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# Ethics Issues Inherent in Special Immigrant Juvenile State Court Proceedings - Practical Proposals for Intractable Problems

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# ARTICLES

## ETHICS ISSUES INHERENT IN SPECIAL IMMIGRANT JUVENILE STATE COURT PROCEEDINGS – PRACTICAL PROPOSALS FOR INTRACTABLE PROBLEMS

ALEXIS ANDERSON\*

*Immigration advocates have long noted how ethical challenges pervade certain areas of their practice, particularly in the employment and spousal contexts. A significant body of literature exists that attempts to identify clear, professional norms for grappling successfully with thorny ethical questions inherent in those areas. This article expands that scholarship by studying the ethics issues that arise for counsel representing youth seeking Special Immigrant Juvenile (“SIJ”) status in state court. Using SIJ case studies to explore questions of confidentiality, conflicts, and candor, this article uncovers key factors that complicate practitioners’ ability to comply with existing ethical mandates. One defining feature of SIJ relief is the requirement that separate proceedings be brought in state court as the first step in establishing youth’s eligibility for relief. Other distinguishing factors include the effects of abandonment, abuse, and neglect on the SIJ youth. In addition, the decision-making capacity of SIJ minors is subject to scrutiny under the relevant ethics rules due to their age. These factors combine with a systemic lack of resources to pressure SIJ advocates into unworkable attorney-client relationships rife with conflicts of interests. This project confirms that SIJ*

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\* Associate Clinical Professor, Boston College Law School. The author wishes to thank her clinical colleagues who are at the forefront of immigration practice for their valued assistance, including contributions by Professors Mary Holper, Sarah Sherman Stokes, and Beth Zilberman. Other clinical colleagues who work at the intersection of juvenile rights and immigration relief also provided critical insights, including Professors Francine Sherman and Rebecca Vose. This article has been greatly improved due to the thoughtful feedback received from colleagues on earlier drafts, including Professors Mary Holper and Paul Tremblay. Furthermore, thanks go to Nicolas Gunton and Robert Park for their invaluable research assistance. The author is very appreciative of the support for this project provided by the Boston College Law School Fund. © 2018, Alexis Anderson.

*practitioners receive inadequate guidance from existing rules of professional conduct and proposes practical reforms of the state court SIJ process, as well as new trainings on implementation of core ethics rules in the SIJ representation. The article concludes with an invitation for further study of these proposals as a critical step in offering long-overdue relief to SIJ counsel.*

“So I do make decisions somewhat on a case-by-case basis, and probably should have some more clear rules in place. It is sometimes difficult, because a lot of the rules are muddy.”<sup>1</sup>

-Attorney speaking about the ethical dimensions of immigration practice

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INTRODUCTION

Since 1990, undocumented minors present in the United States have had a special path to lawful permanent residence: Special Immigrant Juvenile status (hereinafter “SIJ”).<sup>2</sup> Immigration advocates<sup>3</sup> have increasingly and successfully used the SIJ process as an important tool for youth seeking legal status.<sup>4</sup> A rich body of academic literature and practitioner manuals provides guidance to attorneys on the substantive immigration law relevant in SIJ proceedings at the state and federal levels.<sup>5</sup>

2. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2014). In 2008, Congress amended the SIJ provisions by passage of the Trafficking Victims Protection and Reauthorization Act (hereinafter “TVPRA”) of 2008, Pub. L. No. 110-457, 122 Stat. 5044. *See also* 8 C.F.R. § 204.11 (enabling resolutions). For a detailed review of the legislative history of SIJ law, see Laila Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. U. HUM. RTS. L. REV. 266 app. A (2014).

3. Under existing federal immigration law, lay advocates can represent petitioners before the United States Citizen and Immigration Services [hereinafter USCIS]. 8 C.F.R. §292.1(a)(4) (2009). However, the article focuses on the professional duties owed by lawyers, since the latter group is subject to sanction for violation of the relevant state ethical rules applicable to state court proceedings. Therefore, the balance of the paper will address the ethical duties owed by licensed lawyers pursuing SIJ cases in those state court actions.

4. *See* USCIS, *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status 2010-2016* (June 30, 2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360\\_sij\\_performancedata\\_fy2016\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2016_qtr3.pdf). While USCIS received only 1646 SIJ petitions in 2010, it was on track to receive over 15,000 in 2016. The records also confirm that USCIS has granted the vast majority of the SIJ petitions. Despite these statistics, it is undoubtedly true that all too many minors may be unaware of their rights to SIJ relief and therefore lose the opportunity to pursue this important tool. *See* Hlass, *supra* note 2, at 5.

5. *See generally* Representing Unaccompanied Children: Training Manual for KIND *Pro Bono* Attorneys, Chapter 4: Special Immigrant Juvenile Status, Kids in Need of Defense (2015) [hereinafter KIND Manual], <https://supportkind.org/resources/representing-unaccompanied-children-training-manual-for-kind-pro-bono-attorneys/>. Angie Junck, et al. Special Immigrant Juvenile Status, Immigrant Legal Resource Center

This article seeks to offer immigration attorneys assistance of a different sort. Instead of focusing on the substantive provisions of SIJ relief, this project addresses the ethical challenges implicit in SIJ representation in the initial state court proceedings.<sup>6</sup> It analyzes some of the most complex SIJ ethics questions as they arise in practice, acknowledges the significant practical problems in resolving those professional tensions, and proposes systemic changes consistent with existing legal and resource parameters.

Lawyers interested in offering their assistance in SIJ cases face challenges due to the current lack of clarity over their ethical responsibilities. SIJ cases frequently place attorneys in situations ripe for joint representation conflicts, pit traumatized youth against their adult custodians, and challenge counsel to fulfill their duties to the courts. Much has been written about professional challenges inherent in other areas of immigration practice. However, this article is the first to offer an in-depth study of the ethics issues that commonly arise in the requisite state court SIJ proceeding.

After initially cataloguing the various sources of professional norms with which immigration lawyers must comply in Part I, the article proceeds to review certain key ethical issues that arise in practice. Thus, Part II will analyze questions related to the professional duties of confidentiality, conflicts and candor using real world examples. Then, Part III offers proposals for dealing with these ethics challenges, recognizing the resource and legal constraints in which SIJ lawyers must operate.

## I. THE ETHICAL AND SUBSTANTIVE CONTEXT OF SIJ PRACTICE

This section begins by reviewing the legal landscape in which immigration attorneys handling SIJ cases practice. First, we offer a brief overview of the SIJ path to legal status and the primary sources that regulate professional conduct in these immigration proceedings. Then the discussion will proceed to

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(3d ed. 2010), <https://www.ilrc.org/special-immigrant-juvenile-status-sijs>; Special Immigrant Juvenile Status, Political Asylum/ Immigration Representation Project (2014), [http://pairproject.org/wp-content/uploads/2016/04/Manual\\_SIJS\\_Oct2014.pdf](http://pairproject.org/wp-content/uploads/2016/04/Manual_SIJS_Oct2014.pdf); Practice Manual for *Pro Bono* Attorneys – Representing Unaccompanied Immigrant Children, Capital Area Immigrant Rights Coalition (2014), <https://www.caircoalition.org/sites/caircoalition2016/files/PracticeManualforRepresentingUnaccompaniedImmigrantChildrenJan312014.pdf>; Basic Procedural Manual for Representing Children and Youth Seeking Special Immigrant Juvenile Status, National Immigrant Justice Center (2014), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/SIJS%20Manual%2012%202014%20Final.pdf>.

6. Much work has already been done to identify ethics issues in immigration practice generally. A prime example is the significant work of the American Immigration Lawyers' Association (hereinafter "AILA"), that has published the AILA Ethics Compendium, Sherry Cohen (Reporter) (2013) [hereinafter AILA Compendium] and *Ethical Issues in Representing Children in Immigration Proceedings* (2015) (AILA Doc. No. 14102240) [hereinafter AILA Advisory], <http://www.aila.org/practice/ethics/ethics-resources/2012-2015/ethical-issues-representing-children>. See also *Annotated Bibliography: Working with Children-Ethical Issues and Standards of Practice*, VERA INST. JUST. Unaccompanied Children Program (Jan. 2015). The efforts of many committed immigration advocates who have written extensively on immigration lawyers' professional duties should be applauded; this project's focus on the ethical issues inherent in SIJ practice is not intended to denigrate those contributions, but rather to build on that rich literature, in an effort to assist counsel representing youth pursuing SIJ relief.

identify the distinctive aspects of SIJ practice that further challenge immigration attorneys as they attempt to navigate the ethical rules.

#### A. *SIJ Primer*

Many observers of immigration practice in the United States may be unfamiliar with the SIJ path to legal status, given its relatively recent origin and limited application to only undocumented youth. In a nutshell, minors seeking a path to legal status must obtain favorable rulings in two distinct proceedings to establish entitlement to Special Immigrant Juvenile status. Whether minors are pursuing SIJ relief as a defense to being removed or as an offensive tactic to obtain an adjustment of status without any imminent threat of being deported, the first step is to request that a state court determine the minors' best interests in light of allegations of parental abuse, neglect or abandonment.

The appropriate state court having jurisdiction over the care and custody of juveniles (often the state's family or juvenile court) must issue special findings documenting that:

1. the child is a dependent of that state court or has been placed in the custody of a third party (including a custodial parent, relative, adult, state agency or entity);
2. reunification with one or both parents is not viable due to abandonment, abuse, neglect or similar issue; and
3. the best interests of the minor are not to be returned to her country of origin.<sup>7</sup>

Following a successful state court proceeding, the minor can then pursue the second step by requesting that the Department of Homeland Security ("DHS") issue an SIJ visa<sup>8</sup> that, if granted, allows the youth to apply directly for legal permanent residence. Thus, the SIJ process can be a very powerful tool for immigration counsel to consider, assuming any ethical pitfalls lurking in the SIJ process can be addressed.

#### B. *Existing State Ethical Parameters*

Like all lawyers who are bound by the ethical rules of the jurisdiction where they are licensed, immigration attorneys involved in SIJ state court proceedings are governed by their state's version of the Model Rules of

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7. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11. For additional information on SIJ eligibility, see United States Citizenship and Immigration Services, *Eligibility for SIJ Status*, <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij>. For a thorough review of the Congressional amendments to the SIJ statute, see Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 44-58 (2016).

8. 8 U.S.C. § 1101(a)(27)(J).

Professional Conduct.<sup>9</sup> Any constituent of the legal justice system can seek compliance, most notably through clients' malpractice actions and bar grievance reports, judges' imposition of sanctions, and fellow lawyers' moral suasion and bar reports.<sup>10</sup> Therefore, the Model Rules, their official Comments, and relevant ethics opinions construing those provisions will be the starting point for this project.<sup>11</sup>

### C. *The SIJ Context*

As many seasoned immigration counsel have noted, immigration law is replete with ethics questions.<sup>12</sup> Most commentators cite certain aspects of their practice that trigger professional dilemmas, including the frequency of multi-party representation and the potentially non-contentious nature of many types of immigration proceedings.<sup>13</sup> These factors alone have resulted

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9. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016). This article references the Model Rules ("MRPC") throughout given that they have been adopted in some form by nearly every jurisdiction, with California being the major exception.

10. *See generally* American Bar Association 1992, Lawyer Regulation for a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement, [http://www.abanet.org/cpr/reports/mckay\\_report.html](http://www.abanet.org/cpr/reports/mckay_report.html).

11. Immigration counsel appearing before federal courts and agencies must also comply with federal law, including the Federal Rules of Practitioner Conduct ("Federal Rules") as promulgated by the Executive Office of Immigration Review ("EOIR"). 8 C.F.R. § 1003.101 *et. seq.* Those provisions proscribe some twenty-one acts that could result in professional sanction by the Board of Immigration Appeals or a federal adjudicator, including for lack of competence, frivolous behavior, and criminal conduct. 8 C.F.R. § 1003.102 (2016); 8 C.F.R. § 292.3 (a) (1) (2011). While a critical source of ethical norms, the federal provisions are inapplicable in the initial state court proceedings that commence SIJ relief. Therefore, this project will focus on the duties owed by SIJ counsel under the state versions of the Model Rules of Professional Conduct. *See also* 8 C.F.R. § 292.3 *et seq.*, the regulations enacted by the Department of Homeland Security, U.S. Citizenship and Immigration Services [hereinafter USCIS], that incorporate generally the EOIR provisions.

For an overview of the positive law regulating immigration attorneys, *see generally* Hamel Vyas, *Ethical Issues for Immigration Lawyers*, ETHICS IN A BRAVE NEW WORLD 4 (2004). This article focuses on the ethical challenges faced by private (including appointed) counsel rather than attorneys representing the federal agencies. However, government lawyers are also subject to the EOIR regulations. 8 C.F.R. § 1003.109 (2016).

Immigration lawyers are by no means the only advocates who face agency ethical oversight. Examples of other agencies imposing ethical mandates on attorneys practicing before them include: The Social Security Administration and the Securities and Exchange Commission. *See* 20 C.F.R. §§ 404.1740, 416.1540 (2015); 17 C.F.R. § 201.102 (2006). *See generally* Sims v. Apfel, 530 U.S. 103, 111 (2000) ("The Commissioner has no representative before the ALJ to oppose the claim for benefits, and we have found no indication that he opposes claimants before the Council."); *see also* Robert Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with the Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 383, 395 (2007).

12. AILA Compendium, *supra* note 6, at iv (noting challenge of practicing immigration law ethically).

13. Austin Fragomen, Jr. & Nadia Yakoop, *No Easy Way Out: The Ethical Dilemmas of Dual Representation*, 21 GEO. IMMIGR. L.J. 621, 622-23 (2007); Bruce Hake, *Dual Representation in Immigration Practice*, ETHICS IN A BRAVE NEW WORLD 28 (2004); Cyrus Mehta, *Finding the Golden Mean in Dual Representation*, 06-08 IMMIGR. LAW BRIEFINGS 1 (2006). Note that most scholars describe representation of multiple parties as "dual" representation. Given that SIJ litigation in the family/juvenile court proceedings usually involves two potential clients, the minor and the guardian/custodial parent, this article will also refer to joint or concurrent representation as "dual" while recognizing that there could be occasions when there were more than two persons seeking legal representation. Hake, *supra* note 13, at 28. Immigration proceedings frequently do not follow the traditional adversarial model of American

in numerous articles and much hand-wringing, particularly in the employer-employee and spousal contexts.<sup>14</sup>

As discussed in more detail below, close scrutiny of SIJ representation demonstrates that these cases are also fraught with ethical challenges that have largely escaped comprehensive analysis to date. The distinctive SIJ ethics puzzles arise from three characteristics of that practice: (a) the requirement of both state and federal proceedings, the former involving potential representation of both the minor and a third party; (b) the fractured family unit, where, by definition, there is evidence of abandonment, abuse, or neglect; and (c) the SIJ client's youth.

### 1. *Federalism Overlay to SIJ Relief*

Immigration law has traditionally been the primary enclave of the federal government. In enacting the SIJ path to legal status, Congress devised a bifurcated system that attempted to preserve the traditional role of the states in child welfare determinations.<sup>15</sup> In the SIJ scheme, state courts play a major role in determining the best interests of the minor as a critical initial step before federal disposition of an SIJ petition.<sup>16</sup> This hybrid approach necessarily means that youth face not one, but at least two, proceedings in two different fora.

It is well-documented that undocumented immigrants – including SIJ petitioners – all too frequently must navigate the complicated terrain of immigration relief without counsel.<sup>17</sup> The SIJ process exposes these youth to

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litigation. Many petitioners appear before immigration tribunals and agencies where the presiding officers take the lead in cross-examining the immigrants.

14. See generally Section II B. *infra*.

15. See 8 U.S.C. 1101(a)(27)(J); see also Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Supplementary Information, 58 Fed. Reg. 42,843, 42,847, 1993 WL 304167 at \*42847 (Aug. 12, 1993) (confirming that immigration officials would look to the state court determinations of the minor's best interests). See generally Bridgette Carr, *Incorporating the Best Interests of the Child Approach into Immigration Law and Practice*, 12 YALE HUM. RTS. & DEV. L. J. 120, 156-57 (2009) (noting the hybrid nature of SIJ proceedings); David Thronson, *Kids Will Be Kids: Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L. J. 979, 105-111 (2002); Gregory Zhong Tian Chen, *Elian or Alien? The Contradiction of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L. Q. 597, 611 (2000). But see Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat, Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 413 (2009) (arguing that the bifurcated process prejudices SIJ claimants due to imposing delays); see generally Jessica Pulitzer, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J. L. & GENDER 201 (2014) (identifying challenges in SIJ implementation arising from the state court involvement).

16. SIJ petitioners seek Orders from state courts for special findings related to child welfare. See generally KIND Manual, Chapter 4, *supra* note 5, at 2; *Special Immigrant Juvenile Status Training Materials* (KIND et. al. 2014) 11 (noting hybrid approach), <https://www.nationalservice.gov/sites/default/files/resource/Special%20Immigrant%20Juvenile%20Status.pdf>.

17. See generally Ingrid Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. PENN. L. REV. 1, 32 (2015) (finding that only 14% of detained immigrants had counsel); Hlass, *supra* note 2, at 332; Maura Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 900 (2011); Jennifer Nguyen, Note, *The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention*



two rounds of litigation without a constitutional right to appointed counsel.<sup>18</sup> While there is significant disparity among states as to the likelihood that SIJ youth will have counsel, minors have lacked representation in the majority of SIJ petitions.<sup>19</sup>

But this project is concerned with the ethics challenges faced by those attorneys who have offered their services. For SIJ lawyers, inadequate resources mean that the third parties who are critical to SIJ relief, including the prospective guardians or custodial parents of petitioning minors, rarely have independent counsel.<sup>20</sup> If the linchpin of SIJ success is representation,<sup>21</sup> it is very unlikely that all parties to the state court action will have representation. Therefore, SIJ attorneys join the fray already vulnerable to pressures from the potential guardians or custodial parents to provide legal counsel to them, as well as to the youth.<sup>22</sup> Those stressors are magnified when attorneys trained in immigration law must also be competent in state family law to undertake SIJ cases effectively. The impact of this ethics question will be explored in more detail in Section II.

## 2. *Fractured Family*

By definition, SIJ youth have experienced abandonment, abuse and/or neglect. Attorneys representing children in other types of actions would

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Reauthorization Act, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 187, 202 (2010); Claire Thomas and Lenni Benson, *Caught in the Web: Immigrant Children in Removal Proceedings* 31, 36-37 IMPACT CENTER FOR PUBLIC INTEREST LAW (2016), [http://digitalcommons.nyls.edu/impact\\_center/15](http://digitalcommons.nyls.edu/impact_center/15); Keyes, *supra* note 7, at 39. Syracuse University hosts a useful website that collects federal immigration data obtained through Freedom of Information Act requests, the Transactional Records Access Clearinghouse ("TRAC"), <http://trac.syr.edu/phptools/immigration/juvenile/>. Search tools that allow a researcher to sort the data by state and presence of representation for juvenile petitioners confirm that unaccompanied minors' success in adjusting status is directly related to whether they have counsel. For a recent study of the significant advantage afforded undocumented immigrants when they have counsel in their immigration proceedings, see Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 22 (Sept. 28, 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) (analyzing Executive Office of Immigration Review data for the period 2007-2012).

