Ethical Considerations in Representing Children

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ABA Model Rule of Professional Conduct R. 8.5

Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

The Texas Disciplinary Rule of Professional Conduct on this point is at 8.05 and is substantially similar.

Additionally, conduct is regulated by the Federal Rules of Practitioner Conduct when practicing in front of USCIS or EOIR. 8 CFR §§ 292.3 and 1003.102. See also, Immigration Court Practice Manual, Chapter 10.4 (February 4, 2016).
COMMUNICATE WITH YOUR CHILD CLIENT

ABA Model Rule of Professional Conduct Rule 1.4 Communications:

(a) A lawyer shall: ... 

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Texas Disciplinary Rule of Professional Conduct Rule 1.03 on Communication:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- Verbatim from model rule part (b)
“The Attorney shall provide the Child with legal advice and zealously advocate the Child’s legal interests, as directed by the best wishes of the client.”

- Standards for the... Legal Representation... of Unaccompanied Alien Children in the U.S. (ABA 2004), V(A)(1)(b) at pg.13.

“[T]he Attorney must advocate for the Child’s expressed wishes, or for his legal interests where the child expresses no wish....” Id. Comments at pg.14.

“The child’s attorney should represent the child’s expressed preferences and follow the child’s direction throughout the course of the litigation.”

- ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, I(B-4), 1996.

**Relevant Rules:** ABA Model Rule of Prof’l Conduct R. 1.2, Texas R. 1.02.


ABA Model Rule of Prof'l Conduct R. 1.14

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.

TX Disciplinary Rules of Prof'l Conduct R. 1.03 comment #5

“Client under a disability”

[A] lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client... is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children's opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect.
"There is no minimum age regarding a child’s ability to comprehend and sign an engagement letter. The lawyer must make a determination on a case-by-case basis."

AILA Practice Advisory: Ethical Issues in Representing Children

- INA §101(b)(1): “child” is an “unmarried person under 21 years of age.”
- 8 C.F.R. §1236.3: a “juvenile” is defined as “an alien under the age of 18.”
- 8 C.F.R. §1236.2 uses “minor” when describing aliens under 14.
BEST PRACTICES FOR DOCUMENT SIGNING

Contracts/Retainers/Agreements

<18 SIJS (where you’ll be seeking predicate order with custody or conservator): Have both the child and the sponsor or potential conservator sign a “dual rep agreement.”

<18 for all other forms of relief: Have the child sign if capable, otherwise sponsor/parent.

>18: The client.

USCIS

<14 Child OR Parent/Legal Guardian may sign

EOIR

Check the NTA if it was issued when child <14
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ABA Model Rule of Prof'l Conduct R. 1.6(a) 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 [under certain circumstances...]

Texas Disciplinary Rules of Prof'l Conduct R. 1.05
(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege.... Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by [several exceptions], a lawyer shall not knowingly:
(1) Reveal confidential information of a client or a former client to:
   (i) a person that the client has instructed is not to receive the information; or
   (ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.
ABA Model Rule regarding nonlawyer staff - Rule 5.3:

- (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...*

*Texas has adopted this rule almost verbatim. TX Disciplinary Rules of Professional Conduct, Rule 5.03
A Word on Interpreters and Translators

2004 ABA Standards at V((A)(1)(g): “The Attorney shall ensure that any interpreter or translator used in communications with the Child understands [their] confidentiality obligation.”

Avoid Client’s Family and Friends
“...[A]ttorneys are cautioned that using relatives or friends of clients as interpreters carries substantial risks. Such interpreters may have a personal interest in the outcome of the representation and, therefore, their interpretation may be biased. Often, cultural and social factors, or family dynamics can interfere with the accuracy of such interpreters' translation.” New Hampshire Bar opinion 2009-10/2
Think about the way you handle client files:
A) Organization of your desk is a client confidentiality issue; B) Take measures to lock up physical files; C) Think about the way your files are organized, i.e. which documents are located where in the file.

A) computers should be locked to a desk; B) computers should be protected by security software; and, C) emails with client information should be encrypted.
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Mandatory Reporting

Texas Family Code Sec. 261.101:
“PERSONS REQUIRED TO REPORT; TIME TO REPORT.
(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter” (emphasis added).

Many states have mandatory reporting laws whereby an attorney’s duty to report supersedes attorney-client privilege. In Texas, the law specifically states: “The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney...”. Tex. Fam. Code §261.101(c)
Anyone having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect MUST report the case immediately to a state or local law enforcement agency or the Texas Department of Family and Protective Services (DFPS).

- [https://www.texasattorneygeneral.gov/victims/childabuse.shtml](https://www.texasattorneygeneral.gov/victims/childabuse.shtml)

> **DFPS has a toll-free, 24-hour Family Violence Hotline:**
> 1-800-252-5400

> **Online reporting:** [https://www.txabusehotline.org](https://www.txabusehotline.org)
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“My fees are quite high, and yet you say you have little money. I think I’m seeing a conflict of interest here.”
Conflicts Defined

- Traditional program wide pre-acceptance conflicts check against other clients.

- Client-Lawyer Relationship
  ABA Model Rule of Prof'l Conduct R. 1.7 Conflict Of Interest: Current Clients
  (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or
  (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- Client-Lawyer Relationship
  ABA Model Rule of Prof'l Conduct R. 1.9 Duties To Former Clients
  (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
Rule 1.06(b) Conflict of Interest: General Rule in pertinent part:

[A] lawyer shall not represent a person if the representation of that person:
(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Rule 1.09 Conflict of Interest: Former Client
(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
(1) in which such other person questions the validity of the lawyer's services or work product for the former client; (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or (3) if it is the same or a substantially related matter.
WHEN DO CONFLICTS ARISE?

Common Scenarios

• Child no longer wants potential conservator to have rights over him/her
• Proposed conservator no longer wants to be responsible for child
• Proposed conservator abuses, or fails to report abuse by another, of child
• Conservator confides that father on the birth certificate is not actually father, but it’s a secret

Analyze your facts under TX Rules 1.09 (Conflict of Interest: Former Client) and Rule 1.05 (Confidentiality).

In withdrawing, look to Rule 1.15 (Declining or Terminating Representation).
REVIEW

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TEXAS ETHICS HOTLINE:
• (800) 532-3947

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