

Role Of Counsel

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Question

Have you violated any ethical rules by going out to find your client, Charles, despite the father's instruction not to?

Due Process Right to Counsel

- **In re Gault**, 387 U.S. 1 (1967), a youth requires the assistance of counsel “*to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it.*”

Client with Diminished Capacity

SCR 20:1.14

- “minority” **can** be grounds for diminished capacity
- “lawyer **shall**, as far as reasonably possible, maintain a normal client-lawyer relationship”

How Can We Have a Normal A-C Relationship with a Child?

- [1] “The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters...”
- “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.”

Commentary SCR 20:1.14

- [1] “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are **entitled to weight in legal proceedings concerning their custody.**”
- [2] “The fact that a client suffers a disability does not diminish the lawyer's obligation to **treat the client with attention and respect.**”
- [3] “the lawyer must keep **the client's interests foremost** and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.”

What is Normal?

- Competence. SCR 20:1.1.
- Zealous advocacy. SCR 20:1.2
- Diligence and promptness: SCR 20:1.3
- Communication: SCR 20:1.4
- Confidentiality: SCR 20:1.6
- Independence and loyalty. SCR 20:1.7
- Advisor. SCR 20:2.1
- Scope of Representation and Allocation of Authority. SCR 20:1.2
 - Requires advocating for client's stated interest

National Juvenile Defense Standard

1.2 Elicit and Represent Client's Stated Interests



- Counsel serves as the sole voice of the client's expressed interests.
- NOT an advocate for what the lawyer or others believe is in the client's "best interests"

Question

What if you had been hired by Charles's father, rather than having been appointed by the court? Have you now violated any ethical duties in talking to Charles over the father's objection?

Conflict of Interest; Current Clients; Special Rules

SCR 20:1.8(f)

- A lawyer shall not accept *compensation or direction* in connection with the representation of a client from one other than the client unless:
 - **Client gives informed consent**
 - **There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and**
 - **Information relating to the representation is protected by the rule on confidentiality.**

Question

Can you talk to Charles's aunt or sister?

Advisor

SCR 20:2.1

- In representing a client, a lawyer shall exercise independent professional judgment and **render candid advice**. 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.

Confidentiality

SCR 20:1.6

- **Shall not** reveal unless client gives informed consent (or implicit authorization)
- Or if impliedly authorized in order to carry out representation

Confidentiality

SCR 20:1.6

- **May** reveal if reasonably believes necessary:
 - to prevent death or substantial bodily harm
 - to prevent client from committing a crime or fraud resulting in substantial injury to others
- Duty of confidentiality continues after client-lawyer relationship has ended.

Question

Suppose that Charles's aunt and sister call Charles's school in an effort to locate him and find out if he is okay. The school tells them that you have visited the school to meet with Charles, and they give out your phone number. What do you do/say when the aunt calls and wants to know who you are and why you have been visiting her nephew at school?

Truthfulness in Statements to Others

SCR 20:4.1

- **Shall not** knowingly make a false statement of material fact or law to a third person.
- “generally has no affirmative duty to inform opposing party of relevant facts or law.” –
Comment 1

Question

Can you (must you) tell the court that Charles lied about his father being his legal guardian?

Confidentiality

SCR 20:1.6

- **1.6(a)** The *lawyer shall not* reveal without client's consent.
- **1.6(b)** *May* reveal to secure legal advice on compliance with these rules.

Candor toward the Tribunal

SCR 20:3.3

- (a)(1) The *lawyer* shall not knowingly make a false statement of fact or law to tribunal;

Candor toward the Tribunal

SCR 20:3.3

- (a)(3) shall not knowingly offer evidence that the lawyer *knows* to be false (except client testimony)

Candor toward the Tribunal

SCR 20:3.3

- [8] The prohibition against offering *false evidence* only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.
 - A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. . . . *although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.*

- “An advocate does not vouch for the evidence submitted in a case; the tribunal is responsible for assessing its probative value.”

Candor to Tribunal in Criminal Cases

- 3.3 (a)(3) A lawyer *may* refuse to offer evidence (other than client's testimony) the lawyer "*reasonably believes*" is false...

- In criminal cases:
 - Must counsel against client offering false info;
 - *Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].*
 - *In MANY states, state rules require defense attorneys to honor defendant's right to testify **even** if the defender knows testimony to be false.*

Question

Can you report the abuse to a child abuse hotline?

