IMMIGRATION ETHICS 101

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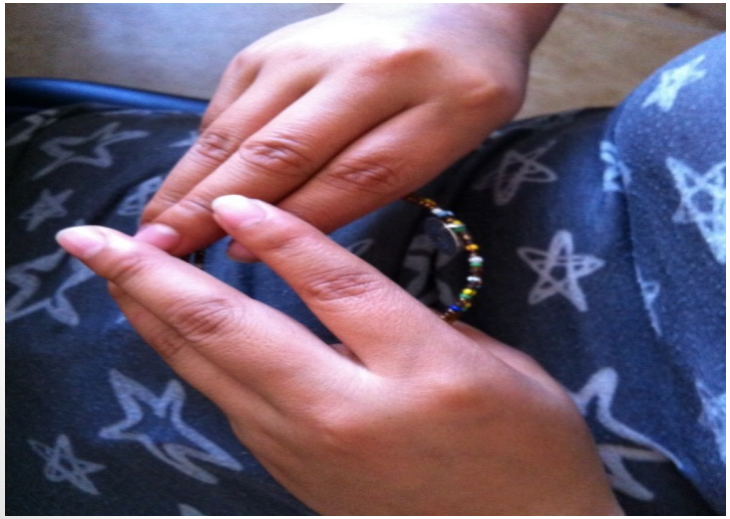
Representing Children in Immigration Proceedings: Child Capacity, Decision-Making and Consent to Representation

M. Aryah Somers

Working with Children



- Age-related considerations in working with children
- Child Consent to Representation
- Diminished Capacity and Forms of Protective Action

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General Considerations on Child Capacities

- A child is *a priori* assumed to have capacity to ensure that children's points of view and autonomy are preserved and we do not ignore his/her point of view or substitute our opinions for theirs
- A child below a certain age is **not** presumed to lack capacity to determine his/her wishes in proceedings
- A child's chronological age is not determinative of developmental capacities, favor a case-by-case approach
- Capacity is focused on the decision-making ability, not on whether we agree with the child's decision
- Context can impact a child's capacities

Poll 1: Child Capacity

Do you think child capacity and mental competency mean the same thing?

- ❑ Yes
- ❑ No

Child Capacity and Mental Competency

- Capacity refers to an individual's ability to make a decision or perform a task in a given context
- "Mental competency" is a legal construct tied to due process in a proceeding

Three Categories of Factors Impacting Child Capacities

- Intellectual and Cognitive Disabilities
  - Permanent conditions that cannot be treated with medications
  - Can be the result of serious physical traumas or surviving birth injuries or serious childhood illnesses
- Mental Health Disorders
  - Diagnosable mental, behavioral, or emotional conditions that substantially interfere with or limit one or more major life activity
  - Diagnosed through the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-IV), although children do not always fit into diagnostic criteria
- Child Development
  - Neurobiological (brain structure and growth), cognitive (understanding and reasoning), and pyschosocial (autonomy, risk-assessment, emotional and behavioral control)

Distinguishing Child Capacities from Other Issues of Concern

- physical disabilities
- language, vocabulary and comprehension
- cultural and educational background
- custodial, placement, and post-release considerations
- trauma and migration related factors

Poll 2: Child Consent

Can a child who is 7 years old consent to and enter into the attorney-client relationship?

- ❑ Yes
- ❑ No

Ethical Standards and Guidelines

- ABA Model Rules of Professional Conduct (6th ed. August 2007). If the ABA Model Rules do not apply in your state, it is necessary to look up the applicable state model rules of professional conduct.
- ABA Standards for the Custody, Placement and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children in the United States (August 2004).
- ABA Standards for the Representation of Children in Abuse and Neglect Proceedings (February 1996) and the ABA Model Act Governing Representation of Children in Abuse and Neglect Proceedings (To be Presented August 2014).

ATTORNEYS SHOULD ALWAYS CONSULT THE ETHICAL RULES OF THE JURISDICTION BY WHICH YOU ARE BOUND AS THE SPECIFIC LANGUAGE AND OBLIGATIONS MAY VARY BY STATE.

