



**Representing Detained Immigration Respondents of
Diminished Capacity:
Ethical Challenges and Best Practices**

ABA Commission on Immigration
July 2015

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¹ The Ethics Bureau is a Yale Law School clinic supervised by Lawrence Fox, an experienced practicing lawyer and lecturer. The Ethics Bureau drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a *pro bono* basis to not-for-profit legal service providers, courts, and law schools.

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I. Introduction

Every year, Immigration and Customs Enforcement (ICE) detains hundreds of thousands of people in removal proceedings, many of whom await hearings in immigration court. An estimated fifteen percent or more of these detained individuals have some kind of mental disability.² The majority of these individuals appear without a lawyer,³ but an increasing number of them are receiving appointed legal representation⁴ thanks to recent judicial decisions and updated guidance documents for immigration officials and the immigration court. Yet, even when immigrants with serious mental impairment are able to secure representation, their lawyers continue to face significant challenges in handling these clients' cases.

This document summarizes best practices for lawyers who represent immigration clients of diminished capacity. Part II discusses the recent *Franco* decision and the resulting process by which the court may appoint counsel for detained immigration respondents of diminished capacity. Part III lays out challenges and recommendations for working with clients of diminished capacity in general. Part IV considers the possibility of assistance from third parties, including friends and family members, diagnosticians, and legally appointed guardians and “next friends.” Finally, Part V walks through each phase of the lawyer-client relationship in the context of appointed counsel for detained immigration respondents of diminished capacity, flagging potential difficulties and offering recommendations to ensure ethical and effective counsel.

II. New Rights for Detained Non-Citizens with Mental Impairment

A. Background: The Franco Decision

The Central District of California’s 2013 opinion in *Franco-Gonzalez v. Holder*⁵ provided two new procedural rights to detained and unrepresented individuals with a “serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings.”⁶ First, those who have been detained

² Human Rights Watch & The Am. Civ. Liberties Union (ACLU), *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, ACLU 3 (Jul. 2010), https://www.aclu.org/files/assets/usdeportation0710_0.pdf [hereinafter *Deportation by Default*]. We are aware of the important distinctions conveyed by terms such as “mental impairment” and “cognitive disabilities.” See *id.* at 13. For the purposes of this document, we use the terms “mental illness” and “mental impairment” interchangeably to refer to conditions that are sufficiently severe for individuals to be eligible for *Franco*’s protections. See *infra*, notes 5–8, and accompanying text.

³ *Deportation by Default*, *supra* note 2, at 5.

⁴ *Franco* recognized the right to “government appointed legal representation” as encompassing a law student under the supervision of a lawyer or a non-lawyer “accredited representative” as defined in 8 C.F.R. § 1292.1. *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013) [hereinafter *Franco I*]. We use the terms “counsel,” “lawyer” and “attorney” out of convenience throughout this document, but our discussion here also applies to the broader set of legal representatives under *Franco* and recognized under 8 C.F.R. § 1292.1(a).

⁵ *Id.* at *1.

⁶ *Id.* at *2.

for at least 180 days have the right to a “custody redetermination hearing” (more commonly called a “bond hearing”) to determine whether continued detention is justified.⁷ Second, detained individuals with mental impairment have a right to government-appointed legal representation if they are found not competent to represent themselves.⁸

Though certainly a step forward for the rights of individuals detained by the Department of Homeland Security (DHS), the rights provided by *Franco* have created troubling issues of professional responsibility for the lawyers appointed to represent immigration clients with mental impairment. The *Franco* holding is limited to Arizona, California, and Washington, but we note that a similar right to appointed counsel has been suggested by the Department of Justice’s Executive Office for Immigration Review (EOIR),⁹ included in proposed immigration reform bills,¹⁰ and considered individually by immigration courts in detention facilities in other parts of the country.

B. *An Overview of the Franco Process*

The right to government-appointed legal representation under *Franco* is triggered by a finding that a detained individual is not competent to provide his own representation. The Central District of California followed *Franco* with an Order that laid out specific procedures for screening detainees, evaluating competency, and coordinating appointed qualified representatives.¹¹ The *Franco* Order provided that a qualified representative (“QR”) could include a law student, law graduate or BIA accredited representative, in addition to traditional counsel.¹² Jurisdictions that are not within the ambit of the *Franco* order may rely on recent memos issued by the federal government directing ICE officials¹³ and Immigration Judges (IJs)¹⁴ to proactively screen detained individuals and, where necessary, to perform competency assessments and potentially appoint a qualified representative.

⁷ *Id.* at *10 (finding this right under the Immigration and Nationality Act and “existing Ninth Circuit precedent”).

⁸ *Id.* at *3 (finding this right under Section 504 of the Rehabilitation Act).

⁹ Memorandum from Brian M. O’Leary, Chief Immigration J., Exec. Office for Immigration Review (EOIR), U.S. Dept. of Justice (DOJ), to all immigration judges (Apr. 22, 2013), *available at* <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf> [hereinafter EOIR memo] (proposing a “nationwide policy to provide enhanced procedural protections to unrepresented detained aliens with serious mental disorders or conditions”).

¹⁰ The proposed language in the immigration bill would apply to all immigration detainees of diminished capacity, including children, who are currently excluded from the *Franco* class of individuals with “serious mental disorder or defect.” *Franco I*, *supra* note 4 at *2.

¹¹ *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) [hereinafter *Franco II*].

¹² *Id.* order at fn. 8.

¹³ Memorandum from John Morton, Dir., US. Immigration Customs and Enforcement (ICE), U.S. Dept. of Homeland Security, to Thomas D. Homan, Acting Exec. Assoc. Dir., Enforcement and Removal Operations, et al. (Apr. 22, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf [hereinafter ICE memo].

¹⁴ EOIR memo, *supra* note 9.

Franco requires that detained individuals with mental impairment receive a bond hearing within 180 days of being detained.¹⁵ The appointed lawyer receives the following information: the client’s name and A-Number, the date of detention, the date the person was found incompetent by the court, the place of detention, and the date of the next hearing, if available. She typically has no additional information other than the presumption that the Court determined the client lacked capacity to proceed *pro se*.

In some instances, counsel is appointed only days before the next scheduled removal or bond hearing. The process has been improving with time, however, and lawyers have successfully sought continuances when they were appointed with insufficient time to prepare for a previously scheduled hearing. Detained individuals who are identified early on as having serious mental impairment may be appointed counsel well before the 180-day bond hearing deadline, leaving the lawyer-client team free to focus on preparing for challenges to removability and relief from removal if they so choose.

The original *Franco* decision specified that the right to counsel is predicated on both mental impairment and status as a detainee.¹⁶ The recent Order clarified, however, the right to counsel, once triggered, continues to exist even if the client is released from detention or transferred to a venue outside the three states where *Franco* applies.¹⁷ The Order also extends certain protections to detained individuals who are suspected of having serious mental impairment, but who are released from detention before a formal competency evaluation has been completed.¹⁸

III. Representing Clients with Diminished Capacity

The ABA Model Rules of Professional Conduct (“Model Rules”) serve as a model of ethical rules for most states.¹⁹ The following two Parts address the Model Rules’ current provisions for representing clients with diminished capacity and offer recommendations. These general best practices remain relevant within immigration proceedings, though certain recommendations may not be realistically transferable depending on the particular characteristics of the client, the case, and the detention facility where the client is being held. Additionally, not all states have adopted the Model Rules and counsel should investigate the relevant law in her jurisdiction before determining which of these best

¹⁵ *Franco I*, *supra* note 4, at *10. It is conceivable that an individual would not receive a bond hearing within the 180-day deadline if the individual were not identified as having a serious mental impairment until after 180 days had already passed.

¹⁶ *Id.* at *4.

¹⁷ *See Franco II*, *supra* note 11, at *12.

¹⁸ *See id.* at *11.

¹⁹ ABA Model Rules of Professional Conduct are available at the following link:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

practices to pursue. Recommendations specific to the immigration context are presented in Part V.

A. *The Standard: ABA Model Rule of Professional Conduct 1.14 and the “Normal” Lawyer-Client Relationship*

Model Rule 1.14 addresses the client-lawyer relationship when a “client’s capacity to make adequately considered decisions in connection with a representation is diminished.”²⁰ The rule instructs that the lawyer should “as far as reasonably possible, maintain a normal client-lawyer relationship.”²¹ “Normal” within the meaning of Rule 1.14 “does not necessarily mean that a lawyer interacts with a client with a mental disability in the same manner” as he would with another client, “but it does mean the nature of the lawyer-client relationship is the same.”²²

The lawyer-client relationship is based on a foundation of client autonomy, meaning that the lawyer serves as the client’s agent and acts only (or primarily) on the basis of the client’s direction. This model of advocacy respects the client’s autonomy and is in contrast to a “best interest” approach, where the advocate takes a “paternalistic role” and may substitute his judgment for that of his client.²³ Model Rule 1.14 specifies that a lawyer may take protective measures only if the lawyer reasonably believes a client is at risk of “substantial physical, financial, or other harm.”²⁴ In such instances, the lawyer should consider taking the least intrusive protection action possible.²⁵

Model Rule 1.14 thus poses a challenge: a lawyer representing a client with diminished capacity should strive to maintain a “normal” lawyer-client relationship; at the same time, “a lawyer does need a heightened sense of awareness” to the mentally disabled client’s needs, and “may need to be more diligent in assuring effective communications and respecting” the client’s objectives.²⁶ Meanwhile, lawyers continue to be bound by the all

²⁰ MODEL RULES OF PROF’L CONDUCT R. 1.14 (2013) [hereinafter MODEL RULES].

