/guardian/sponsor.¹ Specifically, the client may direct his or her attorney to proceed in a manner that the attorney knows is in opposition to the wishes of the parent. Conflicts between parents and children can be especially charged in immigration proceedings, which can change the course of the child's life and will determine his or her country of residence. This memo explores when and whether a minor may engage a lawyer and what duties a lawyer has to a minor client.

Issues Presented

When is a minor legally capable of directing his or her representation? If a minor has legal capacity, what is the role of the parent, and how should the attorney handle disagreements between her client and the client's parent? Does the attorney have any ethical obligations with regard to the parent?

¹ This memo will use the term "parent" to refer to anyone responsible for the custody of the child, whether a parent, guardian, sponsor, or other adult caretaker.

Short Answers

Under the Model Rules and associated guidance, there is no magic age at which a minor client achieves the capacity to engage a lawyer and direct his or her own representation.² The factors relevant to assessing capacity make clear that competence is contextual and incremental, and can be intermittent. ABA Model Rule 1.14 governs a lawyer's relationship with a client with diminished capacity, whether resulting from minority, disability, or otherwise. Under this Rule, an attorney is ethically obligated to follow the directions of a minor client who can effectively direct his or her own representation. ABA Model Rule 2.1 calls upon an attorney to provide independent advice should the attorney disagree with the client's wishes, but ultimately, the client directs the representation, and the attorney's loyalty must lie with her client. In interactions with unrepresented members of the client's family, the attorney must comply with Model Rule 4.3 by making clear that she does not represent them and may be obligated to take actions on behalf of her minor client that are adverse to the family's interests or desires.³

Legal Analysis

A. Representing a Client with Diminished Capacity

The Federal Professional Conduct for Practitioners ("FPCP") establishes a code of ethics for immigration attorneys. Pursuant to these regulations, an attorney is required to "abide by a

² The differing laws of the states may render minors of varying ages legally incompetent to retain a lawyer independently. This memo does not cover such state laws. We note, however, that even very young children regularly have separate counsel in child welfare and custody matters where their interests may diverge from those of their parents.

³ The lawyer's role will be different, of course, if she is representing the child and the parent jointly. Such joint representation is beyond the scope of this memo.

client's decisions concerning the objectives of representation" and must "consult with the client as to the means by which they are to be pursued." 8 C.F.R. § 1003.102(p). The federal regulations thus impose on the attorney an affirmative ethical obligation to communicate with and follow the directions of her client. The FPCP does not, however, provide specific guidance with respect to underage or incompetent clients.

Model Rule 1.14 of the American Bar Association ("ABA")⁴ does offer such guidance, clarifying the relationship between a lawyer and a client with diminished capacity:

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.

Model 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 ABA explains further:

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.

Model Rule 1.14, Comment 1.

The obligation to maintain a regular relationship with a child client "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and

⁴ All citations in this memo are to the Model Rules. Because the Rules of Professional Conduct in the states diverge to varying degrees from the Model Rules, lawyers should consult their state rules for more specific guidance.

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 immigrant children: "The Attorney shall ensure that the Child participates in the Immigration Adjudication to the greatest extent possible, taking into account the Child's age, 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 2018) ["Standards"].⁵ Indeed, these *Standards* explicitly impose on the attorney the "obligation . . . to represent the Child's expressed wishes, even if they conflict with those of the parent or other adult and regardless of who engaged the Attorney to represent the Child." *Id.*, Part V.A.1.d.

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.

⁵ Available at https://www.americanbar.org/content/dam/aba/administrative/immigration/standards_for_children_2018.pdf.

B. Determining Capacity

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.

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

1. *Factual understanding of the proceedings* includes the Child's capacity to understand the basic roles, duties, and interests of the participants in the adjudication; his rights in the adjudication; and the consequences of his various choices in responding to questioning, allegations of fact, and charges of removability, as well as seeking legal relief.
2. *Rational understanding of the proceedings* includes an abstract ability to manipulate what the Child factually understands and to understand the implications of various choices.
3. *The ability to consult and assist defense counsel* includes the capacities to both receive and to express communications with counsel about matters relevant to the adjudication; identify witnesses with relevant information; follow and comprehend

testimony; and provide relevant testimony coherently and with independence of judgment.

4. *Decisional capacity* contemplates an ability to act autonomously and direct a self-interested course of action, rather than cede decision-making to the Child's Attorney or others.

Standards, Part X.C.2.⁶

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 client'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 client receives adequate representation.⁷ If, however, the attorney reasonably believes her client to be competent, Model Rule 1.14 requires the attorney to abide by her client's wishes and directions, even if they are opposed by the client's parent.

C. The Ethical Obligation to Provide Independent Advice

While an attorney is ethically required under Rule 1.14 to respect her competent underage client's wishes, there is no restriction against giving unbiased advice should she disagree with her client. In fact, ABA Model Rule 2.1 requires an attorney to offer independent counsel: "In representing a client, a lawyer shall exercise independent professional judgment and render

⁶ 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), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lis_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).

⁷ An attorney who concludes that her client is not competent should refer to the memo entitled "Ethical Obligations in Representing Children Without Capacity in Immigration Proceedings."

candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model Rule 2.1; *see also* Model Rule 1.0(e) (defining "informed consent" as a client's agreement "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"). Comprehensive advice is especially important to a younger client facing removal from the United States, who may not have fully considered all legal alternatives or all factors relevant to the decision.