18. Lack of counsel in immigration proceedings is of heightened concern in SIJ cases since one attorney may not have the necessary expertise in both family law and immigration practice to represent the youth effectively in both proceedings. David Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 45, 47-48, 73 (2005); Keyes, *supra* note 7, at 82 (listing the specialized legal and ethical skills required of attorneys representing minors in SIJ cases). For arguments in support of a federal right to counsel in unaccompanied minor cases, see Wesley Brockway, *Comment, Rationing Justice: The Need for Appointed Counsel in Removal Proceedings of Unaccompanied Immigrant Children*, 88 U. COLO. L. REV. 179 (2017).

19. Hlass, *supra* note 2, at 60, 367-68. As Professor Hlass notes, "Due to the requirements of specialized knowledge and the ability to initiate proceedings, it is almost unheard of for a child to be able to obtain a predicate order without representation." *Id.*, at n.276.

20. There are occasions where mature youth may be able to self-petition for predicate findings depending on the laws of the particular state; however, that approach is the exception not the rule. See generally Presentation, Catholic Legal Immigration Network, Inc. (CLINIC), Kids in Need of Defense (KIND), and Rocky Mountain Immigration Advocacy Network (RMIAN), *Special Immigrant Juvenile Status* (Dec. 9, 2014), <https://www.nationalservice.gov/sites/default/files/resource/Special%20Immigrant%20Juvenile%20Status.pdf>.

21. Hlass, *supra* note 2, at 325.

22. See generally AILA Compendium, *supra* note 6, at 15-18.

likely turn to the minor's parents to assist counsel in understanding the youth's goals and history.<sup>23</sup> However, those family resources are limited (or totally lacking) to SIJ lawyers where one or both parents has been unable to care appropriately for the child. Furthermore, attorneys representing SIJ minors face the further complication that their clients are being asked to state publicly that they are in conflict with at least one of their parents due to abuse, abandonment or neglect.<sup>24</sup> The SIJ state court actions are commonly styled as adversarial proceedings with the potential of further alienating the minors from their families.<sup>25</sup> Therefore, SIJ counsel routinely face complex ethics issues involving confidentiality and conflicts of interests, examined more fully in Sections II. A and B.

### 3. *The Age of SIJ Clients*

Essentially, SIJ attorneys represent minors who have limited legal rights due to their age.<sup>26</sup> The critical ethical tensions created by SIJ clients' age are two-fold: (a) how best to develop and maintain a normal client-lawyer relationship; and (b) how to fulfill the clients' goals given the legal impediments to minors' legal right to contract.<sup>27</sup>

On the first point, a wealth of interdisciplinary scholarship offers SIJ attorneys some guidance as they attempt to build a working relationship with their minor clients and then proceed to conduct youth-directed representation.<sup>28</sup>

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23. See generally Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L. REV. 1263, 1264 (2006); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities among Parents, Children and Lawyers in Delinquency Cases*, 6 NEV. L. J. 837, 888-89 (2006). But see Annette Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 576-77, 602-05 (2008) (noting the intra-family disruption that naturally occurs when minors obtain counsel).

24. See generally KIND Manual, *supra* note 5, Chapter 4, at 8; Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 886 (2009).

25. Keyes, *supra* note 7, at 78. Relevant state procedures often require notice to the youth's parents. While the non-custodial parent(s) may not attend the state court proceedings, youth must still provide evidence of parental wrongdoing.

Recent Department of Homeland Security ("DHS") advisories risk compounding these tensions. In February 2017, DHS announced that it would consider criminal prosecutions or removal proceedings against parents or extended family without legal status who arrange or facilitate the entry of unaccompanied minor children into the country. John Kelly, Secretary, DHS, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), 11, § D.

26. RESTATEMENT (SECOND) OF CONTRACTS §12 (AM. LAW INST. 1981); see also MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016) ("Client with Diminished Capacity"). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 24 (AM. LAW INST. 2000) ("A Client with Diminished Capacity") (noting in Comment f that some mature minors may retain power to bring a court action in certain situations).

27. This article focuses on verbal SIJ youth, particularly mature minors, rather than infants. Many SIJ petitioners are in their late teens and the Model Rules recognize that clients as young as ten or twelve are "certainly" entitled to have their opinions on custody taken into account. Hlass, *supra* note 2, at 26 (finding the average age for recent SIJ applicants to be 17); MODEL RULES OF PROF'L CONDUCT r. 1.14, cmt. 1 (AM. BAR ASS'N 2016). For a thoughtful review of representation of pre-verbal children, see Lisa Kelly and Alicia Levezu, *Until the Client Speaks: Reviving the Legal Interest Model for Pre-Verbal Children*, 50 FAM. L. Q. 383 (2016).

28. See generally JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (3d ed. LexisNexis 2007). For statistics related specifically to

The academic literature includes extensive exploration of the duties of counsel representing children.<sup>29</sup> Consistent with that essential scholarship, this article accepts as a working premise that SIJ attorneys are obligated to represent the youth's expressed interests.<sup>30</sup>

Still, counsel committed to honoring the wishes of their young immigrant clients face many challenges in being their clients' most zealous advocates. SIJ clients are not only minors, but many have suffered trauma. All are unable to reunite with at least one of their parents.<sup>31</sup> Empirically, SIJ youth are strikingly different from their attorneys based on factors ranging from age and education, to class and race.<sup>32</sup> As one commentator reflecting on representing child asylum seekers noted: "The intersectional disempowerment faced by unaccompanied minors due to their youth, poverty, gender, and immigration status is not accounted for in current governing ethical rules."<sup>33</sup> Thus, the path to ethical legal representation of SIJ youth remains hard to navigate.<sup>34</sup>

Our ethical norms categorize minors along with adults who need protection due to legal incapacity. Existing professional rules place minors in the same category as adults with "diminished capacity," while directing counsel to maintain a normal attorney-client relationship "as far as reasonably possible."<sup>35</sup> Other hurdles complicate counsel's ability to obtain the minor-client's

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unaccompanied minors involved in federal custody, *see* Simy Cuervo & Tosin Ogunyoku, The United States Conference of Catholic Bishops Migration and Refugee Services, The Changing Face of the Unaccompanied Alien Child: A Portrait of Foreign Born Children in Federal Foster Care (2012), [http://www.usccb.org/about/children-and-migration/upload/A-Portrait-of-Foreign-Born-Children-in-Federal-Foster-Care-and-How-to-Best-Meet-Their-Needs\\_USCCB-December-2012.pdf](http://www.usccb.org/about/children-and-migration/upload/A-Portrait-of-Foreign-Born-Children-in-Federal-Foster-Care-and-How-to-Best-Meet-Their-Needs_USCCB-December-2012.pdf).

29. Two academic conferences devoted to the ethics of child representation provide important entry points to this literature. First, in 1995, Fordham Law School hosted a conference, whose working papers were subsequently published as a special issue of that school's law review: *Proceedings of the Conference on Ethical Issues in The Legal Representation of Children*. 64 *FORD. L. REV.* 1281 (1996) [hereinafter Fordham Conference]. A decade later, University of Nevada at Las Vegas hosted the second such conference: *Proceedings of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham*. Its recommendations and papers are available at 6 *NEV. L. J.* 571 (2006) [hereinafter UNLV Conference].

30. *See* Fordham Conference, Recommendations, V. A. at 1312, providing that, "As with adults, lawyers have an ethical obligation to advocate the position of a child unless there is independent evidence that the child is unable to express a reasoned choice." *See also* UNLV Conference, Recommendations, at 592 ("the children's attorneys' community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation"); ABA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN ABUSE AND NEGLECT CASES, cmt. Standard A-1 (AM. BAR ASS'N 1996) ("To ensure that a child's independent voice is heard, the child's lawyer must advocate the child's articulated position."); Thronson, *Kids Will Be Kids*, *supra* note 15, at 990 (arguing for a human rights approach toward minors).

31. Hlass, *supra* note 2, at 331.

32. Appell, *supra* note 23, at 609.

33. Julie Marzouk, *Ethical and Effective Representation of Unaccompanied Immigrant Minors in Domestic Violence-Based Asylum Cases*, 22 *CLIN. L. REV.* 395, 420 (2016). While SIJ youth have experienced hardships, the personal strength and resilience demonstrated by so many of the SIJ clients with whom our colleagues have worked deserves special recognition.

34. Fordham Conference, Green & Dohm, Foreword, *supra* note 29, at 1298; UNLV Conference, Green & Appell, Foreword, *supra* note 29, at 589-90.

35. MODEL RULES OF PROF'L CONDUCT r. 1.14(a) (AM. BAR ASS'N 2016). While beyond the scope of this article, many child advocates have called for amendments to MODEL RULES OF PROF'L CONDUCT r. 1.14 to better reflect the needs and capacities of youth. *See generally* Fordham Conference, *supra* note 29,

consent for representation, for information and document releases, and for conflict waivers.<sup>36</sup> Even if practical “work arounds” exist,<sup>37</sup> these legal restrictions further burden the SIJ lawyer’s representation.

Whether it be the developmental maturity and legal status of the SIJ minors, their complex, personal histories, or the hybrid SIJ process, attorneys handling these cases undertake the representation facing significant ethical challenges. Studying how these complications affect practice will be critically important before attempting to chart a path forward.

## II. ETHICAL DILEMMAS IN SIJ PRACTICE

This Section offers a detailed analysis of three of the most pressing ethical dilemmas that SIJ practitioners face in state court proceedings: confidentiality, conflicts of interests, and candor.<sup>38</sup> Using real case scenarios, each vignette outlines the relevant issue in context, before discussing the rules of professional conduct applicable in the state court proceeding.<sup>39</sup>

### A. Confidentiality and Communication

One of the key duties attorneys owe their clients is the preservation of their confidential information. The Model Rules require lawyers to protect client secrets with only limited exceptions.<sup>40</sup> Given that this standard is so well-

at 1314; PETERS, *supra* note 28, at 29-30 and n. 7; Jonathan Hafén, *Children’s Rights and Legal Representation – The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 423, 455 (1993).

36. AILA Compendium, *supra* note 6, at 11-6 to 11-7; *see generally* Nina Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581 (2016).

37. *See generally* AILA Advisory, *Ethical Issues in Representing Children in Immigration Proceedings* (holding that child maturity regarding ability to provide informed consent is contextual); *see also* RESTATEMENT (SECOND) OF CONTRACTS §12 (AM. LAW INST. 1981), *supra* note 26; *but see* N.Y. Ethics Op. 1059 (N.Y. St. Bar Ass’n Comm. on Prof’l. Ethics), 2015 WL 4592236 at \*3 (June 12, 2015) (indicating that even mature immigrant children may face additional hurdles to providing informed consent beyond their age, such as lack of familiarity with American culture).

38. This selectivity is not meant to suggest that there are only three sources of ethical issues in SIJ practice. To the contrary, a range of problems can arise as in any other type of substantive field of practice. This study also intentionally removes one possible source of dispute: fees. Instead, the scenarios assume pro bono representation. In the employment context, there is ongoing debate among immigration practitioners on the best approach to multiple client representation especially where the fees are being paid by the potential employer. *See* Fragomen & Yakoop, *supra* note 13.

39. The case descriptions used in this article have been sanitized to protect the clients’ confidential information and have been re-framed as needed to focus the analysis on the particular ethics question at issue.

40. MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016); *see also* AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 68, § V(A)(2) at 21 (Aug. 2004), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant\\_Standards\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards_authcheckdam.pdf). The ethics analyses in this article will be based on the Model Rules, while recognizing that attorneys are obligated to comply with the professional rules of the jurisdiction in which they are licensed. Note that the Federal Rules of Practitioner Conduct do not expressly list breach of client confidences as an explicit violation of the ethical standards for immigration practitioners. 8 C. F. R. § 1003.102.

recognized, our focus will be on the practicalities of complying with that mandate in SIJ state court actions.

Joaquin had entered the United States from Haiti as an unaccompanied minor. After being detained at entry, he was temporarily placed with his aunt, Marta. Joaquin and Marta approached one of the immigrant relief agencies in the area which obtained pro bono counsel to represent them jointly.

Subsequent to initial interviews, counsel indicated that Joaquin, 12 years old at the time, would be a candidate for SIJ relief given he had fled Haiti to avoid further physical and mental abuse by his father. Counsel offered to represent both Joaquin and Marta, who quickly and gratefully accepted the assistance. Counsel then explained the SIJ process and requested that Joaquin and Marta each sign retainer agreements that included language defining the scope of the joint representation: Joaquin as a SIJ petitioner and Marta as his prospective guardian. Furthermore, both retainer agreements had the following language: “Counsel may discuss any matters pertaining to the representation of my case with the [other client].”

During the course of the representation, the horrendous magnitude 7.0 earthquake of 2010 hit Haiti. Joaquin’s parents and two siblings continued to live in Haiti. Marta eventually contacted them and learned that the family home had been completely destroyed and that the family had fled to a homeless shelter. Marta told counsel who had been trying to arrange service of the family court pleadings on Joaquin’s parents about that tragedy.

After sharing the family news with counsel, Marta attempted to extract a promise. She asked counsel to swear that the attorney would not share what had happened with Joaquin. Marta said it would be devastating for Joaquin, as he continued to worry and care about his mother and younger siblings. She said he had already talked about returning to Haiti to try to protect them from his abusive father. Should he learn of their homelessness, his anxieties would be heightened and she worried that it would undermine the progress he was making at home and at school in trying to adapt to life in the United States.

Counsel empathized with Marta’s concerns and worried also about the fate of Joaquin’s family. However, the attorney reminded Marta of the terms of the representation and the retainer agreement. Marta continued to plead for counsel’s silence, saying: “I’m not being cruel; I want what’s best for Joaquin, which is a stable life here; I just don’t want to tell him because I know what he’ll do – he’ll go back to help them and then he’ll be lost forever.”

An analysis of this relatively straightforward problem highlights the special hurdles faced by SIJ attorneys. This section explores counsel’s

professional obligations before assessing the consequences of that ethics analysis in the SIJ state court context.

Counsel has two clients, Joaquin and Marta, and owes both the same duties of confidentiality and loyalty. Marta has demanded that counsel remain silent regarding a major event in the lives of Joaquin's family. If counsel focuses purely on the attorney-client relationship with Marta, normally he would be obligated under MRPC 1.6 (a) to accede to her wishes and remain silent about her confidences.<sup>41</sup> The fact that Joaquin's family residence has been destroyed would initially appear to be a confidence that counsel is required to protect when considering only counsel's duties to Marta.<sup>42</sup> However, counsel must be loyal to both clients.

Given Marta's vehement objections to disclosure, counsel would search for some resolution of this dilemma. Here, counsel had advised Joaquin and Marta that SIJ relief could be possible due to the parental abuse Joaquin suffered in Haiti, long before the earthquake occurred and Marta shared her revelation. Therefore, counsel could continue to pursue lawful status due to abuse, rather than raising facts related to the earthquake as the theory of the SIJ case. Under this approach, the lawyer might be tempted to agree to Marta's request for silence, defining the earthquake as not "related to the representation" under MRCP 1.6 (a) and relying on the parties' retainer agreements that limited co-client disclosures to information "pertaining" to the representation.<sup>43</sup>

While a seemingly convenient way to resolve this ethical dilemma, it ignores the likelihood that counsel is now faced with two possible theories of the SIJ case. Were the attorney to conclude that evidence about the earthquake would materially strengthen Joaquin's SIJ action or that evidence of the abuse case had proved insufficient, then counsel would need to review the case strategy with both clients.<sup>44</sup>

That inquiry calls into question counsel's communication duties under MRPC 1.4. For example, if counsel believes that the earthquake and resulting destruction of the family home provided a superior theory for his immigration case, then counsel would need to consult with Joaquin and Marta about the

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41. On the abbreviated facts of the Marta-Joaquin vignette, it seems unlikely that any of the exceptions to confidentiality would be triggered (*i.e.*, 1.6 (b), discretionary exceptions; 3.3 and 4.1, mandatory disclosures). Counsel could not lie to any tribunal about the earthquake, but, absent evidence of Marta's criminal or fraudulent activity, the fact of the destruction does not, without more, prompt a duty to disclose.

42. Note that, even if counsel had learned independently of the earthquake's destruction of Joaquin's family home, the information would still need to be protected if it related to the representation. *See* MODEL RULES OF PROF'L CONDUCT r.1.6 (a), and cmt. 3 (AM. BAR ASS'N 2016).

43. This approach takes a particularly crabbed view of information related to the representation. Here the earthquake destruction would not be prejudicial to Joaquin's immigration case; indeed the disaster might provide additional theories for relief. For reasons developed later in this Section, keeping silent is problematic. *See also* commentary noting the proclivity of counsel for minors to proceed paternalistically. Fordham Conference, *supra* note 29, at I. A. 2. b-d.

44. The earthquake's devastation would certainly be relevant on the third element of the special findings: inappropriateness of returning Joaquin to his country of origin.

means to be used under MRPC 1.4 (a) (2), to keep them reasonably informed about the case status under MRPC 1.4 (a) (3), to advise them of any decisions, such as alternate theories of relief, that would require their informed consent under MRPC 1.4 (a) (1), and to offer explanations of the matters sufficient to allow their active participation in the case under MRPC 1.4 (b).<sup>45</sup>

Furthermore, the lawyer has the related duty to “promptly comply with reasonable requests for information.”<sup>46</sup> It is possible that Joaquin may ask his attorneys about his Haitian family and in that case, it would be difficult for counsel to evade giving a proper answer. Even if Joaquin does not directly ask counsel about his family’s situation, he could learn the information independently from sources other than Marta or counsel. It is certainly plausible that that separate discovery would undermine the trust and loyalty that lie at the heart of the attorney-client relationship.<sup>47</sup>

Here both Marta and Joaquin signed retainers agreeing not only to the joint representation, but also to waiver of confidences between them.<sup>48</sup> Therefore, assuming that Joaquin’s family tragedy becomes central to the case’s successful prosecution, it would then become information “relating to the representation” that his lawyer would normally be obligated under both contract

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45. The Comments to MRPC 1.4 temper those communication duties in Joaquin’s case providing that full communication “may be impracticable, for example, where the client is a child . . .” MODEL RULES OF PROF’L CONDUCT r. 1.4, cmt. 5 (AM. BAR ASS’N 2016). See generally AILA Advisory, *Ethical Issues in Representing Children in Immigration Proceedings*, *supra* note 37 (arguing that “lawyers should not assume that children lack capacity to make decisions or to participate meaningfully in case preparation,” while noting that MRPC 1.4 applies to minor representation).

46. MODEL RULES OF PROF’L CONDUCT r. 1.4 (a) (4) (AM. BAR ASS’N 2016). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 20 (AM. LAW INST. 2000) (requiring a lawyer to keep the client “reasonably informed about the matter”). Rule 1.4 does envision some situations when a lawyer might delay informing the client of relevant information where “the client would be likely to react imprudently to an immediate communication,” citing disclosure of a psychiatric diagnosis as an example. *Id.*, cmt. 7. However, that Comment goes on to direct that a lawyer “may not withhold information to serve the interests or convenience of another person.” *Id.* Here withholding the information may well serve Marta’s goals, even if well-intentioned, rather than those of Joaquin. See also Mass. Bar Ass’n Comm. on Prof’l Ethics Op. 09-03 (2009) (analyzing, under a prior version of MA Rule of Professional Conduct 1.7, the confidentiality and communication rules in the joint representation context and concluding, “it is not a good idea for a lawyer to decide to conceal adverse information from a client because of a surmise that the client wouldn’t want to know the information in order to avoid the consequences”). See generally *State ex rel. Okla. Bar Ass’n v. Schraeder*, 51 P. 3d 570 (Ok. 2002) (sanctioning counsel for pattern of failing to respond to client, finding violation of Oklahoma’s version of MRPC 1.4); *In re Schoeneman*, 777 A. 2d 259 (D. C. 2006) (refusing to discipline attorney whose communications with client were deemed reasonable). Even with client consent, ethics committees have read Rule 1.4 not to require information disclosures to a client’s family members. See St. Bar of Ariz. Ethics Op. 07-01 (2007). Here however counsel represents both Joaquin and Marta.