Capacity to Consent to Representation and Enter into Attorney-Client Relationship

- As attorney for the child, presume capacity until there are indicia of capacity concerns and conduct information-gathering
- Children can enter an attorney-client relationship, as there is nothing that prohibits them from doing so
- Comment [1] to Model Rule 1.1.4:
  - The normal client-lawyer relationship is based on assumption that the client, when properly advised and assisted, is capable of making decisions about important matters
  - The normal client-lawyer relationship may not be possible in all respects with children. Children, even if viewed as having diminished capacity, may have the ability to understand, deliberate, and reach conclusions, including children as young as five or six years of age, and certainly those of ten and twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.
- Model Rule 1.0(e): Informed consent, agreement to proposed course of conduct after lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct

Capacity to Consent to Representation and Enter into Attorney-Client Relationship

QUESTIONS FOR INITIAL DETERMINATION OF CONSENT

- Do you know which country you are in right now? Do you want to stay in the United States?
- Do you want me to help you try to do that?
- Can I help you in the courtroom or in your asylum case?

ARGUMENTS SUPPORTING CHILD CONSENT TO REPRESENTATION

- Due process right to be heard in proceedings, arguably tantamount to choosing counsel
- Analogous support for consent to representation in state family courts
- Unless applicable state ethical rules require explicit consent to representation, you may still be able to represent a client whose competency issues affect his or her ability to consent to representation
- Governing law in multiple circuits presumes that all detainees want the assistance of counsel, and requires those who wish to proceed without counsel to knowingly and voluntarily waive their right to do so

Poll 3: Child Consent

Can a child under the age of 18 sign a client services agreement?

- ❑ Yes
- ❑ No

Client Services Agreements, etc.

- There is no minimum age regarding a child's ability to comprehend and sign a client services agreement or engagement letter.
  - Attorney must make a determination on a case-by-case basis.
  - Consider that 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.

- If an adult signs on the child's behalf, ensure that the child's adult representative is clear that the child is the client and the engagement is on behalf of the child.
  - Both the adult and child could be clients, but consider Rule 1.7 regarding Conflicts of Interest.

What About Signing Immigration Forms?

- 8 C.F.R. § 103.2(a)(2)

  For immigration applications or petitions
- An applicant or petitioner must sign his or her application.
  - A parent or legal guardian may sign for a child under 14 years old
  - A legal guardian may sign for a mentally incompetent person
    - Person signing is certifying that all evidence submitted with the application is true and correct

Child Client with Diminished Capacity

- Model Rule 1.14(a) of the ABA Model Rules of Professional Conduct (6th ed. August 2007), provides:
  - When a client's capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
  - Attorneys can take **reasonably necessary protective action** when the lawyer reasonably believes that the client has diminished capacity, or is at risk of substantial physical, financial or other harm unless action is taken or cannot adequately act in his or her own interest

You may need to take reasonably necessary protective action on behalf of the child as authorized under applicable ethical standards in your state of practice.

Child Decision-Making and Possible Avenues for Protective Action

- Child decision-making tools
- ABA guidance on working with younger children
- Protective Action:
  - Consulting with Family Members
  - Seeking the Appointment of Child Advocate or *Guardian ad litem*
  - Best Interests Model
  - Seeking a Mental Health or Forensic Assessment
    - Guidance on Specific Capacities to Evaluate in Forensic Psychological Assessments

Consulting with Family Members

- Comment [5] indicates that in taking any protective action, including family member consultation, the lawyer should be guided by factors such as the following:
- 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.
- Consult Model Rule 1.6 Confidentiality of Information

Balance ethical considerations, confidentiality, and due diligence in representation

Seeking the Appointment of Child Advocate or *Guardian ad litem*

- Seek the appointment of a Child Advocate from The Young Center, USCRI, or USCCB
- It may also be possible to seek the appointment of a *guardian ad litem* in the state court, see the CAIR Coalition's Practice Manual for Pro Bono Attorneys Representing Detainees with Mental Disabilities in the Immigration and Detention Removal System

Best Interests Model

- The Model Rules authorize the attorney to take protective action in the client's best interests.
- This opens the pathway for an attorney to present the best interests of the child in the immigration proceedings, as opposed to following a legal interests model

Seeking a Mental Health or Forensic Assessment as Protective Action

- Distinguish between mental health assessments that are focused on identifying cognitive disabilities, mental health problems, or child developmental considerations and forensic psychological assessments that connect these factors to a specific legal competency
- Vera Practice Advisory contains Guidance on Specific Capacities to Evaluate in Forensic Psychological Assessments
  - Child's ability to participate in the hearing including consideration of the child's ability to testify coherently; her ability to control his behavior during the proceedings; and her ability to manage the stress of a hearing.