²¹ *Id.*

²² David A. Green, “I’m Ok-You’re Ok”: Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” with a Client with a Mental Disability, 28 J. LEGAL PROF. 65, 68 (2004).

²³ *Id.* at 82.

²⁴ See MODEL RULES R. 1.14(b). The precise parameters of the “substantial harm” requirement have received little elaboration in the case law or in secondary materials, but the concept is broadly worded. It would presumably cover instances where the risk of a client’s deportation would carry further risks of harm (e.g. because of persecution or extortion due to mental illness, or because of lack of access to necessary treatments). Indeed, removal itself may be severe enough to constitute “substantial harm.” See *Padilla v. Kentucky*, 559 U.S. 356, 360, 374 (2010) (referring to deportation as a “drastic measure” and emphasizing its “seriousness” as a consequence of a criminal plea).

²⁵ See MODEL RULES R. 1.14(b) cmt. 5; Nancy Maurer, *Ethical Issues in Representing Clients with Diminished Capacity*, Albany Law School Research Paper No. 24 at 1-15 (2012), available at: <http://ssrn.com/abstract=2220390>.

²⁶ Green, *supra* note 22, at 81. This is consistent with respecting the client’s autonomy, and does not indicate a different relationship. See *id.* at 82.

other ethical rules and obligations that arise whenever a lawyer represents any client,²⁷ as well as the Federal Rules of Practitioner Conduct that govern proceedings within DHS and EOIR.²⁸

As one example of a problem that may arise, consider a scenario where the client is unable to present credible testimony in court. The client may tell you a story about his personal background, but the facts seem implausible. This scenario is especially common with clients who have a high degree of paranoia and/or delusional thought processes. Appointed counsel may lack the expertise to ascertain the veracity of the client's account. This can lead to conflict if the client is insistent that his testimony be presented to the court when the attorney believes the evidence is not credible.

This is particularly problematic where the application for relief sought specifically requires that the client present credible testimony. For example, in an asylum or withholding of removal case, the applicant is required to prove that his fear of return is subjectively genuine.²⁹ To so establish, the applicant must, "be placed under oath, and be questioned as to whether the information in the written application is complete and correct."³⁰ The subjective prong is therefore established where the "testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."³¹ If the client does not testify, he risks denial of his application for asylum. If he does testify, he risks not being able to testify in a credible manner and may be unable to satisfy the subjective prong of the relief.

The Model Rules presume that while clients set the goals of the representation, it will usually be left to the lawyer to determine the most effective legal means for pursuing that goal.³² In the event of a disagreement as to means (such as which evidence to present), the lawyers must continue to abide by rules such as the duty of candor to the tribunal. The lawyer must not "offer evidence that the lawyer knows to be false,"³³ a duty that applies "regardless of the client's wishes."³⁴

²⁷ These include, but are not limited to, the duty to provide competent representation (Model Rule 1.1), to be diligent (Rule 1.3), to communicate promptly with the client (Rule 1.4), to maintain client confidentiality (Rule 1.6), to handle conflicts of interest properly (Rule 1.7), to withdraw from representation when appropriate (Rule 1.16), and to bear a duty of candor to the tribunal (Rule 3.3).

²⁸ See 8 C.F.R. §§ 1003.101—1003.109. Although there is no comparable provision to Rule 1.14, the practitioner must be mindful of sanctions for failing to provide competent representation, 8 C.F.R. § 1003.102(o), failing to act with reasonable diligence and promptness, *id.* § 1003.102(q), and failing to maintain communication with the client during the client-lawyer relationship, *id.* § 1003.102(r).

²⁹ *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013).

³⁰ *In re Fefe*, 20 I&N Dec. 116, 117 (BIA 1989).

³¹ *In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

³² See MODEL RULES R. 1.2 cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

³³ See *id.* R. 3.3(a)(3).

³⁴ *Id.* R. 3.3 cmt. 5.

This prohibition only applies if the lawyer *knows* the evidence to be false, but the lawyer may nonetheless exercise her own discretion and “refuse to offer testimony or other proof that the lawyer *reasonably believes* is false.”³⁵ Normally, the lawyer may be advised to resolve such ambiguities in favor of the client’s wishes.³⁶ However, protective discretion may be appropriate in light of Rule 1.14’s direction to take “reasonably necessary protective action” if the client is at risk of “substantial . . . harm,”³⁷ especially if the evidence in question might negatively affect the client’s case.

The attorney may therefore request that the Court waive the client’s testimony as a procedural safeguard that also protects the client’s substantive rights to due process.³⁸ This would also permit the attorney to follow her obligations under the Model Rules without jeopardizing the client’s right to seek relief.

More recently, the BIA has recognized that asylum applicants in this scenario may be unable to provide credible testimony with “no deliberate fabrication involved.”³⁹ The BIA thus determined that these individuals should not be precluded from being able to establish the subjective prong of the relief due to unreliable testimony.⁴⁰ Instead, “the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim.”⁴¹ Thus, the “better course in most instances would be for the Immigration Judge to accept the subjective belief of the respondent as genuine.”⁴²

If the client were to insist on testifying as to the fact of his fear of removal to the home country, the Immigration Judge would be able to accept that testimony as proof of the subjective prong of relief. Any unreliable testimony should not be held against the client and the attorney would be able to use other evidence in the record to satisfy the other prongs of eligibility and argue that the client warrants relief.⁴³ This course of action would not violate the Model Rules because the evidence would not be offered as

³⁵ *Id.* R. 3.3 cmt. 9 (emphasis added).

³⁶ *See id.* R. 3.3 cmt. 8 (“[A] lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. . . .”)

³⁷ *See id.* R. 1.14(b).

³⁸ *In re M-A-M-*, 25 I&N Dec. 474, 481 (BIA 2011) (“If an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing, the statute provides that the Immigration Judge ‘shall prescribe safeguards to protect the rights and privileges of the alien.’” (*citing to* INA § 240(b)(3))).

³⁹ *In re J-R-R-A-*, 26 I&N Dec. 609, 611 (BIA 2015).

⁴⁰ *Id.* at 612 (“This safeguard will enhance the fairness of the proceedings by foreclosing the possibility that a claim is denied solely on testimony that is unreliable on account of the applicant’s competency issues, rather than any deliberate fabrication.”)

⁴¹ *Id.*

⁴² *Id.* at 612, fn. 1.

⁴³ *Id.* at 612 (“The Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues.”).

intentionally false – it would be offered for the limited purpose of satisfying the subjective prong of eligibility for asylum.

B. The Sliding Scale of Capacity

At any given time, clients should be presumed capable of “participating in the lawyer-client relationship” and of making decisions unless there is reason to suspect otherwise.⁴⁴ Even if a client is unable to make decisions that are legally binding, the client may nonetheless have the “ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”⁴⁵

The Model Rules and relevant literature all emphasize a “sliding scale” of capacity,⁴⁶ consent, and participation in the lawyer-client relationship. There are “varying degrees of disability,” and the lawyer’s responsibilities will necessarily “vary depending on the level of the client’s decision-making capacity”⁴⁷ and the gravity of the decision.⁴⁸ Further, many mental illnesses may manifest to varying degrees on different days, and may also be mitigated with proper medication, care, and services. As the lawyer-client relationship develops over time, the lawyer will likely be able to recognize when a particular client’s decision-making capacity is lower than usual. In those instances, it is important to revisit the issue on another occasion when the client is doing better, to the extent that is possible.

C. Recommendations for Lawyers Representing Clients with Diminished Capacity

This Section presents recommendations for maximizing each client’s ability to participate in and guide the representation. Clients will vary in their level of capacity, just as they vary in their goals and communicative styles.⁴⁹ An effective lawyer must learn to recognize and accommodate these differences to build a strong lawyer-client relationship on each individual’s terms. Many of these recommendations are applicable to any lawyer-client relationship, but may be very challenging with clients who have severely diminished capacity.

We also note that some of these general recommendations may be difficult to implement in the detained immigration setting, where lawyers may have limited control over the

⁴⁴ Maurer, *supra* note 25, at 1-15.