47. See generally AILA Compendium, at 5-15 (discussing the interrelation between the duties of confidentiality and communication in the joint representation context). A request from Joaquin for family information would hardly be the kind of unreasonable or imprudent demand for information that an attorney has some discretion to refuse. See RESTATEMENT, *supra* note 46, at §20, cmt. d; Ill. St. Bar Ass’n Adv. Op. 94-13 (1995, reaffirmed 2010) (refusal to release information permitted where client’s use of the requested information could work harm on third party).

48. Counsel had wisely included in the joint representation agreement that there would not be case-related confidences between the clients: “Counsel may discuss any matters pertaining to the representation of my case with the [other client].” See also MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 30 (AM. BAR ASS’N 2016).

law and ethics rules to reveal to Joaquin.<sup>49</sup>

Research to date has not revealed any state ethics opinion that confronts lawyers' confidentiality duties in the SIJ context.<sup>50</sup> Rather, the common immigration scenarios that have produced ethical guidance regarding confidences are the employer/foreign employee work authorization cases and spousal immigration matters.<sup>51</sup> Those opinions suggest that the immigration context does not warrant any departure from the traditional interpretation of the confidentiality obligations of counsel.

Given these legal impediments to "one way" confidences in joint representation cases, counsel must then confront what remedial steps should be taken. As the Comments to MRPC 1.7 provide: "As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation."<sup>52</sup> The SIJ lawyer already asked Marta to reconsider, but she remained determined on keeping Joaquin in the dark about his family's disaster – even where it could be the basis for the state court findings. Therefore, if counsel's efforts to remonstrate with Marta fail, his or her inability to disclose the information to Joaquin would doom the joint representation. Withdrawal from both clients' cases would be required.<sup>53</sup>

In some types of civil cases where conflicts develop mid-stream, withdrawal might be avoided where the attorney had obtained a valid advance

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49. MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016) while providing that minors can have impaired decision-making, still requires counsel to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

50. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics Op. 1069, 2015 WL 5471442 (2015), dealing with joint representation in a SIJ case will be discussed in Section II. B., *infra*. In its conflicts analysis, the Opinion references its prior Opinion in Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics Op.1059 (2015) that does address the duty to protect confidences in immigration cases involving unaccompanied minors, but does not explicitly address the SIJ context.

51. For the employment context, *see* Mass. Bar Ass'. Comm. on Prof'l Ethics Op. 09-03 (2009) (noting interrelation of joint representation and requirement of no confidences between co-clients); D.C. Ethics Op. 296, revised February 1, 2007 (finding withdrawal could be required in joint representation where client confidences must be shared); L.A. County Bar Ass'n Ethics Comm., Formal Op. 465 (1991) (construing California ethics rules that are not directly based on the Model Rules, as requiring advance mutual consent of employer and undocumented employee to disclosure of employer secrets). In the spouse context, *see* N.Y. State Bar Ass'n Op. 761 (2003), and N.Y.C. Bar Assoc. Ethics Op. 1999-07 (1999) (discussing the dual representation duties of confidentiality in the spousal context).

52. MODEL RULES OF PROF'L CONDUCT r. 1.7, cmt. 31 (AM. BAR ASS'N 2016), citing counsel's equal duty of loyalty to each client and communication duties pursuant to r. 1.4; *see also id.* cmt. 19 (proposing that attorney representing two clients where one is refusing to allow adequate disclosure to the other would be unable to obtain required consent to the joint representation). *See generally* Section II. B., *infra*, regarding conflicts of interests in SIJ cases.

53. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.7, cmt. 29 (AM. BAR ASS'N 2016) ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."); Mass. Bar Ass'n Comm. on Prof'l Ethics Op. 09-03 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 60A (l) and § 121 (e); AILA Compendium, *supra* note 6, at 5-44 (noting that clients' confidences remain protected even after withdrawal).



waiver from the clients.<sup>54</sup> However, that remedy would likely be inapplicable to the Joaquin-Marta scenario. Neither is a sophisticated user of legal services; language barriers and Joaquin's age further complicate the joint representation. In addition, the earthquake was not predictable at the time they agreed to the retainers and therefore could not have been anticipated by counsel and included in the advice given to the parties about the challenges of joint representation.

The consequences of withdrawal are grave. Yes, counsel would have meticulously complied with the ethical rules (and contract rights) of the parties. However, Joaquin's ultimate objective of gaining legal status remains elusive; neither he nor Marta would be any closer to obtaining the predicate SIJ findings from the state court.<sup>55</sup> Indeed, they would now find themselves operating *pro se* or having to retain other lawyers to start afresh in the state court action. It is noteworthy that counsel did not blunder; instead, at the outset, the lawyer sought and obtained informed consent from both clients for the joint representation and for shared confidences. However, an unforeseeable, subsequent event doomed the joint effort.

Here, the SIJ context made the lawyer's struggles particularly acute. First, to obtain the necessary predicate findings in the state court proceedings, attorneys willing to undertake SIJ cases are drawn into the joint representation, lest the parties to the state court action be left *pro se*.<sup>56</sup> Further, counsel's clients are pursuing a guardianship that will legally connect them until Joaquin reaches adulthood. Acceding to Marta's demands, while recognizing that they may be triggered by her benevolent concerns about Joaquin's youth and history of trauma, risks undermining the guardianship from its inception. Surely it cannot be healthy for the new relationship to be founded on non-disclosure of material information. Thus, immigration attorneys face heightened angst when attempting to implement the communication and confidentiality rules when undertaking joint representation for the SIJ action in state court.

Before suggesting approaches to SIJ representation that minimize the likelihood of withdrawal due to confidentiality tensions, it is useful to explore the broader question of conflicts of interests in SIJ practice.

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54. See generally, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 122, cmt. d and illus. 8 (confirming that advance waivers are subject to "special scrutiny"); compare N.Y. State Bar Ass'n Op.761 (2003) (advising that an advance waiver between spouses in an immigration proceeding could be proper).

55. Given the on-going state court proceeding, counsel would need to seek the Court's leave to withdraw, which a state judge might refuse. MODEL RULES OF PROF'L CONDUCT r. 1.16(c) (AM. BAR ASS'N 2016).

56. In some states, courts may appoint counsel for a prospective ward in a guardianship proceeding. That could alleviate the joint representation issues in the state court process, freeing an attorney to represent only Marta. See generally Elizabeth Calhoun, *Right to Counsel in Guardianship Proceedings: Where Do We Stand?* ABA Commission on Legal Problems of the Elderly, 19 BIFOCAL 1, 8 (1998), [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2011\\_aging\\_artg7385\\_righttocounsel\\_tb.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_artg7385_righttocounsel_tb.authcheckdam.pdf).

## B. *Conflicts*

Immigration cases frequently have multiple interested parties. Whether it be the employment situation or various forms of derivative relief, immigration lawyers are no strangers to multiple party actions.<sup>57</sup> Employers and prospective new foreign workers have mutual interests in successfully navigating immigration issues that would otherwise bar employment. One spouse may assist a foreign partner in obtaining legal status to the couple's mutual benefit.

SIJ cases are no exception. The state court proceedings commonly involve either a prospective guardian or custodial parent and the minor.<sup>58</sup> Assuming the minor has been fortunate enough to obtain counsel in the federal immigration proceeding, then that attorney will be hard-pressed to avoid involvement in the state action.<sup>59</sup> The following SIJ case study highlights the tensions present where a minor seeking SIJ relief and a parent are jointly represented.<sup>60</sup>

At the age of fifteen, Mateo decided to leave Guatemala because he could not provide for his four younger siblings. His mother had recently been imprisoned for theft, leaving him and his sisters to fend for themselves. While his grandparents tried to help, they were elderly and unable to cope with five more mouths to feed. Mateo tried to find work locally, but to no avail.

Mateo's father, Diego, had fled Guatemala for the United States five years before. Though lacking legal status, he had gotten a job installing and refinishing flooring and had learned the trade quickly. Recently he had started his own small business taking jobs that his first employer could not or did not wish to handle. Because of limited funds, he had

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57. See generally Hake, *ETHICS IN A BRAVE NEW WORLD*, *supra* note 13, at 30; Fragomen, *supra* note 13, at 640 (dual representation "pervades immigration law"); Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 GEO. IMMIGR. L.J. 719, 726 (1995); Levin, *supra* note 1, at 215 (noting that immigration lawyers frequently deal with conflicts questions, especially in the employment context); Elena Heys, Note, *Ethical Duties of Immigration Lawyers: The Difficult Balance Between Serving Clients and Preventing Employment Fraud*, 30 GEO. IMMIGR. L.J. 143 (2015) (noting immigration lawyers' difficulty in complying with "imprecise" ethical rules, especially as relates to conflicts and candor).

58. In some states, mature minors can self-petition and seek the necessary findings.

Despite the frequent occurrence of multiple interested parties to immigration matters, SIJ state court actions differ from other kinds of immigration relief in that the government is not a party. Rather, the absent parent(s) is the titular "opposing party" that heightens the possibility of conflicts. At least one parent must be shown to have abused, neglected or abandoned the minor; however, court rules on service of process may require notice to be given to that parent. See *KIND Manual*, *supra* note 5, at 8. Further, the other parent seeking custody or the prospective guardian may have mixed goals in agreeing to assist the SIJ minor in the state court action.

59. Some state courts may have the discretion to appoint separate counsel for the minor. However, if the minor's immigration counsel offers to assist the guardian or custodial parent in the state proceeding, even on a limited representation basis, then counsel must satisfy the demands of the conflicts rules given the concurrent representation of potentially differing interests. See *MODEL RULES OF PROF'L CONDUCT* r. 1.7 (AM. BAR ASS'N 2016).

60. This vignette is based on the prospects of parent-youth conflict; however, the basic principles would apply if the co-client was a prospective guardian.

only one assistant; instead Diego handled most of the work himself, working very long hours in the physically demanding business.

Mateo had tried to stay in contact after Diego's emigration to the US, despite little response from the father. Once his mother was jailed, Mateo sought to join his father; Mateo had no other extended family in the US. Diego consented, assuming Mateo could navigate the illegal entry alone. Once in the US, Mateo hoped that he could find work and send money back to his siblings. Immigration officials detained Mateo at the border; Diego was soon contacted, who accepted temporary custody of Mateo.

Advocates at the border screened Mateo for SIJ eligibility and other types of immigration relief and referred him to *pro bono* counsel near Diego. After interviewing both Mateo and Diego, the attorney offered to represent both clients, counseled them on the consequences of joint representation, and had them sign retainers agreeing to be co-clients and to share confidences between them. Counsel agreed to represent Diego in obtaining custody of his son in family court and to represent Mateo in all SIJ proceedings, including the family court and immigration agency actions.

While Diego's custody case in family court was pending,<sup>61</sup> Mateo admitted to counsel that his father had been forcing Mateo to work full time in the flooring business and had not enrolled Mateo in school. Counsel explored that issue with Mateo, who initially said that "I don't want to go to school; I have to earn money." However, when pressed about his wages, Mateo said that Diego had yet to pay the promised salary. Mateo hoped he could convince Diego to send some money back to the younger siblings in Guatemala even if his father continued not to pay him.

Two months elapsed during which time Mateo began to appear increasingly downtrodden. He frequently nodded off during any client meetings; he appeared defeated and had visibly lost weight. When counsel questioned Diego, he denied that Mateo was working full-time, claiming that Mateo only helped out occasionally. Speaking to Mateo alone, counsel learned that Mateo was apparently working long hours, hauling the heavy wood planks and power sanders for his father even though he said that "the dust from the sanding really triggers my asthma."

Mateo agreed to see a pediatrician to help control his asthma. The examining physician confirmed that Mateo's asthma needed treatment

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61. The state court action was styled as a custody matter because Diego and Mateo's mother were married, but currently separated, and there was no divorce action pending.

and that he was significantly underweight. After talking with Mateo, the doctor advised counsel that he reported Mateo's physical condition to the Department of Children and Families ("DCF") which conducted an investigation. Though DCF confirmed that Mateo was thin and suffered from asthma, DCF did not substantiate a finding of abuse or neglect. Therefore, DCF declined to intervene in the state court action.

The final hearing in the custody case was only a week away when the lawyer counseled Mateo again about his goals. Mateo said "Look, you've told me I have to have somebody run my life to get legal status, so it'll have to be my father. I don't have a choice if I'm ever going to get a work permit and be able to get a real job. Just get me the work permit as quickly as you can so I can get out of here. . . ."<sup>62</sup>

There is no question that this SIJ attorney is confronted with a difficult, but far from atypical, ethics challenge. Our analysis will first review the propriety of counsel undertaking joint representation; then it will outline the options open to counsel after evidence of significant differing interests between the co-clients has surfaced. Our SIJ counsel recognized at the inception of the representation that both Mateo and Diego needed legal assistance. Clearly Mateo needed a lawyer to navigate the intricate hybrid SIJ proceedings. Even if counsel only represented Mateo in the federal immigration proceeding while assisting Diego in the state court action, the client conflicts rules would still apply.<sup>63</sup>

Arguably, counsel could have declined to be Diego's attorney. Representing only Mateo might well have been simpler ethically; however, that academic approach ignores the reality that Diego could not be expected to navigate the intricate family court custody case *pro se*.<sup>64</sup> Diego would likely not have been eligible for court-appointed counsel in the custody proceeding given the lack of resources in most states. Like many immigrants trying to proceed *pro se*, Diego would have had to file pleadings, to arrange service, and to concur in the special findings despite language and educational barriers. Therefore, SIJ counsel agreed to the joint representation as it was the most likely means of accomplishing Mateo's goal of legal status.

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62. While some mature youth can self-petition, that procedure would trigger the involvement of child welfare agencies in many states. Like many other children, Mateo requested that counsel not involve the Department of Children and Families.

63. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016). If the representation was sequential rather than concurrent, MODEL RULES OF PROF'L CONDUCT r. 1.9 would govern. Counsel owe the same ethical duties to all clients, including avoidance of conflicts, whether undertaking Limited Assistance Representation ("LAR") or full scope representation. *See generally* Trial Courts of Massachusetts: Limited Assistance Representation Training Manual, <http://www.mass.gov/courts/docs/lar-training-manual.pdf>, 87.

64. *See* AILA Compendium, *supra* note 6, at 5-18 (acknowledging that joint representation is common and noting that contact with an unrepresented party like Diego if no co-client agreement is reached is also ethically problematic since communication with Diego would be governed by MRPC 4.3 that forbids counsel from offering him advice).

As in many immigration matters, the two clients' interests appeared aligned at the outset.<sup>65</sup> Both father and son would benefit from Mateo gaining legal status. Mateo could support himself and advance his long-term goals of a stable life. Diego would no longer be skirting the employment laws and would be helping his son who he had already agreed to shelter. Thus, counsel extended his offer of assistance to both, only to learn of significant intra-familial issues during the course of the representation.

The starting point for any concurrent conflicts question is MRPC 1.7. Therefore, our analysis will begin at the start of the dual representation before proceeding to analyze how counsel should proceed when unexpected disputes arise during the course of the joint representation. The threshold question is whether accepting both clients creates a concurrent conflict of interest. Under MRPC 1.7 (a), there is such a conflict if there is either direct adversity between Diego and Mateo<sup>66</sup> or "a significant risk" that the representation of one family member will be materially limited by the representation of the other.<sup>67</sup> Under the first prong of MRPC 1.7 (a), counsel would claim no direct adversity at the time the attorney first interviewed the parties, given the collaborative custody action envisioned in family court.<sup>68</sup>

The question of significant risk of material limitation contained in the second prong of MRPC 1.7 is a much closer call.<sup>69</sup> As the Comment instructs:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>70</sup>

We can undoubtedly conjure some factual scenario that would trigger a concurrent conflict for virtually any joint representation. Teenagers and parents often differ dramatically in their goals and ends to achieve them. That mere possibility without more would not trigger the "likelihood" test of MRPC 1.7; the joint representation could proceed. When that possibility becomes a probability, as when counsel learned of the father-son work

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65. Fragomen & Yakoop, *supra* note 13, at 623 (noting common interests allow some joint representation to proceed).

66. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2016).

67. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

68. Fragomen & Yakoop, *supra* note 13, at 622 (noting that immigration proceedings involving joint representations are generally consensual rather than adversarial). While the instant case involves a custody action, many SIJ cases involve guardianships where a third party agrees to become the guardian, at least until the youth reaches majority. Guardianship actions by definition deny the ward's legal personhood; therefore, those SIJ cases that seek a family court guardianship pose a heightened risk of conflicts. *See* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1069, *supra* note 50, at \*2 (noting potential adversity between SIJ minor and proposed guardian even though under applicable state law the parties are not directly adverse, though rejecting a per se rule against joint representation); *see generally* Kohn & Koss, *supra* note 36.

69. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

70. *Id.* r. 1.7 cmt. 8.

tensions, counsel must re-assess whether his ability to pursue custody for Diego will be materially limited by his duties to Mateo.<sup>71</sup> Once MRPC 1.7 (a) is triggered, counsel must determine if the concurrent conflict is barred under MRPC 1.7 (b).

There are four predicates that counsel must satisfy before she or he can represent both Diego and Mateo in the SIJ matters where there is significant risk of material limitation:

- (1) reasonable belief that the lawyer will be able to provide appropriate representation to each;
- (2) no legal prohibition;
- (3) no assertion of a claim between the father and son in any of the SIJ proceedings; and
- (4) both clients give informed consent in writing.<sup>72</sup>

Application of these standards requires a deeper investigation into what conflicts would likely arise based on the information available to counsel.

Early on, counsel knew little more than that Mateo had contacted his father who agreed to shelter Mateo when he was detained after his unlawful entry. However, they had not seen each other in over five years, following Diego's unilateral emigration to the US. Further, Diego had not been supporting his Guatemalan family; instead, the responsibility of providing for the family had fallen on Mateo's shoulders. That said, father and son were reunited by the time counsel was contacted and they both professed an interest in working together to obtain Mateo's legal status.

Applying that information to the four requirements of MRPC 1.7 (b), counsel had an insufficient basis to believe that he could not provide adequate representation to both father and son at the critical moment of being retained. In addition, counsel could not have envisioned a direct claim between the parties.

The next ethical step would require the attorney to counsel both Diego and Mateo on the potential consequences of the joint endeavor before asking them to sign retainer agreements.<sup>73</sup> Focusing first on Mateo, many have questioned whether a minor who has suffered trauma or neglect and who likely has limited familiarity with the US legal system or even with the English language can ever provide informed consent.<sup>74</sup> Counsel faces the significant responsibility of attempting to inform both potential clients appropriately of

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71. *Id.*

72. *Id.* r. 1.7(b).

