

**The Foundation of Juvenile Practice Part 1:
You are *Adversary* Counsel , NOT a GAL!**

Private Bar Certification
Forensic Exercise
November 19, 2014

Role of Juvenile Defense Counsel: Forensic Exercise: Question 1

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

Question 1 Response

- **Answer:** No. The role of juvenile defense counsel is to represent the expressed interests of the youth, not the parents' interests. The lawyer should not fall into the trap of parent-directed advocacy even if the lawyer respects the parents' right to raise their children however they wish.
 - A. Due Process Right to Counsel
 - The United States Supreme Court held in *In re Gault*, 387 U.S. 1 (1967), that youths facing potential incarceration have the right to counsel under the Due Process Clause of the United States Constitution. Counsel would assist the youth “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.” *Id.* at 36.
 - B. Client with a Diminished Capacity (including youth)
 - When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, *maintain a normal client-lawyer relationship with the client*. SCR 20:1.14(a) (emphasis added).

Question 1 Response continued

- C. What does it mean to have a “normal” client-lawyer relationship? What are the obligations an attorney has to his client (child or adult)?
 - Competence. SCR 20:1.1.
 - Zealous advocacy. SCR 20:1.2.
 - Diligence and promptness. SCR 20:1.3.
 - Communication. SCR 20:1.4. (thus cannot withhold information from client regarding problems with government’s case)
 - Confidentiality. SCR 20:1.6.
 - Independence and loyalty. SCR 20:1.7.
- **PRACTICE TIP**: Goals in establishing a trusting attorney-juvenile client relationship are the same as an adult-client relationship.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 2

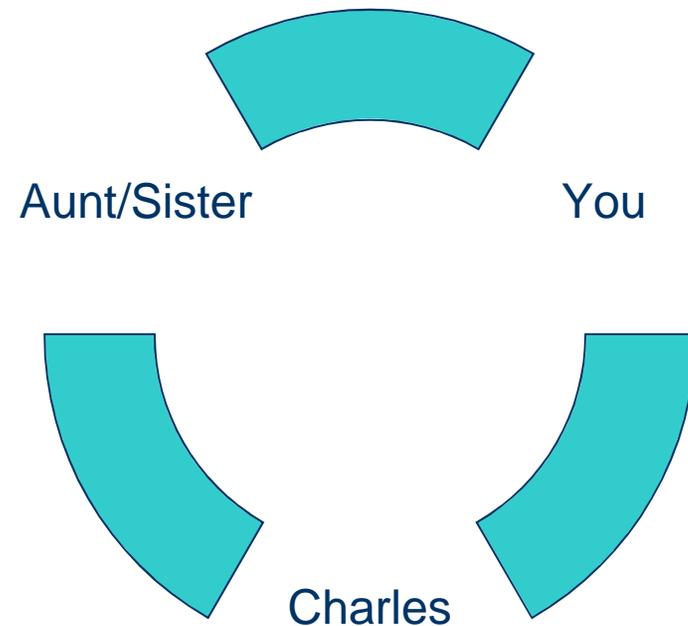
What if you had been hired by Charles's father, rather than having been appointed by the court? Have you now violated any ethical duties in talking to Charles over the father's objection?

Question 2 Response

- **Answer:** The lawyer's role and obligations to the youth would not change if the lawyer was paid by the parent rather than appointed by the court.
 - A. Conflict of Interest: Current Clients – Specific Rules
 - 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 SCR 20:1.6.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 3

**Can you talk to
Charles's
aunt/sister?**



Question 3 Response

- **Answer:** You are bound to maintain the confidences of your client. The rule on client confidentiality includes both attorney-client communications as well as client secrets. “Client secrets” include information you learned not only from your client, but also from other sources during the course of your representation.
 - A. Confidentiality (SCR 20:1.6)
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
 - (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;....

Role of Juvenile Defense Counsel: Forensic Exercise: Question 4

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?

Question 4 Response

- **Answer:** For some, this question may appear to create a tension between client confidentiality (SCR 20:1.6) and a lawyer's duty of candor to others (SCR 20:4.1). SCR 20:4.1, however, does not trump SCR 20:1.6, so you should still not disclose the nature of your relationship with Charles unless he gives you permission.
 - Truthfulness in Statements to Others
 - In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 5

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

Question 5 Response

- **Answer:** This question raises a tension between the lawyer's duty of candor to the tribunal and the lawyer's duty of loyalty and confidentiality to the client. On the one hand:
 - A. Candor to the Tribunal (SCR 20:3.3) states that:
 - A *lawyer* shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law *previously made to the tribunal by the lawyer*. . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter*, that the lawyer reasonably believes is false.
 - On the other hand, you are bound to maintain the confidences of your client. (see next slide)

Question 5 Response continued

- B. Confidentiality (SCR 20:1.6) states that:
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

 - (1) to prevent reasonably likely death or substantial bodily harm;
 - (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the clients commission of a crime or fraud in furtherance of which the client has used the lawyers services;
 - (3) to secure legal advice about the lawyers conduct under these rules;
 - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyers representation of the client; or
 - (5) to comply with other law or a court order.

