

Ethical Concerns When Representing Foster Care Youth

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Attorneys representing child clients in foster care proceedings have the same ethical obligations to their child clients as to their adult clients;¹ however, child clients can present different ethical challenges. The nature of the proceedings as well as the young age of the client can present a more casual courtroom environment for the child attorney. This casual environment and a desire to protect previously abused and neglected child clients can give rise to potential ethical concerns for an attorney representing a foster care client. Children's Law Center of Minnesota previously addressed client confidentiality ethical concerns in our November 2010 practice point. <http://www.clcmn.org/wp-content/uploads/2009/06/NOV-Practice-point-w-header.pdf> This practice point will address the potential tension between the juvenile court's best interests mandate and the attorney's express wishes mandate, as well as client boundaries when representing abused and neglected child clients.

EXPRESS WISHES vs. BEST INTERESTS

Attorneys have an ethical obligation of deference and diligence to their clients.² Minnesota's Rules of Professional Conduct (hereinafter "MRPC") note that except in specific circumstances, attorneys shall abide by their clients' directives concerning "the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."³ Further, attorneys are required to "act with reasonable diligence and promptness in representing a client."⁴ This reasonable diligence requires that a lawyer "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁵ Occasionally in a child protection proceeding, the child's express wishes may conflict with the child's best interests.

Minnesota's Rules of Professional Conduct address the representation of children in the context of a client with diminished capacity. Rule 1.14(a) states: "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁶ Subsection (b) of the same rule provides that if a client with diminished capacity is not able to act in their own best interests a person other than the lawyer should be appointed to advocate

¹ Minnesota Rules of Professional Conduct (hereafter "MRPC") 6.2 cmt 3; Minn. Stat § 260C.163, subd. 3(a)(giving children the rights to effective assistance of counsel in connection with juvenile court proceedings); See also ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases §A-1, §A-1 cmt. (1996), (hereafter "ABA Standards") and the ABA Model Act Governing the Representation of Children in Abuse and Neglect Cases adopted August 8, 2011 at Section 3 cmt. (hereinafter "ABA Model Act").

² MRPC, supra, note 1, Rule 1.2 & 1.3.

³ Id. at Rule 1.2.

⁴ Id. at Rule 1.3.

⁵ Id. at cmt. 1. The comment also notes that "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client."

⁶ Id. at Rule 1.14. Emphasis added.

for those interests.⁷ The comments to this rule discuss the fact that a minor as young as ten or twelve is capable of understanding, and participating in, matters that pertain to their own wellbeing and further clarify that, even when the client has a guardian, the attorney should involve their client in the decision-making process as much as possible.⁸ MRPC Rule 1.14 also requires attorneys to maintain normal-attorney client relationships and advocate for their clients' wishes.

Moreover, the 2011 ABA Model Act Governing the Representation of Children in Abuse and Neglect Cases (hereinafter "ABA Model Act") addresses the duties and scope of representation of a child lawyer. The ABA Model Act notes that "[w]hen the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct."⁹ The Commentary to this section notes:

The child's lawyer helps to make the child's wishes and voice heard but is not merely the child's mouthpiece. As with any lawyer, a child's lawyer is both an advocate and a counselor for the client. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.¹⁰

The Commentary also notes that "[a] determination of incapacity may be incremental and issue-specific, thus enabling the child's lawyer to continue to function as a client-directed lawyer as to major questions in the proceeding."¹¹

It is essential that both you and your child client understand the difference between the attorney role and the Guardian ad Litem (hereinafter "GAL") role. Children in abuse and neglect proceedings are also appointed a GAL who conducts an independent investigation of the matter and advocates for the child's best interests.¹² As noted above, the attorney's role is to advocate for the child's express wishes. A child's lawyer "should determine the child's position based on objective facts and information, not personal beliefs."¹³

The client must clearly understand that while the GAL may take a position or make a recommendation with which the child client does not agree, the attorney's role and duty of loyalty is to the client and to advance the client's position. In many cases the child's voice can only be heard through her attorney. For this reason it is imperative for the attorney to remember that ". . . the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must

⁷ Id. at Rule 1.14(b). Emphasis added.

⁸ Id. at Rule 1.14, cmt. 2.

⁹ ABA Model Act, supra, note 1, at Sect. 7 (c).

¹⁰ ABA Model Act, supra, note 1, at cmt 7 (c), citing ABA M.R. 2.1.

¹¹ Id. at cmt. 7(d).

¹² Minn. Stat. § 260C.163, subd. 5.

¹³ ABA Model Act, supra, note 1, at Sect. 7(d).

advocate the child's articulated position."¹⁴ Thus, a child's lawyer "owes traditional duties to the child as client consistent with the rules of professional conduct."¹⁵

Nationally, "the profession has moved towards allow[ing] the child's own position and perspective to be given real advocacy. . . . in representing the child, attorneys [must understand the need for] multidisciplinary collaboration in fulfilling their role as counselors, as well as advocates, for their child clients."¹⁶ It is through this collaboration that child attorneys sometimes falter. When dealing with other professionals involved in the case, child attorneys must never forget that it is their job to advocate for what their clients want. "[I]t is a mistake to assume we serve children as all-knowing benevolent caretakers."¹⁷ When you are appointed counsel for children, you serve your clients as their attorneys.