73. *Id.* See in particular cmt.18 that provides that the counseling "must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." See also MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 2016) (defining informed consent). See also AILA Compendium, *supra* note 6, at 5-18.

74. Sheard, *supra* note 57, at 742. See also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1059, *supra* note 37, at \*3.

the potential consequences and of obtaining their informed consent to the joint representation.<sup>75</sup>

Several state ethics opinions shed further light on counsel's predicament. The New York State Bar Association's Committee on Professional Ethics recently rejected a per se bar on simultaneous representation of a guardian in the family court proceeding and a minor seeking SIJ relief in the immigration proceedings.<sup>76</sup> Analyzing the question under New York's version of MRPC 1.7, the Committee explored at length the possibility that the co-clients would have differing interests that would fatally undermine the lawyer's ability to provide competent and diligent counsel to each.<sup>77</sup> The Committee cited two unique features of New York practice as relevant to its determination. Its family court judges have the discretion to appoint separate counsel for the proposed ward/youth.<sup>78</sup> Additionally, its courts do not consider the youth to be an adverse party to the guardian in those proceedings.<sup>79</sup> Ultimately, the Committee concluded that counsel undertaking concurrent representation in SIJ state court proceedings must satisfy Rule 1.7 (b)'s terms, including requiring informed, written consent of both parties, but did not impose an absolute bar.

The Committee acknowledged that other commentators have arrived at contrary conclusions. The Westchester County New York Family Court's advisory on SIJ practice had previously concluded that joint representation of the minor and the prospective guardian in its court is barred as an impermissible conflict of interest.<sup>80</sup> Instead of concurrent representation, that court envisioned appointing separate counsel for the minor, a luxury that not every state can provide. Some immigration advocates have also counseled against

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75. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1059, *supra* note 37, at \*3 (outlining types of differing interests that could arise in a guardianship context, but that would also be potentially relevant in a custody action). Note that the Opinion relies upon a defined term under New York State ethics rules, "differing interests," that is not included in the MRPC. See generally Sherry Cohen, *Professional Discipline: The Immigration Lawyer's Nightmare*, N.Y.L.J. (Jan. 13, 2013), <https://www.law.com/newyorklawjournal/almID/1202586303930/?slreturn=20171006230933> (recommending that immigration lawyers avoid dual representation, but counseling that informed consent of both clients would be required to proceed with simultaneous representation); N.Y. St. Bar Ass'n, Formal Op. 761 (2003) (proposing that a new representation of only one spouse seeking legal status on the basis of spousal abuse may be feasible if the couple initially agreed to a valid advance waiver of subsequent conflicts).

76. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1069, *supra* note 50 (concluding that a verbal youth who could be counseled effectively could give informed consent to concurrent representation). The Committee noted that the family courts could appoint separate counsel for the youth in the guardianship matter.

77. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1069, *supra* note 50, at \*3.

78. Some advocates have noted the additional challenges that counsel for a prospective guardian faces where separate counsel represents the youth/proposed ward, including restricted access to the now-separately represented youth. Training Manual prepared by the New York Safe Passage Project, *Special Immigrant Juvenile Status: A Step-by-Step Guide for Safe Passage Volunteer Attorneys* (2014) [hereinafter *Step-by-Step Guide*] at 19, <https://www.safepassageproject.org/wp-content/uploads/2013/02/SIJS-Manual-11.24.2014-CT-FINAL-AMENDED.pdf>.

79. *Id.*

80. Westchester County New York Family Court's advisory on SIJ, *Application for Guardianship/Motion for Special Immigrant Juvenile Status*, [https://www.nycourts.gov/courts/9jd/Westchester/family/pdfs/SIJS\\_FAQs.pdf](https://www.nycourts.gov/courts/9jd/Westchester/family/pdfs/SIJS_FAQs.pdf).

representing both the minor and the prospective guardian in the SIJ family court matter, while suggesting that the minor's attorney could "assist" the prospective guardian in completing the family court paperwork.<sup>81</sup> The recommendation does not indicate how that assistance could be provided without becoming counsel to the prospective guardian. Were an attorney to assist the adult with the state court pleadings, that attorney would still be entering into an attorney-client relationship, even if only to provide limited representation.<sup>82</sup>

In addition to this ethical guidance on SIJ cases, immigration practitioners have actively debated how to approach dual representation issues in other areas, particularly in the employment context. Advocates have increasingly debunked the idea of a "simple solution," whereby counsel treats only the employer paying the attorney's fee as the client, even though the attorney assisted the prospective employee as well.<sup>83</sup> Instead, the majority view recognizes that attorneys who provide legal advice to both the employer and the prospective foreign employee, regardless of who pays, have entered into attorney-client relationships with both parties requiring special safeguards to ensure that counsel can offer unfettered loyalty to both and can obtain each party's informed consent.<sup>84</sup>

In our vignette, counsel undertook the suggested steps of satisfying the requirements of MRPC 1.7 (b), obtaining the parties' consent to share their confidences and requiring the parties to sign written retainers after being counseled about potential challenges. Despite solid ethical footing at the inception of the joint representation, subsequent events exposed a serious rift in the father/son relationship well beyond the typical level of familial discord that counsel could have predicted.<sup>85</sup> Diego has apparently been taking advantage of his son's free labor to minimize business expenses. Meanwhile, Mateo is suffering physically to the point that his doctor, as a mandated

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81. See *Step-by-Step Guide*, *supra* note 78, at 19.

82. Once the limited representation was completed, the adult would become a former client to whom counsel would still owe professional duties (*e.g.*, not to use adversely or reveal confidences). MODEL RULES OF PROF'L CONDUCT r. 1.9 (c) (AM. BAR ASS'N 2016).

83. Hake, *supra* note 13, at 29 ("The Simple Solution . . . is clearly unethical and may create malpractice risks").

84. See Hake, *supra* note 13 (rejecting the Simple Solution and outlining an approach to joint representation in the employment context). Cyrus Mehta also rejects the Simple Solution as improper, but advocates for another position to joint representation, that he has termed the "Golden Mean." Mehta, *supra* note 13 (proposing that counsel seek advance waivers from co-clients in employment cases and concluding that, were a conflict to develop, those advance waivers could allow counsel to withdraw representation from only one client). Lastly, Austin Fragomen, Jr. and Nadia Yakoop have proposed a "continuum" of approaches to dual representation in employment cases reflective of the unique circumstances of each client. Fragomen & Yakoop, *supra* note 13.

85. Our case scenario is by no means atypical; immigration practitioners have previously noted the likelihood that parties' interests can diverge during the course of the representation. Fragomen & Yakoop, *supra* note 13, at 624, 632 (advising that, consistent with state ethical rules, a re-evaluation of the conflicts issue should occur "to determine whether the conflict is such that competent representation, loyalty, and confidentiality would be jeopardized"); see also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1069, at \*4 (2015) (noting likelihood that interests of minor and prospective guardian can evolve into a conflict).



reporter, has sought agency intervention. Mateo also has reported feeling powerless to extricate himself from his father's care until Mateo obtains legal status. Therefore, we turn to an analysis of counsel's ethical predicament now that conflicts have arisen mid-course.

As a first step, counsel must revisit the conflicts analysis and determine if the requisites of MRPC 1.7 (b) can still be met.<sup>86</sup> On the one hand, counsel is obligated to represent Mateo zealously in his SIJ matter and to abide by his instructions. On the other hand, counsel also owes the same duties of loyalty and zeal to Diego, despite the fact that he has apparently been taking advantage of Mateo's free labor. In the custody proceeding, Diego will need to prove that he is a fit parent and that Mateo's best interests are served by Diego being named his son's custodial parent. The Court may well inquire into the parties' relationship and Diego's fitness. It is now increasingly foreseeable that evidence of abuse and neglect will surface.

One might argue that the parties' interests are still aligned: they both still want Mateo to obtain legal status. However, that approach reflects too narrow a vision of counsel's duties under 1.7 (b) (1). Counsel would be hard-pressed to assert that he reasonably believes that he can provide "competent and diligent representation" to both Diego and Mateo, where Diego could be further investigated for child neglect at the same time that he is purporting to be an appropriate custodian. Since one of the predicates of MRPC 1.7 (b) cannot be satisfied, counsel cannot seek the clients' consent to the conflict.

To test that conclusion, assume that counsel withdraws and (surprisingly) Diego and Mateo are able to find separate, successor counsel for the state court custody hearing. It is still true that Diego's new attorney would be forced to deal with the adverse evidence of the father's fitness. However, Diego would not be left wondering if the legal challenges to his custody action were due to the attorney selling the father short in order to protect a joint client's (Mateo's) interests.

Some attorneys, eager to save the concurrent representation, might try to rely on an advance waiver, claiming that the attorney counseled the parties at the beginning on the possibility of their interests diverging and the parties voluntarily consented. Ethics authorities acknowledge that advance waivers can be a potential remedy for emerging conflicts in certain instances as previously discussed.<sup>87</sup> However, even if the retainers here included advance waivers, the clients' capacity to comprehend and voluntarily provide

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86. See generally Fordham Conference, *supra* note 29, Recommendation VII. A. 4 b. iii and VII. A. 5. a. iii at 1318 (advocating that joint representation of a minor and a parent not be undertaken in a child abuse or neglect matter); A.B.A. Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), [http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards\\_abuseneglect.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf) (a child's attorney "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client").

87. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005) (finding that a client's advance waiver of future conflicts may in certain circumstances be upheld); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122, cmt. (AM. LAW INST. 2000) (noting that advance waivers are "subject to special scrutiny"); see also, Mehta, *supra* note 13, at 34 and accompanying text.

knowing consent is highly suspect.<sup>88</sup> Whether because of language, education, sophistication in legal matters, or a power imbalance, the co-clients and counsel are not on an even playing field. Advance waivers are most typically upheld when granted by an “experienced user of legal services”<sup>89</sup>— not the instant case. Therefore, advance waivers would be no panacea for SIJ attorneys caught in a conflicts problem.

With the family court custody hearing looming, SIJ counsel would be tempted to try to soldier through despite the impermissible conflict. After all, DCF, as the state agency overseeing child welfare, did not substantiate the report of neglect. Moreover, Mateo expressed no interest in immediately relocating, despite the problems. Unfortunately, but realistically, other options are limited, given the parties believe that there is no one else who could serve as Mateo’s guardian. Even if there were, Diego has little interest in allowing someone else to intercede who might rob him of his son’s free labor.

Despite being ethically required, withdrawal from the joint representation does not further the parties’ objectives. The parties would be left with the unrealistic alternatives of trying to proceed *pro se* or attempting to obtain separate, successor (*pro bono*) attorneys for each person.

Counsel might be tempted to terminate representation of just Diego; however, that path is complicated.<sup>90</sup> Assuming counsel would argue that the emerging conflict requires his withdrawal under MRPC 1.16 (a) (1), he would still be required under most state procedural rules to obtain the permission of the state court where the custody action is pending.<sup>91</sup> Judges might well be loath to allow counsel to extricate from the case, especially on the eve of the custody hearing and with no successor counsel in sight.

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88. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, cmt. d. *See also* N.Y. St. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 1069, *supra* note 85, at \*8 (determining that a minor’s informed consent to a conflict would require counsel to believe that: “(i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary”); AILA Advisory (noting that obtaining informed consent “may require heightened vigilance and a more detailed explanation of the concerns”); text accompanying *supra* note 6 (regarding efficacy of advance waivers). *But see* Alexa Lutchen, *Conflicts of Interest in Representing Siblings in Child Protection Cases: Problems and Solutions*, 14 WHITTIER J. CHILD AND FAM. ADVOC. at 54, 60-61 (2015) (arguing that youth capable of directing the representation should also be able to provide informed consent to some conflicts).

89. ABA Formal Opinion 05-436, *supra* note 87, at 1.

90. Counsel’s duties of loyalty apply equally to both. If counsel were to terminate representation of Diego, counsel would still need to protect his confidences as a former client. *See* MODEL RULES OF PROF’L CONDUCT r. 1.9 (c) (AM. BAR ASS’N 2016). Here Mateo’s right to SIJ relief is not necessarily dependent on Diego’s involvement; rather some minors might be able to locate someone else to serve as guardian. *Compare* Fragomen & Yakoop *supra* note 13, at 627 (noting that representation of the foreign worker in an employer sponsorship case rarely can continue once a conflict develops because the substantive right to immigration relief has been lost). As in many scenarios where non-consentable conflicts have arisen, withdrawal of representation from both clients is likely required. *See* MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2016).

91. Counsel would have entered an appearance and/or likely signed Diego’s complaint for custody and other pleadings. *See* MODEL RULES OF PROF’L CONDUCT r. 1.16 (a), cmt. 3 (AM. BAR ASS’N 2016). Whether those pleadings contained any statements that counsel would now need to disavow (*i.e.*, a “noisy withdrawal”) would be another hurdle that counsel would face were he to consider withdrawal. *Id.*

At a minimum, counsel would need to come clean with his clients about these options.<sup>92</sup> Unlike many joint representation conflicts questions, the problem does not stem from confidential information that one client has refused to share with his counterpart.<sup>93</sup> Here Diego undoubtedly knows that professionals, including Mateo's doctor and DCF, have questioned his fitness.<sup>94</sup> Therefore, the proverbial cat is out of the bag and a discussion with both parties about how to proceed is in order.

As in our review of the confidentiality case study, there is no easy solution to this conflicts problem. Again, the joint representation so common in SIJ actions, as well as the SIJ client's youth, has contributed to counsel's dilemma. Before moving to the prescriptive portion of the project, one final example of the ethics challenges inherent in SIJ practice will be analyzed.

### C. *Candor*

To date our inquiry has focused on ethical tensions that arise between SIJ clients and their attorneys. The next section is more outward-looking as we turn to the additional professional pressures triggered by attorneys' duties of candor to the courts and tribunals involved in SIJ litigation. As in the sections on confidentiality and conflicts, we begin with a case scenario.

Dinh emigrated from Vietnam two years ago when he was 12, after his father abandoned the family and his mother forcibly ejected him from the home. Having illegally entered the U.S., he was initially released to the care of his uncle, only to see that relationship fail. Dinh essentially lived on the streets until arrested and detained by the state on juvenile delinquency charges.

The juvenile court appointed counsel to represent Dinh who faced allegations of trespassing and possession of marijuana. During his representation of Dinh on the juvenile delinquency counts, counsel also screened him for possible immigration relief and advised Dinh that he was a candidate for SIJ status. Dinh requested counsel's assistance in getting the necessary predicate findings from a state court as the first step in attaining legal status.

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92. See generally MODEL RULES OF PROF'L CONDUCT r. 1.4 and discussion, *supra* note 46.

93. Compare D.C. Ethics Committee Opinion 296, revised Feb. 1, 2007, *supra* note 51 (advising withdrawal if no agreement to share subsequently discovered confidential information between employer and foreign worker) with MA Opinion 09-03, *supra* note 46 (citing Restatement and requiring withdrawal in employment context).

94. Typically, the alleged perpetrators of abuse or neglect are notified of, and frequently interviewed during, a child welfare agency's investigation. See generally *Making and Screening Reports of Child Abuse and Neglect*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau (2017), <https://www.childwelfare.gov/pubPDFs/repproc.pdf> (offering 50 state survey); *A Family's Guide to Protective Services for Children*, Massachusetts Department of Children and Families (2012), <http://www.mass.gov/eohhs/docs/dcf/can-family-guide.pdf>.

Counsel assisted Dinh in preparing a Motion Seeking Special Findings that they filed in a separate proceeding in the state’s Family Court. At the Motion hearing, counsel presented a host of evidence on each of the required findings, including evidence of the father’s abandonment and his mother’s neglect, local school and medical records attesting to Dinh’s enrollment and good health, and affidavits from Vietnamese relatives and neighbors attesting to the difficulties Dinh faced (and would face if deported) due to both his parents’ actions and the gang culture from which Dinh had escaped. However, counsel did not provide any evidence of the pending juvenile delinquency action.

The family court judge unexpectedly questioned whether there was any evidence of drug use. Counsel elicited testimony from Dinh who said, “I don’t have a drug problem.” The judge then ruled: “On the representation that there is no drug involvement and on the strength of the other evidence produced today, I grant counsel’s Motion for Special Findings.”

After leaving the courtroom, Dinh thanked his counsel and asked when the immigration hearing could be scheduled so he could finally obtain legal status. His counsel said, “Not so fast; I’m still thinking through what you just told the judge about not having a drug problem.” Dinh seemed perplexed, noting that he does not consider himself an addict. Counsel however reminded Dinh of the pending possession charge, asking, “Isn’t that a ‘problem?’” Dinh countered, “You can’t tell her about that! Besides you’ll get me off, right?”

Experienced immigration advocates have long decried the difficult balance lawyers face when trying to comply with concurrent duties of zeal, confidentiality and candor.<sup>95</sup> While the candor duties have been analyzed in other immigration contexts, this analysis will be on SIJ proceedings.

In the scenario, Dinh has gotten what he wants: the necessary predicate state court findings that are the first step to SIJ relief. His counsel, however, is less assured that the first step is complete given Dinh’s response to the Judge’s inquiry. Dinh’s testimony is not plainly false, assuming he is not abusing/addicted to drugs. Rather, Dinh’s statement that he has no “problem” is capable of different interpretations; the Judge inferred from Dinh’s response that Dinh had “no drug involvement,” a much more sweeping factual statement than a claim of no substance abuse. Therefore, counsel must analyze his duties of candor.

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95. See generally Elizabeth Keyes, *Zealous Advocacy: Pushing Hard Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015) (focusing primarily on removal actions); Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219, 260 (2007) (noting that “some of the most troubling ethical issues arise where the lawyer’s duties of zealous advocacy and confidentiality on behalf of his client converge with his duty of candor toward the tribunal”); AILA Compendium, *supra* note 6, at 16-1.

MRPC 3.3 sets forth attorneys' duties to be forthcoming to tribunals on matters of law and fact.<sup>96</sup> There is no allegation that SIJ counsel lied to the Court or failed to disclose a relevant legal authority. Furthermore, MRPC 3.3 (b) is inapplicable given that the juvenile charges, even if proven, would not constitute criminal conduct related to the proceeding.<sup>97</sup> Therefore any duty to correct the Judge's misperception must stem from other provisions, either counsel's obligations under MRPC 3.3 (a)(3) or under MRPC 3.3 (d).

As to the first possibility, counsel would need to analyze his duties under MRPC 3.3 (a) (3) which states:

If . . . the lawyer's client . . . 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.<sup>98</sup>

It is undisputed that Dinh has been charged with drug possession. The question therefore becomes whether counsel knew that Dinh's statement was false and whether pre-trial allegations are "material," triggering counsel's duty to remonstrate with his client.

Counsel knows from the court's decision that the Judge considered Dinh's evidence regarding the absence of a drug "problem" to be material. Indeed, the Judge explicitly cited that representation as a basis for her ruling. However, counsel would undoubtedly contend that the scope of the Court's inquiry is limited to entering findings on three distinct points: child dependency, inability to reunite due to abuse/neglect/abandonment, and consequences of return to homeland.<sup>99</sup> None are related to drug involvement.<sup>100</sup>

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96. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 20162016). For purposes of this project, we will focus on the MRPC, rather than the companion EOIR regulations since Dinh's case is before a state court rather than the immigration tribunals. 8 C.F.R. § 1003.101 *et seq.* As previously noted, however, the EOIR provisions are materially different. The relevant section triggers sanctions where an immigration practitioner: "c) Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case including knowingly or *with reckless disregard* offering false evidence." 8 C. F. R. § 1003.102 (c) (emphasis added). For a detailed analysis of the distinctions in approach between the EOIR regulations and the MRPC, *see generally* AILA Compendium, *supra* note 6, at 16-7 to 16-13.

