2017-02-02 CLE: The North Carolina Courts and Special Immigrant Juvenile Status (SIJS)

Presented at the Hope Valley Country Club, Dover Road, Durham, NC on February 2, 2017
presented by Evelyn R.G. Smallwood, Esq., and Derrick J. Hensley, Esq.

Program Content: Federal Immigration and North Carolina Laws regarding SIJS
Audience: Family Law and Immigration Attorneys, State Court Judges, Clerks, and court staff involved in Family Court, all Juvenile (Ch. 7B) Courts, as well as Guardianship and Adoptions proceedings.
Course Objectives: To enable practitioners to screen cases, evaluate the substantive merits of cases, to understand the relevant immigration laws and processes, and to follow correct legal procedures within the state court component, particularly regarding service of process where parents live outside the United States. There will also be a focus on meeting the needs of childhood trauma victims, ethics implications, and cultural competency.

Agenda:

I. Immigration Basics
II. Current Issues in Children's Immigration in NC
III. SIJS: Definition, Elements under Federal Law & Regulations
IV. NC State Law: Substantive Legal Bases for Requisite Findings, Proceeding Types for Findings, Mechanisms for Obtaining Findings
V. Child Custody Jurisdiction (UCCJEA, PKPA), International Service of Process, Venue, other Procedural Issues in State Court actions
VI. Other Considerations – Language Access and Cultural Competence, Needs of Migrant and Trafficked Children, Ethical Issues
VII. Additional Questions and Answers, Discussion of Hypotheticals

LINKS TO ONLINE RESOURCES:

A. Today's Presentation Outline (with Relevant Statutes, Opinions, and other materials available via further links) - **https://goo.gl/PKNncc**

B. Today's Slideshow/Presentation - **https://goo.gl/D4Slo4**

C. SIJS Whole-Process Checklist, with links, forms, go-by's, and further detailed sub-checklists - **https://goo.gl/66zVHF**

D. Derrick's website has permanent links to many SIJS resources: **www.LODJH.com**

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Presenter #1
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Evelyn Smallwood is an associate at Hatch Rockers Immigration in Durham, North Carolina, where she exclusively practices immigration law, including affirmative filings, deportation defense, and appeals. She became a North Carolina Board Certified Specialist in Immigration Law in November 2015, is admitted to the U.S. Court of Appeals for the Fourth Circuit, and is a member of the American Immigration Lawyers Association (AILA) and currently serves as the AILA Carolinas Chapter Asylum Response Coordinator. Among her proudest accomplishments, Evelyn traveled to Artesia, New Mexico, in October 2014 and Karnes City, Texas, in January 2015 to represent women and children who are being detained while seeking asylum in the United States. In recognition of her work in New Mexico and Texas, she was one of the recipients of the AILA 2015 Michael Maggie Pro Bono Award. Prior to joining Hatch Rockers Immigration in November 2016, she worked at Velasquez and Associates in downtown Durham, leading their immigration department. She has also worked in Eastern North Carolina where she practiced immigration law and criminal defense and at the Center for Death Penalty Litigation in Durham, North Carolina, researching NC capital murder cases for racial prejudice under the Racial Justice Act. Evelyn was born in Schweinfurt, Germany, but raised in a small town in the North Carolina Foothills, where she developed her love for North Carolina's immigrant community. She received her Bachelor of Arts degree from Brigham Young University in English Language, where she also studied Spanish and German. While pursuing her undergraduate degree, Evelyn spent a year abroad working in Hildesheim, Germany and a year-and-a-half serving as a missionary in La Paz, Bolivia. Evelyn received her law degree in May 2009 from the University of North Carolina at Chapel Hill School of Law. While there, she participated in a number of pro bono and school projects, her favorite being the work she did in the Immigration and Human Rights Policy Clinic, where she represented clients on U-Visa and TPS applications and researched Immigration and Custom Enforcement's (ICE) detention policies and practices. She also worked as a Research Assistant and contributed to a published policy review entitled "The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina." Evelyn's passion is defending immigrants' rights and believes that as an immigration attorney, she has a special opportunity to protect people and unite families. She lives with her husband, Michael, also an attorney, and their baby, McCoy, in Durham.

Presenter #2: Derrick J. Hensley, Esq.

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Summary: Derrick maintains a solo practice focusing on child welfare and immigration law, and is a NACC-Certified Child Welfare Law Specialist. He graduated first in his class from the Evening Program at NCCU Law School in 2011. He served for 3 ½ years as the GAL Attorney Advocate for Alamance County (Dist. 15A). He has presented more than a half-dozen CLE's on Special Immigrant Juvenile Status across North Carolina, he mentors other attorneys on the subject, and he has participated in numerous other related activities. He is admitted to practice in the State Courts in NC, the three Federal District Courts of NC, the US Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States.

SIJS STATUTE & GOVERNING CFR

8 U.S. Code § 1101 - Definitions

(a) As used in this chapter—

(27) The term "special immigrant" means—

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or *an individual or entity appointed by a State or juvenile court* located in the United States, and *whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*;

(ii) for whom it has been determined in administrative or *judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country* of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

8 C.F.R. § 204.11 - Special immigrant status for certain aliens declared dependent on a juvenile court

(a) Definitions.

~~Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.~~ [Note: The requirement of long-term foster care was removed from the definition of Special Immigrant Juvenile pursuant to the TVPRA, which makes the foregoing definition irrelevant.]

Juvenile court means a *court* located in the United States *having jurisdiction under State law to make judicial determinations about the custody and care of juveniles*.

(b) Petition for special immigrant juvenile. An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the

alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.
(c) Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, *while the alien was in the United States and under the jurisdiction of the court;*

~~(4) Has been deemed eligible by the juvenile court for long-term foster care;~~ [*See* Note, supra.]

~~(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and~~ [*Id.*]

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

~~(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.~~ [Moot]
(d) Initial documents which must be submitted in support of the petition.

(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;

~~(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care; and~~

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

(e) Decision. The petitioner will be notified of the director's decision, and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner will also be notified of the petitioner's right to appeal the decision to the Associate Commissioner, Examinations, in accordance with part 103 of this chapter.

COMMON OBJECTIONS/ISSUES IN STATE COURTS

- State Court Judge doesn't want to make any 'special' findings or talk about 'federal law' or make "immigration decisions"
- Judge is concerned about human trafficking.
- Judge disbelieves the client's story and believes the parties are in collusion.
- Judge won't make findings about return to foreign country.
- Location of parent to be served is 'unknown'; issues with service of process
- Judge doesn't believe service/notice was sufficient because he doesn't know foreign law, or thinks there may be a treaty involved.
- Juvenile proceedings are confidential, won't release orders
- Judge doesn't believe that "reunification" can be found not to be viable outside a child welfare case where he is ordering some form of irreversible guardianship to a nonparent, or even that a termination action must be set to proceed
- Judge doesn't have time or interest in hearing your specific evidence, and/or makes minimal written findings.
- Judge requests paternity be established when no father on birth certificate
- Issues with translations of documents

COMMON ISSUES/CONCERNS WITH USCIS

- Temporary Order (or otherwise deemed to be merely *In Loco Parentis*)
- Primary Purpose (moot/nugatory order)
- Father not on the birth certificate
- Statements from the I-213 (the record of CBP's interview of child at border)
- Statements made in other immigration/visa applications, often times by adults
- Second-guessing Jurisdiction under State Law (age, SMJ)
- Second-guessing the "best interests" determination
- For over-18 children, whether jurisdiction was "As a Minor" vs. "As an Incompetent" or other bases not *bona fide*
- Continuing Jurisdiction over Child
- Adequate Factual Findings (the Why)
- Visa Number Availability EB-4 (at the adjustment of status/green card stage)

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Outline of Legal and Other Issues Covered by Presentation

- UAC's
- Federal Agencies Overview
- Federal-State Structure of SIJS
- Federal Agency Policy & Appeals
- State Law
- International Service of Process
- Practical Tips
- Other Concerns - Language Access, Trauma

- Statutory Excerpts (condensed, emphasis added)
- Basic Vocabulary for Immigration and Family Law Practitioners

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Outline of Legal and Other Issues Covered by Presentation:

I. UNACCOMPANIED MINORS (UAC's)

A. **Definition:** Designation made by Customs & Border Patrol (CBP) upon crossing border regarding Children detained by (or otherwise come to the attention of) the Department of Homeland Security (DHS) who are not in the physical custody of their parent or other legal guardian