Poll 4: What are forms of protective action?

Mark all of the answers you think are correct:

a) **I can make decisions for my client when he/she has diminished capacity**
b) **I can consult with my client's parents about my child client**
c) **My client's father's presence in the courtroom can make my child client competent in court**
d) **I can switch from an expressed interests model to a best interests model**
e) **I can seek the appointment of a Child Advocate**

Where is my client?

- Laying the groundwork before losing contact with client:
  - Multiple methods of communication
  - Knowing the child's network
  - Understanding the child's greatest concerns (not related to the legal claim)
  - Building trust (not judgment)
- Looking out for red flags
  - Work versus school
  - Sponsor challenges
  - Peers
  - Important decision-making points
  - Substance abuse and coping mechanisms
- Approaches in court when your client disappears
  - Withdrawal from representation
  - Creating a record during the *in absentia* order

Special Confidentiality Considerations

Mandatory reporting of abuse requirements

(which may differ depending on type of program staff)

Abbie L. Johnson

Rule 1.6 Confidentiality Of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

An Attorney's Duties regarding Confidentiality

- Protect client confidentiality and safety
- Protect privileged information
- Educate third parties (interpreters or others) to protect confidentiality and privilege
- Obtain client's consent/release of information as necessary

Social Worker/Caseworker Duty to Warn, Duty to Protect & Mandatory Reporting

- Courts have established that Social Workers have a legal obligation to warn the potential victim if they believe their client presents an imminent threat to that individual. This is called the "**duty to warn**."
- Social Workers may also have a legal obligation to seek hospitalization for the client, to inform law enforcement of the potential threat, or to take other steps to protect the potential victim from harm. This is called the "**duty to protect**."
- Social Workers have regular contact with vulnerable people such as children, disabled persons and senior citizens and are therefore legally required to report (or cause a report to be made) when abuse is observed or suspected. This is called "**Mandatory Reporting**."

Social Worker and Attorney Collaboration

- Social workers' responsibility to the larger society or specific legal obligations may on limited occasions supersede the duty of confidentiality owed to clients, and clients should be so advised.
  - CONSENT TO DISCLOSURE = Inform clients that there are exceptions to confidentiality when working with a social worker that differ from those of attorneys
  - Consider the age/development/capacity of your child client when assessing his or her ability to consent

- **Laws regarding Mandatory Reporting are state-specific!**

Other Potential Mandatory Reporters

- Physicians, nurses and medical examiners
- Public and private school officials and employees
- Mental health professionals
- Victim's advocates
- Juvenile parole or probation officers
- State department of human services workers

Credibility and Candor Toward the Tribunal

Justin Tullius

Ethics rules in representing children

- All ethical rules when a lawyer represents a client are also applicable when representing minors, including:
  - 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)
  - Handle conflicts of interest properly (Rule 1.7 - Conflicts of Interest)
  - Withdraw from representation when appropriate (Rule 1.16 - Declining or Terminating Representation)
  - Bear duty of candor to the tribunal (Rule 3.3 - Candor Toward the Tribunal).

Candor Towards the Tribunal

- Lawyer has duty of candor to:
  - Not make false statement of law or fact
  - When lawyer has made false statement, correct it
  - When false evidence has been offered, take remedial measures:
    - Persuading client to correct
    - Moving to withdraw with some information
    - Disclosure, as last resort

Candor Toward the Tribunal

"*New immigration lawyers may assume that if they are honest and fair with their clients, they don't have to worry about specific ethical rules. They are wrong*." AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers, 2014.

Sources of duty of candor in immigration representation:

- ABA Model Rule 3.3: **candor to the tribunal**
- EOIR disciplinary rules: 8 CFR §1003.102
  - Board may "impose disciplinary sanctions against any practitioner..."
  - EOIR rules generally narrower in scope than Model Rules.
  - Candor-related grounds for discipline: (c) **false statement, or misleads**; (j) engages in **frivolous behavior (actions lack arguable basis in law or fact**)
- INA 274C(a)(5): unlawful to **prepare falsely-made application**

Rule 3.3 Candor Toward the Tribunal

- Rule 1.0(m): "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

- Practitioners should generally presume that any adjudicator involved in an immigration case is a tribunal.