97. It is well-established that juvenile charges, even if proved, do not constitute criminal convictions under immigration law. *See generally* KIND, Immigration Consequences of Delinquency and Crimes Manual, Chapter 10, at 2, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-10-Immigration-Consequences-of-Delinquency-and-Crimes.pdf>. That does not mean, however, that juvenile delinquency dispositions are totally immaterial to immigration relief under federal law, especially given the discretionary nature of some paths to legal status. *Id.* at 2-3.

98. MODEL RULES OF PROF'L CONDUCT r. 3.3 (a)(3) (AM. BAR ASS'N 2016).

99. *See generally* Guardianship of Yosselin Guadalupe Penate, 477 Mass. 268, 2017 WL 2510817, \*4 (2017) (reversing the state family court judge's denial of Motions for Special Findings in two SIJ cases and clarifying that the state judge's role on those Motions does not encompass a ruling on the ultimate merits of the immigration case or the claimant's motivation).

100. The family court judge is presiding over a Motion hearing in a care and protection case where Dinh's best interests are controlling, rather than over the pending juvenile delinquency matter. One recent ethics opinion has interpreted the "related to the proceeding" language of the candor rule in an immigration matter as: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

Further, the Comment to MRPC 3.3 sets an appropriately high standard before the Rule requires counsel to take remedial measures. Specifically, the “prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false.”<sup>101</sup> Here there is no evidence that counsel knows that Dinh’s statement is false; rather, his client explicitly denied that he lied. Therefore, counsel would base a decision not to correct the Judge’s misinterpretation on his ongoing duties to protect the confidences of his client – a point that Dinh has just reiterated.<sup>102</sup>

That leaves whether the Motion hearing is considered *ex parte* under MRPC 3.3 (d), which places an affirmative duty on counsel to disclose “all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”<sup>103</sup> As is true of many state court SIJ proceedings, there was no opposition present at Dinh’s Motion hearing. Typically, Dinh’s parents would have been the adverse parties; however, neither had a history of involvement in Dinh’s life since he emigrated. Since they were absent, this Motion hearing had the trappings of an *ex parte* proceeding.<sup>104</sup>

Some courts and commentators have eschewed a technical definition of *ex parte* litigation that would limit application of the Rule to situations where

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without the evidence.” Nebraska Ethics Advisory Opinion for Lawyers, Op. 09-10 (2014) (quoting *State v. Edwards*, 278 Neb. 55, 767 N. W. 2d 784 (2009), construing the state’s version of MRPC 3.3 (b)). Note that the Nebraska Supreme Court in *Edwards* went on to conclude that “Evidence which is not relevant is not admissible.” *Edwards*, 278 Neb. at 84, 767 N. W. 2d at 807. The Nebraska Ethics Committee concluded that the undocumented status of the inquiring attorney’s client was relevant to the workmen’s compensation proceeding because that status limited the amount of damages that could be awarded. Once the Committee declared the status information relevant, counsel faced an ethical quandary since filing the benefits claim required completion of a court form that requested a claimant’s social security number. Since mandating disclosure of the client’s immigration status would have likely chilled the client from filing for benefits, the Committee developed a creative solution that allowed the attorney to sidestep. Specifically, the Nebraska Ethics Committee recommended that the attorney complete the portion of the mandatory court form that sought the client’s Social Security Number with “Intentionally Left Blank.” Nebraska Ethics Opinion 09-10, *supra* note 100. The Committee reasoned that that response put the onus on the Court to decide whether to request additional information; should that occur, then the attorney would need either to obtain the client’s consent to disclose his lack of status or to withdraw. *Id.*

101. MODEL RULES OF PROF’L CONDUCT r. 3.3, cmt. 8 (AM. BAR ASS’N 2016) (emphasis added); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 120 (c) (AM. LAW INST. 2000) (adopting “firm factual basis” as the standard for assessing lawyer knowledge of falsity).

102. Authors of one leading Professional Responsibility casebook reported having scoured bar disciplinary cases involving deceit and omission to find that: “Not one of the cases resulted in discipline of a lawyer because the lawyer or a witness called by the lawyer misled a tribunal or an opposing lawyer without actually making a false statement of fact.” Lisa Lerman & Philip Schrag, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 622 (2d ed. 2008).

103. MODEL RULES OF PROF’L CONDUCT r. 3.3 (d) and cmt. 14 (AM. BAR ASS’N 2016) (providing that the attorney has a duty to “make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision”). See generally AILA Compendium, *supra* note 6, at 16-23 to 16-24.

104. In some states, the Court might have appointed counsel for Dinh’s absent parents. However, that attorney would likely be at a loss to represent clients who are not only not in the country, but also uninvolved in their son’s life. Similarly the government would not have been involved in the state court case. Ethics opinions are divided as to counsel’s duties under Rule 3.3 (d) in certain administrative hearings where the government is also not present. Social Security Administration Administrative Law Judge hearings are such an example. See generally Rains, *supra* note 11, at 383-86 (reviewing several state ethics opinions and concluding that the issue is unsettled).

there is no opposition, such as a hearing on an application for a temporary restraining order.<sup>105</sup> Instead, those sources adopt a more practical approach based on whether the Court had adequate information to “accord the absent party just consideration.”<sup>106</sup>

If applicable, then MRPC 3.3 (d) heightens a lawyer’s affirmative duty to disclose material information, trumping duties of confidentiality. A Minnesota federal district court judge has invoked that provision to sanction counsel in an immigration hearing where counsel sought a Motion for Temporary Restraining Order to forestall his client’s deportation.<sup>107</sup> There, counsel failed to advise the trial court that her request for a stay of her client’s removal had already been twice denied by the Eighth Circuit Court of Appeals. Given that the deception robbed the trial court of jurisdiction to hear the Motion, the Court deemed the results of the prior appellate litigation material and wrongly withheld from the Court.<sup>108</sup>

In our case study, it is less clear that the facts relating to Dinh’s criminal charges are “material” than in the Minnesota ruling. As we saw in the prior discussion of MRPC 3.3 (a) (3), Dinh’s counsel would argue that the allegations of criminal conduct are not necessary to the judge’s “informed decision” on the state court SIJ Motion since they are arguably irrelevant to its resolution. Given the Judge’s ruling, it seems clear that she would disagree with that interpretation and a decision by Dinh’s counsel to remain quiet.

This tension around counsel’s conflicting duties of confidentiality and candor has produced much scholarship in the criminal defense context, questioning whether mandatory disclosure duties undermine counsel’s duty of zeal.<sup>109</sup>

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105. See, e.g., *Malmin v. Oths*, 895 P. 2d 1217, 1027 (Id. 1995) (affirming sanctions against attorney in a family law matter where she failed to disclose to the court material settlement discussions with an out of state opposing attorney, who had notice of the hearing but who did not attend, concluding that “application of the rule [3.3 (d)] is not meant to hinge on a technical definition of the term *ex parte*”; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. c, reporter’s note (AM. LAW INST. 2000) (concluding that the Idaho court in *Malmin* made the “sound point that an *ex parte* hearing is one where there is no opposition present”). See also MODEL RULES OF PROF’L CONDUCT, r. 3.3 (d), cmt. 14 (AM. BAR ASS’N 2016) (noting a universal characteristic of *ex parte* proceedings is that there is “no balance of presentation by opposing advocates”).

106. MODEL RULES OF PROF’L CONDUCT, r. 3.3 (d), cmt. 14 (AM. BAR ASS’N 2016). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112, cmt. b (AM. LAW INST. 2000) (“A potential for abuse is inherent in applying to a tribunal in absence of an adversary.”)

107. *Ndreko v. Ridge*, 351 F. Supp. 2d 904 (D. Minn. 2004) (sanctions imposed under 3.3 after concluding that counsel for the asylum seeker had intentionally withheld the key facts that robbed the court of subject matter jurisdiction). Note that counsel for the government, assigned on an emergency basis, was present but the proceeding was “similar to an *ex parte* motion” since that attorney was apparently not privy to the critical information about the pending appeals. The court notes that only counsel for the immigrant knew of the Eighth Circuit’s rulings. *Id.* at 910. Given those facts, the Court based its imposition of sanctions on the immigration attorney under both Rule 3.3 (d) and Rule 3.3 (a).

108. Note that MRPC 3.3 (d) uses the term “material” while MRPC 3.3 (b) limits its reach to knowledge of “criminal or fraudulent conduct related to the proceeding.” MODEL RULES OF PROF’L CONDUCT, r. 3.3 (AM. BAR ASS’N 2016). See also Maryland State Bar Association Committee on Ethics Opinion 2004-05 (defining the remedial measures to be taken by an immigration lawyer who has discovered that his former client has committed a fraudulent representation in obtaining legal status).

109. For a recent detailed review of that literature, see Keyes, *supra* note 95, at 489-93, 511-17.

More recently, immigration advocates have urged that the stakes for clients without status are so high as to warrant a similar testing of the ethical lines.<sup>110</sup>

Unlike the first two vignettes, this case study does not involve the dual representation issues common to SIJ cases. Rather, Dinh's scenario graphically demonstrates the ethical pressures on counsel in the state court proceedings designed to produce the predicate findings required for SIJ relief. As in Dinh's hearing, it is common for hearings on Motions for Special Findings to be unopposed.<sup>111</sup> Therefore, SIJ counsel frequently experience tensions between their duty of zeal and state judges' expectations of candor. For Dinh's attorney, counsel's duties of zealous representation and confidentiality trumped any obligation under MRPC 3.3 (d) to disclose in this murky context.

Whether immigration cases raise confidentiality, conflicts or candor issues or some combination thereof, these three scenarios have demonstrated that immigration lawyers are besieged by ethical dilemmas. Each also has highlighted the unique presentation of SIJ ethical issues, given the client's under-age status, turbulent family histories, and hybrid litigation process. In examining the existing ethics rules at work, this analysis has exposed a significant lack of clarity.<sup>112</sup> Whether alternative approaches can be developed that could provide counsel more guidance is the crux of the next Section.

### III. PROPOSALS FOR FUTURE PROGRESS

This final Section will attempt to outline methods that could alleviate, if not eliminate, some of the most acute ethical issues facing SIJ attorneys. At the outset, this project rejected one potentially useful solution: a proposal that every interested party receive court-appointed counsel at all stages of the SIJ proceedings. While warranted, the current political atmosphere makes that resolution impractical.<sup>113</sup> This part therefore offers more modest, targeted recommendations and calls for systemic change.

110. *Id.* at 494-496; Gilbert, *supra* note 95, at 260.

111. Many states provide for notice to the SIJ youth's parents; however, by definition, at least one of the parents abandoned, abused, or neglected the minor, undercutting that parent's interest in the proceeding. Therefore, a contested SIJ Motion for predicate findings would be a rarity. As to the jurisprudential consequences of proceeding without opposition, *see generally* Wallace Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORD. L. REV.* 1873, 1891 (1996) (confirming that hearings seeking consent to obtain abortions by minors are frequently conducted *ex parte* and result in determinations based on individual judge's assumptions about child development).

112. *See generally* attorney reports chronicled in Levin, *supra* note 1, at 222 (noting adverse consequences where immigration practitioners are left with ambiguous messages about proper ethical conduct); AILA Compendium, *supra* note 6, at iv (noting "sometimes confusing standards of conduct" in this ethically complex field); Sheard, *supra* note 57, at 755 ("The field of ethics in immigration practice is currently flawed by the ambiguity and imprecision of ethical rules and the erratic enforcement of ethical standards by the relevant authorities.").

113. *See* text accompanying note 17 *supra*, regarding the limited access to counsel in SIJ cases. *See generally* Report on the Unmet Legal Needs in Civil Cases, Legal Services Corporation, *Documenting the Justice Gap in America* (3d ed. 2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf); Lutchén, *supra* note 88, at 79-81 (noting that appointment of individual attorneys for all siblings involved in care and protection actions is



### A. *Enhanced Access to Justice for Parties to State Court SIJ Proceedings*

The reality is that most SIJ youth lack resources, especially access to legal services. Given these limited means, either the minor or the sponsoring adult or both parties find themselves undertaking this path to legal status without the benefit of counsel. Therefore, one modest proposal is to provide access to more materials and procedures in order to increase the likelihood that *pro se* state court petitioners may be able to navigate the process effectively.

There has already been much work undertaken by immigration advocacy groups in preparing basic instruction manuals, mentoring networks, online resource banks and conferences aimed primarily at immigration practitioners and *pro bono* attorneys.<sup>114</sup> The next step would be to expand upon those resources to assist the guardians and custodial parents involved in initiating the SIJ proceedings. Revamping existing materials to serve this new audience is not without upfront costs and complexity. Manuals would need to be rewritten in “lay speak,” be available in multiple languages, and be distributed widely through social service agencies, churches, and other local immigrant community organizations, as well as through the courts.

Another facet of a broad reform would require revamping the court forms to simplify the state court litigation. The state courts in New York and California have already taken important steps in streamlining the process of obtaining the necessary state court Order by issuing a template of standardized findings in SIJ actions.<sup>115</sup> Building on that approach, immigration advocates, courts, and bar associations could collaborate to develop uniform models of the state court SIJ pleadings with appropriate instructions for use by the prospective guardians and custodial parents, just as family courts throughout the country have already done for many of divorce and paternity actions.<sup>116</sup>

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unworkable); Sheard, *supra* note 57, at 745. *But see* Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013) (arguing that the particular nature of family law disputes, particularly between parents, may not benefit from greater lawyer involvement).

114. *See* Levin, *supra* note 1, regarding the significant leadership role played by the American Immigration Lawyers Association (AILA) within this specialty bar; *see generally* other advocacy groups in the field, including Kids in Need of Defense, Immigrant Legal Resource Center, Catholic Charities Legal Immigration Network, Capital Area Immigrants Rights' Coalition, to name a few.

115. *Form Special Immigrant Juvenile Status Order GF 42*, N.Y. FAM. T. (Feb. 2017), available at <http://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf>; *California Superior Court Order Regarding Eligibility for SIJS*, CAL. SUPERIOR CT. (Jul. 1, 2011), [http://www.courts.ca.gov/documents/BTB\\_XXII\\_IG\\_11.pdf](http://www.courts.ca.gov/documents/BTB_XXII_IG_11.pdf). *See generally* Center for Gender and Refugee Studies & KIND, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* 41 (Feb. 2014) [hereinafter “*Treacherous Journey*”], [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf) (recommending that every state adopt template orders to be used in adjudicating Motions for Special Findings and that USCIS also promulgate guidelines to facilitate the hybrid SIJ process).

116. *See* ABA, SEC. OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: REPORT OF THE MODEST MEANS TASK FORCE 145-46 (2003) [hereinafter ABA HANDBOOK], available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_handbook\\_on\\_limited\\_scope\\_legal\\_assistance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf) (recommending simplified, standardized pleading forms). Technological advances are also beginning to assist access to justice initiatives. *Id.* at 49-50 (noting efficiencies resulting from effective use of technology in family law practice).

But *pro se*-friendly manuals and user-friendly court forms should be married with other changes in the delivery of services in SIJ cases. In addition to “step-by-step” procedural materials to assist the parties in litigating the state court action, a comprehensive reform would also rely upon a network of *pro bono* attorneys who could provide limited representation to the guardians and custodial parents.<sup>117</sup> Those attorneys could provide targeted advice and assistance in completing the necessary pleadings without becoming embroiled in the entire state court proceeding. For the reasons explored in the conflicts scenario, the cadre of attorneys offering limited representation to the parents and guardians should be a distinct pool from those lawyers representing the youth.

That proposed division of duties risks exhausting existing legal resources since it envisions separate counsel for the parties to the SIJ state court actions, even though some attorneys would be proceeding on a limited basis only. Therefore, a more viable long term proposal would be to enlist the assistance of para-professionals to assist the adult parties to the state court actions. Some states have begun to experiment with these models for service delivery.<sup>118</sup> Washington State’s Supreme Court has crafted a novel track for legal assistants, called Limited Licensure Legal Technicians (“LLLTs”), who are permitted to provide legal assistance within narrow parameters in family court proceedings.<sup>119</sup> New York has piloted its courthouse Navigator program, whereby trained lay persons provide limited assistance to otherwise *pro se* housing court litigants.<sup>120</sup> California has approved para-professionals

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117. See MODEL RULES OF PROF’L CONDUCT, r. 1.2 (c) (AM. BAR ASS’N 2016) (authorizing limiting scope of representation, following amendment to the Model Rules). See also ABA HANDBOOK, *supra* note 116, at 144-46 (reviewing amendments to the Model Rules and recommending establishment of state and local limited representation referral panels); *Limited Scope Representation Helps Lawyers Expand Practice*, YOUR ABA (Apr. 2015), available at <http://www.americanbar.org/publications/youraba/2015/april-2015/limited-scope-representation-helps-lawyers-expand-practice.html> (detailing advantages of unbundling legal services, particularly in the family law context). For one state’s initiatives to support attorney “lawyer for the day” programs and other forms of limited representation, see Boston Bar Association, *Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts*, Report of the Boston Bar Association Task Force to Expand Civil Legal Aid in Massachusetts (Oct. 2014) at 33-34; *Massachusetts Access to Justice Commission, Statement of Strategies, Objectives and Goals* (May, 2013), <http://www.massaj.org/a2jwp/?p=187>.

118. Both the ABA and the National Center for State Courts are generally supportive of this new approach to access issues. See generally ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2016), <http://abafuturesreport.com/2016-fls-report-web.pdf>; National Center, *Justice for All Project*, <http://ncsc.org/jfap>.

119. *In re Adoption of New APR 28, No. 25700-A-1005* (Wash. Sup. Ct. June 14, 2012), [http://www.wsba.org/~media/Files/Licensing\\_Lawyer\\_Conduct/LLLT/20120615\\_ScT\\_Order\\_Legal\\_Technician\\_Rule.ashx](http://www.wsba.org/~media/Files/Licensing_Lawyer_Conduct/LLLT/20120615_ScT_Order_Legal_Technician_Rule.ashx). For one critical view of LLLTs, see Julian Aprile, *Comment: Limited Licensure Legal Technicians: Non-Lawyers Get Access to the Legal Profession, But Clients Won’t Get Access to Justice*, 40 SEATTLE U. L. REV. 217, 242-46 (2016) (finding LLLTs to be riskier than, and redundant of, Limited Practice Officers who are permitted to assist in preparation of court-approved forms upon consent of all parties).