TIPS

- i From the outset of your representation, ensure that your client knows the difference between the role of her GAL and the role of her attorney. Explain to your client that the GAL might take a position that the client doesn't like, but you, as her attorney will always inform the court and parties of her position.
 - o It is often helpful to explain to your client the roles and responsibilities of all the people involved in his case. This can provide your client with an overview of the process and may make it easier for the client to understand, trust and accept your role.
- i Constantly remind yourself of your obligations to your client. It is your duty as an attorney to be a zealous advocate, as well as a counselor to your client, regarding his positions to the court. Even if you disagree with your client's state position, it is your role to advocate for your client's position.
 - o Remember that the child's attorney role may be foreign to your client while the role of a GAL closely resembles adult roles with which your client is familiar. It can take time for your client to understand the attorney-client relationship.
 - o Other participants in the court process often misperceive the role of the attorney.¹⁸ It can be helpful to meet with these adults and discuss exactly what your duties are and the importance of confidentiality in your relationship with your client.
 - o Discuss the best interests of your client with your client in counseling and strategy sessions. This allows the client to make an informed decision and contributes to his sense of autonomy.
- i When your client's position overlaps with the position of others involved in the case, be prepared to advocate for that position rather than merely deferring to the other parties. Remember the identity of a client's position should be based on the merits of the position and not simply an endorsement of another party's position.¹⁹

¹⁴ ABA Standards, *supra*, note 1, at cmt A-1.

¹⁵ *Id.*

¹⁶ Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 *Hamline J. Pub. L. & Pol'y* 177, 179-180 (2006).

¹⁷ Marvin Ventrell, *The Practice of Law For Children*, 28 *Hamline J. Pub. L. & Pol'y* 75, 94 (2006).

¹⁸ Emily Buss, *You're my What? The Problem of Children's Misperceptions of Their Lawyers' Roles* 64 *Fordham L. Rev.* 1699, 1710 (1996).

¹⁹ ABA Standards, *supra*, note 1, at cmt. D-4.

HOW INVOLVED IS TOO INVOLVED?

Those who have experienced childhood abuse and neglect are 53% more likely to be arrested as a juvenile, 38% more likely to be arrested as an adult, and 38% more likely to commit a violent crime.²⁰ Many child advocates are aware of these statistics and want to help their clients avoid such negative outcomes. It is often difficult to hear a client's stories of severe and repeated abuse and not want to help; however, this nurturing instinct can lead to problems if ethical boundaries are crossed. Most attorneys know that it would not be appropriate to pay a client's college tuition, but what about providing school clothes, or giving the client a small gift on her birthday? Where is the line between showing the child that she has a supportive adult in her life and violating an attorney's ethical responsibility?

There is only one ethical rule that addresses the issue of financial assistance to a client. Minnesota's Rule of Professional Conduct Rule 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation[.]"²¹ This rule is titled "Financial Advances to the Client" which clearly implies that funds referred to in the rule are expected to be paid back. The rule provides little guidance when dealing with gifts to a child client. There are no Minnesota cases expanding this rule to include offering financial assistance or gifts to a client. Additionally, neither the Institute of Judicial Administration American Bar Association Juvenile Justice Standards, Standards Relating to Counsel for Private Parties,²² nor the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases²³ address the issue of providing gifts to child clients.

It is CLC's position that anything other more than occasional gifts²⁴ to the child client should be avoided. There are several reasons for this position. First, your role is the child's attorney, not her foster parent or social worker. If your client is not receiving books, clothing and the like, your job is to advocate for these items. If the funding that a child receives for her care is not enough to cover the client's basic expenses, the issue should be raised with the client's GAL and county agency. If the matter is not resolved, it should then be raised by motion to the Court. Second, although it is a good practice to foster a relationship with your child clients, your client must understand that you are not a financial resource for them. Finally, providing substantial gifts to a child client places your relationship with that child outside of the normal attorney-client relationship that is required by the Minnesota Rules of Professional Conduct.²⁵ As a child's attorney, always strive to maintain that mandated relationship.

²⁰ The Honorable Kathleen Blatz, Keeping an Eye on the Child, 26 Wm. Mitchell L. Rev. 625, 626 (2000).

²¹ MRPC, supra, note 1 at Rule 1.8(e).

²² Complete text available at http://www.njdc.info/pdf/ija_aba_jjstandards.pdf (last accessed 5/16/2012)

²³ Complete text available at

http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf (last accessed 5/16/2012)

²⁴ Example of such occasional gifts may include the following: taking your client out to eat during a regularly scheduled meeting, or providing your client with a small gift on her birthday, graduation from high school, a major holiday such as Chanukah or Christmas and/or adoption day.

²⁵ MRPC, supra, note 6.

TIPS

- i Remember that the goal of your representation is a "normal client-lawyer relationship."²⁶ Before buying a gift for your client, stop and ask "Would I buy this for any other client?" If the answer is "no" you probably shouldn't purchase it for your child client either.
- i If your client seeks you out and asks you for gifts, use it as an opportunity to discuss with your client what services or materials are not being provided to your client. Explain to your client the parameters of the attorney -client relationship.
- i If your client continually asks you for items that you believe should be covered by the stipend provided to the foster parents make sure that this problem is discussed with others involved in the case. If such discussion does not resolve the issue, raise the matter to the Court. It may be that an adjustment needs to be made or that funds are being misappropriated.

At times representing a child client can raise unique ethical challenges different from those posed by representing an adult client; however, these unique issues do not diminish the attorney's ethical obligations to the child client. As the ABA Model Act noted "[c]hildren and youth deserve a voice when important and life-altering decisions are being made about them. They deserve to have their opinions heard, valued and considered... They deserve ethical representation."²⁷ As a child advocate, it is your job to provide that ethical representation.

²⁶ MRPC, *supra*, note 1, at Rule 1.14(a).

²⁷ ABA Model Act Report at 22.