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US IMMIGRATION & NATIONALITY LAW

A WORK IN PROGRESS: MENTAL COMPETENCY ISSUES IN IMMIGRATION PRACTICE

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It is already hard enough for an immigration lawyer to represent a foreign national client in an immigration proceeding, given the language and other cultural barriers, along with the fact that immigration law can be extremely complex and unforgiving. On top of this, an immigration lawyer who represents a foreign national client with mental competency issues faces even greater challenges, including ethical conundrums.

To what extent can a lawyer represent a client who may not even have the capacity to consent or to comprehend the fact that there is a lawyer who can assist him or her? This client may be discovered in immigration custody while in the middle of complex removal proceedings. The lawyer may also encounter a client with mental competency issues who may need to file for immigration benefits such as adjustment of status or naturalization. This issue has gained even more importance in light of the mandatory appointment of counsel for unrepresented respondents in immigration custody who have mental disorders.

While clients with diminished mental capacity also include children, this blog focuses on the challenges that lawyers face in representing clients with mental disorders. The first breakthrough with respect to the development of safeguards came about in *Matter of M-A-M*-, 25 I&N Dec. 474 (BIA 2011), where the Board of Immigration Appeals held that for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by the law. The decisive factors are whether the respondent understands the nature and object of the proceedings, can consult with the attorney or

representative, and has a reasonable opportunity to examine adverse evidence, present favorable evidence and cross examine government witnesses. Further guidance relating to *Matter of M-A-M-* can be found in the excellent practice advisory of the Litigation Action Center.

Subsequently, in *Franco-Gonzales v. Holder*, No. 10-02211 (C.D. Cal Apr. 23, 2013), a class action law suit, the court ordered that non-citizen detainees with severe mental disabilities in Arizona, California and Washington be provided qualified legal representatives at government expense in removal and bond proceedings. The court also ordered bond redetermination hearings for those detained more than 180 days. The EOIR on December 13, 2013 issued guidelinesto provide enhanced procedural protection to unrepresented detained respondents with mental disorders. These guidelines are more robust than the principles set forth in *Matter of M-AM-*, and require an assessment of eight competencies in order to determine whether the respondent is competent to represent him- or herself:

A rational and factual understanding of:

- The nature and object of the proceeding;
- The privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
- The right to present, examine, and object to evidence;
- The right to cross-examine witnesses; and
- The right to appeal

A reasonable ability to:

- Make decisions about asserting and waiving rights;
- Respond to the allegations and charges in the proceedings; and
- Present information and respond to questions relevant to eligibility for relief.

If a detained respondent is unable to perform any one of the above functions, then he or she is unable to represent him-or herself. An Immigration Judge is required to detect facts suggesting incompetency, conduct a judicial inquiry, and follow up with a competency review. If the Immigration Judge determines that a respondent is not competent to represent him-or herself, the EOIR may provide a qualified representative who is found to be incompetent to represent him-or herself. While this elaborate process to determine whether a

respondent is competent or not is a good first step, one wonders why this process is conducted on behalf of a respondent without the presence of a lawyer. This writer believes that the respondent should have a legal representative earlier in the process, when his or her competency is being evaluated.

Even when a lawyer is appointed by the court to represent a respondent who is not found to be competent, there is a potential for conflict of interest as the appointment will generally only last while the client is detained. If the client is bonded out, the lawyer will no longer be paid by EOIR after the client is released. This creates an ethical dilemma. If the client desperately needs the assistance of a lawyer who is paid by the government, he or she can only be represented by counsel at government expense while in immigration custody. Would it be in the client's best interest to be released but not to have appointment counsel, or rather to have appointed counsel while in custody? This might be easier to resolve if the client could make decisions and provide informed consent, but clients with severe mental disabilities might be unable to make informed decisons.

