CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE ETHICAL OBLIGATIONS OF A LAWYER WHO REPRESENTS A THREE YEAR OLD CHILD

Posted on March 13, 2016 by Cyrus Mehta

There has been a justifiable sense of shock and outrage after a senior immigration judge testified in a legal proceeding that three and four year olds could represent themselves in complex removal proceedings. This is precisely what Immigration Judge Weil said in a deposition on behalf of the Department of Justice:

> *I've taught immigration law literally to three year olds and four year olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done.*

The Immigration Judge repeated this same assertion two more times during the deposition. These ludicrous assertions have now gone viral, and there has been much eloquent protest, although immigration attorney Amber Weeks' takes the cake when she tried to test these assumptions on her own three year old child, and this is what she found:

> *I happen to have a three year old daughter, so I interviewed her to test the theory of whether she could answer even the most basic questions to represent herself in immigration court. Where were you born? Where were your parents born? Where do you live? Where would you like to live? Not legal questions, but just basic questions that a kind and thoughtful judge would want to know before deporting a child (See first video below.) Although hilarious, her candid answers are heart-wrenching when I consider where unrepresented children in immigration court will end up.*

Not much has been written in the aftermath of this incident about a how a

lawyer ought to handle this situation, especially if he or she had a three year old as client. Unfortunately, at the outset, most unaccompanied children are not provided legal representation, and even if they are older than three year old, ought to be provided with a lawyer as they are many times more vulnerable than an adult. The Board of Immigration Appeals in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), has already held that for a respondent 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. When a respondent in removal proceedings is incapable of participating, the court must provide adequate safeguards, including ensuring legal representation. It is readily obvious that a minor may not be able to participate in a proceeding; but unfortunately the *Matter of M-A-M-* safeguards are not being applied to minors who need them the most, especially a three year old!

Assuming the three year old has the privilege of having a lawyer, what are the lawyer's ethical obligations when representing such a client? The lawyer is guided by ABA Model Rule 1.14, as adopted in state bar ethical rules of professional conduct:

> **Rule 1.14 Client With Diminished Capacity**
>
> (a) 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.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably 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.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.14, at the outset, instructs a lawyer to maintain a normal lawyer-client relationship as far as possible. Thus, to the extent that a client with diminished capacity is capable of making competent decisions, including a child, the lawyer must follow them. Comment 1 to Rule 1.14 states, "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." A lawyer may seek help from a family member or others in communicating with a client with diminished capacity; and according to Comment 2 to Rule 1.14, the presence of such persons does not affect the applicability of the attorney-client privilege. When a lawyer represents a child, all the other ethical obligations that a lawyer owes to a client trigger, such as the duty to provide competent representation (Rule 1.1), be diligent (Rule 1.3), avoid conflicts of interest (Rule 1.7) and to adequately communicate with the client (Rule 1.4). In fact, there is a heightened duty to communicate with a child client in a way that the child will be able to properly understand the removal proceeding and make informed decisions.

Still, just because a child is older does not absolve the lawyer to ensure that the child is not at risk of harm. Even a twelve year old child, especially one who has suffered trauma or abuse, is extremely vulnerable and is at risk of being harmed by not being capable of making appropriate decisions in a removal hearing. Of course, compared to a twelve year old, a three year old will be far more vulnerable. Under the next prong, 1.14(b), a lawyer is allowed to take reasonable protective action on behalf of the client when the lawyer reasonably believes that the client is at risk of harm and cannot adequately act in his or her own interest. This is doubtlessly going to apply to any minor, but more so with a three year old. The lawyer may consult with parents, other family members or individuals and entities that have the ability to protect the child, and if necessary, even seek the appointment of a guardian ad litem or guardian.

A three year old is likely to be eligible for Special Immigrant Juvenile (SIJ) relief,

assuming a court can make a finding of neglect or abandonment based on unification with one or both parents not being viable, or if the child has been placed in the custody of a state agency or individual or entity. Assuming the child is not eligible for SIJ, and there is no other relief against removal, the attorney representing the child must make every effort to invoke the protections under *Matter of M-A-M,* and argue that such a child is unable to comprehend the nature of the proceeding and either seek termination or administrative closure of the removal proceeding. Still, the attorney, as part of taking protective action, can seek asylum on behalf of the child, assuming that there is objective evidence that the child will fear harm or the child has already suffered past persecution based on one of the protected grounds for asylum. Even if a child will not be able to testify credibly, the BIA in *Matter of J-R-R-A*, 26 I&N Dec. 609 (2015) allowed a client with diminished capacity to nevertheless testify regarding his or her subjective fear, while there was credible objective testimony. This can get further complicated when the child's parent or guardian wishes to take the child back to the home country, and the lawyer knows that the child will be harmed in that country. When a child is twelve, it is easier for the lawyer to maintain a normal lawyer-client relationship, and abide by that child's informed decision. It becomes much harder when the child is only three years old. Under these circumstances, the lawyer must take protective action by seeking the intervention of child protection agencies and the like. Comment 9 to Rule 1.14 clarifies: "In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer." Of course, all this begs the question as to why a non-citizen child should be put into adversarial removal proceedings in the first place where a hostile government lawyer can sharply cross examine a child, and there are no readily available provisions for the appointment of counsel, a guardian ad litem or child advocate.

Although the current governmental policy of not providing a child with legal representation in an imperfect immigration court setting constitutes a horrific gap in due process, the presence of a lawyer while an improvement does not necessarily solve the child's conundrum who is in removal proceedings. Rule

1.14 does not provide an attorney with all the answers, and is far from perfect. The attorney must use the tools provided under Rule 1.14, along with all the other ethical rules, AILA's Ethics Compendium Module on Rule 1.14 as well as a good dose of judgment and common sense, to find the optimum way to competently represent and protect the vulnerable child.