B. Crises in Central America

1. Dangers to Males
    a) Gang recruitment into the most notorious gangs in the world
    b) Child abuse
    c) Negligent Parents
    d) Abandonment
    e) Forced labor
2. Dangers to Females
    a) Sexual abuse/assault
    b) Child abuse
    c) Abandonment
    d) Prostitution
    e) Gang recruitment as a gang member's girlfriend

C. **Humanitarian Relief** (overview of existence of options)

1. Family-based Relief
2. Asylum
3. T Visas
4. U Visas
5. DACA (June 2012) - currently being processed
6. Executive Action/DAPA/Expanded DACA (Nov 2014) - On Hold, in the Federal Courts
7. Prosecutorial Discretion: Enforcement Priorities
8. Special Immigrant Juvenile Status (SIJS)

D. Factors Influencing SIJS as a choice of relief:

1. Emphasis on Deterrence & Prioritization of Recent Arrivals (including UAC's)
2. High Deportation Rate from Charlotte Immigration Court
3. Lack of Asylum or other forms of relief
4. Can apply for multiple, concurrent forms of relief

II. FEDERAL IMMIGRATION LAW ENFORCEMENT AND ADMINISTRATIVE AGENCIES:

A. **Overview of relevant Agencies within US Department of Homeland Security ("DHS"), within the US Department of Health and Human Services ("DHHS") and within the US Department of Justice ("DOJ")**

1. DHS:

a) US Customs and Border Patrol ("CBP"): Apprehends Aliens at the Border

b) US Immigration and Customs Enforcement ("ICE"):

Apprehends Aliens in the Interior

c) **US Citizenship and Immigration Services ("USCIS"):** Administers Benefits/Visas Domestically

2. **DHHS: Office of Refugee Resettlement ("ORR")**: Maintains shelters for unaccompanied minor children until release to relatives or, much less frequently, the foster care agencies with which it contracts
3. **DOJ: Executive Office for Immigration Review ("EOIR"):** For non-expedited-removal cases, Immigration Judge ("IJ"), DHS Trial Attorney ("TA"), purpose to adjudicate certain claims
   a) Immigration Court Process
   b) Methods of Case Disposition

III. FEDERAL-STATE STRUCTURE OF SIJS: FEDERAL STATUTES

A. **What is SIJS?** Definition at 8 U.S.C. § 1101(a)(27)(J)

B. **Structure - Federal-State Interplay**: The INA contemplates a state court's assistance with certain findings of fact is made pursuant to section 101(a)(27)(j) of the Immigration and Nationality Act (the "INA"), which is codified at Title 8 of the US Code at section 1101(a)(27)(J), with implementing regulations at 8 C.F.R. § 204.11.

C. **State-level Venues ("State or Juvenile Courts" in federal jargon)**: State Courts using state law to make judicial determinations about the custody and care of minor children and juveniles, able to make the required predicate findings. 8 U.S.C. § 1101(a)(27)(J)(i), 8 C.F.R. § 204.11(a),(c). More fully detailed below.
   1. 2008 TVPRA expanded range of eligible children and proceedings by completely removing requirement for foster-care involvement.
   2. Any qualifying court's order placing the Minor Child in the custody of "an individual or entity" will be taken into consideration by USCIS in that agency's determination as to whether the Minor Child qualifies for Special Immigrant Juvenile Status. 8 U.S.C. § 1101(a)(27)(J)(i), 8 C.F.R. § 204.11(a),(c).
   3. The 2008 Trafficking Victims Protection Reauthorization Act ("TVPRA") was passed by unanimous consent in Congress and expanded the range of eligible children by:
      a) removing requirement for foster-care eligibility
      b) reunification with only one parent now needs to not be viable.
   4. TVPRA provides numerous other protections while in the custody of the federal government, in filing asylum applications

D. Two specific factual findings are necessary to enable the Minor Child or his representative to petition the U.S. Citizenship and Immigration Services ("USCIS") for a classification of Special Immigrant Juvenile Status ("SIJS").
   1. The first required finding is that that "reunification with one or both of the [Minor Child's] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law." 8 U.S.C. § 1101(a)(27)(J)(i).
   2. The second required finding is that it is not in the best interest of the Minor Child to be returned to his/her previous country of last habitual residence. 8 U.S.C. § 1101(a)(27)(J)(ii).

E. The minor (or representative) petitions USCIS for a SIJS classification by filing the form I-360 with other required documents. USCIS has six months in which to adjudicate the petition and either award or deny the classification (not any form of permanent status, in itself). A complete list of documents for the I-360 filing packet is in the Special Immigrant Juvenile Status Comprehensive Checklist.
F. The SIJS classification by USCIS would open the possibility for a child to remain in the United States notwithstanding his or her prior legal status. The child may apply to adjust status/adjustment of status ("AOS") to that of lawful permanent residence (obtaining a green card) under 8 U.S.C. § 1255(a), (h). This application requires the filing of the form I-485, other forms, and various required documents. See the Special Immigrant Juvenile Status Comprehensive Checklist for full listing of forms and other required items in the I-485 filing packet.
G. If the child completes the immigration process and obtains lawful status, it has an extremely positive impact on the child's well-being, including physical and emotional safety, education, medical care, and almost every aspect of the child's life. This significantly improves 'permanency' for the child, well into the future.
H. Some public benefits may be available in certain states upon filing or approval of the I-360; however, many public benefits will not accrue until the child has actually adjusted status and been a lawful permanent resident for five years.
I. Caveat: All "Special Immigrants", including Special Immigrant Juveniles, must become eligible an available visa number in order to apply for adjustment of status (though there is no limit on how many individuals may obtain the underlying special immigrant juvenile status).
    1. Normally, there have been adequate numbers of visas for all countries for all kinds of Special Immigrants under the EB-4 category as also defined by law and implemented by the Department of State, which publishes visa number availability each month in its monthly Visa Bulletin. Thus, normally for an individual who was not in removal proceedings, he or she could file both their Form I-360 Petition for Special Immigrant Juvenile Status as well as their Form I-485 Adjustment of Status Application together because a visa number would be available upon the approval of the SIJS petition. However, such dual-filing is not allowed when a visa number is not available.
    2. The filing of the Special Immigrant Juvenile Petition I-360 locks in a 'priority date', which will be important in determining when a visa is available when the allotments are insufficient to cover all pending actions, and the Department of State thus doles out the numbers to those who have been waiting the longest before advancing to newer applications.
    3. Presently, individuals from El Salvador, Guatemala, Honduras, India, and Mexico are oversubscribed, meaning that no more visa numbers are available due to having too many applicants from each of those countries, for this category, for this fiscal year. Each new federal fiscal year (October 1), new allotments are available. In light of the growing backlog, there is great uncertainty about best practices for children in the interim, especially those who are also in EOIR Removal proceedings. There is a good article about some potential options, from the Center for

the Study of Social Policy, titled *Special Immigrant Juvenile Status: A Critical Pathway to Safety and Permanence*. Another article from Michelle Mendez and Sarah Bronstein is *Strategies for SIJS cases in light of adjustment backlog*.

4. Because the filing of the Form I-360 Special Immigrant Juvenile Status petition locks in a priority date, it is important to continue to timely file that petition, even though there may be a wait before being able to adjust status - and of course, for individuals in removal proceedings, there may be a delay in the ability to terminate the removal case (to adjust with USCIS) or to attempt to adjust status before the Immigration Judge instead.

J. Further caveat: in order to adjust status, an individual must be 'admissable' to the United States (even though they are already physically here). This determination includes looking at whether any 'grounds of inadmissability' pertain, and if so, whether any of them may be waived. Although after the award of Special Immigrant Juvenile Status a number of those grounds are automatically waived, and waivers may be available for other grounds, there can still commonly be issues related to gang affiliation, controlled substances, criminal history, and various other issues. The Immigrant Legal Resource Center has an excellent breakdown of the provisions, titled: *Grounds of Inadmissibility for Special Immigrant Juveniles*. However, this material can quickly become very murky, and it is often crucial to consult an immigration attorney dealing with waiver issues and the intersection of criminal issues and immigration in your state, as there is considerable variation geographically.

