



LEGAL AID ONTARIO

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**Practical Tips
Representing Minors & Persons with
Mental Health Disorders or Disability
Before the IRB**

**June 14, 2007
Quality Service Office**

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A. PRACTICAL TIPS WHEN REPRESENTING A PERSON WHO IS A MINOR

1. *Who are minors?*

- Persons under the age of 18 are ‘minors’ and if appearing before the IRB require a designated representative
- In circumstances where the claimant’s age is in question (ie., whether under 18) due to lack of ID or other factors, age assessment must be based on the totality of the evidence, taking into account both physical and psychological maturity and including documents, evaluations of healthcare professionals and case workers, information from family members and any scientific exams.

2. *How do I have a designated representative (DR) appointed for a minor?*

- The IRB appoints a designated representative as soon as possible to look after the interests of any unaccompanied claimant under 18 years of age
- The Board may schedule a conference for the purpose of appointing a DR
- If a parent is available, he or she is often appointed as the designated representative without a scheduled conference
- If the minor claimant has no parents in Canada, the Board usually appoints a relative, if one is available, or someone from the claimant’s ethnic community
- In circumstances where a parent’s or relative’s credibility is in question, counsel should consider requesting the Board appoint someone else
- If counsel is aware of a suitable designated representative for the claimant, counsel must provide the person’s contact information to the board
- If no suitable person can be found from among the persons mentioned above, the Board will appoint someone from their DR list

3. *What are the kinds of things to consider when a DR for a minor is being appointed?*

- Language and cultural compatibility with the child
- Existence of trust relationship
- DR’s skill or experience communicating with children
- DR’s ability to ensure child’s proper treatment by counsel, RPD and other authorities
- DR’s ability to recognize particular issues that affect children
- Appropriateness of DR being a relative (e.g., concerns regarding domestic violence, or family honour)

- Any conflict of interest situations (e.g., relative acting as DR who may be potential witness at hearing)
- If counsel has any concerns regarding the designated representative, he or she should advise the Board of the concern and request that a new designated representative be appointed (e.g., DR inappropriately coaching minor regarding what to say)

4. *What do designated representatives (DRs) for minors do?*

- Act in the minor's best interests
- Retain counsel
- Assist in obtaining evidence
- Support the minor with making and attending appointments (lawyers, doctors, etc.), appropriate dress, decorum
- Ensure the minor understands the nature of the proceedings.
- Ensure the minor has legal aid
- Give instructions to the minor's lawyer
- Special assistance such as suggesting a morning or afternoon hearing depending on the minor's needs
- Testifying when appropriate (e.g., circumstances when child cannot testify)
- Ensuring appropriateness of interpreter in counsel's office

5. *Should a minor testify?*

- Case by case decision
- If child under 14, should rarely be asked to testify
- Try to have evidence given by DR
- Introduce expert evidence or testimony (e.g., psychologist, social worker)
- Rely on objective evidence (situation of children similarly situated)

6. *What should I do if I believe the minor's evidence is very powerful?*

- Consider using a video of child speaking about persecution with trusted DR or social worker
- Get expert advice of the effect on the child of having to testify (you might win the case but cause severe harm to child during testimony)

7. *What should I do if the IRB wants a minor to testify?*

- Address this issue with the Board member before the hearing commences (establish whether the member really needs this evidence and why)
- Have DR make representations about why child should not be questioned (not in child's best interest, retraumatization, child frightened of authority)
- If member insists, get agreement ahead of time on what questions will be

- ❑ Some members are concerned about adult manipulation and will want to ask the child “what did your mother tell you to say to us”. Lawyer and DR should try and ensure this kind of manipulation does not occur