Rule 3.3 Candor Toward the Tribunal

3.3(a)

Lawyer’s own statements and submissions

Rule 3.3 Candor Toward the Tribunal

3.3 (a): A lawyer shall not **knowingly**:

- (1) **Make a false statement of law or fact to a tribunal** or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction know to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing counsel; or
- (3) **Offer evidence that the lawyer knows to be false**. If a lawyer, the lawyer's client or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take **reasonable remedial measures**, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

8 CFR §1003.102(c): Board may discipline practitioner who:

- **Knowingly or with reckless disregard makes a false statement** of material fact or law, or willfully misleads…any person…including **knowingly or with reckless disregard offering false evidence**.
- If a practitioner has offered false evidence….shall take appropriate remedial measures.

Rule 3.3 Candor Toward the Tribunal

- Comments to Rule 3.3(a): Lawyer must refuse to offer evidence the lawyer knows to be false, regardless of the client's wishes.
  - A lawyer's **reasonable belief that evidence is false does not preclude its presentation** to the trier of fact.
  - Rule permits lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false (may not apply to testimony of criminal defendants).
- INA 274(c)(a)(5): It is unlawful for any person… knowingly:
  - to prepare, file, or assist another in preparing or filing, any application for benefits under this Act, or any document required under this Act, or any document submitted in connection with such application or document, **with knowledge or in reckless disregard of the fact that such application or document was falsely made** or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted.

Rule 3.3 Candor Toward the Tribunal

- When are you in "reckless disregard" of facts that testimony or evidence is false?
  - Not defined under EOIR rules, but Board can infer it from circumstances
  - But, see ABA Standard B(6), Testimony of the Child: In assessing the credibility of a Child's testimony, the Adjudicator shall consider the Child's intellectual, social, and emotional development, and cultural background; the subject matter of the Child's testimony, and the circumstances under which the Child is testifying…
- Lawyer must decide how much investigation to do:
  - Lawyer's own reputation and ability to advocate for future clients suffers if evidence proves false
  - Client may suffer at later stages of immigration (adjustment, naturalization, others) if currently offers false evidence.
  - Best practice: corroborate whenever possible.

Disclosure in immigration cases

Immigrant bears burden to establish:

- Eligibility for benefit sought
- Eligibility for adjustment:
  - No inadmissibility grounds, at INA 212(a) bar client from relief
  - Client merits favorable exercise of discretion

For adjustment, immigrant submits Form I-485 to Immigration Court or USCIS:

- Questions relate to charged and uncharged past conduct
- Some questions do not go to identified grounds of inadmissibility
- Some grounds of inadmissibility are not reflected in questions on the form.

Rule 3.3 Candor Toward the Tribunal

Special consideration of disclosure in immigrant children's past conduct:

For the immigration practitioner, in particular, the line between the line between the obligation to preserve confidences (which may not only be adverse, but may establish a complete bar to achieving legal status) and the obligation of candor to the appropriate immigration agency or court can be difficult one to walk." AILA Ethics Compendium, 2014.

Rule 3.3 Candor Toward the Tribunal

Special considerations in disclosure of immigrant children's past conduct:

- Many UACs fleeing their home countries disclose involvement – often coerced – in acts that raise bars to legal status
- Complete bars with no waiver may apply even in children's cases, depending on type of relief, e.g.:
  - INA 212(a)(6)(C)(ii) - false claim to citizenship
  - INA 212(a)(2)(C) - illicit trafficking in a controlled substance)

Rule 3.3 Candor Toward the Tribunal

Special considerations in disclosure of immigrant children's past conduct:

- If client discloses facts that clearly show ineligible for the relief sought, the advocate must advise the client accordingly and not go forward. See A. Junck, *Practice Advisory: Legal and Ethical Considerations in Disclosure of Delinquent Conduct*, March 2010.
- Advocate's paradox: establishing trust with disclosure may rob of advocate of ability to seek relief

Diligence and Candor

- Comment to Rule 1.3 - Diligence: “A lawyer should… take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”

- When bad facts surface, and disclosure is not required: “…every lawyer must balance the duty of zealous advocacy to their client under the adversarial system and the duty of candor to the court.” A. Junck, Practice Advisory, March 2010.