IV. FEDERAL AGENCY POLICY AND APPEALS

A. **Agency Policy Memoranda:**

1. **USCIS Memorandum No. 3: Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004)** (a.k.a. "Yates Memo") articulating policies for adjudicating SIJS cases, available on the USCIS website.
2. **USCIS Memorandum: Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (March 24, 2009)** (a.k.a. "Neufeld Memo") articulating updated policies for adjudication of petitions implementing the TVPRA's changes, available on the USCIS Website.
3. USCIS will often issue notices or requests when they are reviewing a case and are not willing to approve the case as-submitted:
    a) Requests for Evidence ("RFE") - the most benign kind of request, seeking particular additional evidence that if received, will help them in rendering a possibly positive decision
    b) Notice of Intent to Deny ("NOID") - a notice indicating that they do not intend to approve a case, but offering the opportunity to provide additional evidence and arguments
    c) Notice of Intent to Revoke ("NOIR") - a notice issued after an approval, indicating that USCIS considers their prior approval to

have been erroneous, and seeking to revoke the benefit, but offering an opportunity to provide additional evidence and arguments

4. If you encounter opposition from USCIS on a legally-sound SIJS petition, which is common, it may be helpful to consult with other members of the advocacy community about the current state of affairs and what has been successful for others. There are also good resources available from immigration advocacy nonprofits that may be helpful in overcoming the objections of USCIS, including the great document by the Immigrant Legal Resource Center ("ILRC") entitled *Responding to Inappropriate RFEs & NOIDs in SIJS Cases*
5. In the event of unfavorable action at the field office level, one may seek reconsideration based on new evidence, or may appeal to the AAO.

B. **Decisions of the Administrative Appeals Office ("AAO" - the authority within USCIS for many kinds of appeals, including denials of Special Immigrant Juvenile Status):** Defining categories of courts with jurisdiction to enter predicate orders involving custody determinations, finding that a wide variety of types of courts nationwide were able to make these findings. There are also opinions addressing the adequacy and support of the factual findings, including a non-precedent March 10, 2014 opinion out of the Philadelphia office indicating that a state court which bases its decree upon a best interests determination may be deemed to impliedly make the 'special findings' when they would be necessary for the court to reach its decision. A registry of technically non-binding, non-precedent decisions that may nonetheless be useful for guidance and illustration is available at the AAO's Database for SIJS Decisions (broken down by year).
    1. Decisions of the AAO, and potentially other agency action/inaction, may be challenged through an Administrative Procedure Act ("APA") suit (also, possibly a *Habeas Corpus* writ, if the child is detained). This gateway to the federal courts may be the only option for challenging
    2. Final Decisions and long-delayed decisions may also be brought to the attention of the USCIS Ombudsman, an independent agency within DHS (not under USCIS), which has the power to recommend systemic change and to advocate for USCIS to reconsider in particular cases if they see mishandling or misapplication of the law.

C. **Injunctions in Force against USCIS regarding handling of SIJS adjudications: Materials relating to the 2015 stipulations in the long-running *Perez-Olano* case, originally settled in 2010** (a class action lawsuit filed on behalf of children whose applications for Special Immigrant Juvenile Status or SIJS-based Adjustment of Status were denied because they either turned 21 or ceased to be under the jurisdiction of a juvenile court while their applications were pending) - see the most current agreement which provides for clearer "age-out" protections for SIJS eligible youth here and other prior materials on the settlement at the USCIS website here.

V. STATE LAW, SUBJECT MATTER JURISDICTION, LEGAL BASES, VENUES

WHERE SIJS FINDINGS MAY BE MADE

A. Public Policy in every state we know if is that every unemancipated Child needs and deserves a Guardian or Custodian who has full legal authority to act in their best interests, during each and every day of their childhood, and if both parents are not available/willing to assist, for just one of them to be able to act alone

B. **What is Child Custody?**
   1. Child custody is a "bundle" of rights and responsibilities relating to the care, custody, and control of a minor child.
   2. Prior to any court involvement or other binding legal action, biology controls and the parents share equal custody rights (regardless of whether a child is legitimated, and often even without any formal paternity determination by courts, though sometimes at least some action is required)
   3. Child custody may be shared by multiple individuals/entities, and some, all, or none of whom may be the biological parents.
   4. Child custody consists of both legal custody (decisionmaking authority) and physical custody (physical care, visits, delegated care). Mere physical custody is not usually awarded alone; rather, legal custodians typically have authority to designate who will have any particular periods of physical custody if not exercising it him/herself.
   5. Mere physical custody or possession (caretaking) of a child does not constitute the kind of legal custody required for SIJS.
   6. What Kinds of Custodians Exist?
      a) A biological parent or an adoptive parent
      b) A general guardian or guardian of the person
      c) A custodian appointed by a court, including child welfare agencies
      d) Other types of legal relationship which control the child's legal custody
   7. What categories are not custodians?
      a) Caretakers
      b) Individuals appointed by ORR as voluntary 'sponsors'
      c) Individuals with (revocable) powers of attorney over the child

C. A recent UNC School of Government Blog Post by Professor Cheryl Howell, regarding the NC Courts that may make SIJS findings, is available at: https://goo.gl/AbjQqg
   1. **North Carolina Public Policy shows that every Child needs and deserves a Guardian or Custodian who has full legal authority to act in their best interests, during each and every day of their childhood, and if both parents are not available/willing to assist, for just one of them to be able to act alone:**
      a) § 35A-1201(6) The General Assembly of North Carolina recognizes that: Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when

they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

b) For children with parents, if both parents are not available, willing, and able to exercise custody, one of them should have the right to act alone.

2. **What is Child Custody?**
   a) Child custody is a "bundle" of rights and responsibilities relating to the care, custody, and control of a minor child.
   b) Prior to any court involvement or other binding legal action, biology controls and the parents share equal custody rights (regardless of whether a child is legitimated or any formal paternity determination)
   c) Child custody may be shared by multiple individuals/entities, and some, all, or none of whom may be the biological parents.
   d) Child custody consists of both legal custody (decisionmaking authority) and physical custody (physical care, visits, delegated care)
   e) Mere physical custody or possession (caretaking) of a child does not constitute the kind of legal custody required for SIJS.
   f) What Kinds of Custodians Exist?
      (1) A biological parent or an adoptive parent (Ch 48)
      (2) A general guardian or guardian of the person (Ch 35A or 7B)
      (3) A custodian appointed by a court (Ch 50 or, rarely Ch 7B)
   g) What categories are not custodians?
      (1) Caretakers
      (2) Individuals appointed by ORR as voluntary 'sponsors'
      (3) Individuals with (revocable) powers of attorney over the child
3. **City of Durham Policy**
   a) On January 5, 2015, the Durham City Council passed resolution supporting these migrant children, joining Orange Co., Chapel Hill, and Carrboro:
      (1) It recognized the humanitarian crisis in Honduras, El Salvador, and Guatemala
      (2) It recognized that the children were "in urgent need of protective adult care" and legal services
      (3) It thanked the local court system for dealing with the needs of these children
   b) Sources:
      (1) **http://www.southerncoalition.org/movement-supporting-immigrant-children-grows-durham/**
      (2) **http://www.msnbc.com/msnbc/communities-reframe-message-welcome-immigrant-kids**
      (3) **http://www.southerncoalition.org/wp-content/uploads/2**

015/01/Final-Proposed-Durham-Resolution.pdf

4. **Juvenile Court Actions**
    a) **7B Article 1-10, Juvenile Abuse/Neglect/Dependency Actions**
        (1) Only a County Department of Social Services ("DSS") may initiate a juvenile petition regarding a child who meets the statutory criteria of Abuse, Neglect, or Dependency
        (2) DSS involvement is based on a confidential Child Protective Services ("CPS") report.
            (a) DSS has discretion in screening reports, focused on the child's safety, and it is hard to change their response
            (b) Your local DSS may be more reticent to get involved with non-English-speaking families, or non-citizen/non-LPR children due to special burdens (including funding)
        (3) Court may award custody or guardianship to non-parents.
        (4) If a one-parent home, SIJ may still be appropriate.*
        (5) The Court's File is confidential - Make sure any SIJS order is released by a court order (including the SIJS order itself)
    b) 7B Article 11, Termination of Parental Rights ("TPR")
        (1) may be brought by DSS, a GAL for the child, a guardian, one parent against another, a long-term custodian or caretaker, or anyone who has filed a petition to adopt the child. N.C. Gen. Stat. § 7B-1103.
        (2) The TPR is a more severe deprivation of rights than a mere custody determination and involves significantly more procedural hurdles than other actions.
        (3) It is not normally NC public policy to sever parental rights except in extreme cases or where an adoptive placement is viable.
        (4) Provisional Counsel is appointed pursuant to § 7B-1101.1, but if the parent doesn't show after having been duly served with summons under § 7B-1106 and noticed of the § 7B-1108.1 Pretrial hearing, counsel will normally be discharged.
        (5) A Termination order, based on finding that the termination is in the child's best interests, the court should make suitable changes in custody in favor of the petitioner/movant: § 7B-1112. Effects of termination order… "(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person, or in the custody of the department of social services or licensed child-placing agency, as may appear to be in the best interests of the juvenile."