⁴⁵ MODEL RULES R. 1.14 cmt. 1.

⁴⁶ *See, e.g., In re M-A-M-*, *supra* note 38, at 480 (2011) (“Mental competency is not a static condition. ‘It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.’” (*quoting* *Indiana v. Edwards*, 554 U.S. 164, 175 (2008))).

⁴⁷ Maurer, *supra* note 25, at 1-35.

⁴⁸ California Advocates for Nursing Home Reform, *Determining Capacity and Representing Clients with Diminished Capacity: An Advocate’s Guide* 1 (2013).

⁴⁹ *See* MODEL RULES R. 1.4 cmt. 6 (“Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity.”).

scheduling and location of client meetings, and may only have a short amount of time with any given client.

Define the scope of the lawyer-client relationship

- **Build trust with the client.** The lawyer should establish that the purpose of the representation is to serve the *client's* interest and concerns, not to expedite the process for the government.
- **Emphasize the confidentiality of the lawyer-client relationship.** A client's mental illness may include elements of paranoia. A perception often exists that because the appointed lawyer is paid by the government, the lawyer is a government employee, and thus works with the judge or DHS counsel. It is important to explain very explicitly that you do not work for the DOJ or DHS and that you are not permitted to share any confidential information without the client's permission, except in rare circumstances when mandated by ethical rules.⁵⁰
- **Ensure that the client understands any limits on the scope of representation.** This may be the first time that the client has an attorney, so it is important to explain what the lawyer can and cannot do for the client. For example, the lawyer can request a bond hearing and represent the client at that hearing, but the lawyer is not responsible for paying any bond that is set. Be sure to promise only what you can deliver and be explicit and up front about issues you will not be able to resolve, such as securing housing or a job, child custody matters, and so on.

Encourage client participation

- **Moderate the pace of information delivery.** Speak slowly and distinctly. Consider breaking information into small segments, discussing one issue at a time. Be aware that some clients may have difficulty with abstract concepts. Repeat and summarize as necessary. If language or cultural barriers impede communication, arrange for an interpreter. If the lawyer is able to have a mental health professional conduct a psychological evaluation for the client, she might reach out to that person and ask for suggestions regarding how to effectively communicate with the client.
- **Schedule meetings to accommodate shifts in client capacity.** Clients with lower cognitive functioning may only be able to process certain amounts of information at a time. If that is the case, the lawyer should try to limit meetings to no longer than an hour per session in order not to overload the client. Also, many psychotropic medications have significant side effects that can impact a client's ability to function at certain times of the day. The lawyer should ask the client if there is a time of day when she generally feels most alert and then make best efforts to have client

⁵⁰ See *id.* R. 1.6(b) (discussing instances when a lawyer may reveal otherwise confidential information).

meetings during those times. If the client is detained, it may be helpful to reach out to the medical staff at the detention center or to the guards in the client's unit to determine the best times of day to speak with the client.

- **Use simple, open-ended questions** to assess the client's understanding of covered material or to solicit input. Avoid asking "yes or no" questions or simply asking if the client understands. Allow sufficient time for the client to think and respond to the questions. You should confirm that the client understands by asking the client to explain or restate things in her own words. For example, to make sure the client comprehends the full consequences of a decision (*e.g.*, that if they are deported, they will not only leave the detention facility, but also leave the country), you could ask the client to explain what will happen under the different legal options that are presented.
- **Make sure the client understands that you value her input.** Respond directly to the client's feelings. Make the client feel respected, and use encouragement and verbal reinforcement. You may need to repeatedly remind the client that, as her lawyer, your role is to work toward the legal objective that she identifies, and that there is not a "right" answer. If, however, the client's impairment is such that she cannot understand the options presented, it may be unrealistic to expect the client to guide the choice of legal strategy.
- **Ask about the client's reasoning for major decisions.** Some clients may be eager to please their lawyer, and may try to guess what the lawyer wants them to say. Be clear that you want the client's opinion, and that there is not a "right" answer. Understanding a client's reasons and values can also help you assess apparently erratic conduct, and determine whether the client has really changed her mind or is simply being inconsistent. This is essential when working with detained clients, who are often frustrated by detention to the extent that they announce they want to stop pursuing relief from removal to be released, even if that means being removed from the country. For major decisions, such as whether or not to appeal, it is ideal to discuss the decision over the course of more than one meeting to ensure that the client's reasoning is consistent. Here again, it may be necessary to consult with a mental health professional to determine whether your client has the capacity to make reasoned decisions regarding her immigration case.

Proceed one step at a time

The following model for a lawyer-client conversation implements the above recommendations:⁵¹

⁵¹ This model for a conversation with a client of diminished capacity draws on existing models like the "three-staged" interview. *See* Green, *supra* note 22, at 89, and "gradual counseling," *see* Linda F. Smith,

- **Stage 1: Preliminary problem identification.** Ask open-ended questions to assess the client's awareness of the present legal situation, understanding of the lawyer-client relationship, and goals for the representation. The client's responses will be helpful both for the information they contain, as well as for the opportunity to gauge the client's level of competence. How much does the client understand about her legal situation, or about her own diminished capacity? What matters to the client for the future? Ascertain the most important values and goals the client expresses, and restate and reconfirm them with the client. An initial screening should include the following questions:
 - Why are you in removal proceedings?
 - What is the purpose of these proceedings?
 - What are the possible outcomes?
 - Who will make the decision about which outcome will occur?
 - What is the role of the immigration judge?
 - Is there anyone against you in court? Who is that person and what is her job?
 - What is my role as your lawyer? What do you want me to do for you?
 - Why did the judge appoint a lawyer for you? Do you agree with the judge's reasons for appointing a lawyer for you?
 - What is your role when you go to court?
 - Is there anything about going to court that is difficult for you? If so, is there anything that could be done differently in court to make it easier for you?
 - Do you want to stay in the U.S.? Why or why not?
 - If you do/don't want to stay in the U.S., where will you go? How will you support yourself? Will you have access to treatment?
- **Stage 2: Overview and confirmation.** Summarize the client's responses and get feedback to make sure the client agrees with your statement of the factual background, the current problem, and the client's goals and values.
- **Stage 3: Theory development and verification.** Identify the available legal options and explain the main pros and cons in relation to the client's goals and values. For some clients, you may need to focus on just a few salient factors. Ask questions to confirm that the client understands the

key considerations and the consequences of each option. Ask questions to see how the client feels about each option.

IV. Working with Third Parties

When working with clients of diminished capacity, lawyers may find it helpful to consult with third parties who may be able to offer information or assistance with regard to this particular client or, more generally, about the client's condition. Part IV discusses potential interactions with the client's family and friends, medical clinicians and experts, and legal guardians, including issues related to the lawyer's duty of confidentiality.

A. With Client Permission, Seek Input from Family and Friends

In a typical lawyer-client relationship, the client controls the course of representation.⁵² The lawyer may hope to include family or friends in conversations about the client's goals and legal options, but the lawyer should only do so at the client's request or with the client's consent.⁵³ "When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege."⁵⁴ Unless one of the third parties is a legally authorized representative (see Section IV.C below), the client with diminished capacity maintains authority over the representation; the lawyer "must look to the client, and not family members, to make decisions on the client's behalf."⁵⁵

Note, however, that under *Franco*, "ICE and detention facility personnel must accept relevant information and documents from family members, social workers, or treatment providers regarding detainees' mental disorders or conditions" for the purposes of identifying detainees who may have mental impairments sufficient to qualify them for appointed counsel.⁵⁶ Also, Model Rule 1.14 condones "consulting with family members" and various other protective actions, even without client consent, if a lawyer "reasonably believes that a client is at risk of substantial physical, financial or other harm."⁵⁷ Where an individual presents with indicia of mental incapacity, DHS is further required to serve the Notice to Appear on "a relative, guardian, or person similarly close to the respondent," when possible.⁵⁸

In many cases, family or friends may be able to provide vital information to the lawyer that can fill in the gaps if the client displays impaired memory or psychosis. For example,

⁵² Maurer, *supra* note 25, at 1-34.

⁵³ *Id.*; see also Bernard A. Poskus, *Rule of Professional Conduct 1.14 and the Diminished Capacity Client*, 39 COLO. LAW 67, 68 (2010).

⁵⁴ MODEL RULES R. 1.14 cmt. 3.

⁵⁵ *Id.*

⁵⁶ See *Franco II*, *supra* note 11, at *3-4.

⁵⁷ MODEL RULES R. 1.14 cmt. 5.

⁵⁸ See *In re E-S-I*, 26 I&N Dec. 136, 145 (BIA 2013).

family members may be able to provide information about how and when a traumatic brain injury occurred or when the client began exhibiting symptoms of mental illness. Likewise, family members may be able to identify prior medical or mental health providers, from whom the lawyer might seek medical records. Finally, family members may be able to corroborate information relevant to the client's eligibility for relief from removal.