Mandatory Reporters

Six States

- Georgia
- Mississippi
- Nevada
- New Jersey
- Oklahoma
- Texas

Other States

- Attorneys specifically excluded by state reporting statute
- Attorneys not mentioned at all in reporting statute
- ABA and/or State Rules of Professional Conduct call for confidentiality

Question

Can you have your intern place an anonymous call to a child abuse hotline?

Question

It is clear that Charles will have difficulty complying with conditions of release if he continues to reside with his father, because his father is interfering with school attendance and insisting that Charles continue to sell drugs around 1st and Main Streets. You know that Charles loves and misses his aunt and sister and believe that it would be “best” for him to live there. What can you do about it?

Scope of Representation and Allocation of Authority - SCR 20:1.2

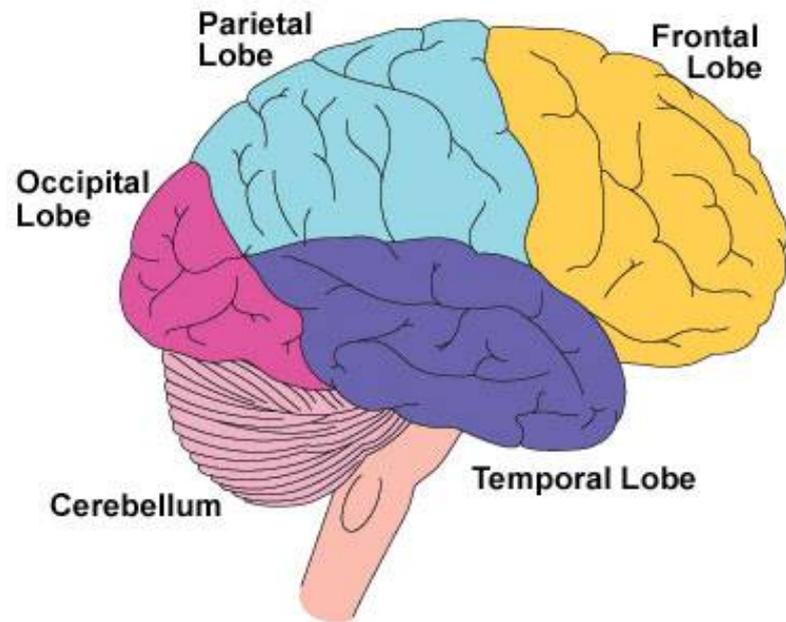
- The lawyer shall abide by a client's decisions concerning the objectives of the representation and ... shall consult with the client about the means to pursued those objective.

***National Juvenile Defense Standard 1.2* Elicit and Represent Client's Stated Interests**

- Counsel's primary and fundamental responsibility is to advocate for the client's expressed interests.
- Advising on what the lawyer believes, knows, and expects allows the client to make informed decisions.

In light of significant developmental research, juvenile defenders must be adept at using:

- Age-appropriate language
- Simple, direct sentences
- Visual aids
- Active listening





"Miss Finch, my attorney has advised me that I'm not obligated to address the question of what I did on my summer vacation. Nonetheless, I would like to respond."

Question

It is also clear that Charles would benefit from counseling and therapy, but he tells you he doesn't want to go, because he knows that his father will call him a "sissy" again. Can you ask the court to order it?

Question

Can you investigate the factual allegations in this case?

You Must!

- Competence
- Diligence
- Communication
- Advisor
- 2012 Supreme Court says ineffectiveness extends to plea advising.

National Juvenile Defense Standard

4.1 Investigate Facts of the Case

Counsel must conduct a prompt, thorough, and independent investigation of the facts and circumstances of the case.



Question

So, you did some investigation and come to believe that there is a very clear Fourth Amendment violation in this case? What do you say when Charles tells you that his father told him to plead guilty?

It may be ineffective to not counsel your client on the plea ramifications

- 2012 Supreme Court says ineffectiveness extends to plea advising.
- *Lafler v. Cooper*, 132 S.Ct. 1376 (2012)
 - Counsel's deficient performance in advising client to reject plea offer and go to trial was ineffective assistance of counsel.

National Juvenile Defense Standard

4.9 Plea Agreements

- The ultimate decision of whether or not to plead guilty lies with the client.
- Prior to advising the client on a plea, counsel must conduct an investigation and engage in an assessment of the strength of the case.
- Counsel must also explain to the client, in developmentally appropriate language, the strengths and weaknesses of the prosecution's case, the benefits and consequences of accepting a plea, and any rights the client may be forfeiting by pleading guilty.

Question

If your client refuses to talk to you about the Fourth Amendment issue, do you go talk to the father and let the father decide how to proceed?

Overcoming Systemic Barriers