On the other hand, there are no safeguards relating to non-citizens applying for immigration benefits outside a custodial setting. Practitioners representing clients with mental disorders should advocate for the application of the safeguards enunciated in *Matter of M-A-M* even outside a removal hearing, which include:

– Legal representation

– Identification of close friends or family members who can assist

– Docketing/managing case to give time for legal representation or medical treatment

– Participation of a guardian in the proceedings

– Continuance or administrative closure

– Closing hearing to the public

– Waiving respondent's appearance

– Assistance with development of record

– Reserving appeal rights

Lawyers must also consult ABA Model Rule 1.14, and its analog in a state bar ethics rule, which relates to representing a client with diminished mental capacity. Rule 1.14 instructs a lawyer to maintain a normal lawyer-client relationship as far as possible. Thus, to the extent that an impaired client is capable of making competent decisions, the lawyer must follow them. A lawyer may seek help from a family member or others in communicating with a client with a mental disorder, while at the same time taking into consideration whether the presence of others would affect the attorney-client privilege.

This writer has represented clients for benefits applications, and has found it extremely useful to communicate with the client through trusted family members. A client with a mental disorder may have moments of lucidity, and it is important for the lawyer to ascertain how best to work with such a client through a professional diagnostician. At the benefits interview, counsel must insist that the USCIS generously provide accommodations for a client, including having the presence of a family member during the interview and to only ask the most basic questions, while relying on documentary evidence to determine eligibility for the immigration benefit. Note that 8 CFR 103.2(a)(2) allows a legal guardian to sign a form for a person with mental disabilities.

With respect to applying for naturalization, the law has developed favorably towards persons with disabilities. Applicants who are physically or developmentally disabled, or have mental impairment are exempt from the English as well as civics/history test. Applicants may also seek a waiver of the oath requirement if they are unable to comprehend it. Designated representatives can complete the Form N-400, such as a guardian, surrogate, US citizen spouse, parent, son, daughter or sibling. It is potentially possible for a comatose applicant on a respirator to be able to apply for and obtain US citizenship, and sponsor a qualifying spouse through an I-130 petition, who in turn files his or her own adjustment application for lawful permanent residence.

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

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

To the extent that a client with mental disorders can provide informed consent, the lawyer's role is made that much easier. The challenge lies with a client who is unable to consent at all. Under these circumstances, should the lawyer still play an activist role and represent the client? Is counsel then always required to seek the appointment of a guardian? Or are there less restrictive alternatives such as seeking the assistance of family members in determining the client's best interests. If counsel has been appointed by an immigration judge, how relevant is the client's incapacity to consent if the lawyer believes it is still in the client's best interests to have a legal representative? 8 CFR 1292.1(a)(1) &(a)(4) state, without reference to consent, that attorneys are entitled to appear in removal hearings. An attorney can play a crucial role on behalf of a client who is unable to consent. Indeed, if the goal is for the respondent to remain in the United States (but that may only be assumed if the client is unable to comprehend the nature of the immigration proceeding), the very fact that a respondent may have a mental disorder may prompt an immigration judge to consider granting asylum if the respondent will be removed to a country that is unable or unwilling to protect its citizens with mental disorders. An immigration judge may also grant cancellation of removal pursuant to INA section 240A(b) if the documentation is able to demonstrate eligibility, such as 10 years of physical presence, good moral character and the qualifying relatives, who may be US citizens or permanent residents, are able to demonstrate exceptional and extremely unusual hardship. There may be times, especially with clients who cannot seek relief, to advocate for administrative closure of the case or

even termination. Again, when the client is unable to consent, would administrative closure or termination be in the client's best interest over being removed from the United States and being with close family members abroad?

There is much work that needs to be done to develop standards and provide clearer guidance. In the meantime, the lawyer must grapple with emerging standards from the courts and EOIR, as well as interpret Rule 1.14 within the immigration context, although not all states have adopted this rule. While representing non-citizen clients with mental competency issues can pose additional challenges, obtaining a successful outcome for the client under difficult circumstances can be extremely rewarding to the immigration lawyer.

"The test of our progress is not whether we add to the abundance of those who have much. It is whether we provide enough to those who have little."

Franklin D. Roosevelt