120. Administrative Order of the Chief Administrative Judge of the Courts 42-14 (Feb. 11, 2014), <https://www.nycourts.gov/courts/nyc/SSI/pdfs/AO-42-14.pdf>. An independent study of this pilot project concluded that the project benefitted housing court stakeholders. See REBECCA L. SANDEFUR & THOMAS M. CLARKE, *Roles Beyond Lawyers, Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects* (2016), available at <http://www.americanbarfoundation.org/uploads/cms/documents/>

assisting in immigration proceedings.<sup>121</sup> The common denominator among these programs is the need for appropriately trained and supervised lay advocates. While the adult parties to the SIJ state court proceedings would still lack full legal representation, some of the initial barriers to access, especially at the pleadings stage, would more likely be successfully undertaken.<sup>122</sup>

If the resources available to guardians and custodial parents like Marta and Diego can be enhanced, then those attorneys who are able to handle SIJ cases could be freed to represent solely the SIJ youth in both the state and federal phases of the hybrid litigation. Perhaps most importantly, this proposal also constitutes a form of triage whereby full legal representation is directed toward the most complex and challenging decisions. It leaves to lawyers the task of counseling SIJ youth about the best state court procedure to obtain the predicate findings (i.e., guardianship, parental custody, self-petition) and the consequences of the various available forms of immigration relief (SIJ status vs. other paths to legal status).<sup>123</sup>

An additional benefit of this initial proposal is to reduce the occasions where concurrent representation occurs, given the significant ethical dilemmas inherent in that work. Enhancing the likelihood that the adult parties, like Diego and Marta, can proceed effectively *pro se*, with limited lay assistance through the state court process, minimizes the chances that they will seek to be co-clients with the SIJ youth. For these benefits to accrue, the SIJ attorneys must be diligent about not assisting the guardians/custodial parents, lest the attorneys run afoul of ethical bars against advising unrepresented parties.<sup>124</sup>

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new\_york\_city\_court\_navigators\_executive\_summary\_final\_with\_final\_links\_december\_2016.pdf. For the full study, see *Roles Beyond Lawyers: Evaluation of the New York City Court Navigators Program* (Mar. 27, 2017), available at <http://www.americanbarfoundation.org/research/A2J/RolesBeyondLawyers>.

121. See CAL. BUS. & PROF. CODE §224441(a) (2015) (providing for non-legal assistance and advice in immigration matters, including preparation of forms, to be provided by lay immigration consultants).

122. While the potential for conflicts between prospective guardians or parents and the SIJ youth is ever present, contested litigation is less common at the state court phase, given parents are frequently not present and parties to a guardianship are likely to be in accord about the ultimate goal of obtaining the predicate findings.

123. Outsourcing these critical “theory of the case” decisions to non-attorneys risks leaving vulnerable youth with inadequate access to justice. In addition, any reforms would have to be mindful of state statutes barring unauthorized practice of law (“UPL”). While non-lawyers can, under certain circumstances, practice before the immigration agencies, lay practitioners trying to represent SIJ youth in state courts would risk running afoul of UPL provisions. See generally AILA Compendium, *supra* note 6, at 1-21; MODEL RULES OF PROF’L CONDUCT, r. 5.5 (AM. BAR ASS’N 2016).

124. MODEL RULES OF PROF’L CONDUCT r. 4.3 (AM. BAR ASS’N 2016) (mandating that counsel “shall not state or imply that the lawyer is disinterested” and “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.” (emphasis added)). See also AILA Compendium, *supra* note 6, at 15-18. For the reasons discussed in Section II. B., *supra*, conflicts of interests frequently emerge between SIJ youth and their adult sponsors. Therefore, it is advisable that SIJ counsel not advise the prospective guardian or custodial parent.

### B. *Specialized SIJ Retainer Agreements for the State Court Proceedings*

It would be naïve to assume that the first proposals will eliminate all representation issues in SIJ cases. Therefore, another necessary, but still modest, proposal involves providing counsel with templates for retainer agreements for use in the state court actions. These models build on the insights previously provided about the unique features of these cases. They also aim to respect the particular needs and abilities of SIJ youth and their caregivers. The first sample would apply when the SIJ minor is being represented. The second draft could serve as a template in those hopefully rare cases when dual representation must be undertaken to obtain the predicate findings.<sup>125</sup>

The approach of drafting model fee agreements for general use is not new. For example, some states have provided templates for contingent fee agreements as part of their ethics rule-making.<sup>126</sup> Therefore, broad distribution of sample retainers would again be a modest reform measure.<sup>127</sup>

Attached as Appendix 1 is a model retainer agreement for use when only the minor will be represented in the state court proceeding.<sup>128</sup> It includes specific provisions regarding the minors' right to representation of their expressed interests, despite the SIJ clients' youth.<sup>129</sup> The sample retainer agreement acknowledges that the prospective guardian or parent may have an active role in the minors' lives, but explicitly provides that counsel is not representing them.<sup>130</sup> Had this retainer been used and joint representation

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125. See generally Sheard, *supra* note 57, at 742 (advocating written retainers with conflicts waivers in other types of immigration proceedings).

126. See, e.g., MASS. RULES OF PROF'L CONDUCT, r.1.5 (f) (2014), including two model agreements for use in contingent fee cases.

127. Adoption of a retainer template by a state regulatory authority would have the imprimatur of passing ethical muster. However, amending existing state Rules of Professional Conduct would likely be a lengthy process, especially where the ABA's Model Rules have not (yet) addressed that issue. Therefore, the proposal envisions that immigration advocacy groups would take the lead. Note that many such groups have already drafted retainer templates for immigration matters at the federal level. See Sample Retainers, CATHOLIC CHARITIES, [https://cliniclegal.org/sites/default/files/retainer\\_agreement\\_sample\\_1\\_and\\_sample\\_2.pdf](https://cliniclegal.org/sites/default/files/retainer_agreement_sample_1_and_sample_2.pdf). To date, the AILA however has not adopted a unitary approach to resolving conflicts with written retainer agreements in dual representation cases. See Levin, *supra* note 1, at 220 (noting the lack of consensus on how to handle these conflicts issues among their constituents).

128. The proposed model builds on existing examples for individual retainer agreements; see, e.g., Catholic Charities' Sample Retainers, *supra* note 127. Note that the samples appended to this article envision *pro bono* assistance. However, these templates can be easily modified to include a fee agreement if the parties have agreed upon payment for legal services to be rendered.

129. As noted earlier, the legal rights of SIJ youth to contract are burdened by states' laws on the rights of minors. This study has focused on counsel for mature youth, rather than representation of pre-verbal children. Applied to those older minors, the general rule is that contracts are not per se barred; rather agreements entered into by youth are voidable. Therefore, the youth seeking SIJ relief cannot be bound by the terms of the retainer. Given that clients retain the right to fire their attorneys, this age-based contract limitation should not prevent counsel from formalizing their representation of youth in the SIJ context by asking them to enter into written retainer agreements. RESTATEMENT (SECOND) OF CONTRACTS, *supra*, §12 and cmt. a (AM. LAW INST. 1981) ("lack of capacity merely renders contracts voidable"); MODEL RULES OF PROF'L CONDUCT, R. 1.16 (a) (3) (AM. BAR ASS'N 2016). Note that a discharged attorney may still need the Court's approval to withdraw if litigation is impending. *Id.* at R. 1.16 (c). See also Appendix 1, B. 6 (explicitly reserving to youth the right to discharge the SIJ attorney).

130. See Appendix 1, "Recognitions of Caregiver." Including this acknowledgment would be appropriate only where counsel has no reason to expect a conflict of interests between the caregiver and the youth and where the youth consents to the caregiver being privy to the terms of the retainer. MODEL

rejected, Diego would have had fair warning that Mateo's attorney was not also Diego's lawyer. Further, the lawyer would have had a clear mandate to counsel only Mateo as to his options and then to represent Mateo's stated interests.

In addition, this retainer agreement conforms to the relevant ethical rules requiring counsel to maintain the confidences of the SIJ youth, even from their caregivers, absent client consent.<sup>131</sup> Whether Mateo would have felt freer to disclose Diego's misconduct with an explicit confidentiality pledge is conjecture; however, at least counsel would not have been caught in the vice of joint representation.

Attached as Appendix 2 is a draft agreement for those occasions when counsel undertakes to offer limited assistance representation to the prospective guardian or custodial parent in the state court action, while providing full representation to the youth.<sup>132</sup> This template builds on the comments to MRPC 1.7 which detail the topics that should be included when concurrent representation is undertaken, including how confidential information will be treated between co-clients.

Further, it anticipates the thorniest issue of dual representation – the subsequent emergence of conflicts of interests between the clients.<sup>133</sup> By proactively addressing the potential for the divergence of interests, the sample retainer alerts the adult client to this danger at the inception of the client-attorney relationship.<sup>134</sup> This approach by no means guarantees that conflicts will not arise or that, when they occur, they can be dealt with judiciously. However, the absence of an agreement surely spells doom if/when conflicts do arise.

As we saw in our first two vignettes, conflicts are predictable in the SIJ context. Even if counsel initially did not foresee a rift in the parties' interests, conflicts did arise between Joaquin-Marta over information disclosure and between Mateo-Diego over neglect. In both cases, counsel had the parties sign joint retainer agreements; however, the retainers apparently used in those cases did not include specific contractual provisions regarding emerging conflicts.

The sample requires counsel to articulate the possible areas of future conflict and have the adult client acknowledge the potential for a divergence of

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Rules of Prof'l Conduct, R. 1.6 and R. 4.3(AM. BAR ASS'N 2016). *See generally*, AILA Compendium, *supra* note 6, at 15-18 (noting the advantages of written retainer agreements especially where conflicts questions could arise).

131. *See* Appendix 1, Section B. 4.

132. Appendix 2 borrows heavily from the Limited Assistance Representation retainer form included in the LAR Training Manual for the Massachusetts Trial Courts at 112-16, available at <http://www.mass.gov/courts/docs/lar-training-manual.pdf>.

133. Conflicts specialist William Freivogel, has publicly shared his advice on joint representation. While his on-line postings do not specifically cover the SIJ context, his materials are instructive for drafting of any joint representation agreement. *See* WILLIAM FREIVOGEL, *Freivogel on Conflicts*, <http://www.freivogelonconflicts.com/waiverconsentforms.html> (last visited Nov. 1, 2017).

134. Appendix 2, Section D.

interests before the representation can begin. For example, before counsel agreed to joint representation of Mateo and Diego, the attorney would have been required to have counseled his prospective clients about the likelihood of future conflicts similar to the following exchange:

I know that parents and kids do not always get along; therefore, there will likely be some developments while I am presenting both of you where, outside of the legal work we are doing in the state court, you two may not see eye to eye. Unless I find that I cannot serve as the counsel you need me to be in the state court as a result of those likely future disagreements, I will not get involved in those issues and they won't limit my work in the state court action. However, if I find that those disagreements do rise to the level where I cannot serve as effective counsel in the state court case, then I will have to withdraw from representing both of you.<sup>135</sup>

In addition to the verbal exchange, this retainer template expressly requires counsel to identify those areas where possible future conflicts could develop, but stops short of seeking an advance waiver.<sup>136</sup> Rather, it indicates that, should a conflict arise that the attorney believes is consentable, an additional counseling session would be needed to determine if the parties wish to agree to continued representation.<sup>137</sup>

The sample retainer agreements provided in the Appendix will never insulate counsel completely from the ire of an aggrieved client – nor should they. Further, the contracts are only as useful as the robust counseling that must necessarily precede execution of the retainers. However, detailed retainers and attention to their terms by all parties at the inception of the representation increase the likelihood that clients and their counsel will undertake the challenges of SIJ representation with a heightened appreciation of the ethical quicksand that may await.

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135. The author is indebted to Professor Paul Tremblay for the language of this sample counseling discussion with the prospective SIJ clients. For sample language for inclusion in employee agreements where joint employer-employee representation is being considered, *see* Mehta, *supra* note 13.

136. Appendix 2, Section D. 2-4.

137. Our proposal focuses on written retainer agreements. However, as the Model Rules make clear, the key is obtaining the parties' informed consent. *See* MODEL RULES OF PROF'L CONDUCT, r. 1.0 (e) and MODEL RULES OF PROF'L CONDUCT, r. 1.7 (b) (4) (AM. BAR ASS'N 2016). Counseling each client about the need to share confidences between the parties, the potential for conflicts, and the potential for withdrawal if non-consentable conflicts arise is a taxing assignment for any lawyer and two clients. In the SIJ context, those difficulties are multiplied due to the background, education, language proficiency, and power dynamics of the potential clients. Therefore, the sample joint retainer agreement in Appendix 2 does not go further and attempt to achieve an advance waiver of the prospective conflict. *See* text accompanying note 54 *supra*, as to the limited efficacy of advance waivers in these situations; MODEL RULES OF PROF'L CONDUCT, R. 1.7, cmt. 22 (AM. BAR ASS'N 2016); NY State Bar Ass'n. Op. 761, *supra* note 75 (predicting that an advance waiver of conflicts by husband where wife has alleged abuse would be suspect); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 122, cmt. d (AM. LAW INST, 2000) (noting that advance conflicts waivers are "subject to special scrutiny").

### C. Court Reforms

The previous proposals will fall short of meaningful reform if they fail to engage the judiciary. Our earlier call for more user-friendly forms and more lay assistance would require the assistance of court administrators, but that is only a small step. This next proposal addresses the consequences of more substantive reforms that would require state judiciary buy in. These additional suggestions may produce some improvement in the efficiency of the state court SIJ process. But these initiatives are included here as a means of alleviating some of the ethical angst experienced by SIJ practitioners.

While family court judges have been adjudicating custody and guardianship cases for decades, presiding over SIJ actions is a comparatively recent phenomenon.<sup>138</sup> Congress enacted the hybrid SIJ process to maintain the traditional separation between state and federal functions.<sup>139</sup> Immigration decisions remain the bailiwick of the federal government; child welfare endures as a state court determination. Congress recognized that state court judges have the expertise and case precedents to apply the best interests standard to these new actions.

When the state court judges joined the SIJ fray, they experienced the federalism tensions first hand. Now they were being asked to decide only one chapter of a much larger work. After their decisions on the predicate findings, other adjudicators, this time federal decision-makers, will assume jurisdiction and will resolve the ultimate questions regarding immigration status. State judges have had little experience with that type of “hand-off” to another judicial system. They typically are accountable principally through appellate review of their decisions, rather than from federal agency and judicial oversight. Like the family court judge in our third scenario, state court judges may be skeptical about exercising their powers in this new realm, particularly where they feel that counsel has not provided all material information to the Court.<sup>140</sup>

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138. Shannon Aimée Daugherty, *Note: Special Immigrant Juvenile Status: The Need to Expand Relief*, 80 BROOK. L. REV. 1087, 1116 (2015) (noting the significant increase in SIJ petitions since the 2008 Congressional amendments).

139. Carr, *supra* note 15, at 156 (noting the federalism approach of SIJ relief); Chen, *supra* note 15, at 602 (noting the challenges raised by the hybrid system).

140. See *Guardianship of Yosselin Guadalupe Penate*, *supra* note 99. See generally Jennifer Baum, Alison Kamhi, and Mario Russell, *Most in Need But Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM CT. REV. 621, 626 (2012) (noting resistance of state court judges and limited jurisdiction of state courts as barriers to SIJ relief for detained minors); Theo Liebmann, *Keeping Promises to Immigrant Youth*, 29 PACE L. REV. 511, 512 (2009); Chen, *supra* note 15 (proposing re-evaluation of federalism division); Daugherty, *supra* note 138, at 1104 (concluding state courts issue predicate Orders arbitrarily and recommending new approaches especially for youth who are victims of domestic violence). In addition, immigration clinicians have shared their experiences in SIJ cases on listservs where the state court judges have expressed their hostility to entering SIJ predicate findings (on file with author). See also Sheard, *supra* note 57, at 745 (noting judges’ concerns about fraud in immigration proceedings).

State court judges should welcome training opportunities for themselves and their staff focused on this new role.<sup>141</sup> At a minimum, these discussions could include streamlining the state court pleadings and providing additional resources to *pro se* SIJ litigants.<sup>142</sup> In addition, attending conferences on the SIJ hybrid process would allow the judges to develop case handling guidelines and collaborate on best practices.<sup>143</sup> Convening multi-state conferences for state judges could also begin to address the significant outcome disparities that currently plague the SIJ process; currently the likelihood of successful adjustment of status varies dramatically among states.<sup>144</sup>

Further education on the role of the state bench in SIJ actions may well clarify the limited issues before the state judges. Rather than deciding the ultimate question of legal status, the state court judges are being asked to rule on the SIJ youth's welfare where issues of abandonment, abuse, and/or neglect have been alleged. Had the Judge hearing Dinh's Motion better understood that his juvenile delinquency charges did not bar subsequent federal immigration proceedings, the Judge could have focused on the evidence counsel did submit that addressed his welfare and best interests.<sup>145</sup> That narrower view of her role could have streamlined approval of Dinh's Motion

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141. See generally Thronson, *Of Borders and Best Interests*, *supra* note 18, at 72 (highlighting the challenges facing state court judges in adjudicating cases involving immigrant family members); Pulitzer, *supra* note 15, at 223-37 (proposing uniform state court standards consistent with international human rights mandates).

142. See also the proposals *supra* at text accompanying note 118, regarding various state court orders that have allowed lay advocates to assist *pro se* litigants. Those alternatives to legal service delivery typically require modification of state procedures and ethical provisions. Therefore, opportunities for the state judiciary to collaborate with immigration advocates to brainstorm appropriate new mechanisms for better legal access will be key to long term progress.

143. See, e.g., Westchester County New York Guidelines, *supra* note 80; see generally Liebmann, *supra* note 140, at 521 (noting significant strides that New York courts and social service agencies have taken to enhance efficacy of state court role in SIJ cases, but recommending further judicial and attorney education); Lisa Frydman, Elizabeth Dallam & Blaine Bookey, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, University of California Hastings (2014), available at [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf) (recommending that USCIS offer trainings for state court judges handling SIJ cases to clarify the scope of the state court inquiry).

144. Immigration advocates have identified several factors producing these inter-state differences. Hlass, *supra* note 2. In addition to access to counsel, some states have interpreted the SIJ federal statute as requiring both parents to be unavailable to be a minor's custodian. Other state laws relating to jurisdiction over juveniles have caused SIJ youth to "age-out" of relief at 18, rather than the federally recognized limit of 21. See generally Sarah Pierce, *Unaccompanied Child Migrants in US Communities, Immigration Courts, and Schools*, Migration Policy Institute Issue Brief (Oct. 2015) (noting that "[b]ecause they involve state juvenile courts, SIJ adjudications vary considerably across states"). Nebraska (In re Erick M, 820 N.W.2d 639 (Neb. 2012)) and New Jersey interpreted the federal immigration provision as requiring evidence that reunification with both parents, rather than just one, was not possible (though the New Jersey Supreme Court has since reversed that interpretation: HSP v. JK, 23 N. J. 196 (New Jersey, 2015). Meghan Johnson and Kele Stuart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, ABA Section of Litigation (Jul. 14, 2014), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

145. See text accompanying note 97, *supra*. See generally Wendi Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 81 (2008) (reporting that some state judges have refused to issue predicate Orders of dependency due to perceived likelihood that youth would proceed to seek immigration relief); Daugherty, *supra* note 138, at n. 123 (listing specific cases where state courts failed to issue SIJ findings to otherwise eligible youth).



and alleviated the Court's perceived need to inquire about drug or gang activity.

Other commentators have proposed additional judicial reforms, particularly for SIJ cases where conflicts of interests arise.<sup>146</sup> When the conflicts developed, there was no question that the ethics dilemmas inflicted on counsel for Joaquin and Mateo were very troubling. However, it is unclear that having state judges intervene in order to evaluate the propriety of joint representation will be beneficial. These "conflicts hearings" could expose details of the confidential attorney-client relationship to court review. In addition, they would add more procedural layers even though SIJ youth and their counsel are seeking simplicity.<sup>147</sup> Instead, more detailed retainers, clarification of the role of the state court judges, and more ethics trainings for SIJ practitioners to which we now turn, may prove more effective antidotes to SIJ conflicts questions.