While there is much potential to gain useful information from family members, great care must be taken to ensure that contact with third parties does not violate the ethical rules. Just as the lawyer and her client must define the scope of the representation, they must similarly define the scope of permissible information sharing and gathering between the lawyer and third parties. These boundaries should be clarified early on, ideally before the lawyer speaks with third parties.⁵⁹

The lawyer should not simply ask the client for permission to speak to a family member. Rather, the lawyer must find out what information she is able to share with whom, and which topics she might raise to seek further information. For example, is the lawyer permitted to reveal information about prior criminal convictions, medical diagnoses, upcoming court hearings, substance abuse issues, or the details of past persecution that might be relevant for an asylum application?

If third parties learn any confidential information in the course of working with the lawyer, they are not permitted to disclose that information to anyone else without the client's consent. Rule 1.6 directs the lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure" of confidential information,⁶⁰ including by third parties "who are participating in the representation of the client."⁶¹

Thus, while the client may authorize you to contact his brother about financial assistance for paying a bond, the lawyer should anticipate the brother asking a myriad of questions about the client's case and must be prepared to respond accordingly. This includes explaining to the brother the duty of confidentiality and the issues the lawyer herself may or may not have authorization to discuss with him. The lawyer must also identify any information revealed to the brother that he is not permitted to disclose to anyone else. Furthermore, if a client wants a family member to testify in court, but that person is unaware of the client's criminal history, the lawyer must explain to the client that there is a high likelihood the family member will be asked about the client's criminal history.

B. Seek Guidance from Appropriate Medical Experts

Where a client's capacity is questionable, the Model Rules recognize the lawyer may "seek guidance from an appropriate diagnostician."⁶² In all the cases where an IJ has

⁵⁹ Maurer, *supra* note 25, at 1-34.

⁶⁰ MODEL RULES R. 1.6(c).

⁶¹ *Id.* R. 1.6 cmt. 18.

⁶² *Id.* R. 1.14 cmt. 6.

already appointed counsel, there will be mental health records⁶³ with information about the client's capacity.⁶⁴ DHS is required to file these documents with the court,⁶⁵ and appointed counsel should make every effort to get access to those records as early as possible in the representation in order to have more information about the client's particular needs.⁶⁶ If counsel believes that DHS may be in possession of other relevant medical and mental health records, she may move the court pursuant to *Franco*, to compel DHS to produce those records.

Appointed counsel are not permitted to speak with any medical staff who have assessed the client at government request, so lawyers must turn elsewhere for information beyond the medical records. Family and friends may have helpful information about the individual's condition, or may know where to seek additional records from prior medical treatment and/or hospitalizations.

The lawyer may consider contacting an outside clinician or a disability rights advocate to ask about how to communicate effectively with the client in light of the client's specific mental illness.⁶⁷ EOIR funding may be approved for additional mental health assessments that the appointed counsel deems necessary for the case. In addition, some private organizations offer independent funding for expert medical or psychological evaluations of immigration respondents.⁶⁸

Just as in any standard lawyer-client relationship, the lawyer should preserve all client confidences. Applicable exceptions include a "matter of life or death or risk of serious injury," or when the client is incapable of making "his or her own decisions and disclosure is necessary to protect the client's interests or fulfill the purposes of the representation."⁶⁹

C. *Appoint a Legal Guardian or Next Friend*

⁶³ There is a varying degree of information about competency provided by the court. In some instances, IJs order a full psychological assessment conducted by a psychiatrist. In other cases, there may only be a two page assessment conducted by staff at the detention center which provides much less detail. Interview with Erica Schommer, Esq., formerly with Rios & Cruz, P.S., Seattle, Wash., (Apr. 22, 2015).

⁶⁴ See *Franco II*, *supra* note 11, at *2-3, *9.

⁶⁵ See *id.* at *5-6.

⁶⁶ EOIR should provide counsel with a complete copy of the record of proceedings, which will include any medical documentation DHS has submitted to the court, as soon as counsel has entered an E-28. Where the client was previously in removal proceedings, it may be necessary to submit a FOIA request to EOIR. Additionally, if the client is detained, counsel should contact the detention facility medical provider to determine the proper procedure for obtaining the client's medical records. Often, either a signed release of information or a signed Form G-639 should be sufficient to obtain these documents. Interview with Krishna Parsad, Senior Staff Attorney, Immigration Justice Project, San Diego, Cal. (May 29, 2015).

⁶⁷ *Id.*

⁶⁸ Some of these organizations include: Physicians for Human Rights, <http://physiciansforhumanrights.org/asylum/>; The Center for Victims of Torture, <http://www.cvt.org/>; Survivors of Torture International, <http://www.notorture.org/>; and Center for Survivors of Torture, <http://cstnet.org/>.

⁶⁹ Maurer, *supra* note 25, at 1-35.

This Section discusses when it may be appropriate to consider appointing a guardian, legal barriers to guardianship proceedings in some states, options for different types of guardianships, and finally, the less drastic alternative of relying on a “next friend.”

1. Legal Authority for Appointing a Guardian

Sometimes, the challenge of representing a client with diminished capacity becomes so difficult that “the client’s immediate legal needs cannot be accomplished without the intervention of a legal representative, or . . . the aid of some protective action.”⁷⁰ Such a need may arise if a mentally impaired client is unable to set goals for the representation⁷¹ or understand the nature of the legal proceedings.⁷² The immigration regulations establish that when mental incompetency makes it impracticable for a respondent to appear or represent herself at a hearing,⁷³ then another person may appear on behalf of the respondent, including “the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear.”⁷⁴

This text seems to suggest that an attorney is a substitute for a legal guardian, and EOIR’s *Immigration Judge Benchbook*’s mental health section frequently references “representation in the form of counsel and/or a guardian ad litem.”⁷⁵ However, the *Benchbook* also lays out the text of Model Rule 1.14, which directs lawyers to “seek[...] the appointment of a guardian ad litem, conservator or guardian” when the client is at risk of substantial harm,⁷⁶ and urges IJs to “exercise flexibility when dealing with respondents who may have mental health issues, taking any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”⁷⁷ Among the safeguards outlined are termination of proceedings and appointment of a guardian ad litem.⁷⁸

⁷⁰ American Bar Association (ABA) Ctr. for Prof’l Resp., Client Under a Disability, Formal Ethics Op. 96-404, 651 (1996) [hereinafter Formal Op. 96-404].

⁷¹ See MODEL RULES R. 1.2(a) cmt. 1 (noting that the client possesses “the ultimate authority to determine the purposes to be served by legal representation”).

⁷² See *id.* R. 1.4(a)(2) (requiring that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”).

⁷³ The text of the regulation seems to turn on the respondent’s ability to be physically present, see 8 C.F.R. § 1240.4 (“When it is impracticable for the respondent to *be present* at the hearing because of mental incompetency” (emphasis added)). However, courts have noted that “[a] mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.” Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007) (citing Drope v. Missouri, 420 U.S. 162, 171 (1975)).

⁷⁴ 8 C.F.R. § 1240.4.

⁷⁵ See *Immigration Judge Benchbook: Mental Health Issues*, EOIR, DOJ (last updated Aug. 2014), <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/>.

⁷⁶ MODEL RULES R. 1.14(b).

⁷⁷ See *Immigration Judge Benchbook: Mental Health Issues*, *supra* note 75, at Section II.B.1.

⁷⁸ *Id.*; see also Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, 3 IMMIGR. L. ADVISOR, No. 4 (April 2009).

2. Legal Barriers to Appointing a Guardian

Guardianship may not be a feasible course in the immigration context for many individuals for several reasons.⁷⁹ First, no formal procedure currently exists for obtaining a guardian in the immigration court process, and IJs may not even have the authority to do so in response to an *ad hoc* motion.⁸⁰ Second, depending on the jurisdiction, conservatorship proceedings may not proceed if the person of interest is detained by ICE (as all *Franco* class members are, at least initially) or if the respondent is undocumented.⁸¹ Nonetheless, in some jurisdictions state courts do order guardians for detained individuals with diminished mental capacity, so for that reason, we offer the following discussion of guardianship to the extent it may prove helpful for certain clients.

Special attention should be paid to state-specific ethics rules and ethics opinions relating to client consent and the appointment of a guardian or conservator. While most states have adopted the American Bar Association's (ABA) Model Rule 1.14,⁸² some states have adopted the rule with variations,⁸³ and Texas and California have failed to adopt the rule at all.⁸⁴

Further, in California (one of the largest states covered by *Franco*, and thus where the issue of appointed counsel for this population is currently most relevant), it may be considered unethical to petition the court for a conservator or guardian without the client's informed consent. According to a 1989 formal ethics opinion by California's

⁷⁹ When lawyers act as "qualified representatives" under *Franco*, this program is limited to certain types of assistance for eligible clients, which generally does not include proceedings to establish guardianship or conservatorship. Furthermore, some qualified representatives are accredited representatives and/or law students working under the supervision of an attorney. The federal regulations allow these non-attorneys to represent respondents in removal proceedings, but they are not authorized to provide representation in state court under these regulations. *See*, 8 C.F.R. § 1292.1(a); Interview with Elizabeth Knowles, Director, Immigration Justice Project, San Diego, Cal. (Mar. 2, 2015).