c) **Definitions in Child Welfare Proceedings (A-N-D and TPR): these statutes were drafted to the meet state's due-process burdens, representing a high standard**
   (1) **Definitions** for "Abused Juvenile," "Neglected Juvenile," and "Dependent Juvenile," for purposes of Juvenile A/N/D ("DSS Court") Proceedings: N.C. Gen. Stat. § 7B-101
   (2) **Definitions** for "Abandonment" and other related grounds for purposes of Termination of Parental Rights Proceedings: N.C. Gen. Stat. § 7B-1111

d) 7B Article 15-27, Juvenile Undisciplined/Delinquent Actions
   (1) These actions qualify under the federal statute, where the court makes an award of custody of the minor.
   (2) Note that certain crimes may eliminate the possibility of obtaining legal immigration status - USCIS will carefully examine and evaluate these before granting status

5. **Chapter 50 Child Custody Actions**
   a) Often this is one parent versus another, showing that only one should have right to legal custody
   b) N.C. Gen. Stat. § 50-13.1 allows non-parents to petition for custody of a minor child, ***so long as*** they have standing with respect to the particular child, and can show unfitness of the parents
   c) In 3rd party custody cases, Unfitness (general) OR Acts inconsistent with the parental status (specific, includes yielding parental authority/acquiescing) must be shown by clear and convincing evidence
   d) N.C. Gen. Stat. § 50-13.2 codifies that a best interest standard applies ("the court *shall* consider *all relevant factors*... and *shall make findings accordingly*… which support **the determination of what is in the best interest of the child**.")
   e) and N.C. Gen. Stat. § 50-13.5 provides for the detailed procedure, including grounds for *ex parte* or temporary orders prior to service of process.
      (1) N.C. Gen. Stat. § 50-13.5(d)(2) states that the court may enter orders prior to service of process in appropriate cases.
      (2) A temporary or ex parte order for custody solidifying status quo may normally be ordered.
      (3) Where no custody order exists, a third party who has physical custody may normally argue with success that an emergency custody order is necessary to grant them decision-making power until a full hearing on the merits, especially with children who are abandoned and have no legal caretaker (or would be "dependent" under 7B-101)
      (4) Under N.C. Gen. Stat. § 50-13.5(d)(3) in order to enter an order that changes the living arrangements ex parte, the child must be exposed to:

(a) a substantial risk of bodily injury/sexual abuse
(b) a substantial risk of abduction/removal from the State (to evade the jurisdiction of North Carolina courts).

f) Temporary Orders require a specific time for reconvening, and convert to permanent orders if that doesn't happen within a reasonable period of time
g) *N.B. ex parte* orders take the form of TRO's under NC Rule of Civil Procedure Rule 65 and require 10-day turnarounds for review until a more settled hearing - normally temporary custody - occurs after at least some opportunity for the other side to be heard.
h) Also of note, N.C. Gen. Stat. § 50-13.8 provides for custody of individuals past 18 where they are physically or mentally incapable of self-support. There are no binding statutory definitions provided for these courts, as they make determinations based on common law principles and in performing their role in determining the best interests of minor children.
(1) This is applicable where a child was already under the jurisdiction of the court as a minor; a new action for that 18+ year old would have to be through an adult guardianship, N.C. Gen. Stat. Ch. 35A Articles 1-5, as with other incompetent adults.

6. **Guardianship Proceedings**
a) These special proceedings under N.C. Gen. Stat. Ch. 35A, Art., 6 are available to appoint a guardian of the person or general guardian (types of custodian) only where the minor has no "natural guardian." (Confusingly, a guardian of the estate, which handles the child's money, can be instituted even when the parents are alive.)
b) These informal "special proceeding" are handled by the Clerk's office, not by judges, and are conducted informally.
c) In all instances the Clerk must hold a hearing or determine the facts, however informally and may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to ***determine the minor's best interest***." G.S. § 35A-1223
d) In all instances the Clerk must determine the facts in order to determine the best interests of the minor child, and " the clerk shall in every instance base the appointment of a guardian or guardians on ***the minor's best interest***." G.S. § 35A-1224
e) In practice, it is rarer for a guardianship proceeding to be practicable as vehicles for a custody determination, but is an option available for orphans (this is also the appropriate vehicle for effectuating the testamentary recommendations of deceased parents for some particular person to act as guardian).
f) The clerk may appoint separate guardians of the estate and of the

person for the minor child, which is acceptable per § 35A-1224: "Criteria for appointment of guardians. (a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian."

(1) The type of guardian that will qualify under federal law as a 'custodian' for SIJS purposes is the guardian of the person charged with care, custody, and control.

(2) A guardian of the estate, which handles the child's money, does not exercise the relevant type of custody. Therefore, a child with a guardian of the estate and no guardian of the person would likely not be eligible for SIJS.

g) If a child has just aged-out, a new action for that 18+ year old would have to be through an adult incompetency petition and application for guardianship under N.C. Gen. Stat. Ch. 35 Articles 1-5, as with other incompetents who are no longer minors under NC Law.

h) N.B. that 18-20 year olds may be adults for the purposes of guardianship proceedings under NC law, but those individuals remain children under federal immigration law. It appears that adult competency/guardianship proceedings do determine the kind of legal custody and caretaking that would be awarded if the person were still a child, using the same kinds of best interests determinations, and therefore it stands to reason that an order of adult guardianship could fulfill SIJ requirements for 18-20 year olds. See, e.g. § 35A-1214. Priorities for appointment."The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward."

7. **Adoption Proceedings**

a) The are special proceedings under N.C. Gen. Stat. Ch. 48 which may be brought by a narrower class of individuals and under narrower circumstances, with many procedural barriers.

b) These informal "special proceedings" are handled by the Clerk's office, not by judges (unless referred to the district court), and are conducted with somewhat less formality.

c) § 48-2-601. Hearing on, or disposition of, adoption petition; transfer of adoption proceeding; timing... (a1) If an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk, the clerk shall transfer the proceeding to the district court

under G.S. 1-301.2.[1]

d) The clerk is charged with determining the best interests of the child and potentially awarding the most powerful/permanent form of custody, legal parenthood:

(1) § 48-2-603(a). Hearing on, or disposition of, petition to adopt a minor.

...the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee

(2) § 48-2-606. Decree of adoption.

(a) A decree of adoption must state at least:

…

(7) That the adoption is in the best interest of the adoptee.

8. **Declaratory Judgments**: Speaking broadly, any NC court may interpret any question of law or matter in dispute between the parties already before it, including the foregoing types of custody matters, and therefore those courts have an additional mechanism in which to answer the questions required about the child's best interests and reunification with parents.

a) Per N.C. Gen. Stat. Ch. 1, Art. 26: Any division and any court of record within the General Court of Justice may, in an action pending before it solely for a declaratory judgment or for other matters wherein it has jurisdiction over the parties, may make a determination of facts and law applicable to settling a controversy between the parties.

b) **N.C. Gen. Stat. § 1-254 Courts given power of construction of all instruments.** Any person... *whose rights, status or other legal relations are affected by a statute*, municipal ordinance, contract or franchise, may have determined *any question* of construction or validity arising under the instrument, statute, ordinance, contract,

[1] § 1-301.2. Transfer or appeal of special proceedings; exceptions.
(a) Applicability. - This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.
(b) Transfer. - Except as provided in subsections (g) and (h) of this section, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court. In court, the proceeding is subject to the provisions in the General Statutes and to the rules that apply to actions initially filed in that court.
(c) Duty of Judge on Transfer. - Whenever a special proceeding is transferred to a court pursuant to subsection (b) of this section, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge's disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.
(d) Clerk to Decide All Issues. - If a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer, the clerk shall decide all matters in controversy to dispose of the proceeding.
(e) Appeal of Clerk's Decisions. - Except as provided in G.S. 46-28.1(f), a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo. Notice of appeal shall be in writing and shall be filed with the clerk. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay. Any matter previously transferred and determined by the court shall not be relitigated in a hearing de novo under this subsection.
(f) Service. - Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.
...

or franchise, and *obtain a declaration of rights, status, or other legal relations* thereunder.

c) **N.C. Gen. Stat. § 1-264 Liberal construction and administration.** This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.