#### D. *Attorney Training on Key Ethical Rules Applicable to SIJ Practice*

This final section explores ways to alleviate the ethical challenges faced by SIJ practitioners by offering them clearer guidance. One option could entail carving out special ethics rules to assist SIJ practitioners on the basis that that practice is so unique and meaningful access is so limited. Immigration advocates will be understandably skeptical of that approach given the uphill battle required to change existing norms. After all, attorneys in a host of other fields could make a case that the unique demands of their particular practice area warrant special dispensation.<sup>148</sup> Further, while the ABA's Model Rules have embraced distinct mandates for certain types of attorneys, those special rules have been defined more by the attorneys' roles, than by their field of practice.<sup>149</sup> Therefore, we recognize that any reforms of the state bars' Rules of

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146. Sheard, *supra* note 57, at 744 (proposing conflicts waiver colloquy in joint representation, but acknowledging implementation difficulties in immigration context). *See also* Baum et al., *supra* note 140, at 623 (recommending that state courts permit SIJ youth to self-petition); Lutchen, *supra* note 88, at 74-86 (offering a range of possible options for holding counsel accountable in joint representation cases); Fordham Conference, *supra* note 29, at 1323, Recommendation VIII. C. 6. e. (noting judges' duty to monitor competent representation of children).

147. Lutchen, *supra* note 88, at 85-86 (recognizing challenges inherent in the proposals for more effective judicial handling of joint representation of siblings). In Joaquin and Mateo's situations, the conflicts erupted mid-course, not at the inception of the representation. Therefore, prophylactic court measures at the filing of the SIJ state court action would likely not have barred the dual representation in those scenarios.

148. *See generally* Sheard, *supra* note 57, at 741 (acknowledging the difficulties in proposing amendments to ethics rules for specialty practice).

149. Most notably, the Model Rules provide for enhanced duties for in-house counsel (MRPC 1.13), government employees (MRPC 1.11), and prosecutors (MRPC 3.8).

Immigration attorneys are already bound by specialized restraints when practicing before federal agencies. While there is no specific regulation governing dual representation, improprieties from attempting to represent co-clients in SIJ cases could be sanctioned federally under certain existing broad provisions, including engaging in conduct that is prejudicial to the administration of justice or failure to provide competent representation. 8 C. F. R. § 1003.102 (n) and (o), respectively. Since the focus of this article is on the SIJ youth's need to litigate in state court, amendments to the federal immigration regulations would

Professional Conduct on behalf of politically marginalized clients would involve a lengthy process lacking political momentum.<sup>150</sup>

Having rejected the option of ethics amendments, other remedial action is in order since doing nothing to alleviate ethics dilemmas also has a cost – to counsel, to their clients, and to the systems in which they operate. Take for example one ethical bind explored in this study: conflicts of interests.<sup>151</sup> Currently there is little accountability to SIJ clients when joint representation produces a conflict. The alternative of withdrawal once irreconcilable conflicts arise is fraught with costs for the clients and disruption for their counsel and the courts.<sup>152</sup> Lawyers may be hesitant to self-police and to flag an emerging conflict once invested in a matter; therefore, commentators have questioned the efficacy of leaving to counsel’s discretion the decision of when a non-consentable conflict has emerged.<sup>153</sup> Given the SIJ population’s limited resources, reports to bar counsel or malpractice suits are weak compliance mechanisms.<sup>154</sup>

Our case scenarios highlight immigration practitioners’ angst; in addition, the literature contains ample evidence of attorney complaints about insufficient ethical guidance.<sup>155</sup> One lawyer decried the lack of clarity in immigration dilemmas, noting:

[I]t’s a very tricky issue. . . . And every time I go to conferences, and there’ll be ethics seminars. And the bottom line is: Yeah, this is a problem! But there’s never any, like . . . ‘[h]ere’s what is the best thing. . . .’ So I don’t think there’s any good answer.<sup>156</sup>

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not govern immigration attorneys’ conduct when advocating for special predicate findings in the family and juvenile courts. Therefore, the article’s recommendations target only state ethics rules.

150. Arguably, the immigration bar, complemented by the number of attorneys who specialize elsewhere but who voluntarily undertake SIJ representation on a *pro bono* basis, might muster support for rule change. However, even if some leverage exists, such a move would still face state-by-state approval.

151. See Section II. B., *supra*.

152. The text speaks of “costs” intentionally. Even if clients are receiving free legal services as in our scenarios, they still face the additional time investment involved in retaining new counsel – assuming another *pro bono* attorney can be found.

153. See generally Lutchén, *supra* note 88, at 87-88 (noting the lack of accountability of counsel in the throes of conflicts); Sheard, *supra* note 57, at 739-40.

154. Lutchén, *supra* note 88, at 72; see also Jennifer L. Renne, *Legal Ethics in Child Welfare Cases-Quality Representation*, 16 PROF. LAW 4, 8 (2005) (“Consider who is victimized by unethical practice. To sue for malpractice, the client must be aware of this right, and have the resources to bring the claim. Whether a client brings a malpractice claim, or files an ethical grievance depends on many factors, including experience, education level, and age. Disciplinary actions and referrals in child protection cases are therefore rare, and usually only address outrageous situations.”).

155. See generally Levin, *supra* note 1, and quote from the same attorney interviewee whose comments opened this article, Immigration Attorney # 31 in Manhattan, N.Y. (Aug. 22, 2006).

156. Levin, *supra* note 1, at 217 (quoting from her interview with Immigration Attorney #1 in Manhattan, N.Y. (Jul. 28, 2006)).

Another immigration attorney expressed similar frustration:

[E]very day is a conflict! It's a problem, the way the whole system is set up. . . . I mean, if it was any other part of the law, you wouldn't want . . . one attorney representing both parties. But it just has evolved, and that's the way [it has] become acceptable. So to me, I find it to be really a conflict, but two people aren't going to two different attorneys. . .<sup>157</sup>

The practitioners' concerns are also reflected in the academic commentary: "The field of ethics in immigration practice is currently flawed by the ambiguity and imprecision of ethical rules and the erratic enforcement of ethical standards by the relevant authorities."<sup>158</sup>

Rather than doing nothing to help immigration lawyers combat these questions, this project recommends ethics trainings and practice advisories<sup>159</sup> specifically designed for SIJ counsel on the ethics rules governing minor clients<sup>160</sup> and concurrent client conflicts.<sup>161</sup> The key concepts to instill would be to:

Treat SIJ youth as you would your adult clients, absent evidence of diminished capacity;

Beware joint representation and take the conflicts counselings seriously.

The particulars of this ethical guidance will be explored below.

First, the nature of the client relationship under MRPC 1.14 needs to be clarified when counsel agrees to represent a minor. That Rule is triggered when "a client's capacity to make adequately considered decisions in connection with a representation is diminished."<sup>162</sup> Despite the Rule's official title, the text and comments distinguish the ethical duties owed youth from those owed adults who have diminished capacity. Absent evidence of decision-making infirmity, there is no ethical requirement that counsel usurp a youth's

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157. Levin, *supra* note 1, at 215 (quoting from her interview with Immigration Attorney # 32 in Manhattan, N.Y. (Aug. 28, 2006), regarding conflicts in the employment context).

158. Sheard, *supra* note 57, at 755; *see also* Fragomen & Yakoop, *supra* note 13, at 640 (noting the inherent tension between immigration counsel's ethical duties of loyalty to one client and confidentiality duties to another, and urging review of the ethics rules to provide increased guidance); Lutchen, *supra* note 88, at 87 (despairing the lack of accountability and compliance mechanisms to monitor attorneys facing conflicts of interests in dual representation of siblings in child protective actions).

159. The immigration bar is so fortunate to have the leadership of the AILA, which regularly sponsors conferences, produces the ethics compendium, and issues practice advisories. *See, e.g.*, AILA Advisory, *Ethical Issues in Representing Children in Immigration Proceedings*, *supra* note 6; AILA Ethics Compendium, *supra* note 6.

160. MODEL RULES OF PROF'L CONDUCT r.1.14 (AM. BAR ASS'N 2016). The title of Model Rule of Professional Conduct 1.14 is "Client with Diminished Capacity;" however, as discussed, *infra*, minor youth should be deemed capable of entering into a normal attorney-client relationship absent contrary evidence calling into question their decision-making capacity.

161. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016).

162. MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2016).

expressed interests. Rather, a minor client who has the “ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being” should be accorded the same representation as competent adult clients.<sup>163</sup>

Advocates for children have long objected to the formulation of Rule 1.14 that lumps minors into the same category as clients with diminished capacity.<sup>164</sup> Building on those insights, SIJ advocates should be trained to establish normal attorney-client relationships with their minor clients who are capable of expressing their interests, absent evidence of cognitive or decision-making impairment. Furthermore, SIJ practitioners would benefit from instruction on recognizing youth’s capacity for directing the representation to avoid any temptation to substitute their judgment for that of their minor clients.<sup>165</sup> SIJ ethics trainings should refer attorneys to their state’s case law on mature minors.<sup>166</sup>

In addition, language in one comment to Rule 1.14 raises the specter that parents of minors could be deemed their “natural guardians.”<sup>167</sup> However, a SIJ proceeding is exactly the type of case where parental guardianship should not be implied. Where, by definition, a SIJ youth has experienced parental abandonment, abuse, or neglect, it would be inappropriate to supplant minor clients’ expressed interests with those of their parents.

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163. *Id.*, cmt. 1.

164. Fordham Conference, *supra* note 29, at 1314 (proposing that the ethical duties owed children be dealt with separately from those obligations owed persons with diminished capacity), at 1301 (noting that counsel should represent minor’s stated interests where minor is capable of directing the representation), and at 1352 (recommending revision of MRPC 1.14 by drafting a separate ethical rule for representing minors); *see also* UNLV Conference, *supra* note 29, at 609-10 (suggesting the need for a robust investigation of capacity by counsel for children with the goal of allowing them to direct the representation where feasible); *but see* Jonathan Hafen, *Children’s Rights and Legal Representation – The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J. L. ETHICS & PUB. POL’Y 423, 461-63 (1993) (proposing amendment to MRPC 1.14 to ensure parental voice in decision-making in cases involving children). *See generally* Kohn & Koss, *supra* note 36, at 633-36 (proposing amendments to the Comments to MRPC 1.14 to best protect adults with diminished capacity).

165. Empirical data demonstrate that the average age of SIJ applicants was 17 years of age for the period of 1999-2012. Hlass, *supra* note 2, at 26. The language of Comment 1 to existing MRPC 1.14 provides that children “certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” MODEL RULES OF PROF’L CONDUCT r. 1.14, cmt. 1 (AM. BAR ASS’N 2016). Having an opinion worth consulting is potentially not synonymous with having the capacity to direct representation. While a bright line approach that would set a specific age for maturity, *e.g.*, twelve, has the benefit of clarity, it robs the SIJ attorneys who know their minor clients best from making individualized assessments. Some advocates, relying on child development literature, have recommended that adolescents older than fourteen be deemed to have the capacity to make informed decisions, while the capabilities of those between ten and fourteen should be assessed on an individual basis. *See generally* Mlyniec, *supra* note 111, at 1907 (1996); *see also* Fordham Conference, *supra* note 29, Recommendations, V. A. 2 at 1812; UNLV Conference, *supra* note 29, at 609-10.

166. *See, e.g.*, Baird v. Att’y Gen., 371 Mass. 741, 754 (1977) (applying the “mature minor” rule to youth’s constitutional right of choice in abortion procedures); *see generally* AILA Advisory, *Ethical Issues in Representing Children in Immigration Proceedings*, *supra* note 6, at 4 (urging counsel for youth to research the law of the relevant state for presumptions regarding competence of minors).

167. MODEL RULES OF PROF’L CONDUCT r.1.14, cmt. 4 (AM. BAR ASS’N 2016) (“In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.”)

How would this proposed new ethical guidance have affected the SIJ attorneys in our three case scenarios? Each of the three SIJ youth was at least 12 years old with no documentation of decision-making impairment. Therefore, counsel would be ethically bound to maintain a normal attorney-client relationship with each, including all of the attendant obligations of competence, communication, confidentiality, loyalty, zeal, and avoidance of conflicts.

For example, when Marta attempted to extract a promise of non-disclosure, counsel's obligations to Joaquin would have come into sharper focus. His counsel would recognize that he has a duty of zeal and loyalty to Joaquin despite his age, rather than automatically abiding by the wishes of the adult client. Similarly, counsel's obligations to protect Dinh's confidences, despite his being underage, would shape the attorney's decisions regarding whether remedial action was required.

In contrast, counsel for Mateo may worry that his father has put the son at risk, triggering additional professional duties under the provisions of Rule 1.14 (b):

When the lawyer reasonably believes that the client . . . 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. (emphasis added)<sup>168</sup>

Over the course of the representation, counsel developed significant concerns about Mateo's health and financial exploitation. Appropriate training on the express requirements of Rule 1.14, however, would support counsel in his effort to continue to respect Mateo's expressed interests. This Rule does not mandate that counsel seek appointment of a surrogate; at most, the Rule merely affords counsel discretion where the predicates to intervention are met. Here, Mateo obtained medical treatment and the state agency empowered to protect children investigated and took no further action. Thus, Mateo is entitled to have his clearly articulated interests zealously pursued by his lawyer. Requiring counsel to commit to being the loyal legal representative clarifies the attorney's role and helps prevent counsel from slipping into a best interests, paternalistic stance.

But clarification of the mandates of MRPC 1.14 alone fails to address the fundamental problem of joint representation in SIJ cases. Therefore, further training on implementing MRPC 1.7 in SIJ cases would expose the challenges posed by dual representation of a minor and the prospective guardian or custodial parent in cases involving allegations of abandonment, abuse or

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168. MODEL RULES OF PROF'L CONDUCT r.1.14 (b) (AM. BAR ASS'N 2016).

neglect.<sup>169</sup> The text of MRPC 1.7, governing concurrent conflicts of interest, already provides that some concurrent conflicts are non-consentable, where the four requirements of MRPC 1.7 (b) cannot be met.

In SIJ cases, trainings should demonstrate why dual representation of minors and their parent or guardian should be the rare exception rather than the rule given the challenges inherent in trying to obtain informed consent from both prospective clients.<sup>170</sup> Practitioners need more guidance before undertaking the complex threshold counseling that must transpire before an attorney can obtain informed consent to the joint representation. First, they should be trained to analyze what conflicts exist or could arise at the inception of the relationship when little is likely known about the parties:

The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>171</sup>

Assuming the attorney concludes that the prospective clients' interests appear sufficiently aligned, then counsel should be taught to take two further steps to satisfy MRPC 1.7. The lawyer must communicate the consequences of the proposed joint representation effectively to both clients.

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . . When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.<sup>172</sup>

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169. See generally AILA Advisory, *Ethical Issues in Representing Children in Immigration Proceedings*, *supra* note 6, at 8 (noting that separate counsel for the minor and the adult in SIJ state court proceedings is common practice in many states and holding that it is "best practice" to avoid sequential representation of the adult in the state court action and the minor in the federal immigration proceeding due to conflicts).

170. Whether dual representation should be deemed suspect in other types of state court actions involving minors, including child protection cases, custody cases where child welfare is at issue, and non-SIJ guardianships over minors, is beyond the scope of this article. However, some state courts already appoint separate counsel for the minor in guardianship or proceedings. See, e.g., West Chester County New York Family Court's advisory on SIJ, *Application for Guardianship/Motion for Special Immigrant Juvenile Status*, *supra* note 80; Minn. Stat. §260C.163(3)d.

171. MODEL RULES OF PROF'L CONDUCT r.1.7, cmt. 8 (AM. BAR ASS'N 2016).

172. *Id.* at cmt. 18; See also *id.* at r. 1.0 (e) (defining informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct") (emphasis added).

Then counsel must have the minor and the prospective guardian or parent confirm their assent in writing.<sup>173</sup> Implementing those steps effectively is demanding in any representation. SIJ cases magnify those complexities due to the frequent presence of language and cultural barriers, education disparities, and power imbalances, as the first two scenarios in this paper have demonstrated.

Counsel for Marta and Joaquin could not have foreseen the natural disaster. At the beginning of the joint representation, the clients' mutual interests in obtaining status for Joaquin trumped any concerns about differing goals. However, post-earthquake, counsel owed his clients further investigation and counseling before assuming that the joint representation could continue. With withdrawal otherwise on the horizon, the attorney would be obliged to counsel the clients anew, exploring whether there was any possibility of resolving the conflict.<sup>174</sup> After hearing counsel's obligations, Marta might be more likely to reconsider her demand that Joaquin be kept in the dark. If not, then costly withdrawal would be imminent.<sup>175</sup>

In the second case, counsel should have foreseen the possibility of conflicts between son and his previously estranged father, if not the specific triggers of the dispute. However, "mere possibility of subsequent harm" does not prevent joint representation, so counsel undertook the joint assignment.<sup>176</sup> Once the financial and medical concerns have surfaced, SIJ advocates should be taught to recognize a duty to re-assess and re-counsel. Using this vignette, trainers could explore with immigration lawyers how counsel should have

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173. MODEL RULES OF PROF'L CONDUCT r.1.7 (b) (4), r. 1.7 cmt. 20 (AM. BAR ASS'N 2016). Some commentators would complement any conflicts counselings with a mandatory requirement that the potential co-clients be advised to seek independent counsel. See Sheard, *supra* note 57, at 740. However, that proposal, while well-intentioned, would be difficult to enforce, could be costly, and would result in little meaningful change given the shortage of able counsel.

174. MODEL RULES OF PROF'L CONDUCT r.1.7, cmt. 4 (AM. BAR ASS'N 2016) (instructing that withdrawal is normally required unless each client provides informed consent following counseling about the new developments). In this first scenario, the lawyer would need to re-counsel both Marta and Joaquin given the initial consent did not cover the possibility that Marta would want to prevent Joaquin from obtaining information about his family. Counsel would start with Marta and explain the need for withdrawal if she persisted in keeping the news from Joaquin. Then Joaquin could be counseled on the pending need for counsel's withdrawal without offering specifics, because of an "emerging" conflict. Joaquin would surely press for more information that counsel would need to withhold unless Marta had a change of heart. Given the likelihood that Joaquin will hear of the earthquake from other sources, even if not the particulars of his family's situation, he may well infer that some major event has happened. Furthermore, service of the state court pleadings on the parents is imminent; therefore, once they are contacted, they could also reach out to Joaquin directly. Counsel could attempt to work with Marta to obtain the services of a trained juvenile psychologist for Joaquin to assist him in dealing with news of the tragedy.

175. Counsel would likely consider whether he could continue representation of Joaquin and withdraw from being Marta's counsel. However, he would still owe Marta the duty to protect her confidences. MODEL RULES OF PROF'L CONDUCT r.1.7, cmt. 5, r. 1.9 (c) (AM. BAR ASS'N 2016). That restriction would likely hobble counsel's ability to represent Joaquin competently especially where the natural disaster provided a preferable theory of the case.