Question 5 Response continued

- C. This case is complicated for two main reasons.
 - First, you – the lawyer – never made any affirmative representations about Charles’s guardian status, so you do not have any obligation to correct your own misstatement.
 - Second, because you cannot talk to the aunt/sister, you do not have any true understanding about Charles’s legal status and the legal dynamics between each of the family members.

Although you cannot affirmatively represent to the court (in writing or orally) that Charles has been “raised by his father” if you are certain that is not true, you probably cannot affirmatively correct Charles’s misrepresentation without violating his confidences under SCR 20:1.6, unless one of the exceptions listed in SCR 20:1.6(b) applies. If you are asked directly by the judge about Charles’s legal status in this case, you may say that you have not been able to gather or verify information about the legal status. However, in some cases, you may have a duty to speak if silence is understood as agreement.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 6

Can you report the abuse to a child abuse hotline? Can you have your intern place an anonymous call to a child abuse hotline? Does it matter that Charles denies any abuse by his father and insists that he wants to live with him?

Question 6 Response

- **Answer:** You cannot call the Child Abuse hotline if Charles does not want you to, as implied by his denial of abuse and insistence that he wants to remain with his father.
 - **It is important for the defender to understand the difference between a *Guardian ad Litem* (“GAL”) and a defense attorney.** While the GAL is generally appointed as an officer of the court to act in the best interests of the child, the defender is required to follow the stated interests of the child. Moreover, while the GAL is generally bound under mandatory reporting obligations to report abuse, the defender is not and should not be a mandatory reporter. In some jurisdictions, the defense bar is also appointed to serve as a GAL in some cases. In any case in which the lawyer is appointed as defense counsel, the lawyer is bound to follow the “normal” client-lawyer relationship discussed in Question #1 above.
 - This hypothetical presents a classic best-interests-of-the-child versus expressed-interests-of-the-child tension. Notwithstanding our desire to help Charles, we are bound to approach this case and interact with this client in the same way we would if we were representing an adult. (See obligations of counsel set forth in Question #1). You also cannot use someone else (*i.e.*, your intern) to do something that the rules prohibit you (the lawyer) from doing.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 7

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?

Question 7 Response:

- **Answer:** You can (and probably should) advise and encourage Charles to talk to his aunt and sister and return to live with them. A lawyer's advice and/or encouragement, however, should not be so overbearing as to interfere with Charles's right to independent choice. A defender's duties to the client require that the defender inform clients of all of the options and help the client understand and choose between each of the options. At the end of the day, however, counsel must follow Charles's expressed interests.
 - A. 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.
 - B. Maintaining the role of juvenile defense counsel is especially important when addressing ancillary issues like school, family or mental health. While the juvenile defender will often have to address these issues, he or she must always do so through the lens of advancing the client's interests.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 8

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 8 Response

- **Answer:** You can only ask the court to order it if Charles gives you permission. You can encourage him to allow you to request, or at least not oppose the probation officer's request, for counseling or therapy. You also should work creatively to identify and provide Charles with any detailed information you can about how to obtain counseling without the court's intervention, and if you think it is appropriate, even advise or encourage Charles to get help – from his aunt, from his sister, from a counselor or teacher at school, from a local mental health clinic, etc.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 9

Can you investigate the factual allegations in this case?

Question 9 Response

- **Answer:** Yes. In fact, you must.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 9(a)

What if you decide to conduct some preliminary 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?

Question 9(a) Response

- **Answer:** You need to tell Charles that he has a good chance of beating these charges, and you need to assure him that you will zealously fight the charges if he directs you to do so.
 - A. When a youth relies heavily on the misguided advice of his parent, the lawyer should remind the youth that he has the right to make his own decisions in the juvenile case. The lawyer should help Charles talk through his underlying reasons for deferring to his father and then re-direct Charles's attention to the strengths and weakness of the case. The lawyer may find that Charles's decision is motivated by a well-considered and selfless loyalty to his father, by moral or religious views that require him to admit fault and take responsibility for his own actions or by a legitimate and well-thought-out desire to avoid financial or other consequences for his father. Charles, on the other hand, may discover that his father's advice is well-intentioned, but simply ill-informed.

Side Note for 9(a)

- B. As a side note: evidence of physical abuse or extreme mental duress by a parent may in some cases render the youth's decision incompetent. In these circumstances, a lawyer can take protective action, but measures of this nature should be approached with extreme caution – so as not to compromise the expressed legal interests of the client, violate the client's confidences or bring greater harm to the client.
 - Client with Diminished Capacity, Taking Protective Action (SCR 20:1.14(b)) If a lawyer reasonably believes that a client 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 guardian *ad litem*, conservator or guardian.

Role of Juvenile Defense Counsel: Forensic Exercise: Question 9(b)

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?

Question 9(b) Response

- **Answer:** This is especially difficult when you fear that the father does not have Charles's best interests at heart or does not have an appreciation for the consequences of a juvenile adjudication. But if the client has given you permission to talk to his father, you might meet with the father and convince him of the viability of the Fourth Amendment motion.