9. **Verification of Pleadings:**
   a) All pleadings relating to child custody have to be sworn-to and include an affidavit regarding compliance with the UCCJEA. The typical scenario for Civil Actions is that the pleading needs to be verified as required by law.
   b) **N.C. Gen. Stat. § 1-148 Verification before what officer:** Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes.
10. **Venue:**
   a) The general rule is that the Defendant must raise a venue defense in the pleadings, or it is waived. *See Zetino-Cruz v. Benitz-Zetino*, et al., Slip Op. CoA 15-1154, ____ NC.App. ____, 791 S.E.2d 100 (N.C. App., Aug. 16, 2016) and the UNC SOG Blog Post about it here.
   b) If your specific local venue has problems with obtaining relief in a timely, unbiased, and fair manner, and whether there are logistical barriers for you or your client that may push toward another venue being more convenient, then generally there is no barrier to filing in the most convenient venue for your client..
   c) Specific Child Custody Venue Statute: Any County in which any parent or the child resides, or where the child "is physically present" N.C. Gen. Stat. § 50-13.5(f)
11. **Subject Matter Jurisdiction: Uniform Child Custody Jurisdiction and Enforcement Act: N.C. Gen. Stat. § 50A-101 et seq.** Applicable to all child custody proceedings of any sort, this statutory provision deprives a custody court of subject-matter jurisdiction unless and until North Carolina meets the definition of a "Home State" or the court at least has temporary emergency jurisdiction under **§ 50A-204** when the child is present in North Carolina and has been abandoned or threatened with abuse or mistreatment (which may ripen into non-temporary jurisdiction with passage of time). **UCCJEA** vests NC courts with the jurisdiction to render custody determinations regarding minor children after six months of residence and arguably sooner, treating a foreign country like another state, and the information that must be included with any new filing: N.C. Gen. Stat. § 50A-102, -105, -201, -209
   a) Home State is defined under **§ 50A-102 Definitions** as follows:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

b) This article treats foreign countries as though they were other states for purposes of these definitions, per **§ 50A-105 International application of Article:**

(a) A court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2.
(b) Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this Article must be recognized and enforced under Part 3.
(c) A court of this State need not apply this Article if the child-custody law of a foreign country violates fundamental principles of human rights.

c) The UCCJEA also addresses Service of Process & Personal Jurisdiction
   (1) Notice (Service) to persons outside State: § 50A-108 (a) "Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective."
   (2) § 50A-201(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

d) Temporary Emergency Jurisdiction: § 50A-204(a) allows the state court to act in emergency circumstances involving abuse or abandonment, prior to NC becoming the 'home state,' after which point it can ripen/merge into a permanent order under § 204(b) under appropriate timing, usually (but not necessarily) upon NC obtaining home state jurisdiction where no other state has timely acted.

VI. PERSONAL JURISDICTION - INTERNATIONAL SERVICE OF PROCESS

A. **Federal Rules of Civil Procedure** for International Service of Process: Rule 4(j)
B. Use the Department of State country information widget as the first tool to check on which treaties apply
C. Review this helpful article on International Service of Process.
D. Due process likely requires translation of the summons and complaint into a language spoken by the defendant, even if an international agreement does not

govern or specify that the documents must be translated.

E. **Hague Service Convention**
   1. This convention governs service in many countries around the world
   2. The US is a full party to the convention
   3. You may wish to read the Full Text of the Treaty and determine whether the other country is also a party by looking in the Status Table**.**
   4. See also W. Mark C. Weidemaier, International Service of Process Under the Hague Convention.
   5. Most Relevant NC Case Law: *Hammond v. Hammond*, 708 S.E.2d 74 (N.C. App., 2011)
      a) The Hague *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ("Hague Service Convention") is Binding on State Procedure and Mandatory as a means of Service whenever both countries are signatories.
      b) However, there is always room for Judicial Discretion to overlook procedural irregularity or nonconformity where ACTUAL NOTICE and a good faith effort to comply.

F. **Inter-American Service Convention and Additional Protocol** governing service in certain Western Hemisphere Countries, as the US is a full party to the convention (and considers parties who adopted the original convention but not the additional protocol not to be full parties): you may wish to read the text of the Additional Protocol. As explained below, this is not a mandatory treaty, and most individuals, unless they want to ensure the highest degree of assurance of the enforceability of a judgment in the foreign country, will opt to use a simpler and faster method of service.

G. All jurisdictions to address the question (so far as I have found) have interpreted the Inter-American Convention on Letters Rogatory + Additional Protocol to be NON-EXCLUSIVE, and therefore any U.S. State is free to follow its own civil procedure with respect to service abroad in countries which are signatories only to the Inter-American Convention on Letters Rogatory and Additional Protocol. Federal Cases: *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634 (C.A.5 (Tex.), 1994); *Pizzabiocche v. Vinelli*, 772 F.Supp. 1245 (M.D. Fla., 1991); and *Morgenthau v. Avion Resources Ltd.*, 11 N.Y.3d 383, 898 N.E.2d 929 (N.Y., 2008)

H. Principles of International Comity (discussed briefly in *Avion Resources, supra*) do not require adherence to the precise procedural rules for service in the receiving country, and is not an "additional hurdle."

I. Absent any binding treaty (to wit: the Hague Service Convention), so long as Due Process is afforded to the individual served and the service complies with the U.S. State's rules (which may adopt or find sufficient foreign methods of service), then the service will generally be valid.

VII. PRACTICAL TIPS:

A. DRAFTING THE COMPLAINT/MOTION/REQUEST PACKET

1. As much detail about abuse, abandonment, and/or neglect as possible
2. Tell why it is in the child's best interests to remain in the United States and why the Plaintiff is the proper person to have custody of the minor child

3. Include details of any prior litigation regarding custody of the minor child
4. Details of where the child has lived for the past 5 years
5. Include all required documents per the template/packet appropriate for your state, though the list may vary by locality and local rule - always follow local rules
6. If you do not have an in-house interpreter, you can often obtain a volunteer interpreter to assist with interviewing the minor child and any caregivers with relevant information (for individuals in the GAL program, it is recommended to request appointment of the volunteer interpreter through the court to comply with the strict confidentiality requirements)

B. FILING

1. Take original and 3 copies to clerk of court in civil filings
2. Use Petition to Sue/Appeal/File Motions as an Indigent if client qualifies to waive filing fees
3. File Motion to waive Parent Education and Mediation with Family Court

C. Initial Hearing: Calendar Call

1. After filing proof of service, follow your county's procedures for scheduling hearings.
2. When you attend Calendar Call, know your deadlines and approximately how much time you will need to conduct your custody hearing.
3. Most hearings are unopposed and last approximately 30 minutes.

D. PREPARING FOR TRIAL

1. Notify the potential guardian/sponsor and the minor child of the date of the hearing.
2. Make sure they know the address and set up a meeting place within the courthouse.
3. Draft direct examination questions for both the potential guardian/sponsor and the minor child.
4. Distribute the list of questions to them for review and set up a time to practice before the hearing.
5. Prepared an opening statement which summarizes the case.
6. Draft your proposed order, making sure to include the requisite language and findings of fact.
7. Arrange a court interpreter to be present at the trial.

VIII. ETHICAL CONSIDERATIONS:

A. **Dual-Representation:** In SIJS cases, if an attorney or firm/organization is representing the child in more than one court/agency, they may have different legal clients (though normally the purpose of the representation is seeking a benefit for the child). Rules 1.7 and 1.8 of the NC Revised Rules of Professional Conduct govern the potential conflicts between current clients, regarding adverse interests, financial assistance, etc.

B. **Mandatory Reporting Law**: N.C. Gen. Stat. § 7B-301 (also note Immunity from liability for reporters: N.C. Gen. Stat. § 7B-309)

C. **NC State Bar Ethics Opinion** indicating that a lawyer may violate client confidence to comply with the reporting statute (substantially the same language exists in the current statute, but the references in the opinion are to the version

prior to recodification into Ch. 7B): RPC 175 January 13, 1995 (see also consistent prior opinion RPC 120 July 17, 1992)

D. **NC State Bar Ethics Opinion** indicating that attorneys may not report opposing parties to ICE: 2009 FEO 5 January 22, 2009. Would similar restrictions be present for the Court under the Canons of Judicial Conduct to restrain Judges from reporting litigants to ICE?
E. **NC State Bar Ethics Opinion** that attorneys may prepare an *acceptance of service document*, but **not** a *waiver of the right to answer* or an *answer* or other responsive pleading: CPR 296 July 15, 1981 (see also CPR 121 July 15, 1977)
F. **NC State Bar Ethics Opinion** that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person: 2015 FEO 1.