⁸⁰ *See* Memorandum from David L. Neal, Chief Immigration J., EOIR, DOJ, to all immigration judges (May 22, 2007), *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> ("Neither the [Immigration and Nationality Act] nor the regulations permit immigration judges to appoint a legal representative or a guardian ad litem."); *see also* Calero v. I.N.S., 957 F.2d 50, 51 (2d Cir. 1992) (rejecting an as-applied constitutional challenge that it would violate the Due Process Clause "if INS regulations and statutes do not permit the appointment of a guardian ad litem" for the respondent).

⁸¹ Interview with Ilyce Shugall, Directing Attorney, Community Legal Services in East Palo Alto, Immigration Program (Nov. 2014).

⁸² *See* ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 1.14 Client With Diminished Capacity* (last updated Oct. 21, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.authcheckdam.pdf.

⁸³ *See id.* (Georgia, for example, adds that "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. The maximum penalty for a violation of this Rule is a public reprimand.").

⁸⁴ *See id.*

Standing Committee on Professional Responsibility and Conduct,⁸⁵ instituting such proceedings would necessarily involve disclosing the client's confidences to the court, and also potentially to family members or other third parties. Further, the lawyer would be representing conflicting interests by attempting to protect the interests of both the client and third parties, such as family members, and it is questionable whether the client could sufficiently understand the complexities to provide informed consent to this conflict of interest.

However, the San Francisco Bar Association revisited the same issue in 1999 in an attempt to provide practitioners with the tools to act where appropriate.⁸⁶ There, the San Francisco Bar Association outlined a chronological history of all ethics opinions and case law addressing the issue of whether an attorney may initiate conservatorship proceedings on behalf of a client who is mentally incapacitated. In particular, the panel pointed out that under the California Penal Code, criminal defense attorneys were required to address the mental capacity of their clients when asked to do so by the court, and also had the option to volunteer that information to the court where appropriate.⁸⁷ They thus found "some evidence of a California policy that an attorney for an incompetent person may say and do something other than watch the client self-destruct."⁸⁸

The panel reasoned that despite the fact that California had not yet adopted Model Rule 1.14, it could consider other sources of law as guidance for this issue in the absence of a California specific rule to the contrary.⁸⁹ The panel therefore concluded that "the attorney has the discretion, but not the mandate, to act."⁹⁰ The panel also sought to reassure counsel in this situation that "an attorney who believes that the client is impaired is not acting adverse to the client by suggesting to a court that an investigation for a possible conservatorship be established."⁹¹

It is important to note that every case is different and comes with its own set of ethical considerations. Each of these ethics opinions offers valuable insight into a complex issue. If ever in doubt, the attorney should consider contacting the ethics hotline for her local bar association for further guidance.⁹²

⁸⁵ State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 1989-112 (1989), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=pNXKAO8aInA%3D&tabid=840>.

⁸⁶ *See* San Francisco Bar Association, Ethics Opinion 1999-2, *available at* http://www.sfbar.org/ethics/opinion_1999-2.aspx.

⁸⁷ *Id.*, *citing to* California Penal Code § 1368.

⁸⁸ *Id.*

⁸⁹ *Id.*, *citing to* People v. Ballard, 104 Cal. App. 3rd 757, 761 (1980) (explaining that in the absence of a California specific rule, the ABA rules and published ethics opinions may be considered for guidance).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The State Bar of California Ethics Hotline can be reached at 1-800-2-ETHICS.

3. Options for Guardianship

When thinking about protective action like appointing a guardian, lawyers must maintain a respect for the client's autonomy.⁹³ There has been a "remarkable paradigm shift" in American law in relation to the notion of self-determination and autonomy as applied to persons with mental disabilities.⁹⁴ As ABA Formal Op. 96-404 notes, "[t]he appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available."⁹⁵ To make this decision, the lawyer might consider consulting with a diagnostician or the client's family and friends about how best to proceed.⁹⁶

A lawyer who has decided that he or she wants to seek the appointment of a guardian for his or her client should consider what type of guardian would be most appropriate:

- **A guardian ad litem** would represent the client's best interest for the purposes of the single immigration proceeding. In this scenario, the guardian's authority is limited to the needs of the specific proceeding, thus preserving client autonomy more generally.
- **A general guardian** would transfer more control away from the client, but might be necessary in extreme instances. In the immigration context, the lawyer is typically only working with the client on a single legal matter, but may recognize that the client has other needs as well.

In the majority of cases, it is most appropriate to limit the guardian's role to only the immigration court proceeding, circumscribing the guardianship only to the context within which it is needed. However, the guardian order should be broad enough to allow the guardian to consult with third parties, medical professionals and secure treatment if necessary.⁹⁷ The ABA recommends that the lawyer herself *should not* become the guardian "except in the most exigent of circumstances,"⁹⁸ since that would impermissibly mix the roles of legal advocate and "best interest" advocate.

4. Appointing a "Next Friend"

A less drastic and perhaps more feasible safeguard outlined by the Board of Immigration Appeals in *In re M-A-M-* is the appearance of a family member or friend on behalf of the client.⁹⁹

⁹³ See Formal Op. 96-404, *supra* note 70 at 653.

⁹⁴ Parry & Gilliam, *Handbook on Mental Disability Law*, ABA COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW, 7 (2002).

⁹⁵ See Formal Op. 96-404, *supra* note 70 at 653.

⁹⁶ *Id.* at 652. Disclosures of information necessary for an assessment of the client's capacity do not violate the lawyer's duty of confidentiality, as they fall within Model Rule 1.6's exemption for information necessary to carry out a representation. Nonetheless, disclosures should be limited to that information "pertinent to the assessment of the client's capacity and discussion of the appropriate protective action." *Id.*

⁹⁷ Interview with Dennis Windscheffel, Senior Counsel, Akin, Gump, Strauss, Hauer & Feld LLP, San Antonio, Tex. (July 20, 2015).

⁹⁸ *Id.*

⁹⁹ See *In re M-A-M-*, 25 I. & N. Dec. 474, 483 (2011).

As noted above, the regulations specifically recognize the court’s authority to permit a “near relative, or friend” to appear on behalf of a mentally incompetent respondent.¹⁰⁰ While the regulation *requires* an immigration court to allow such a person to appear on behalf of an unrepresented person, the court may also allow a next friend to appear even if the respondent has counsel.

Seeking appointment of a next friend in the proceedings may provide a substantial benefit to the client. For example, a next friend may be able to testify in place of the client, provide input as to cross-examination of government witnesses, direct the lawyer to evidence that may support the claim, and provide emotional support by sitting with the client during adversarial hearings.

However, a next friend does not have the same legal authority as a guardian to make the decisions directing representation that the client normally makes.¹⁰¹ This option will thus not be a viable alternative for those who lack capacity to make the most fundamental decisions to direct the lawyer as to the course of representation.

V. Challenges and Recommendations for Representing Detained Immigration Respondents of Diminished Capacity

In addition to the general recommendations above, which are applicable to all clients with diminished capacity, this Part discusses specific challenges and recommendations for immigration lawyers in the *Franco* process.

When a detainee is appointed counsel under *Franco*, there are four main legal paths to consider: (1) seek release through a bond hearing; (2) pursue relief from removal; (3) request to terminate proceedings entirely; or (4) consent to removal. Section A reviews each option in turn. Section B summarizes the main factors that the lawyer and client should consider in deciding the goals of representation. Section C considers ethical duties when a lawyer is unable to locate a client who has been released. Section D discusses the possibility of conflicts of interest when a lawyer is appointed to represent the friend or relative of an individual whom the lawyer is representing on other issues.

A. Potential Legal Options for Detained Immigrants

1. Seek Release Through a Bond Hearing

By the time that counsel is appointed, the client may have been in detention for weeks or months. For clients who are not subject to mandatory detention, it may also be possible to request a bond hearing before *Franco*’s 180-day deadline has passed. If the client’s time

¹⁰⁰ See 8 C.F.R. § 1240.4.