176. MODEL RULES OF PROF'L CONDUCT r.1.7, cmt. 8 (AM. BAR ASS'N 2016). In Mateo's situation, Diego was not initially viewed as the neglectful or abusive parent; rather Mateo's mother became the non-custodial parent when she was incarcerated. SIJ cases by definition involve introduction of evidence of abuse, neglect, or abandonment to obtain the predicate findings; however, the conflicts analysis at issue here involves the prospective custodial parent.

proceeded. Arguably, Mateo might consider allowing counsel to convene a session with his father. When confronted with counsel's conflicts concerns, Diego might agree to compensate Mateo or free Mateo from more forced labor if the father's top priority was helping his son achieve legal status. If the counseling produced no change of heart, then the clients would have been informed of the ethical predicaments mandating withdrawal.

These case scenarios could be used as critical ethics training materials since they clearly demonstrate the hazards of accepting joint clients. SIJ attorneys should be instructed to document their conflicts analysis and the substance of their counseling sessions to supplement the clients' written consent. Those additional steps would bring some healthy accountability to the infrequent situations when counsel would decide to accept joint representation.

Practitioners seeking ethical bright lines might value a presumption against concurrent client representation in SIJ matters. Such a presumption would not need to be a *per se* bar, but might still deter attorneys from undertaking joint representation.<sup>177</sup> Rather than being pulled into the dual representation by the need of the parties, the presumption would embolden immigration practitioners to say no.

This project ultimately rejects adoption of a presumption against concurrent representation until such time as the relevant jurisdiction has sufficient legal resources for the prospective guardian/custodial parent to proceed without counsel. If one attorney can no longer represent both parties, then more parties to the state court actions will need counsel or be forced to proceed *pro se*. As we have seen, there are currently inadequate legal materials and lay advocates for the adult petitioners in the state court proceedings.<sup>178</sup> Until such time as it becomes feasible for the adults to obtain the predicate findings *pro se*, implementing a presumption against joint representation could result in fewer eligible SIJ youth successfully adjusting their legal status.

As a stopgap, SIJ practitioners contemplating joint representation should offer an adult otherwise unable to proceed in state court some legal assistance limited to the tasks necessary to obtain the predicate findings. Frequently, this limited representation would involve assisting the adult with drafting the pleadings and other procedural steps, such as obtaining service. Counsel would then marry that limited representation of the parent or prospective guardian with full scope representation of the SIJ youth.

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177. Even with a presumption against joint representation in place, there could be special exceptions. For example, a mature youth about to age out of access to SIJ relief and a prospective guardian who had been the surrogate parent for a decade could present a compelling case. The guardianship being sought would be very time-limited given the youth is on the cusp of reaching majority. Another example could involve a situation where the prospective co-clients have a significant history of being a family unit, even though no formal, legal relationship had yet been obtained.

178. See Section III. A. and C., *supra*, regarding need for streamlined court processes, limited representation, and lay advocates.



Both parties would be clients of the attorney with all the attendant professional duties. However, limiting the scope of the adult representation to pre-trial matters would allow the attorney to take the lead in the state court hearing on behalf of the youth.<sup>179</sup> Limited representation in some scenarios can leave the client at the mercy of opposing counsel in an adversarial proceeding after the limited assistance lawyer concludes his representation. In contrast, SIJ state court hearings are less likely to have vocal opposition from the absent parent(s) or the youth. Therefore limited assistance to the adult petitioners may be necessary in those jurisdictions where they would otherwise risk being unsuccessful petitioners if left *pro se*.

#### CONCLUSION

The immigration bar has taken the lead in alerting the legal profession that their practice area is rife with ethical dilemmas. As we have seen, SIJ cases offer compelling evidence that the ethics questions in this previously unexplored area of immigration practice are endemic and intensely problematic. At the very time that we should be incentivizing attorneys willing to undertake representation of minors seeking a path to legal status, these unresolved ethics questions undermine that effort. We have only begun to identify a roadmap for future inquiry. Further collaboration among professional ethicists, immigration practitioners, family court judges and staff, and child advocates would be the necessary next step in that journey.

#### APPENDIX 1 – SAMPLE SIJ RETAINER AGREEMENT FOR *PRO BONO* REPRESENTATION OF YOUTH †

##### A. TERMS OF REPRESENTATION:

This agreement for legal representation and service is between Attorney and \_\_\_\_\_. I, the undersigned client, hereby authorize Attorney to represent me limited to the following legal matter:

\_\_\_\_\_  
[define scope of representation, e.g., “state court action to obtain guardianship/determine custody or Special Immigrant Juvenile Status;” add additional immigration proceedings as agreed]

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179. Counsel owe the same ethical duties to all clients, whether undertaking Limited Assistance Representation (“LAR”) or full scope representation. See generally the LAR Training Manual for the Massachusetts Trial Courts, *supra* note 63, at 87. If counsel for Mateo had offered Diego only limited assistance representation to file the custody pleadings (and terminated his assistance thereafter), the lawyer would have been freer to press Mateo’s interests at the state court Motion hearing.

† The two model forms found in these appendices were created by Alexis Anderson based on many samples in the immigration community. See, e.g., *supra*, notes 128 and 132. © 2018 Alexis Anderson.

**B. I UNDERSTAND I HAVE THE FOLLOWING RIGHTS AS A CLIENT:**

1. To be kept informed by Attorney about any important developments in my case.
2. To be consulted by Attorney before any significant decision or action is taken on my behalf and to have the Attorney represent my interests. Attorney will abide by my decisions with respect to the objectives of the representation, subject to ethical and legal obligations.
3. To expect that Attorney will pursue my case with all reasonable diligence.
4. To have my Attorney maintain my confidential information as required under the relevant Rules of Professional Conduct, including as to my family or caregiver. Attorney will inform other professionals (law students, interpreters and experts) working with Attorney on the obligation of confidentiality about my case and personal information.
5. To be informed in writing if the Attorney withdraws as my legal representative for any reason, and to be provided with any original documents belonging to me or issued by USCIS, the Immigration Court, or the state court regarding my case.
6. To terminate this retainer agreement at any time with advance, written notice to my Attorney.

**C. I UNDERSTAND I HAVE THE FOLLOWING RESPONSIBILITIES AS A CLIENT:**

1. To attend all scheduled appointments with my Attorney, or to contact counsel to reschedule an appointment if I cannot attend.
2. To be truthful in all my communications with my Attorney.
3. To inform my Attorney of all changes of address and telephone number within 7 days of any change.
4. To cooperate in assisting my Attorney in obtaining requested documents or information needed for my case.
5. To respond to communications from my Attorney requesting my response.
6. To attend all USCIS interviews, court hearings or other appointments scheduled in my case with the USCIS, the Immigration Court, or the state court.
7. To agree that any money I have paid to Attorney for costs incurred will not be refunded to me, and that I will remain responsible for paying all costs that may still be owed by me for charges already incurred by Attorney on my behalf if this agreement is terminated by either me or Attorney.

8. To agree not to leave the United States while my immigration case is pending, unless I talk to my Attorney first to see if it is possible for me to leave the United States without risking my right to return to the United States.

D. I FURTHER UNDERSTAND THE FOLLOWING:

1. Attorney cannot guarantee that I will be granted the benefit that I am seeking from USCIS, the Immigration Court, or the state family court, even after the Attorney successfully files all necessary applications and documents.
2. If I am in the United States without legal immigration status, I am always subject to deportation or removal. If I am not already in deportation or removal proceedings at the time that the Attorney agrees to represent me, the Attorney may not be able to protect me from deportation or removal, and will make an independent decision whether to represent me in my deportation or removal proceedings.
3. Attorney may withdraw as my legal representative and close my case at any time if I fail to provide truthful information or documentation to my legal representative, or fail to comply with my responsibilities in Part C, above, subject to any court requirements for withdrawal.
4. If my case involves several steps, the Attorney is not obligated to represent me in all steps of the process beyond those agreed to in Part A, above. The Attorney may withdraw from representing me in any additional stages, or the Attorney and I may make a new agreement, effective only after put in writing, for continued representation for any additional or new steps not described in Part A, above.
5. I understand that Attorney reserves the right to withdraw from representing me in certain limited circumstances. These circumstances include, but are not limited to, the following:
  - (A) where insufficient legal grounds exist to continue a court or administrative action or appeal;
  - (B) where I fail to cooperate with Attorney's reasonable requests;
  - (C) where a conflict of interest is discovered or arises that makes it inappropriate for Attorney to continue representation; and
  - (D) where I fail to meet the terms of this agreement.

E. I UNDERSTAND THAT ATTORNEY HAS THE FOLLOWING RESPONSIBILITIES:

1. Attorney does not work for any part of the U.S. or state government, including the Department of Homeland Security, the Immigration Court, or the state courts.

2. Attorney will do Attorney's best in every legal process according to Attorney's abilities and consistent with the relevant Rules of Professional Conduct, using the information I have provided. I understand that Attorney may not present false information, in any form, to the United States government or to the state court in order to secure a benefit in my case. I understand and agree that, if I do not provide truthful information, Attorney is required under certain Rules of Professional Conduct to take remedial measures if false information has been provided to courts or immigration officials, including disclosure and potential withdrawal of representation of me, asking the Court's permission if necessary.
3. Attorney agrees to keep me informed about my case and to represent my stated interests. If I decide not to follow the advice of Attorney regarding an important decision, and the decision I make requires Attorney to put more time and money in my case or requires Attorney to take steps that are not in accordance with the Rules of Professional Conduct, Attorney may take steps to withdraw representation of me in my case, asking the Court's permission if necessary.

#### F. LEGAL FEES AND COSTS:

I understand that Attorney is providing legal services described in Part A, above, for free. I also understand that I owe Attorney for the costs incurred for the services described in Part A, above, and agree to pay them by Money Order. I understand that these costs could include any of the following, but is not limited to:

- Costs of state court, USCIS, or Immigration Court filing fees;
- Costs of fingerprints, and photos that may be required with my application, if any;
- Any extraordinary charges incurred by Attorney in pursuing my case, such as costs of experts, long distance telephone calls, messenger or express delivery services, extraordinary photocopy costs, if any;
- Costs of preparing any additional USCIS applications that are not mentioned in Part A, such as work authorization renewal applications, etc.

Attorney will request fee waivers where possible and/or seek other assistance to pay these costs. However, I understand that if Attorney cannot secure cost waivers or other assistance, I will be responsible for the costs reasonably related to my case.

#### **Acceptance by the Client**

1. I acknowledge that nothing in this agreement is a promise or guarantee that I will win my immigration case.

2. I acknowledge that I have read, understand, and freely accept this agreement and have received a copy of this agreement.

Client \_\_\_\_\_ Date:

Print Client's Name: \_\_\_\_\_

Accepted By (Attorney's Signature): \_\_\_\_\_ Date:

Print Attorney's Name: \_\_\_\_\_

Recognitions of Caregiver [where appropriate]

1. I am \_\_\_\_\_ [name and relationship of the caregiver to the minor]. I understand that Attorney agrees to represent \_\_\_\_\_ [name of minor]. My desires are generally consistent with the wishes of \_\_\_\_\_ [name of minor], but I understand that Attorney only represents the wishes of the client.
2. I understand that Attorney will not represent me in any legal case regarding \_\_\_\_\_ [name of minor].
3. I understand that my cooperation is important and that Attorney can request my help because I am the person who cares and supports \_\_\_\_\_ [name of minor]. I agree to cooperate with Attorney and to be honest in all my communications with Attorney.
4. I understand that the rules of the legal profession prohibit Attorney from sharing information about \_\_\_\_\_ [name of minor], even with me or my family, without the authorization or consent of \_\_\_\_\_ [name of minor].

Parent/Guardian/Caregiver \_\_\_\_\_ Date:

Print Parent/Guardian/Caregiver's Name: \_\_\_\_\_

APPENDIX 2 –SAMPLE SIJ RETAINER AGREEMENT FOR *PRO BONO* LIMITED ASSISTANCE REPRESENTATION OF PROSPECTIVE GUARDIAN/CUSTODIAL PARENT IN STATE COURT ACTION

A. TERMS OF REPRESENTATION:

This agreement for legal representation and service involves Attorney and \_\_\_\_\_ [SIJ Prospective Guardian or Custodial Parent]. I, the undersigned client, hereby authorize ATTORNEY to provide limited representation of me in the following legal matter based on the scope of work defined specifically below: \_\_\_\_\_

[define scope of representation with great particularity, e.g., “drafting and filing of pleadings in state court;” “accomplishing service of state court pleadings”]

These services relate to a state court legal matter for \_\_\_\_\_ [name of youth] who seeks Special Immigrant Juvenile status.

**B. CLIENT RESPONSIBILITIES:**

I will remain responsible for the conduct of my case and understand that I will remain in control of and be responsible for all decisions made in the course of the case. I further agree to:

- a. Cooperate with Attorney or his/her office by complying with all reasonable requests for information in connection with the matter for which I am requesting services;
- b. Keep Attorney or his/her office advised of my concerns and any information pertinent to the case;
- c. Provide Attorney with copies of all pleadings and correspondence to and from me regarding this case;
- d. Immediately provide Attorney with any new pleadings or motions received from the other party(ies); and
- e. Keep all documents related to the case in a file for review by Attorney.

**C. SERVICES TO BE PERFORMED BY ATTORNEY:**

I seek the services from Attorney for the specific tasks set forth in Section A above.

- a. I may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement and initialed and dated by both parties. The date that both Attorney and I initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services.
- b. It is the intention of Attorney and me that Attorney shall only perform those services specifically requested of Attorney in Section A. Some of those services may require Attorney to become attorney of record or make a court appearance in my case in order to perform the service requested. Attorney and I specifically agree that becoming attorney of record for such purposes shall not authorize or require Attorney to expand the scope of representation beyond the specific services designated. In the event that any court requires Attorney, as attorney of record for one or more authorized issues or tasks, to assume the responsibility for other tasks or issues reserved to me or a third party professional, Attorney may, at his/her option, elect to withdraw from representation and I agree to execute any forms reasonably requested by Attorney.

**D. REGARDING THIS REPRESENTATION, I ALSO UNDERSTAND THAT:**

1. Attorney is currently representing [*name of youth*] to obtain Special Immigrant Juvenile status.

2. I have represented to Attorney that I do not believe there are currently any conflicts between me and [name of youth]; I have generally the same goal of \_\_\_\_\_ [state goal, e.g., obtaining guardianship of the youth; having parent awarded custody] and believe I can work together with Attorney to accomplish the services requested in Section A above in the state court proceeding.
3. Attorney has counseled me on the possibility that a conflict of interest could arise. An example of that type of conflict includes, but is not limited to, the possibility that \_\_\_\_\_ [e.g., a dispute could arise between the client and the youth about the minor's care, decision-making, welfare, or about sharing of information].
4. I consent to the sharing of any confidential information related to the representation obtained by Attorney with [name of youth] in providing the services in Section A.
5. In the event the Attorney advises us that a conflict has arisen and Attorney believes that Attorney can represent each of us zealously within the bounds of the law, I understand that Attorney will seek my informed consent to continue to provide limited assistance representation after counseling me on the consequences of the conflict that has emerged.
6. In the event the Attorney concludes that a conflict has arisen that precludes Attorney from continuing to represent me zealously within the bounds of the law, I understand that Attorney may seek to withdraw, as rules of the state court allow, from providing the limited assistance representation provided in Section A of this Agreement and to terminate my representation.

E. I FURTHER UNDERSTAND THE FOLLOWING:

1. The Attorney cannot guarantee that I will be granted the benefit that I am seeking from the state family court, even after the Attorney successfully provides the services requested in Section A above.
2. The Attorney may withdraw, subject to any court requirements for withdrawal, from the limited assistance representation and close my case at any time, if I fail to provide truthful information or documentation to Attorney, or fail to comply with my responsibilities in Part B, above.
3. I understand that Attorney reserves the right to withdraw from providing the limited assistance outlined in Section A above under certain limited circumstances. These circumstances include, but are not limited to, the following:
  - (A) where insufficient legal grounds exist to perform those services;

- (B) where I fail to cooperate with Attorney's reasonable requests;
- (C) where a conflict of interest is discovered or arises that makes it inappropriate for Attorney to continue representation; and
- (D) where I fail to meet the terms of this Agreement.

F. I UNDERSTAND THAT ATTORNEY HAS THE FOLLOWING RESPONSIBILITIES:

1. Attorney does not work for any part of the U.S. government, including the Department of Homeland Security or the Immigration Court or the state courts.
2. Attorney will do Attorney's best in every legal process according to Attorney's abilities and consistent with the relevant Rules of Professional Conduct, using the information I have provided. I understand that Attorney may not present false information to the United States government or to the state court. I understand and agree that if I do not provide truthful information, Attorney is required under certain Rules of Professional Conduct to take remedial measures if false information has been provided to courts or immigration officials, including disclosure and potential withdrawal of representation, asking the Court's permission if necessary.
3. Attorney agrees to keep me informed about my case. If I decide not to follow the advice of Attorney regarding an important decision, and the decision I make requires Attorney to put more time and money into providing the services listed in Section A or requires Attorney to take steps that are not in accordance with the Rules of Professional Conduct, Attorney may take steps to withdraw representation, asking the Court's permission if necessary.

G. LEGAL FEES AND COSTS:

I understand that Attorney is providing legal services described in Section A, above, for free. However, I also understand that I owe Attorney for the costs incurred for the services described in Section A, above, and agree to pay them by Money Order. I understand that these costs could include any of the following, but is not limited to:

- Costs of state court filing fees;
- Costs of fingerprints, and photos that may be required, if any;
- Any extraordinary charges incurred by Attorney's efforts to provide the services in Section A, such as costs of experts, long distance telephone calls, messenger or express delivery services; extraordinary photocopy costs, if any.

Attorney will request fee waivers where possible and/or seek other assistance to pay these costs. However, I understand that if Attorney cannot secure



cost waivers or other assistance, I will be responsible for the costs and other expenses reasonably related to the services rendered.

#### H. ENTIRE AGREEMENT, EFFECTIVE DATE AND SEVERABILITY

1. This Agreement is the complete Agreement between Attorney and me.
2. If Attorney and I decide to amend this Agreement in any way, the amendment must be in writing, signed by both parties, and attached to this Agreement. If I wish to obtain additional services from Attorney beyond those listed in Section A above, an amendment which clearly denotes which extra services are to be provided, signed and dated by both Attorney and me and attached to this Agreement, shall qualify as an amendment.
3. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.
4. The effective date of this Agreement will be the date when, having been executed by me, one copy of the Agreement is received by Attorney.

#### **Acceptance by the Client for Limited Assistance Representation**

1. I acknowledge that nothing in this Agreement is a promise or guarantee that I will obtain the requested relief in the state court proceeding.
2. I signify my agreement with the following statements by initialing each one:
  - a. \_\_\_\_\_ I have accurately described the nature of my case and the services that I want Attorney to perform in my case in Section A above.
  - b. \_\_\_\_\_ I will be responsible for the conduct of my case and will be in control of my case at all times.
  - c. \_\_\_\_\_ I understand that any amendments to this Agreement will be signed and in writing.
  - d. \_\_\_\_\_ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to have that attorney advise me on my rights as a client before I sign this Agreement.

I acknowledge that I have read, understand, and freely accept this Agreement and have received a copy of this Agreement.

Client-Prospective Guardian/Custodial Parent \_\_\_\_\_ Date:

Print Client's Name: \_\_\_\_\_

Accepted by (Attorney's Signature): \_\_\_\_\_ Date:Print  
Attorney's Name: \_\_\_\_\_