IX. Other Considerations

A. Language Access:
    1. Your state should make available interpreters for child custody/welfare type proceedings, and there should be a process in place (if not, call the US DOJ to complain, as they've intervened in states with such problems).
    2. Consider whether there is a dialect or other language altogether in which the client might be more proficient - always ask, as clients may not realize that you may be interested or willing to accommodate their specific needs, particularly if they came from an oppressed/minority group.
B. Be Trauma-Informed:
    1. Even under the best of circumstances, international migration causes trauma and loss to clients. Most individuals qualifying for humanitarian relief have suffered significant trauma. It is important to recognize that many things may be difficult for the client to talk about, especially with a very confusing foreign attorney (you). Building comfort, rapport, and trust across such large divides may take substantially more time than for other client types. For children who have faced parental abuse, neglect, and abandonment, typically on top of other concerns in their country of origin, this is especially true.
        a) Ensure that if possible, clients seek appropriate counseling/mental health services - some parts of your state (but probably not all) have sliding-scale providers in some common foreign languages.
        b) You may need to re-interview the client after time has passed, and adjust your case based on your client's continuing disclosures. Expansion or clarification of a client's story is a positive sign.
        c) Recognize that stability and security have been scarce in your client's life, and that court proceedings (determining whether they will face deportation) are a huge source of stress. For clients fleeing danger, in particular, these consequences are life-or-death. Many clients' mental and physical health hinge on their case. Additional time and energy devoted to showing compassion and performing the legal counsellor role are often needed.

C. Connect Traumatized Children (and adults) with Mental Health Services
    1. This will improve your client's ability to process and talk about the issues
    2. This will also improve your client's wellbeing and functioning, and happiness, which is a benefit to your client
    3. This may also produce medical records that are easy to put in evidence and would have good value at hearing or with the immigration agency.

2017-02-02 CLE: The North Carolina Courts and Special Immigrant Juvenile Status (SIJS)

Statutory Excerpts (condensed, emphasis added)

Federal:
8 U.S. Code § 1101
8 C.F.R. § 204.11

State:
§ 50-13.2
§ 35A-1223-1224
§ 7B-101
§ 7B-1111
§ 7B-2901
§ 50-13.5
§ 50A-102
§ 50A-108, -201, -204, -205
§ 7B-301
Rule 4(j1)-(j4)
Rule 4(j5)
§ 1-75.10

8 U.S. Code § 1101 - Definitions

(a) As used in this chapter—

(27) The term "special immigrant" means—

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or *an individual or entity appointed by a State or juvenile court* located in the United States, and *whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*;

(ii) for whom it has been determined in administrative or *judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country* of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

8 C.F.R. § 204.11 - Special immigrant status for certain aliens declared dependent on a juvenile court

(a) Definitions.

~~Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.~~ [Note: The requirement of long-term foster care was removed from the definition of Special Immigrant Juvenile pursuant to the TVPRA, which makes the foregoing definition irrelevant.]

Juvenile court means a *court* located in the United States *having jurisdiction under State law to make judicial determinations about the custody and care of juveniles*.

(b) Petition for special immigrant juvenile. An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.

(c) Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, *while the alien was in the United States and under the jurisdiction of the court;*

~~(4) Has been deemed eligible by the juvenile court for long-term foster care;~~ [*See* Note, supra.]

~~(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and~~ [*Id.*]

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

~~(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.~~ [Moot]

(d) Initial documents which must be submitted in support of the petition.

(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;

~~(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care; and~~

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

(e) Decision. The petitioner will be notified of the director's decision, and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner will also be notified of the petitioner's right to appeal the decision to the Associate Commissioner, Examinations, in accordance with part 103 of this chapter.

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State; consideration of parent's military service.

(a) An order for custody of a minor child entered pursuant to this section ***shall award the custody of such child*** to such person, agency, organization or institution as will ***best promote the interest and welfare of the child***. In making the determination, the court ***shall consider all relevant factors*** including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and ***shall make findings accordingly***. ***An order for custody must include findings of fact which support the determination of what is in the best interest of the child***. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. ***Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.*** If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

...

§ 35A-1223. Hearing before clerk on appointment of guardian.

The clerk shall receive evidence necessary to determine whether a guardian of the person, a guardian of the estate, or a general guardian is required. If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and ***the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest***. (1987, c. 550, s. 1.)

§ 35A-1224. Criteria for appointment of guardians.

(a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.

(c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) If the minor's parent or parents have made a testamentary recommendation pursuant to G.S. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and ***the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.***

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 1989, c. 473, s. 1.)

§ 7B-101. Definitions. As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. - Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; rape of a child by an adult offender, as provided in G.S. 14-27.2A; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; sexual offense with a child by an adult offender, as provided in G.S. 14-27.4A; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; unlawful sale, surrender, or purchase of a minor, as provided in G.S. 14-43.14; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-205.3(b); and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others;

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile; or

g. Commits or allows to be committed an offense under G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) against the child.

…

(9) Dependent juvenile. - A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

…

(15) Neglected juvenile. - A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has

died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

§ 7B-1111. Grounds for terminating parental rights.

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

…

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:

a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.

c. Legitimated the juvenile by marriage to the mother of the juvenile.

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind

of plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

…

(10) Where the juvenile has been relinquished to a county department of social services or a licensed child-placing agency for the purpose of adoption or placed with a prospective adoptive parent for adoption; the consent or relinquishment to adoption by the parent has become irrevocable except upon a showing of fraud, duress, or other circumstance as set forth in G.S. 48-3-609 or G.S. 48-3-707; termination of parental rights is a condition precedent to adoption in the jurisdiction where the adoption proceeding is to be filed; and the parent does not contest the termination of parental rights.

(11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.

…

§ 7B-2901. Confidentiality of records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office alleging abuse, neglect, or dependency. The records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the court.

The following persons may examine the juvenile's record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court:

(1) The person named in the petition as the juvenile;

(2) The guardian ad litem;

(3) The county department of social services; and

(4) The juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the juvenile's parent, guardian, or custodian.

(b) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by the Department or under placement by the court, which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile. The records maintained pursuant to this subsection may be examined only in the following circumstances:

(1) The juvenile's guardian ad litem or the juvenile, including a juvenile who has reached age 18 or been emancipated, may examine the records.

(2) A district or superior court judge of this State presiding over a civil matter in which the department is not a party may order the department to release confidential information, after providing the department with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the trial of the matter before the court and unavailable from any other source. This subsection shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The department may surrender the requested records to the court, for in camera review, if surrender is necessary to make the required determinations.

(3) A district or superior court judge of this State presiding over a criminal or delinquency matter shall conduct an in camera review before releasing to the defendant or juvenile any confidential records maintained by the department of social services, except those records the defendant or juvenile is entitled to pursuant to subdivision (1) of this subsection.

(4) The department may disclose confidential information to a parent, guardian, custodian, or caretaker in accordance with G.S. 7B-700.

(c) In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim.

(d) The court's entire record of a proceeding involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes is not a matter of public record, shall be maintained separately from any juvenile record, shall be

withheld from public inspection, and may be examined only by order of the court, by the unemancipated minor, or by the unemancipated minor's attorney or guardian ad litem.

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. - The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

….

(b)(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. -

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204...

(d) Service of Process; Notice; Interlocutory Orders. -

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions... Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. -

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. - An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been

previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

…

UCCJEA Definitions:

§ 50A-102. Definitions. In this Article:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this Article.

...

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

...

(13) "Person acting as a parent" means a person, other than a parent, who:

a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and

b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

(14) "Physical custody" means the physical care and supervision of a child.

…

Service and Notice under the UCCJEA

§ 50A-108. Notice to persons outside State.

(a) Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. ***Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.***

(b) Proof of service may be made in the manner prescribed by the law of this State or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court. (1999-223, s. 3.)

§ 50A-205. Notice; opportunity to be heard; joinder.