¹⁰¹ See MODEL RULES R. 1.14 cmt. 3 (noting that the lawyer “must look to the client, and not family members, to make decisions on the client’s behalf,” unless the lawyer has deemed it necessary to take protective action like appointing a guardian).

in detention is approaching the 180-day mark, a bond hearing may already have been scheduled. If the lawyer feels that adequate preparation would require more time, she can seek consent from the client to request a continuance of the proceedings. However, practitioners have indicated that some IJs do not look favorably on these requests; court schedules are tight, and one goal of having appointed counsel is to facilitate smooth and timely proceedings.¹⁰²

Many clients are understandably eager to seek release as soon as possible. There is also a health-related motivation to seek release: the available evidence suggests that prolonged detention can exacerbate mental conditions, especially if detainees lack access to effective treatment.¹⁰³

On the other hand, the bond hearing may ultimately be unhelpful for indigent clients who are unable to afford any bond amount.¹⁰⁴ Even if a client were to be released, the client may not have a safe and stable place to stay and/or to receive medical treatment while awaiting further proceedings. Furthermore, in many jurisdictions, non-detained respondents face significant delays in their immigration court proceedings.

At a minimum, counsel should work with the client to identify the following information concerning bond and potential release: who has the resources to assist in posting the bond, where will the client reside upon release, where will the client be able to obtain

¹⁰² The Franco order requires that the bond hearing at least start within 15 days of the 180 day mark. See *Franco*, Partial Judgment and Permanent Injunction at 3. Thus, EOIR headquarters will contact local courts directly to ensure that the bond hearing is timely scheduled. However, once the bond hearing has started, counsel may then request a continuance to adequately prepare. It is also important to note that the client may have already had a Franco bond hearing before counsel was appointed. Thus, in some cases, DHS has argued that where the respondent already had a Franco bond hearing without counsel, a subsequent hearing is not required because there has not been a material change in circumstances. The immigration court is still generally allowing a second *Franco* bond hearing, however, with the benefit of counsel. Interview with Krishma Parsad, *supra* note 66.

¹⁰³ See *Deportation by Default*, *supra* note 2, at 68 (“Many individuals interviewed after release from detention said their conditions had deteriorated while there.”); Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL’Y INST. 8, http://www.unicef.org/ceecis/REP-Danger_of_Detention_JJ.pdf (last visited Dec. 12, 2013) (reviewing evidence from the juvenile context that “young people with behavioral health problems simply get worse in detention, not better”); see also *Practice Manual for Pro Bono Attorneys: Representing Detainees with Mental Disabilities in the Immigration Detention and Removal System*, CAPITAL AREA IMMIGRANTS’ RIGHTS COALITION 27–36 (Stephen Dekovich & Liz McGrail, eds., Jan. 2013), <http://www.caircoalition.org/wp-content/files/CAIR-Coalition-Practice-Manual-2013.pdf> (describing strategies to advocate for health-related needs on behalf of a client with mental impairment).

¹⁰⁴ The minimum bond amount listed in the statute is \$1,500. 8 U.S.C. § 1226(a)(2)(A) (2013). Many practitioners argue that an immigration judge (IJ) has the option of releasing certain individuals on their own recognizance, however, some IJs read the statute to prohibit releasing detainees who have not posted bond. Even when IJs are willing to release individuals on their own recognizance, the option may be less likely for a client with diminished capacity who is prone to erratic behavior or likely to miss scheduled hearings. See *Rivera v. Holder* ---F.R.D. ---, 2015 WL 1632739 (W.D. Wa. 2015) (holding that IJs have the authority to release respondents on conditional parole without needing to pay a bond). See also the ACLU’s practice advisory regarding the same: <https://www.aclu.org/legal-document/rivera-v-holder-practice-advisory>.

treatment, and how will the client support himself or herself financially upon release. It is extremely important for the lawyer to explain to the client whether or not the client will be eligible to apply for employment authorization at some point in the future, as well as the client's obligations to inform the court and DHS of changes of address. Ideally, the lawyer should confirm with friends or family identified by the client that his expectations are correct, (e.g. that the client really can live with his brother, who really will provide housing, food, and transportation to hearings and appointments).

2. Pursue Relief from Removal

Immigration respondents of diminished capacity remain eligible for appointed counsel even if they are released on bond or transferred to a venue outside the three states where *Franco* applies.¹⁰⁵ Regardless, counsel should advise clients that moving outside appointed counsel's service area may result in a change of counsel to a different organization through the National Qualified Representation Program. Thus, for a variety of reasons, clients may prefer to direct their lawyers to focus on legal avenues that could allow them to remain legally in the United States while still in detention. This could include challenging the client's deportability, as well as seeking to acquire a new lawful status for the client such as a visa or legal permanent residency. The client's mental health may prove relevant for certain arguments pertaining to relief from removal,¹⁰⁶ cancellation of removal,¹⁰⁷ or non-immigrant status.¹⁰⁸ As with any other choice, the lawyer must inform the client of the possible avenues of relief, as well as the likelihood of success for each one, and the client should instruct the lawyer on which applications for relief he wants to pursue.

3. Request to Terminate or Administratively Close the Client's Proceedings on Grounds of Severe Impairment

A recent update to the the *Immigration Judge Benchbook* notifies IJs that they have the discretion to "terminat[e] cases where respondents are unable to proceed in light of mental health issues."¹⁰⁹ This is a murky area of the law, and some practitioners fear that IJs may be less willing to consider termination where a client is represented by appointed counsel, no matter how severe the client's mental impairment may be. There are four

¹⁰⁵ See *Franco II*, *supra* note 11, at *12.

¹⁰⁶ See *Practice Manual for Pro Bono Attorneys*, *supra* note 103, at 58–73.

¹⁰⁷ See *id.* at 74–81.

¹⁰⁸ See *id.* at 82–85 (discussing U visas).

¹⁰⁹ *Immigration Judge Benchbook: Mental Health Issues*, *supra* note 75 at Section II.B.1 (citing 8 C.F.R. § 1003.10(b)); see also *In re M-A-M-*, 25 I. & N. Dec. 474, 483 (2011) ("In some cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain. In these cases, the Immigration Judge may pursue alternatives with the parties, such as administrative closure . . ."); Legal Action Ctr. & Univ. of Houston Law Ctr. Immigration Clinic, *Practice Advisory: Representing Clients with Mental Competency Issues Under In re M-A-M-*, UNIV. HOUSTON L. CENTER 5–6 (Nov. 30. 2011), <http://www.law.uh.edu/clinic/immigration/UH-AIC-Mental-Competency-Issues.pdf>. ("[S]ome immigration judges have terminated proceedings in cases where the severity of the respondent's competency issues precludes a fair hearing."). But see *id.*, at 6 (The Board of Immigration Appeals "has not yet issued a published decision affirming or rejecting termination" in such circumstances.).

main situations in which it may be appropriate for the lawyer to pursue termination or administrative closure.

A completely non-responsive or psychotic client may be an appropriate candidate for termination of proceedings, or for the lawyer to seek guardianship, as discussed above. This client's impairments are so severe that, absent a third party's assistance, the lawyer is unable to meaningfully fulfill ethical duties like deferring to client goals or maintaining continuous communication.

A completely uncooperative client presents a slightly different challenge. This client is alert and able to communicate, but refuses to work with or even to meet the lawyer, perhaps due to paranoia (*e.g.*, a belief that the lawyer is secretly trying to help the government's case), an inability to understand the lawyer's role as advocate, or simply feeling overwhelmed and declining to take any action at all.

Normally, formation of a lawyer-client relationship requires the informed consent of the client, but EOIR's position is that appointment alone is sufficient to create a lawyer-client relationship in this instance, so the lawyer must file a notice of appearance whether or not the client has given informed consent.¹¹⁰ This position is also supported by the law regarding the right to self-representation pursuant to the Sixth Amendment in the criminal context.¹¹¹ Nonetheless, lawyers may consider pursuing termination of proceedings where the client has not only failed to consent to the representation, but obstructs the representation entirely by refusing to communicate with the lawyer. In such cases, if *no* conceivable safeguards would ensure a safe hearing whereby the client's rights to due process are protected, termination of removal proceedings may be the only appropriate option.¹¹²

For a client who is a low enforcement priority, administrative closure or termination may be viable options, particularly if the client has been released from custody. Termination is clearly preferable over administrative closure because termination results in the case being permanently closed in the court system. However, if administrative closure is the only option, the limitations of administrative closure must be carefully

¹¹⁰ Under the relevant federal regulations, "attorneys and accredited representatives may represent aliens without the request of the person entitled to representation." *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1146 (C.D. Cal. 2011) (Order Re Plaintiff Maksim Zhalezny's Motion for a Preliminary Injunction) (internal quotation marks omitted) (discussing 8 C.F.R. § 1292.1). The court notes that lawyers and accredited representatives may appear without the request of the detainee, but that "[i]f a mentally incompetent immigrant detainee were to agree to be represented by a non-attorney identified in 8 C.F.R. § 1240.4, such detainee would . . . be required to knowingly and voluntarily waive his right to counsel[,] . . . a dubious proposition for someone who is mentally incompetent." *Id.* at 1145–46. For additional discussion of this distinction, see Legal Action Ctr. & Univ. of Houston Law Ctr. Immigration Clinic, *supra* note 109, at 11 (explaining that lawyers are entitled to appear in immigration proceedings under 8 C.F.R. §§ 1292.1(a)(1) and (a)(4), but that the regulations do not reference consent).