8. *How should I prepare a minor for questioning by the IRB?*

- ❑ Be extremely careful about preparing a minor for questioning by the Board.
- ❑ Determine what the minor knows – sometimes the child does not know much about what has happened – has been sent away by parents without clear information about why sent away.
- ❑ Be thoroughly aware of the differences of children’s memory abilities: children have very uncertain skills in this area: a child might now be 16 but events occurred when child was much younger and memory is very confused. A child might be very sure of dates on one day and give completely different dates a week later. Try to emphasize this lack of exact knowledge of dates in the PIF; try to focus on issues like sequence of events; where child was living at time of event, was it summer, how old was child, what grade was she in, had younger sibling been born yet, etc..
- ❑ Tell children that it is fine not to remember or not to know (not like a school test where they were expected to know certain things), but that it is NOT okay to guess – explain that they won’t remember what they guessed before and that would trip them up and make it look like they are lying.
- ❑ Remember that age does not necessarily reflect maturity – issues of child’s access to schooling, etc.
- ❑ Adolescents have particular difficulty with issues involving sexual abuse or other “embarrassing” matters; teens are more inhibited than younger children
- ❑ Children want to please, impress, and may say what they think the adult wants to hear;
- ❑ Children may not understand questions, language, but be embarrassed to admit this
- ❑ Children often answer in monosyllables – one word replies – and need help to learn how to tell a story in complete sentences
- ❑ Children assume that adults know much more than we do – children tend to be self-centred and think that everyone else knows what happened to them.
- ❑ Children may understate experiences drastically – “suffered badly” means he was tortured and has scars of bayonet wounds and cigarette burns all over his body
- ❑ Children may have inappropriate trust in adults who are kind to them: Board member’s friendly joking manner may make the child feel Board member will say yes and believes everything child is saying when exactly the opposite is happening
- ❑ Child may be under pressure not to reveal family history that is “shameful” – such as rape of sisters, mother, etc.
- ❑ Young people may exhibit drastic mood changes: depression, rebelliousness, defiance, hopelessness, lack of seriousness, brashness, boastfulness, naivete, ignorance of many things assumed to be “common knowledge” by adults

- ❑ Teens might show “attitude” and annoy the Board with chewing gum, slouching, looking around
- ❑ Under cross-examination, child is more likely to panic and start inventing, or become antagonistic or resentful of questioner
- ❑ Children may not recognize importance of specific details – number of soldiers who arrested him, specific dates, etc.
- ❑ Children may show “inappropriate” reactions such as laughing when describing something painful or recounting embarrassing events

9. How do children fit within protected person definition?¹

- ❑ Situations which constitute persecution for both adult and child asylum seekers (e.g., political or religious persecution)
- ❑ Situations of child specific persecution where the fact the applicant is a child is central to the harm inflicted or feared (e.g., conscription of a child soldier, subjection to child abuse, threat of infanticide or pre-puberty female circumcision, child sale or marriage)
- ❑ Situations where the behavior complained of should be considered persecution when inflicted on or threatened against a child, even though the same behavior may not rise to a level of persecution in the case of an adult due to a child’s heightened sensitivity and emotional response or a child’s heightened dependence
- ❑ Children who become homeless as a result of domestic abuse or family destitution and who are deprived of basic social and economic rights such as access to schooling or housing, may validly claim to face persecution.

B. PRACTICAL TIPS WHEN REPRESENTING A PERSON SUFFERING FROM MENTAL HEALTH DISORDER² OR MENTAL DISABILITY³

1. How do I know a person has a mental health disorder or mental disability and requires a designated representative?

- ❑ Someone (e.g., social worker, settlement worker) accompanying the person brings it to your attention

¹ “Seeking Asylum Alone”, United States, Jacqueline Bhabha, Susan Schmidt, June 2006, Report Funded by the John D. and Catherine T. MacArthur Foundation

² Mental disorders, which may also be called psychiatric disorders, include the following: schizophrenia, mood disorder, anxiety disorder, and eating disorder.

