

ETHICS IN CHILD WELFARE CASES

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Maybe I need
an attorney

ROLE OF COUNSEL

Legal ethics is
following the rules
governing the conduct
of lawyers and judges
that are adopted by
each state, even if
nobody is watching.

WHAT DOES IT MEAN TO BE A **LAWYER** FOR A **CHILD**?

- Is it different from representing an adult?
- Is there a different consideration of The Rules?
- Does juvenile representation demand the best practice beyond just the bare minimum?

WHAT DOES IT MEAN TO BE A **LAWYER** FOR AN **ADULT** WITH AN IMPAIRMENT?

- Is it different from representing a child?
- Is there a different consideration of The Rules?
- What about when you are an attorney representing an adult with a GAL? Or the GAL yourself?

DECISIONS, DECISIONS...

- Who decides what motions to bring, or whether to bring any?
- Who decides whether to go to trial?
- What about when you disagree with the client?
- What about when the client has bad judgment?
- What if the client seems to have difficulty understanding what's going on?

WHAT ARE THE RULES?

- American Bar Association's Model Rules of Professional Conduct (MRPC)
- Georgia Rules of Professional Conduct (official version appears at gabar.org)



THE GEORGIA RULES

- 1.1 – Competence
- 1.2 – **Scope of Representation**
- 1.3 – Diligence
- 1.4 – **Communication**
- 1.6 – **Confidentiality of Information**
- 1.7 – Conflict of Interest
- 1.14 – **Client with Diminished Capacity**
- 2.1 – **Advisor**
- 3.3 – **Candor toward the Tribunal**
- 3.4 – Fairness to Opposing Party & Counsel
- 4.1 – Truthfulness in Statements to Others
- 4.2 – Communication with Person Represented by Counsel
- 4.3 – Dealing with Unrepresented Person
- 5.3 – Responsibilities Regarding Nonlawyer Assistants
- 8.4 – Misconduct



1.2 – SCOPE OF REPRESENTATION

(a) A lawyer shall **abide by a client's decisions** concerning the objectives of representation... and shall **consult with the client** as to the means by which they are to be pursued....

A lawyer shall abide by a client's decision whether to settle a matter.

1.4 - COMMUNICATION

(a) A lawyer shall:

- Promptly inform the client of any decision or circumstance with respect to which the client's informed consent. . . Is required;
- Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- Keep the client reasonably informed about the status of a matter;
- Promptly comply with reasonable requests for information, and
- Consult with the client about any relevant limitation on the lawyer's conduct with the lawyer knows the client expects assistance not permitted by the [RPC] or other law

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

1.4 – COMMUNICATION: COMMENT 6

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability.

COMMUNICATION: HYPOTHETICAL

- You represent Robert, a 15-yr-old child in DFCS custody. Robert loves and would like to maintain contact with his parents.
- He is currently living with Aunt Sue, but is not happy with this arrangement. If he can't live with his parents, he would prefer to live with Aunt Mary, with whom he feels closer. You also believe that Mary would be a better permanency option, and believe you would be able to convince the judge of this.
- The Department has informed you that if Robert does not consent to permanent guardianship with Aunt Sue, that they will file for TPR against his parents.
 - Do you tell Robert about this?

RULE 1.6(A)—CONFIDENCES & SECRETS

- A lawyer shall maintain in confidence all information gained in the professional relationship with a client...
- unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

RULE 1.6(B)—EXCEPTIONS

- **A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:**
 - to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 - to prevent serious injury or death not otherwise covered by subparagraph (i) above;

CONFIDENTIALITY: HYPOTHETICAL

- You represent Charles as his attorney in dependency proceedings. In the past, Charles has had some very bad experiences with DFCS placements. He is now living with his aunt, with whom he is very close.
- During your most recent meeting with Charles, which he insisted take place at McDonald's, he showed up with a black eye.
- During your conversation, he disclosed that he received the black eye from his aunt's new boyfriend, and that the boyfriend hits him with some regularity. He also said that the boyfriend sometimes sells drugs from the house. He continues by saying he can handle the boyfriend and doesn't want you to do anything about this.

HYPOTHETICAL (CONT)

- Do you tell anyone about Charles' black eye?
- Do you make a report to anyone?
 - What if you learned the information about how Charles received the black eye from a friend of his, not from him directly – does that change the answer to whether you tell anyone?
- Suppose your meeting with Charles was the day before court. At court, the judge notices the black eye and asks Charles what happened. Charles tells the judge that he got into a fight at school.
 - What do you do?
- How can you help Charles?

1.14 – CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with the 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.**

1.14 – CLIENT WITH DIMINISHED CAPACITY

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer **may** take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a **guardian ad litem**, conservator or guardian.

1.14 – CLIENT WITH DIMINISHED CAPACITY

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interests.

OTHER CONSIDERATIONS WHEN REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

■ Protective measures:

- Consult with family members
- Use a reconsideration period
- Consult with professional services and others with the ability to protect the client
- Appointment of GAL

■ Confidentiality:

- The attorney is *impliedly authorized* to make disclosures necessary to protect client's best interest.
- Must provide some information to establish basis for protective action, but also guard against harm to client rights

HYPOTHETICAL

- You are representing a mother with mild developmental disabilities. Right before the adjudication hearing, the SAAG says that if your client is willing to stipulate to dependency, DFCS will recommend that her child be placed at home with mom under a protective order. You discuss the offer with your client, but it is clear that she is not comprehending the risks associated with a stipulation.
 - How do you proceed?

HYPOTHETICAL

- 1) At a Preliminary Protective Hearing you are appointed to represent a mother in a dependency case. After several conversations, you question the mother's mental capacity and request that a GAL be appointed. The mother is not in agreement.

How do you proceed?

- 2) If a GAL is appointed, what is your role in the case now?

HYPOTHETICAL

A GAL is appointed after a parent is adjudicated incompetent.

Can the GAL waive fundamental rights on behalf of the client?

- Waive parent's presence at a court hearing?
- Waive representation by counsel?
- Stipulate to dependency?
- Surrender parental rights or consent to termination of parental rights?

2.1 - ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

2.1 – ADVISOR: COMMENT 2

In rendering advice, **a lawyer may refer not only to law but to other considerations** such as moral, economic, social and political factors that may be relevant to the client's situation... Purely technical legal advice... can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

3.3 – CANDOR TO THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a **false statement** of material fact or law to a tribunal;
- (2) **fail to disclose a material fact** to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) **fail to disclose to the tribunal legal authority** in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer **evidence that the lawyer knows to be false**. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

HYPOTHETICAL

- You represent 14-year-old Maria, who is in DFCS custody. One day she calls to tell you she has run away from her group home. She says she trusts you, and she gives you info about where she can be reached.
- Aware of your close relationship with Maria, her DFCS caseworker calls and asks whether you have heard from her.
 - What do you do? Any difference if you learned the information from Maria's best friend rather than from Maria?
- Concerned for Maria's well-being, the judge assigned to her case calls an emergency hearing. The Judge asks if you have heard from Maria.
 - What do you say?
 - What if the judge orders you to disclose Maria's whereabouts?

TAKEAWAY

In light of significant developmental research attorneys must be adept at using:

- ☐ Appropriate language
- ☐ Simple, direct sentences
- ☐ Visual aids
- ☐ Active listening skills

QUESTIONS?