All clients are "entitled to straightforward legal advice expressing the lawyer's honest assessment" and if the attorney, in her exercise of judgment, believes that her client should consider an alternative course of action, she must present that option to her client for consideration. *See* Model Rule 2.1, comment 1. Moreover, especially with regard to family conflicts, the attorney is authorized under Rule 2.1 to advise her client to seek the opinion of an expert in another field. *See* Rule 2.1, comment 4 (advising that "[w]here consultation with a professional in another field is something a competent lawyer would recommend, the lawyer should make such a recommendation."). Thus, if the attorney believes her client and his parent would benefit from speaking with a therapist or family counselor, she should make that recommendation and allow the client and his parent to work through their issues with skilled professional assistance.

D. Client Confidentiality and Parental Involvement

Of course, even a child client who is generally capable of directing his own representation may want his parent to be present at meetings with his attorney. The comments to Rule 1.14 anticipate this situation: “When necessary to assist in the representation, the presence of [family members] generally does not affect the applicability of the attorney-client evidentiary privilege.” Model Rule 1.14, Comment 3. Even when a parent is present and necessary to the representation, however, “the lawyer must keep the client’s interests foremost and . . . must look to the client, and not family members, to make decisions on the client’s behalf.” *Id.*

While a full discussion of the attorney-client privilege and client confidentiality is beyond the scope of this memorandum, attorneys should remember to keep their meetings with underage clients private, allowing attendance only by those third parties whose presence is “necessary to assist in the representation.” *Id.* Case law in various jurisdictions confirms that the attorney-client privilege is not waived by the presence of a third party who is *necessary* to the representation:

Confidential communications made for the purpose of obtaining legal advice between a client’s representative and the client’s attorney, between representatives of a client, or between attorneys for a client should be protected from disclosure under the attorney-client privilege. Consistent with [FRE] 503, courts have held that the attorney-client privilege protects communications between lawyers and agents of a client where such communications are for the purpose of rendering legal advice.

In re Copper Market Antitrust Litig., 200 F.R.D. 213, 217 (S.D.N.Y. 2001); *see also Oxyne Telecommunications, Inc. v. Onse Telecom*, 2003 WL 660848, *2 (Feb. 27, 1003) (“[*United*

States v. Kovel] recognized that the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client.' Thus, the presence of an interpreter when attorney and client speak different languages does not waive the privilege.") (citing *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)); *Hendrick v. Avis Rent a Car Syst., Inc.*, 944 F. Supp. 187, 189 (W.D.N.Y. 1996) (holding that parents' communications with child's counsel were privileged due to parents' role as agents for severely injured and hospitalized child). Thus, if the inclusion of a third party is necessary to enable the attorney to provide advice (such as an interpreter or a family member who can provide important context or background information), the privilege should be preserved.

As a general matter, attorneys who are bringing individuals into their meetings with an underage client should be mindful of the privilege and confidentiality rules and make sure that no privileged or confidential conversations are occurring with unnecessary third parties present.

E. Dealing with an Unrepresented Person

In many cases, the minor client's parent is not represented by counsel and is herself an immigrant. She may therefore be unfamiliar with the nuances of the attorney-client relationship and may even believe that the representation of her child extends to herself as well. To protect attorneys from entering into unintentional attorney-client relationships, Model Rule 4.3 provides this advice:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Model Rule 4.3. This rule is critical when dealing with unrepresented family members who are participating in a minor client's immigration proceeding. Pursuant to the Rule, each time an attorney meets with or interviews her client's family members, she should (1) make clear that she is not a disinterested person but is actively representing the interests of her underage client, (2) ensure that the family members understand that she does not represent them in any capacity and may in fact take positions on behalf of her client that are adverse to their interests or wishes, and (3) not provide any legal advice to family members, except to recommend that they seek their own counsel, if they have legal interests that are or may be in conflict with the interests of the child client. "In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." Model Rule 4.3, Comment 1.

F. Application to Fact Pattern

Consider the following fact pattern: a 16-year-old boy is in removal proceedings. He has decided to return to his home country and is thus seeking a voluntary departure. He is represented by legal counsel. The child's parent, however, lives in the United States and is opposed to her son's decision because she believes he should remain in the United States with

her. The parent is unrepresented by counsel but has accompanied her son to client meetings and participated in discussions with the attorney.

Under these circumstances, Model Rule 1.14 requires the attorney to follow the directions of the client, assuming that the client is competent to direct his own representation. Absent signs that the sixteen-year-old is incompetent, his attorney is ethically obligated to respect his wishes and help him seek voluntary departure from the United States. Model Rule 2.1 requires the attorney to present legal alternatives and to explain to the client the consequences of his decision, but if the client makes an informed decision to seek voluntary departure, the attorney may not overrule his decision or seek guidance from his parents or guardians. In fact, when dealing with the client's family, the attorney should make it clear that while she may interview or be friendly with them, the attorney's loyalty remains with her client and she does not represent any other individual in the matter. Because the mother believes her son should remain in the United States, her interests are adverse to her son's wishes. Thus, the attorney should not provide any legal advice to the mother, should advise her to seek her own counsel, and should inform the mother that she will take direction only from her client.

Conclusion

The ABA Model Rules require that an attorney representing a competent minor client provide the best possible representation to her client, including following his reasoned directions. The attorney is also obligated to provide independent advice and offer reasonable alternatives to her client's chosen course of action. Ultimately, however, the attorney must follow her client's

wishes (subject to applicable law and ethical considerations beyond the scope of this memo), even if she or others disagree with that decision.

In dealing with the minor client's parent, the attorney must make it clear that she represents only the minor client and that there are limitations with respect to what information the attorney will reveal to the parent. If the parent has legal interests adverse to the minor client's, the lawyer may not give the parent any legal advice other than to seek her own counsel.