³ Intellectual/mental disability, also referred to as cognitive disability, developmental disability, or mental retardation, is a disability that begins in childhood. Persons with intellectual disability have limitations in their mental functioning and in their ability to communicate, socialize, and take care of their everyday needs.

- The person provides you with a psychological/psychiatric report
- The person during interviews demonstrates behaviors which raise concern (weeping non-stop, withdrawn and non-communicative, paranoid or delusional thinking)
- During the initial interview, you ask the person whether he/she is seeing a doctor or on medication
- The person is unable to provide instructions
- In situations where the person denies mental health issues and refuses to cooperate in getting a psychological report, counsel should bring this to the Board's attention

2. *How do I have a DR appointed by the IRB for a person with a mental health disorder or mental disability?*

- A designated representative may be appointed for someone who is unable to appreciate the nature of the proceedings, usually due to mental illness
- If counsel is of the opinion that the claimant is mentally ill or cannot appreciate what is going on, he or she should notify the Board of the need for a designated representative without delay.
- If counsel becomes aware of a conflict with the designated representative, he or she should advise the Board of the conflict and request that a new designated representative be appointed
- Persons such as family members or relatives struggling with the social stigma of mental disorder or disability or who don't understand the condition may not be suitable as DRs
- If counsel is aware of a suitable designated representative for the claimant, counsel must provide the person's contact information to the Board
- If no suitable DR can be found among the persons mentioned above, the Board will appoint someone from their DR list

3. *What are the kinds of things to consider when a DR for a person with mental health disorder or mental disability is being appointed?*

- DR works with persons with mental incompetence challenges and has training or expertise in this area
- DR can clearly testify about issues the person has – observations regarding medications and their effect on the person, effect on person's memory or ability to answer questions,
- Cultural and language compatibility,
- Skill in recognizing the person's changes in mood
- Knowledge of appropriate resources in community for person and whether they have been accessed

4. *What do designated representatives (DRs) do?*

- Act in the person's best interests
- Testify if needed about the person's fear
- Assist the person with making and attending appointments (lawyers, doctors, etc.) and with transportation and directions to the hearing

- Ensure the person understands the nature of the proceedings
- Ensure the person has legal aid
- Assist in obtaining evidence
- Ensure the person is comfortable with the interpreter (gender issues, country of origin)
- Retain counsel and give instructions
- Special assistance such as suggesting a morning or afternoon hearing given the claimant's condition or advising on appropriate dress

5. *Should a person with mental health disorder or mental disability testify?*

- This decision should be weighed carefully. The testimony of the mentally incompetent adult can result in confusion and could harm the claim.
- If you have concerns about the person testifying and the board insists on “just a few questions” – put an objection on the record.
- Deal with this issue with Board members ahead of time, out of the presence of the person – with the DR present.
- Try to get a list of questions that the Board member will ask and the reason for the Board insisting on questioning

6. *How do I prepare a person with mental health disorder or mental disability who will testify?*

- Schedule short and frequent appointments
- Draw a diagram of the hearing room and explain the procedure simply
- Limit the testimony where possible by focusing on critical questions only to avoid retraumatization (e.g., why can't you go back?)
- Ask short, simple questions
- Let person know they can ask for a break during testimony

7. *How do I argue a case of a person with a mental health disorder or mental disability?*

- Have person declared a vulnerable person pursuant to IRB Guideline 8⁴
- Place emphasis on evidence other than *viva voce* evidence – focus on documentary evidence
- Obtain witnesses and expert testimony
- Clearly establish identity through authentic birth certificates, passports, etc.
- Use pre-hearing conference to advise Board member of any quirks (tics, pacing, overdressing)
- Present evidence of treatment of like persons in like situations
- Present evidence of country conditions on treatment of mentally ill if evidence supports claim that treatment or lack thereof is grounds of persecution

⁴ See footnote 1

8. How does the DR get paid?

- The IRB pays a professional DR (e.g., a lawyer, social worker) \$400 per claim plus disbursements
- The IRB pays a non-professional DR \$100 per claim