- Advocates must determine whether facts are:
  - Responsive to the questions posed in an immigration proceeding, and
  - Make the client ineligible for the benefit sought (inadmissible)

Disclosure takeaways

- Advocate zealously - assess facts carefully to determine responsiveness and legal effect
  - Review Angie Junck, *Practice Advisory: Legal and Ethical Considerations in Disclosure of Delinquent Conduct*, March 2010.
  - Many juvenile acts could not be prosecuted as crimes in the U.S., and do not create inadmissibility under INA 212(a) inadmissibility grounds
- Don’t decide alone!
  - Consult colleagues
  - Seek technical assistance
  - Ask state bar ethics hotline

Rule 3.3: Candor to the Tribunal

Rule 3.3(b)

Lawyer's remedial measures
for others' statements or submissions

Rule 3.3 Candor Toward the Tribunal

- 3.3(b): A lawyer who represents a client in an adjudicative proceeding and who **knows** that a person intends to engage, is engaging or has engaged in criminal or **fraudulent conduct related to the proceeding** shall take **reasonable remedial measures, including, if necessary, disclosure to the tribunal**.

- Comments to Rule 3.3: If lawyer elicits false testimony from client, take **remedial measures**:
  - First, consult with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek cooperation to withdraw or correct statement.
  - If that fails, advocate must make limited disclosure to tribunal to remedy the situation - may withdraw if effects is to undo the false evidence.
  - Lawyer may withdraw from case if compliance with duty of candor results in extreme deterioration of the client-lawyer relationship, and can no longer competently represent client.

- 8 CFR 1003.102(c): representative must "take appropriate remedial measures, if the attorney comes to know that she has submitted false material evidence."

Rule 3.3 Candor Toward the Tribunal

When bad facts surface, and disclosure is required:

- Best practice in remonstrating with client to not commit or to cure a fraud: discuss consequences of remedying, including alternative immigration relief still available.
- If disclosure required, identify avenues that may overcome bars:
  - DHS letter providing capacity exception to false claim bar for children (Sept. 2013)
  - Duress, capacity, and policy arguments for non-application of illicit trafficking bar to children in some scenarios.
  - Alternative forms of relief that allow for broader waivers (e.g. U visa)

Rule 3.3 Candor Toward the Tribunal

- 3.3(c): The duties in (a) and (b) continue to the conclusion of the proceeding even if information is protected by Rule 1.6
- Comments on duration of Obligation:
  - The conclusion of the proceeding is a reasonably definite point for the termination of the obligation to rectify false evidence or false statements
  - Proceeding has concluded when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed
- But see some state rules - silent on duration, or limiting it.

Candor and Confidentiality

- **Candor trumps confidentiality** in ABA model rules:
  - ABA Model Rule 3.3(c): The duties in (a) and (b) continue to the conclusion of the proceeding **even if information is protected by Rule 1.6**.
  - But see some state ethics rules where disclosure is not among remedial measures – if your state does not allow disclosure, seek guidance from bar association or ethic professional.
- However, lawyer must disclose:
  - Only enough to undo false evidence
  - In a way that harms client least

Rule 3.3: Candor to the Tribunal

Rule 3.3(d)

Lawyer’s duty to inform in ex parte proceedings

Rule 3.3 Candor Toward the Tribunal

- 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Case example

- You are representing Juan, who is applying for SIJS and tells you he is 15. Both of Juan's parents are deceased. As you are preparing for the dependency hearing in state court and the I-360 filing with USCIS, you receive a birth certificate for Juan showing that he is indeed 15. However, the information on the faxed copy of the birth certificate you have is handwritten, and there are smudge marks on the document that look like they may be erasures.
- Juan lives with his aunt in the U.S. She tells you that she does not know his exact age, and when you call his brother whom he lived with for several years in Guatemala, he tells you that he does not know Juan's exact age, although he believes Juan may be 17 or 18.
- How do you proceed?