¹¹¹ See *Faretta v. California*, 422 U.S. 806 (1975); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); and *Indiana v. Edwards*, 128 S. Ct. 2379 (2008). This line of cases explains that individuals who are incapacitated are unable to knowingly and voluntarily waive their right to appointed counsel. Thus, they do not have a Sixth Amendment right to self-representation.

¹¹² Legal Action Ctr. & Univ. of Houston Law Ctr. Immigration Clinic, *supra* note 109, at 5.

explained to the client in order for him or her to understand that his or her ability to work, travel or obtain legal status may be limited by such relief, if granted and that the Department of Homeland Security may request that the case be re-calendared at any time in the immigration court.

A client who has been released from detention, but whose current whereabouts are unknown may also be a candidate for administrative closure. Lawyers may have difficulty locating clients who have moved among temporary residences, who have become inpatients at a medical facility, who have become homeless, who have become fugitives, or who simply fail to respond to the lawyer's communication attempts due to their mental impairment.

“Even when a lawyer loses track of a client, the duty to communicate important information persists and requires at least reasonable effort to find the client to deliver the information.”¹¹³ The definition of “reasonable efforts” varies by situation, but likely includes multiple attempts to contact the client via known telephone numbers, emails, and physical addresses (by mail and in person, if the distance is reasonable); attempts to contact the client's friends, relatives, or coworkers (if the client was working) for information; contacting any medical providers the client has had contact with in case the client has had a medical visit.¹¹⁴ Lawyers should anticipate the possibility that such a search may be necessary, and should therefore be thorough in collecting contact information from the client and secondary contact persons at the time of the client's initial release.

If the lawyer is unable to locate the client after pursuing “reasonable efforts,” then the lawyer should consult her state's ethics opinions on how to proceed. Under Model Rule 1.2, the lawyer may take any further actions that are “impliedly authorized to carry out the representation,”¹¹⁵ but states vary in terms of how they have interpreted this rule in the context of a missing client.¹¹⁶

¹¹³ ABA, *Rule 1.4 Communication*, ANN. MOD. RULES PROF. COND. § 1.4, 59 (7th ed., 2011) (citing examples of state ethics rules to this effect).

¹¹⁴ These suggestions were pulled from various state ethics opinions concerning missing clients, though other suggestions were inappropriate for a non-citizen client with severely diminished capacity (e.g. voting records, registry of motor vehicles). *See, e.g.*, Linda G. Bauer, *Missing in Action: What To Do When You Can't Find Your Client*, MASS.GOV (May 2000), <http://www.mass.gov/obcbbo/missing.htm>; Ak. Bar. Ass'n, Ethics Opinion No. 2011-4 (2011); Suzanne Lever, *Where's Waldo*, N.C. STATE BAR J., ETHICS OPINION ARTICLES, http://www.ncbar.com/ethics/eth_articles_16,4.asp (last visited Apr. 1, 2015); State Bar of Ariz., Ethics Op. 01-08 (2001).

¹¹⁵ MODEL RULES R. 1.2(a).

¹¹⁶ *Compare* Nebraska Ethics Advisory Opinion for Lawyers No. 08-03 (advising that a lawyer should file a previously agreed-upon lawsuit, even though the lawyer is currently unable to locate the client, in order to avoid running the statute of limitations; this conclusion was based in part on specific language included in the retainer agreement); Ak. Bar. Ass'n, Ethics Opinion No. 2011-4 (2011) (“If . . . the [convicted criminal defendant] client cannot be contacted, then the attorney must file the notice of appeal and points on appeal where the client previously has directed that an appeal be filed. “), *with* ABA Comm. on Ethics and Prof'l Responsibility, ABA Informal Op. 1467 (1981) (“A lawyer does not have a duty to file a lawsuit (and thereby toll the statute of limitations) in the name of a client who has disappeared provided the loss of

If an immigration hearing date is approaching and the lawyer cannot locate a released client, the lawyer may consider requesting that the client's presence be waived, that the hearing be continued or that the case be administratively closed or terminated. Counsel may also request a pre-hearing status conference at which the respondent's presence would not be required.

The lawyer has likely met with the client at least once prior to the client's release, and should thus have a sense of whether the client hopes to remain in the U.S. If so, any of these options would presumably be preferable to the client over an order of removal *in absentia*, the typical result when a respondent fails to attend a hearing.¹¹⁷ Moreover, administrative closure or a termination order would generally not be prejudicial to any future proceedings. Such action would be consistent with the Immigration Judge Benchbook's direction that IJs "exercise flexibility when dealing with respondents who may have mental health issues."¹¹⁸

After taking whatever actions are "impliedly authorized," the lawyer may be allowed to withdraw from the case, making reasonable efforts to inform the client of the withdrawal and filing for withdrawal with any relevant tribunals,¹¹⁹ consistent with Model Rule 1.16 although the ability to simply withdraw in *Franco* cases has been prohibited more recently.¹²⁰

Note that if DHS is searching for a fugitive client, and the client herself notifies her lawyer of her whereabouts, the lawyer has a duty to notify the proper authorities.¹²¹ If, however, the lawyer *independently* discovers the client's whereabouts (*e.g.*, by following tips from a relative), the lawyer may attempt to convince the client to turn herself in, but

contact has not been caused by the lawyer's neglect."); Prof'l Ethics of the Fla. Bar, Op. 72-36 (Reconsideration) (1987) ("A lawyer retained for litigation by a client who has since disappeared is not obligated to file suit to toll the running of the statute of limitations if the lawyer has made a reasonable effort to locate the client and the client's unavailability is not the result of neglect on the part of the lawyer.").

¹¹⁷ The court's order in *Franco II* mentions that an IJ may still deport a *Franco* class member *in absentia* if he/she is represented. *Franco II*, *supra* note 11, at *11.

¹¹⁸ See *Immigration Judge Benchbook: Mental Health Issues*, *supra* note 75, at Section II.B.1.

¹¹⁹ See, *e.g.*, Ak. Bar. Ass'n, Ethics Opinion No. 2011-4 (2011) ("[T]he attorney, either simultaneously with the filing of the notice of appeal and points on appeal or subsequently, may file a motion to withdraw where the attorney shows that he or she has made reasonable efforts to contact the client, who, despite those reasonable efforts, cannot be contacted, and that withdrawal is appropriate.")

¹²⁰ The ability to withdraw in these circumstances has been limited significantly after the decision was issued requiring representation to continue once the client was released from detention. Now that representation continues to be required post-release, providers are not permitted to withdraw. Interview with Krishma Parsad, *supra* note 66.

¹²¹ ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 155 (1936) ("An attorney, whose client has fled the jurisdiction of the court while out on bail, must reveal the whereabouts of his client even if received in confidence from the client. If the client refuses to surrender to the authorities upon the attorney's advice, the attorney should withdraw from the case.").

the duty of confidentiality dictates that the lawyer should not disclose the client's whereabouts without the client's consent.¹²²

If the lawyer discovers that the client has left the country, the lawyer may ask the IJ to grant the client the status of voluntary departure *nunc pro tunc*. In such an event, the client may need to take some formal action to confirm their departure, such as visiting a local US Consulate or Embassy in their country of destination.

4. Consent to Removal or Voluntary Departure

Some clients may choose to leave detention either through accepting removal or applying for voluntary departure¹²³ rather than remaining detained while pursuing other legal options. Lawyers can help their clients assess their options in terms of likelihood of success on the merits and length of time required before resolution. When clients express a desire to pursue voluntary departure or removal, lawyers should try to obtain consent to speak with family members or consular officials in the home country to ensure that the client will have someone to receive him, as well as access to food, shelter, and medical treatment upon return.

B. Factors to Consider in Reaching a Decision

A lawyer appointed to represent a client with mental impairment should consider the following factors when discussing the goals of representation with the client:

- **The client's decision-making capabilities.** The lawyer's ability to get clear decisions about the goals of representation will depend in part on the client's kind and degree of mental impairment, as well as the potential presence of a guardian or other advocate. A client with severe impairment and no guardian or advocate may leave the lawyer with no ability to determine the client's wishes, meaning that termination may be the only viable remedy to pursue.
- **The strength of the client's preferences.** Assuming the client (or a third-party advocate) is able to express preferences, the lawyer should determine the strength of those desires. How strongly does the client value getting out of detention as soon as possible versus having a quicker resolution on an application for legal status? How strongly does the client wish to remain in the U.S. versus being removed to his or her country of nationality?
- **The nature of the detention facility.** Conditions vary across detention facilities. Does the client have access to adequate treatment? Does the facility have living conditions that may worsen the client's mental condition including the use of

¹²² ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 23 (1930) ("An attorney for a fugitive from justice should not disclose the fugitive's hiding place to the prosecuting authorities when he learns of it from information given to him by relatives.").