RESOURCES

Refugee Lawyers Association

IRB Guidelines

- Guidelines: Children, Vulnerable Persons, Gender [IRB Guidelines](#)

General

- LAO LAW: [LAO Law](#)
- Immigration and Refugee Law Practice Manual [Practice Manual](#)
- Immigration and Refugee Board: [IRB](#)
- LAO's Tariff & Billing Handbook: [Handbook](#)

Minors

- Convention on the Rights of the Child: [Convention](#) CRC Report on Canada, October 3, 2003: CRC/C/15/Add.215
- UNHCR Guidelines on Formal Determination of the Best Interests of the Child, May 2006, [Guidelines](#)
- "Refugee Children, Guidelines on protection and Care" UNHCR Geneva 1994 See UNHCR Publications on line: [Publications](#)
- "Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US" by Jacqueline Bhabha and Mary Crook, Sydney, Themis Press, available on line: Human Rights at Harvard
- "Best Practice Statement: Separated Refugee Children in Canada," Wendy Ayotte, International Bureau of Human Rights: [International Bureau](#)
- "Canada's Treatment of Separated Refugee Children" G. Sadoway *European Journal of Migration and Law* 3: 347-381, 2001, Kluwer, Neth.

- ❑ “Separated Children seeking Asylum in Canada: A Discussion Paper Adapted from an Original Report researched and Written by Wendy Ayotte” UNHCR July 2001: [UNHCR](#)
- ❑ “Working with Refugee and Immigrant Children: Issues of Culture, Law and Development” Lutheran Immigration and Refugee Services, US
- ❑ “Through A Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers” Jacqueline Bhabha and Wendy Young, *Interpreter Releases*” Vol. 75, No. 21, June 1, 1998
- ❑ “Refugee Children before the Immigration and Refugee Board” G. Sadoway, *35 Immigration Law Reporter* (2d) 106 (1997)
- ❑ Chairperson’s Guideline 3: Child Refugee Claimants
- ❑ “Guidelines for Children’s Asylum Claims” US Department of Justice: INS Dec 10 1998
- ❑ Royal College of Paediatrics and Child Health. The Health of Refugee Children: Guidelines for Paediatricians, November 1999

Designated Representatives for Minors – Sources

- ❑ FCJ Refugee Centre
- ❑ Sojourn House
- ❑ Covenant House
- ❑ Romero House
- ❑ Youth in crisis workers for specific immigrant communities
- ❑ Social workers involved with schools
- ❑ NGOs working with particular ethnic or refugee communities
- ❑ Justice for Children and Youth
- ❑ Office of Children’s Lawyer

<i>Mental Health Disorder or Disability</i>
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- ❑ Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975
- ❑ UN Convention on the Rights of Persons with Disabilities for issues of basic human rights for mentally incompetent persons. 2006 [Convention](#) [not yet in force]

- ❑ Refugee Health Care: A Handbook for Health Professionals (New Zealand)
- ❑ [Refugee Health Care](#)
- ❑ Canadian Mental Health Association, (CMHA) Toronto [Canadian Mental Health Association](#)
- ❑ Centre for Addiction and Mental Health (CAMH) [Centre](#)
- ❑ Community Resources Connections of Toronto [Connections](#)
- ❑ Consent and Capacity Board [Board](#)

Designated Representatives for Persons with Mental Health Disorder or Disability - Sources

- ❑ Social workers with competence in area of mental health
- ❑ Across Boundaries
- ❑ Psychologists

APPENDICES

- A. Plain language Client Expectations document: “What to expect from your lawyer”.
- B. Letter to RPD requesting appointment of DR
- C. Letter confirming acceptance of DR role
- D. RPD’s letter confirming appointment



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**For more information call
Legal Aid Ontario at
416 979-1446
or
1-800- 668-8258**

APPENDIX A

What to Expect from Your Lawyer

Your Lawyer:

Is there to protect your interests under that law, and for no other reason.