Case example

- Gilberto, 17, is applying for SIJS in a join filing of the I-360 and I-485. You obtain a dependency order in state court and have filed an I-360 and I-485 with USCIS. When you prepared the I-485 questions with Gilberto, he answered no to all the questions related to inadmissibility and negative discretionary factors. You have carefully reviewed the ORR file from the shelter from which he was released, and you are not aware of any inadmissibility issues.
- When preparing with Gilberto a week prior to the adjustment interview, you ask him “have you ever sold drugs?” He again says he has not, but also tells you, for the first time, that several years ago while he was living on the street in Honduras, a gang member in his neighborhood threatened him with a gun, telling him that to avoid being killed he had to carry drugs to a nearby location and bring money back. Gilberto did this twice before fleeing to the United States.
- How do you proceed?

Supervising paralegals and interns: attorney responsibility, defining the practice of law, and formation of the attorney-client relationship

Justin Tullius

Sources

Defining roles of attorney and paralegal:

- ABA Model Rules of Professional Conduct
- State Ethics Rules
- ABA Model Guidelines for the Utilization of Paralegal Services (2004)
- 8 CFR §1003.102 (Limits on nonlawyers' activities)

Limiting attorney's (and paralegal's) role where no representation intended:

- 8 C.F.R. §§ 1.1(i) and 1001.1(i) :
  - Definition of "representation" in immigration context
  - For application, helpful to review EOIR Office of Legal Access Programs memorandum: "Legal Orientation Program Guidelines - Orientation vs. Representation," July 11, 2011.

Defining roles of attorney and paralegal

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
  - (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable **managerial authority** in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving **reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer**;
  - (b) a lawyer having **direct supervisory authority** over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is **compatible with the professional obligations of the lawyer**; and
  - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    - (1) the lawyer **orders** or, with the knowledge of the specific conduct, ratifies the conduct involved; or
    - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has **direct supervisory authority** over the person, and **knows of the conduct** at a time when its consequences can be avoided or mitigated but **fails to take reasonable remedial action**.

Lawyer's responsibility for paralegal work - ABA Model Guidelines for the Utilization of Paralegal Services

- **ABA Guideline 1**: a lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.
- **ABA Guideline 6**: a lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.

Delegation of tasks - ABA Model Guidelines for the Utilization of Paralegal Services

- **ABA guideline 2**: provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal **any task normally performed by the lawyer except those tasks proscribed** to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.

- **ABA Guideline 3**: a lawyer may not delegate to a paralegal:
  - (a) responsibility for **establishing an attorney-client relationship**.
  - (b) responsibility **for establishing the amount of a fee** to be charged for a legal service.
  - (c) responsibility for a **legal opinion** rendered to a client.

Attorney-paralegal teams – some best practices

- Learn from your paralegal colleagues
  - They may be great mentors in all aspects of advocacy
  - Because paralegals often focus on high-volume services, they may be become experts in skills like challenging interviewing techniques, or country conditions
- As a legal team, determine roles clearly
  - Paralegals should remind clients that they cannot give legal advice
  - Attorney should establish the attorney-client relationship at the beginning of case, and should remain clear to client that attorney is representing

Attorney-paralegal teams – some best practices

- Partner with your paralegal colleagues
  - Share case information and analysis as fully as possible
  - Seek ways to empower in challenging case work roles
  - Support in new training opportunities
  - Support in seeking BIA Accreditation if organization allows
  - Support paralegals in taking leadership within organization
  - Organizations should develop consistent and transparent case acceptance policies, ideally with buy-in and sense of ownership by all staff members

Attorneys and paralegals:
limiting roles where no representation is intended

Application: two pitfalls to avoid

- Protect your paralegal colleagues from engaging or appearing to engage in the unauthorized practice of law!
- Be careful that you, and they, do not inadvertently form an attorney-client relationship under your state's rules with someone you do not intend to represent.

Who can represent in immigration cases?

8 C.F.R. § 1292.1:

- Attorneys
- Accredited representatives
- "Other qualified representatives:"
  - Law students and law graduates of accredited U.S. law schools not yet admitted to the bar but working under the supervision of an attorney;
  - Reputable individuals of good moral character who have a personal or professional relationship with the represented alien (e.g., relative, neighbor, clergy, co-worker, or friend) and who are appearing without direct or indirect payment; or
  - An accredited official of the government to which the represented alien owes allegiance (e.g., a consular officer).

