

## Role of Defense Counsel

### **Role of Defense Counsel in Delinquency Proceedings: Who Is Your Client?**

#### **History and Why This Is Important?**

In October 2003 a collaborative report *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* issued from the American Bar Association Juvenile Justice Center, Southern Juvenile Defender Center, National Juvenile Defender Center and the North Carolina Office of Indigent Defense Services. The conclusions of that report demonstrated the need to improve the quality of representation of juveniles throughout the State of North Carolina. With 100 counties, North Carolina was challenged to find a way to insure that differences in appointing juvenile defense counsel and varying means of delivering defense services throughout the urban, suburban and rural areas did not erode the quality of juvenile defense. In May 2004 a Report of the Juvenile Committee of the Commission on Indigent Defense Services identified key areas that needed strengthening in North Carolina as a result of the assessment. The following pertinent issues were noted in the report on page 1:

- The quality of juvenile defense in many areas of the State is deficient
- The absence of training opportunities, qualifications, qualification standards, and performance guidelines for juvenile defense attorneys contributes to the deficient quality of representation.
- The status of juvenile court practice needs to be elevated.

Out of that report a recommendation was made to develop the Statewide Juvenile Defender position in order to facilitate the necessary improvements in juvenile defense representation. In January 2005 the position was officially established.

One of the primary issues to be addressed by the Juvenile Defender has been to establish the Role of Juvenile Defense Counsel in Delinquency Proceedings. The confusion evidenced throughout the State by some juvenile defense lawyers about who the client is was often reflected by similar confusion among parents, parties in the juvenile justice system, including judges, and the juveniles themselves. That role at the various stages of delinquency proceedings is the focus of this presentation.

**Who is the client?** Is it the child and their express interest, their best interest or the parents (whether you are retained or not).

In North Carolina a “minor” is a person under 18 and a juvenile is a person who has not reached the person’s eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States. (NC 7B-101 (14) 2005 North Carolina Juvenile Code and Related Statutes Annotated) NC General Statute 143B-515 (14) contains additional language: “Wherever the term “juvenile” is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well. The two terms

juvenile and minor may have specific meaning depending on what the legal context is, but generally the terms are interchangeable for purposes of this discussion.

North Carolina General Statute 7B-3400 Juvenile under 18 subject to parent's control states: Notwithstanding any other provision of law, any juvenile under 18 years of age, except as provided in 7B-3402 and 7B-3403, shall be subject to the supervision and control of the juvenile's parents. (1969, c. 1080,s.1; 1998-202,s.6.) So the question is who is your client--especially when the parents and the juvenile conflict as to a course of action?

The Office of Indigent Defense Services Juvenile Defender has established that the role of the defense counsel in juvenile delinquency proceedings is to advocate the expressed interests of the juvenile at every stage of the proceedings.

So what happens when lawyers encounter their clients and clients' parent, guardian or custodian and the first thing you hear is this:

"I'm the parent. You aren't going to talk to my child without me being present."

(parent does not understand or respect confidential communication)

"He's not pleading to anything, he's innocent, we want a trial."

(parent wants to control outcome)

"She's pleading guilty. She assaulted me. She did it."

(parent victim wants to control outcome)

"I don't know why he needs an evaluation, he just won't listen to me."

(parent refuses to cooperate with evaluation)

"We are paying you to represent our child. This is what we want."

(parents want to control outcome b/c paying lawyer)

"She's the one in trouble, not me. I'm being punished. I'll lose my job."

(parent does not want to come to court)

"He can't stay with me, I'm through with him. You can have him."

(child wants to go home from detention)

"I had something to do, so we left court . . ."

(child has to leave court with parent-no permission from court-secure custody order is issued on the juvenile/ show cause on the parent)

The dilemmas presented by these scenarios are common and crystallize the conflict between express interest and best interest.

North Carolina General Statute 7B-2000 (a) and (b) establishes the allegedly undisciplined or delinquent juvenile's conclusive presumption of indigence without

necessity to establish same and their right to counsel, whether appointed or retained. From a reading of the statute one can only conclude that the client is the juvenile.

“Counsel” is not defined in the juvenile code; nor is there a provision present in the juvenile code to direct counsel as to their role. In contrast reference to the juvenile’s right to counsel North Carolina General Statute 7B-2001 Appointment of Guardian gives specifically acknowledges the Courts authority to appoint a Guardian to act in the “best interest of the juvenile” p. 174.

Considering the juxtaposition of these two statutes and the legislature’s implicit recognition that the juvenile may have parent, guardian, custodian or counsel, it is permissible to infer that the legislature intended that “counsel” represent the “express interests” of their juvenile clients in contrast to the “best interests” that North Carolina General Statute 7B-2001 contemplates the necessity for.

The inherent conflict that is presented by “express interest” and “best interest” representation is the essence of the problem in defining the role of defense counsel in delinquency proceedings when your client is a minor.