Is your voice, and follows your instructions and no one else's.

Provides you with the information you need to make an informed decision about how the lawyer should represent you.

Is there to stand up for your rights to the best of their ability

Does not decide what is "good for you"

Only deals with legal matters (as funded by their Legal Aid certificate)

Will talk or meet with you as soon as possible

Will answer questions you have about your case

Will inform you of the results of your hearing and what it means for you

Will inform you of your right to an appeal of the Board's decision

Will try to accommodate your special needs (such as providing an interpreter if needed)

Will maintain your confidentiality

APPENDIX B

Letter to RPD requesting appointment of DR

September 27, 2005

Case Officer
Immigration and Refugee Board
74 Victoria St, Suite 400
Toronto, On M5C 3C7

Re: Appointment of Designated Representative

Dear,

Further to our conversation today, we would like to formally request that Ms. Smith be appointed the designated representative of our client Jane Doe, in the matter of her refugee claim and hearing. As Ms. Smith is a social worker, and is familiar with our client's personal and family history it is our position that she would be an idea representative.

We met with Ms. Smith on August 3, 2005, and outlined what would be expected of her within the capacity of a designated representative. At that time, Ms. Smith indicated she would be willing to act on our client's behalf. Ms. Smith will forward to your attention a letter indicating that she both accepts and understands her role and responsibilities as a designated representative.

Thank you for your assistance with this matter. If you have any questions please contact us.

Yours truly,

Shirley Jones
Barrister & Solicitor

APPENDIX C

Letter confirming acceptance of DR role

September 29, 2005

Case Manager
Immigration and Refugee Board
74 Victoria St Suite 400
Toronto, Ontario M5C 3C7

Dear,

At a meeting on August 3, 2005, lawyer Shirley Jones asked me whether I would be willing to be appointed the designated representative for client Jane Doe. At that time I agreed to the request and would like to indicate in this letter that I accept the role as the designated representative for this client. I am a Registered Social Worker at the Help Centre, a Children's Mental Health Centre that provides mental health services to youths and their families. I am familiar with the client's language and culture, as I am myself an immigrant from the Caribbean. I also believe that since I know this client's family I am in the position to bring pertinent information to the hearing.

In preparing to assume my role as designated representative, I was able to obtain information in this area. I understand that since the client is a minor she may not be capable of understanding the legal process in which she is involved. My role as her designated representative is to try to ensure that her wishes are carried out with respect to the proceedings, and in so doing help to ensure that the client is able to put forward the best possible case to the Refugee Board. With regards to the client's counsel representative, I have met Shirley Jones and feel confident that she will do an excellent job in representing the client. Under the Immigration and Refugee Board Section 10.4: PROCEDURE FOR DESIGNATING A REPRESENTATIVE, I meet the specific criteria for the designation of a representative.

Sincerely,

Ms. Smith
Supervisor Community/Family Support Services

Resume Attached

APPENDIX D

RPD's letter confirming appointment

Ms. Smith
Help Centre
24 Oshawa Dr.
Toronto, Ontario
M2M 2B3

Re: RPD's Confirming Letter of Appointment

Dear Ms. Smith,

The Refugee Protection Division of the Immigration and Refugee Board has appointed you to be the designated representative for Jane Doe.

The duties of the designated representative are as follows:

- To retain counsel
- To instruct counsel or to assist the child in instructing counsel
- To make other decisions with respect to the proceedings or to help the child make those decisions
- To inform the child about the various stages and proceedings of the claim
- To assist in obtaining evidence in support of the claim
- To provide evidence and be a witness to the claim
- To act in the best interest of the child

The role of the designated representative does not include legal representation, rather it involves helping the claimant to make decisions and ensuring the claimant's wishes are carried out with respect to the refugee proceedings.

Yours truly,

Case Management Officer