Where does information end, and representation begin?

"The term representation before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section." 8 C.F.R. §§ 1.1(m) and 1001.1(m)

- 8 C.F.R. §§ 1.1(i) and 1001.1(i) - "The term practice means the act or acts of any person **appearing in any case, either in person or through the preparation or filing** of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service, or any officer of the Service, or the Board."

- 8 C.F.R. §§ 1.1(k) and 1001.1(k) - "The term preparation, constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but **does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms** by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure."

Breaking that down: representation and attorney-client relationship

- **Under <u>federal regulations</u>** at 8 CFR, representation occurs when the representative:
  - (1) studies the facts of the case
  - (2) gives legal advice, and
  - (3) performs other activities, such as the preparation of forms or a brief for the Immigration Court.
- **Under <u>state rules</u>**:
  - Providing even one of these three services, though, may lead to circumstances in which an attorney-client relationship is created
  - Could constitute the unauthorized practice of law if provided by a non-attorney/accredited representative.
- In order to avoid both, clearly **distinguish advice from information:**
  - … The concept of advice is directive ("I suggest you apply for this relief") and not informational ("If you are interested in applying for this type of relief, this is what the Immigration Law requires").

Children perceive differently

- *"Children are find it difficult to distinguish each person's role and to understand how a lawyer is different from a social worker, an immigration officer or another government official*." KIND Manual, *Representing Children in Immigration Matters*.
- In many states, the formation of the attorney-client relationship may occur based on the client's perception.
- For this reason, especially important to avoid giving legal advice to children who are not clients.
- Be clear about purpose of consultation or informational meeting, and limits of your role (unless and until you take the case).

Case example

- You learn that an emergency hearing is scheduled, and you have to cancel your consultation with Michelle, 16, who you know from a brief discussion on the phone has an asylum claim and has been told by the immigration judge in her case that the court will not provide her another continuance. Michelle's next master hearing is tomorrow.
- In your absence, Michelle asks John, the paralegal in your office what form she should fill out, and for help in doing that. John gives Michelle a blank I-589 and reads the questions to Michelle in Spanish, writes down her answers. He then tells her that she should include more detail about the threats she received.
- Have any rules been violated?

Case example

- You are licensed in New York and are practicing immigration law in Texas. You consult with, Luis, 16, a potential client who tells you he fled El Salvador after receiving threats from gang members.
- Luis has prepared an I-589 with a set of documents, which tells you he is about to file, and asks you to review the application and documents to tell him if they look alright.
- During the consultation, Luis also tells you that his father frequently used cocaine in front of him and has not provided for him since age 10. Your organization has successfully obtained predicate orders and I-360 approvals on similar fact patterns.
- What should you do?

Additional Ethical Quandaries

Leonardo

- Leonardo is 15 years old and is from Guatemala. His primary language is Chuj. However, Leonardo lives with his uncle, who speaks both Spanish and English.
- In your initial intake meeting with Leonardo and his uncle, Leonardo is quiet and shy. Leonardo's uncle answers most of the questions you ask in Spanish regarding Leonardo's family and immigration history.
- How should you proceed?

Elena

- You are representing Elena, who is thirteen years old, in her immigration proceedings and have prepared an application for Special Immigrant Juvenile Status on her behalf.
- When you call Elena and her aunt to schedule a meeting to come in to sign the USCIS forms, Elena's aunt says that Elena no longer wants to apply and just wants to go home to be with her mother and siblings in El Salvador.
- How do you proceed?

Ethics Resources

- M. Aryah Somers, PRACTICE ADVISORY: CHILDREN IN IMMIGRATION PROCEEDINGS: CONCEPTS OF CAPACITY AND MENTAL COMPETENCY, Produced for the Vera Institute of Justice's Unaccompanied Children Program, November 2014
- AILA Practice Advisory, ETHICAL ISSUES IN REPRESENTING CHILDREN IN IMMIGRATION PROCEEDINGS, October 2014
- AILA Ethics Compendium: MODERN LEGAL ETHICS FOR IMMIGRATION LAWYERS, 2014.
- ABA STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES, August 2004.