### SCENARIOS

1. Rachel is charged with two counts each of felony breaking and entering and felony larceny. Both the assistant district attorney and Rachel’s court counselor have advised you that they plan to strenuously recommend commitment. At Rachel’s last hearing, the judge warned her that “any more slip-ups” would result in her commitment to the youth development center.

Rachel’s cousin who is 19 and is familiar with the system, recommends to Rachel (though she’s unsure) that Rachel can waiver her juvenile jurisdiction and enter a plea of guilty in adult criminal court because it is unlikely that Rachel will receive prison time as a first offender. Although Rachel has never been detained long-term, she attempted suicide during her most recent stay in detention because she “couldn’t take” being locked up.

Rachel asks for your advice.

2. Jeff is charged with misdemeanor possession of marijuana. At the time of the offense Jeff was the front seat passenger of a car carrying three other teenagers each of which is 16 or older. The marijuana was found in a baggie tucked under the back seat behind one of the other teenagers. When the officer stopped the vehicle, he didn’t notice an odor of marijuana and found no other trace of marijuana. All four boys were charged, and Jeff denies the marijuana was his. When Jeff comes to your office, his parents ask to speak to you alone. Once Jeff leaves the office his parents tell you that they know that the marijuana wasn’t Jeff’s. But they are concerned that Jeff is “with the wrong crowd” and that “he may have a drug problem.” When you meet with Jeff separately he tells you that

he does smoke marijuana but only on the weekends and that he can quit anytime. You tell both Jeff and his parents that you believe he has a chance to win his case and recommend setting the case for trial. Jeff's parents become very upset telling you that the intake counselor said that Jeff would "only be placed on probation," that he wouldn't be "locked up," and that only court can provide the services that he needs. They tell you that they are going to hire an attorney for Jeff, and will have the attorney call you for "any information in the case."

What are the ethical issues presented?

3. Larry is charged with crime against nature for inappropriate contact with his 5 year old niece. The petition is very specific as to time, date, and nature of the act. Larry, who is now 17 but was 15 at the time of the alleged offense, comes and meets with you. Larry denies having touched his niece on that particular day and time. However, he reveals to you that he has touched her inappropriately several other times. He remembers touching her both when he was 15 and also on a few occasions past his sixteenth birthday. Larry is very remorseful about his actions, and feels that he "needs help," but is still adamant in denying that he acted as the petition specified as to the date, time and nature of the allegations. He asks you what he should do.

How do you counsel Larry?

4. Aaron is a fourteen year old juvenile who is in the seventh grade and has been held in detention for five days while he waits for a detention hearing on Monday. He is being held because he is charged in a petition alleging simple assault. The alleged victim is his mother. The juvenile has a history of mental health problems, is diagnosed with attention deficit disorder, intermittent explosive disorder, oppositional defiant disorder, and it is believed he is bi-polar (though he is too young for that diagnosis). The juvenile's mother tells you at the detention hearing that she wants to be present with you when you talk to her son because she wants to make sure you don't put words in his mouth. She also tells you that he is going to plead because "he did it." She also tells you that he cannot come home because she's tired of him and wants the court to do something about him or lock him up. He has had numerous suspensions from school and has not been evaluated by the school though she has asked repeatedly since he was in the fifth grade. You learn from your client just before the detention hearing that there is a history of domestic violence in the home and that he believes that he acted in "self defense." He wants to go home with his mother despite what his mother says. You know of alternative placements that could be available rather than detention.

What ethical issues are you presented with and how should you deal with them?

5. It is arraignment day for your client 11 year old Sue Ann. She has a petition for Assault with a Deadly Weapon. You have eight cases on that morning. You do not have a lot of time to talk with the parents who need to talk to you. Your client

tells you that she is guilty. You talk with your client about the details. You conclude that based on the information she provides that she needs a trial. As you are talking to your client and parents, the assistant district attorney knocks and says that the Judge is ready for your case to be heard. The parents tell you that their daughter is innocent and you need to investigate. Your client wants to get it over with.

What is your ethical responsibility?

### North Carolina Rules of Professional Conduct

#### Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions 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. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
  - (1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
  - (2) A lawyer does not violate this rule by according to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
  - (3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

#### Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

#### Rule 1.4 Communication

- (a) A lawyer shall:
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined by Rule .0(f) ("informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct 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.

#### Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information acquired during the professional relationship with 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 protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary;
  - (1) to comply with the Rules of Professional Conduct, the law or court order;
  - (2) to prevent the commission of a crime by the client;
  - (3) to prevent reasonably certain death or bodily harm;
  - (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
  - (5) to secure legal advice about the lawyer's compliance with these Rules; 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 lawyer's representation of the client . . .

#### Rule 1.14 Client With Diminished Capacity

- (a) 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.

- (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 or guardian.
- (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 reasonably necessary to protect the client's interests.

## 2.1 Advisor

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 also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

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Additional guidelines: IJA/ALA Juvenile Justice Standards