¹²³ Lawyers can also advise their clients on the difference between consenting to removal and pursuing the relief of voluntary departure, meaning that the respondent "concedes removability but does not have a bar to seeking admission at a port-of-entry at any time." *Voluntary Departure*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/tools/glossary/voluntary-departure> (last visited Mar. 31, 2015).

solitary confinement? This assessment is relevant for weighing the relative merits of seeking immediate release or removal versus remaining in detention while pursuing other legal options. If there are other facilities with better treatment options, it's possible (though certainly not guaranteed) that the client may be able to transfer to a different facility. The lawyer could request transfer with the client's consent, and after advising him or her of the pros and cons, including being assigned different counsel and possible delays in adjudicating the case if it is moved to a different jurisdiction.

- **Support outside the detention facility.** Some clients may have family, friends, and other social support in the area. Clients without such support may be less likely to benefit from release on bond. Given the long delays in many areas of the country for non-detained cases, it is essential for the lawyer to inform the client of the length of time his case is likely to take if released. Likewise, the client should be made aware of any practical concerns such as limitations on accessing public benefits or employment authorization while her case is pending. Indigent clients with no outside support may not be able to post bond at all. If it turns out that the client has a support network in another country but has no local support in the United States, options like voluntary departure or removal may be considered more seriously.
- **The nature of relevant legal options.** For each legal option considered, the lawyer should assess and explain the likelihood of success on the merits, the procedural complexity, and the expected length of time before receiving a decision. It is important for the lawyer to create realistic expectations about options for relief. The lawyer should explain from the outset that an immigration judge can only grant benefits established by law and does not have the power to simply allow a person to remain in the U.S. due to a serious medical or mental health issue.

C. Potential Safeguards that May Be Requested to Facilitate Client Competence during Hearings

There are a number of potential safeguards that may assist lawyers in accommodating particular client needs or maximizing clients' ability to express themselves effectively. Though some immigration officials have taken the position that the presence of counsel obviates the need for any additional safeguards,¹²⁴ IJs have the discretion to accommodate respondent needs and have been specifically directed to exercise it in favor of respondents of diminished capacity.¹²⁵ Depending on the needs and wishes of a particular client, the lawyer might consider requesting any of the following:

¹²⁴ See *Practice Manual for Pro Bono Attorneys*, *supra* note 103, at 48.

¹²⁵ "If an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge will evaluate which available measures would result in a fair hearing. Immigration Judges 'shall prescribe safeguards to protect the rights and privileges of the alien.'" *In re M-A-M-*, 25 I. & N. Dec. 474, 478 (2011) (*quoting* 8 U.S.C. § 1229a(b)(3)). The Immigration Judge Benchbook also directs IJs to "exercise flexibility when dealing with respondents who may have mental health issues, taking any action consistent with their authorities under the Act and regulations that is

- **Scheduling hearings or meetings.** The client may be able to communicate more effectively at certain times of day as a result of medication timing or predictable swings in capacity and temperament. In addition to requesting hearings/meetings at particular times, the lawyer should consider whether hearings/meetings of shorter duration might help to avoid having the client feel overwhelmed or fatigued. Some lawyers report encountering clients who feel uncomfortable in particular meeting rooms in the detention facility, particularly in rooms where the client is required to be shackled. In such situations, the lawyer may inquire whether other spaces are available for the lawyer and client to meet, such as an empty courtroom.
- **Interpretation services.** In-person interpreters may be necessary for clients with language or cultural barriers. Specialized interpreters may also be able to assist with clients who suffer from auditory or visual hallucinations. For some clients, simultaneous translation may be confusing or overwhelming, and consecutive translation may facilitate comprehension. Some clients may be more comfortable with interpreters of a particular gender.
- **Seating during the hearing.** The client may feel more comfortable at a hearing if the client is permitted to sit with her lawyer at counsel’s table, potentially also joined by a close friend or family member.
- **Testimony.** Lawyers may request that the IJ waive the client’s obligation to testify and offer to make a proffer of the relevant testimony. In addition, the IJ may permit testimony on the client’s behalf by a family member or “next friend.”¹²⁶ If the client does testify, the lawyer may request accommodations in asking leading questions where the client has difficulty initiating a response.

D. *Avoiding Impermissible Conflicts of Interest*

1. Situations that May Present Conflicts of Interest: Dual Representation

Conflicts of interest will likely be rare for lawyers appointed as counsel for detained immigration respondents. They may, however, arise in cases of dual representation. The lawyer should remain vigilant for situations in which “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities” to another client or a third party, as described in Rule 1.7.¹²⁷

For example, the detained person with diminished capacity may be eligible to adjust status through a family-based petition filed by a spouse. In such a situation, the attorney would be representing the detained respondent as appointed counsel for any proceedings related to bond or other relief, but would also be representing the sponsoring spouse as

appropriate and necessary for the disposition of such cases.” *Immigration Judge Benchbook: Mental Health Issues*, *supra* note 75, at Section II.B.1 (citing 8 C.F.R. § 1003.10(b)).

¹²⁶ 8 C.F.R. § 1240.4.

¹²⁷ MODEL RULES R. 1.7(a).

part of the adjustment. As described, this dual representation seems mutually beneficial for all parties. However, if, at some point during the representation, the spouse reveals that she no longer wishes to continue with the adjustment application process (*e.g.*, because of domestic violence, or because of concerns about the respondent's worsening mental illness), the attorney can no longer continue to represent both parties. The spouse's wishes (*i.e.*, not pursuing relief from removal) now appear to be adverse to those of the respondent (who wishes to remain in the U.S.).

2. Resolving Conflicts of Interest

When a conflict “arises after representation has been undertaken,” and “more than one client is involved,” then “whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed” to each client “and by the lawyer's ability to represent adequately the remaining client or clients.”¹²⁸

In general, a lawyer may continue to represent a client in the face of a conflict of interest if the lawyer “reasonably believes that [she] will be able to provide competent and diligent representation,” “the representation is not prohibited by law,” the conflict does not involve directly adverse claims “in the same litigation or other proceeding,” and “each affected client gives informed consent, confirmed in writing.”¹²⁹

Written informed consent may present a challenge for a client of diminished capacity, who may not be competent to consent on this particular issue or at certain points on a scale of capacity that shifts over time. In the absence of a legal guardian or next friend, and if the lawyer has determined that the conflict will not materially limit her competence and diligence, then the lawyer should attempt to explain the situation to the client using the strategies discussed in Part III, *supra*.

If the client's informed consent cannot be obtained, then the lawyer may consider invoking Rule 1.14's provision for protective action if the lawyer reasonably believes that the delays or uncertainty in switching appointed counsel may cause substantial harm to the client. The threshold for consent in this context may also be relaxed somewhat, since EOIR does not require that respondents provide informed consent to the representation itself, unlike standard lawyer-client relationships. If, however, the lawyer perceives a risk of material limitation on her own ability to effectively represent the client, she should seek to withdraw from the representation under Rule 1.16 or, if not permitted to withdraw pursuant to the *Franco* order, substitute counsel.

Returning to the example above, the lawyer certainly faces a conflict of interest if the respondent's spouse not only declines further involvement in the respondent's case, but also seeks to bring claims directly adverse to the respondent (*e.g.*, relating to child custody). The lawyer would have to withdraw from representing or substitute counsel for at least one or both clients, especially if the lawyer has learned confidential information

¹²⁸ *See id.* R. 1.7 cmt. 4.

¹²⁹ *Id.* R. 1.7(b).

from either party. The duty of confidentiality extends past the conclusion of representation,¹³⁰ and could limit the lawyer's ongoing representation of an adverse party.

If, on the other hand, the respondent's spouse simply wishes to cease involvement in the respondent's adjustment application without taking any adverse action, then it may be possible for the lawyer to ethically terminate the spouse's representation and continue to represent the respondent (with the respondent's consent). Once again, there may be concerns about confidential information learned from the spouse.

Conflicts of interest will likely be rare in the appointed counsel context, but changing relationships within the respondent's family could cause significant disruption. The lawyer should thus proceed with caution before agreeing to dual representation, ensuring that all relevant parties understand what will be required of them, as well as the potential consequences for the respondent under each possible outcome.

VI. Conclusion

The right to appointed counsel is a major step forward for detained immigration respondents of diminished capacity. Representing members of this vulnerable population comes with unique challenges, but lawyers can maximize their impact by adhering to best practices and making efforts to maximize client autonomy as part of their zealous advocacy.

¹³⁰ See *id.* R. 1.9 cmt. 1 (“After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality.”).