(a) Before a child-custody determination is made under this Article, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to all persons entitled to notice under the law of this State as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(b) This Article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child-custody proceeding under this Article are governed by the law of this State as in child-custody proceedings between residents of this State. (1979, c. 110, s. 1; 1999-223, s. 3.)

UCCJEA Part 2. Jurisdiction.

§ 50A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) **This State is the home state** of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or **a person acting as a parent, have a significant connection with this State** other than mere physical presence; and

b. **Substantial evidence is available in this State** concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)

(c) Physical presence of, or personal jurisdiction over, a party or a child is not

necessary or sufficient to make a child-custody determination. (1979, c. 110, s. 1; 1999-223, s. 3.)

§ 50A-204. Temporary emergency jurisdiction.

(a) A court of this State has temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child-custody determination that is entitled to be enforced under this Article and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203. If a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

…

§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.

(a) Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the department's assessment of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of sexual abuse of the juvenile in a child care facility, the director shall notify the State Bureau of Investigation within 24 hours or on the next workday. If sexual abuse in a child care facility is not alleged in the initial report, but during the course of the assessment there is reason to suspect that sexual abuse has occurred, the director shall immediately notify the State Bureau of Investigation. Upon notification that sexual abuse may have occurred in a child care facility, the State Bureau of Investigation may form a task force to investigate the report.

(b) Any person or institution who knowingly or wantonly fails to report the case of a juvenile as required by subsection (a) of this section, or who knowingly or wantonly prevents another person from making a report as required by subsection (a) of this section, is guilty of a Class 1 misdemeanor.

(c) A director of social services who receives a report of sexual abuse of a juvenile in a child care facility and who knowingly fails to notify the State Bureau of Investigation of the report pursuant to subsection (a) of this section is guilty of a Class 1 misdemeanor. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 2; 1993, c. 516, s. 4; 1997-506, s. 32; 1998-202, s. 6; 1999-456, s. 60; 2005-55, s. 3; 2013-52, s. 7.)

SERVICE OF PROCESS N.C. Gen. Stat. 1A-1 Rules of Civil Procedure **Rule 4**

(j1) Service by publication on party that cannot otherwise be served. - A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication

...

(j2) Proof of service. - Proof of service of process shall be as follows:

…

(3) Publication. - Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(a)(2).

(j3) Service in a foreign country. - Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) Process or judgment by default not to be attacked on certain grounds. - No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) Personal jurisdiction by acceptance of service. - Any party personally, or through the

persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

§ 1-75.10. Proof of service of summons, defendant appearing in action.

(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. -

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. - In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. - The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. - In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

(5) Service by Designated Delivery Service. - In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.

b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.

c. That the delivery receipt or other evidence of delivery is attached.

(6) Service by Signature Confirmation. - In the case of service by signature confirmation as provided by the United States Postal Service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation.

b. That it was in fact received as evidenced by the attached proof of delivery obtained from the United States Postal Service, or other evidence satisfactory to the court of delivery to the addressee.

c. That the copy of the signature confirmation or other evidence of delivery is attached.

(b) As used in subdivision (5) of subsection (a) of this section, "delivery receipt" includes a facsimile receipt and a printout of an electronic receipt.

ETHICAL/OTHER CONSIDERATIONS:

A. **Dual-Representation:** In SIJS cases, if an attorney or firm/organization is representing the child in more than one court/agency, they may have different legal clients (though normally the purpose of the representation is seeking a benefit for the child). Rules 1.7 and 1.8 of the NC Revised Rules of Professional Conduct govern the potential conflicts between current clients, regarding adverse interests, financial assistance, etc.

B. **Mandatory Reporting Law**: N.C. Gen. Stat. § 7B-301 (also note Immunity from liability for reporters: N.C. Gen. Stat. § 7B-309)

C. **NC State Bar Ethics Opinion** indicating that a lawyer may violate client confidence to comply with the reporting statute (substantially the same language exists in the current statute, but the references in the opinion are to the version prior to recodification into Ch. 7B): RPC 175 January 13, 1995 (see also consistent prior opinion RPC 120 July 17, 1992)

D. **NC State Bar Ethics Opinion** indicating that attorneys may not report opposing parties to ICE: 2009 FEO 5 January 22, 2009. Would similar restrictions be present for the Court under the Canons of Judicial Conduct to restrain Judges from reporting litigants to ICE?

E. **NC State Bar Ethics Opinion** that attorneys may prepare an *acceptance of service document*, but **not** a *waiver of the right to answer* or an *answer* or other responsive pleading: CPR 296 July 15, 1981 (see also CPR 121 July 15, 1977)

F. **NC State Bar Ethics Opinion** that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person: 2015 FEO 1.

Selected Rules and Ethics Opinions Relevant to SIJS-type Proceedings

Rule 1.7
Rule 1.8
RPC 175
2009 Formal Ethics Opinion 5
CPR 296
CPR 121
2015 FEO 1

Rule 1.7 of the Revised Rules of Professional Conduct: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 of the Revised NC Rules of Professional Conduct: Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

> (1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

RPC 175
January 13, 1995

Editor's Note: This opinion was originally published as RPC 175 (Revised).

Reporting Child Abuse

Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

Inquiry #1:

RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. §7A-543 et seq. In 1993 the North Carolina General Assembly amended G.S. §7A-543 and G.S. §7A-551. G.S. §7A-543 now generally provides that as follows:

...any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent...or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. §7A-551 now generally provides as follows:

...[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney to report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

Opinion #1:

No. Rule 4(b) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(c). Rule 4(c) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(c) allows a lawyer to reveal confidential information "when... required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. *While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client.* See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship..."). For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. *Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal).* ***It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.***[2]

Inquiry #2:

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

Opinion #2:

Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(c)(3).

Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.

[2] All Emphasis Added

2009 Formal Ethics Opinion 5
January 22, 2009

Reporting Opposing Party's Citizenship Status to ICE

Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over $30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. See Rule 3.1, Rule 4.4, 2005 FEO 3.

Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, **may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status**?

Opinion #2:

No, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation?

Opinion #3:

No. See Rule 4.4(a).

CPR 296
July 15, 1981

"Acceptance of Service and Waiver" Form

INQUIRY:
Attorney A practices domestic relations law in Wake County . The Clerk of the Domestic Courtroom for Wake County District Court has available a document entitled "Acceptance of Service and **Waiver**" which is frequently used for uncontested divorces. The form states that the defendant, or defendant's attorney, accepts service of the summons and acknowledges receipt of a copy or the summons and a copy of the complaint. The form further states that the defendant waives service by an officer and further **waives the right to file an answer** or any other pleadings, the right to be notified of the time and place of the trial of the action, and waives the right to trial by jury, and further agrees that the court may proceed immediately with the trial of the action in question.

In view of CPR's 121 and 125, may Attorney A representing a plaintiff in a divorce or other action ethically prepare this form and make it available to a defendant? May he do so only at the request of the defendant? May he allow his client, the plaintiff, to provide such a form to the defendant?

OPINION:
No. Attorney A may **not send to or directly make available** to a defendant the "Acceptance of Service and Waiver" form. To provide the form waiving the right to answer and to be notified of the date of trial has the **same effect as providing an answer for the defendant**. See CPR's 121 and 125. Similarly, Attorney A may not allow his client, the plaintiff, to provide such a form to the defendant. See CPR 125. Of course, Attorney A may send to defendant a form solely for acceptance of service. See CPR 121, Question 1.

CPR 121
July 15, 1977

Inquiry: Is it ethical for the attorney representing the plaintiff in a divorce action, with the plaintiff's consent, to:

1. Send to the defendant the summons, together with copy of summons and copy of complaint, for **acceptance of service** in a divorce action where no minor children are involved?

Opinion: **Yes**.

2. Send to defendant summons, together with copy of summons and copy of complaint, for acceptance of service and, in addition thereto, send to defendant a **form type answer** that may be used in admitting the allegations of the complaint where no children are involved?

Opinion: **No**. EC 7-18; DR 7-104(A) (2).

3. Send to defendant summons for acceptance of service, together with copy of summons and copy of complaint, and send to defendant an **answer admitting the allegations of the complaint**, suggesting that she may sign it, appearing in her own person, and verify it and return it to be filed to thus speed up the granting of a divorce where no children are involved?

Opinion: **No**. EC 7-18; DR 7-104(A) (2).

4. Draft a **consent order** concerning custody and support of children and sent to defendant in a divorce action summons for acceptance of service, together with copy thereof and copy of complaint and consent order concerning custody and support of children, suggesting that defendant, if the defendant finds the papers acceptable, may sign all of the papers and return them to be filed without the expense of engaging counsel?

Opinion: No. EC 7-18; DR 7-104(A) (2).

5. Permit the defendant to pay the balance of his fee in an uncontested divorce action to enable plaintiff to go forward and obtain a divorce?

Opinion: Yes. If the attorney has no role in inducing the defendant to pay such fee.

2015 Formal Ethics Opinion 1

April 17, 2015
Preparing Pleadings and Other Filings for an Unrepresented Opposing Party

Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

Background:

The Ethics Committee recently received several inquiries on whether a lawyer may prepare a pleading or other filing for an unrepresented opposing party in a civil proceeding. There are a number of rules and ethics opinions that address this issue, but not collectively. The purpose of this opinion is to provide guiding principles for when a lawyer may prepare a pleading or other filing for an unrepresented opposing party.

This opinion is limited to the drafting of pleadings and filings attendant to a proceeding that is currently pending before a tribunal (as that term is defined in Rule 1.0(n)), and to the drafting of any agreement between the parties to resolve the issues in dispute in the proceeding including a release or settlement agreement. The principles do not address the drafting of documents necessary to close a business transaction or other matters that are not the subject of a formal proceeding before a tribunal. “Pleading or filing” is used throughout the opinion to include any document that is filed with the tribunal and any agreement between the parties to settle their dispute and terminate the proceeding.

Survey of Rules and Opinions:

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. As long as the lawyer explains that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

CPR 296, which was adopted in 1981 under the Code of Professional Responsibility which was then in effect, opines that a lawyer may not send to or directly make available to an unrepresented defendant an acceptance of service and waiver form waiving the right to answer and to be notified of the date of trial. However, a lawyer may send to a defendant a form solely for acceptance of service. *See* CPR 121.

RPC 165, adopted in 1993, states that, "[i]n order to accomplish her client's purposes, the attorney may draft a confession of judgment for execution by the adverse party and solicit its execution by the adverse party so long as the attorney does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that she is disinterested." The opinion continues:

[a]lthough previous ethics opinions, CPRs 121 and 296, have ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution, there appears to be no basis for such a prohibition when the lawyer is not furnishing a document which appears to represent the position of the adverse party such as an answer, and the lawyer furnishing a confession of judgment or consent judgment does not undertake to advise the adverse party or feign disinterestedness. CPRs 121 and 296 are therefore overruled to the extent they are in conflict with this opinion.

2009 Formal Ethics Opinion 12 rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2002 Formal Ethics Opinion 6 provides that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file *pro se*. The basis for this holding is also the prohibition on giving legal advice to a person who is not represented by the lawyer.

Guiding Principles

The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party.

However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of "means" that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer must avoid using tactics that intimidate or harass the unrepresented opposing party.

In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some

benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document.

Opinion:

Applying the guidelines and considerations above leads to the conclusion that a lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel.

A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the unrepresented opposing party to relinquish significant rights without obtaining some benefit. Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above.

Immigration Law *Basic* Definitions useful for a State/Family Court Practitioner

1. **Adjustment of Status ("AOS")** - The legal grant of lawful permanent residence ("LPR," also colloquially known as a "green card") to an alien.
2. **Alien** - A person who is not a US Citizen
3. **CBP** - US Customs and Border Patrol, a law enforcement agency which (among other things) processes individuals seeking entry to the US as well as apprehending aliens near the border
4. **Child** - for immigration purposes, an unmarried person under 21
5. **DHS** - the US Department of Homeland Security, a Department of the federal government tasked with enforcing the immigration laws, as well as administering benefits
6. **DOJ** - the US Department of Justice, the federal Department tasked with fairly administering the removal process for aliens, providing hearings for DHS and aliens
7. **EOIR** - Executive Office for Immigration Review - the federal agency, within the DOJ, which adjudicates the immigration cases of aliens who are in removal proceedings. The immigration courts, which fall under EOIR, may issue orders of removal (deportation) and may award certain immigration statuses
8. **Green card** - an ID indicating that the alien has lawful permanent resident status, usually first opportunity to get a SSN (instead of TIN) and then driver's license
9. **Lawful Permanent Resident** - an alien who has been granted an adjustment of status, and who may remain in the US indefinitely, unless they commit certain crimes or abandon the US
10. **SIJS** - Special Immigrant Juvenile Status - a designation that may be given by USCIS to children who meet certain specific criteria, which may then be a basis to adjust status
11. **Sponsor** - With regard to UACs, an adult who agrees to provide care and physical custody of an Unaccompanied Alien Child, to provide for the child's basic needs, and to ensure that the child attends any and all required hearings in EOIR's immigration courts. Note: A sponsor does not necessarily have legal custody or guardianship of the child.
12. **TVPRA** - William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which increased procedural protections for UACs and expanded the SIJS classification to eliminate the requirement that a child be designated eligible for long-term foster care and to include children whose reunification with just one parent is not viable due to abuse, abandonment, neglect or similar (rather than both parents)
13. **Unaccompanied Alien Child ("UAC")** - an alien under age 18, who, at the time s/he first comes in contact with federal immigration agencies, is without lawful immigration status and lacks a parent or legal guardian who is available to provide care and physical custody (normally remains designated a UAC even if child later reunites with parent)
14. **USCIS** (or just CIS) - the Federal Agency, within DHS, which administers immigration benefits

NC State Law *Basic, Custody-related* Definitions useful for an Immigration Practitioner

1. **Adoption** - the complete substitution of new legal parent(s) for a child
2. **Application** - the document that is drafted to request a guardian for a minor child.
3. **Complaint** - the document that contains the claims made in a civil action. In all family/custody/domestic cases, the complaint must be "Verified."
4. **Custodian** - an individual or entity appointed by a court to exercise some portion of the duties and obligations of care, custody, and control of a minor child.
5. **Defendant** - the person against whom the Plaintiff is proceeding
6. **District Court** - A Division of the General Court of Justice (the unified court system exercising all the judicial power in this state) where certain types of civil actions can be heard by a **judge**, including family/domestic cases involving child custody under **Ch. 50**, as well as the different types of Juvenile proceedings under **Ch. 7B**
7. **Family Court** (aka Domestic Relations) - District Court proceedings under Ch. 50 regarding divorce, custody, or family finances
8. **Guardian** - a type of custodian and decisionmaker for a child appointed by a juvenile action (even when parents are alive) or by the clerk's office (only when parents deceased)
9. **Juvenile Court** - Cases which are brought under and follow the procedures of the Juvenile Code, Ch. 7B, which has differences from other civil (and criminal) actions.
    a. Juvenile Abuse/Neglect/Dependency action (aka "DSS Court") - may only be filed by DSS and seeks to deem a child the status of "abused," "neglected," or "dependent," which is a prerequisite for judicial involvement and oversight of the parents and department of social services, designed to protect the child and remedy any conditions preventing the child from safely returning home
    b. Termination of Parental Rights ("TPR") - an action to permanently sever the parent-child relationship, has high procedural hurdles to protect the constitutional rights of parents, and may be necessary to 'clear the way' for an adoption
    c. Juvenile Delinquency/Undisciplined Action ("DJJ Court") - an action brought against a child under 16 for corrective (and punitive) purposes, which may result in changes in custody (including appointing guardians for children who appear without parents) and actions needing to be taken by the parents.
10. **Minor Child** or **Juvenile** - unemancipated, unmarried, person under 18 years of age.
11. **Petition** - a description of the document that is drafted to start juvenile actions (abuse/neglect/dependency, undisciplined/delinquent, and termination of parental rights), as well as the document that is drafted to start an adoption.
12. **Petitioner** - the person/agency who files a petition.
13. **Plaintiff** - the person seeking relief via civil action, complaining of some Defendant(s)
14. **Respondent** - the persons whose legal rights/relationships are affected by a petition
15. **Special Proceeding** - Cases that are not civil actions, which are handled by the Clerk of Superior Court, exercising certain judicial powers in a (relatively) informal process.
16. **Summons** - the form, which is signed by a clerk, that indicates that a lawsuit has been filed and is active, and that the person being served therewith must defend their interests
17. **Verified** - relating to Complaints and Petitions, this means that the Plaintiff or Petitioner have reviewed the factual allegations in the document and under solemn oath or affirmation signed to indicate the veracity of those allegations, before a notary.
18. **Ward** - means a minor child for whom a guardian has been appointed