Ethical Considerations in Representing Child Clients

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Can I represent a child client?

**YES!**

- In re Gault
  - SCOTUS Juvenile justice

- In re D.M.O.
  - TX App. Family (Termination)
  - TFCA §107.021(a-1)

- Kenny A
  - 11th Circuit Foster Children

- HHS Children’s Bureau
  - Title IV-E funding for children’s representation

- ABA Standards for UCs
  - III(H) Right to an Attorney

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Mandatory Reporting

- Texas Family Code Sec. 261.101:
- “PERSONS REQUIRED TO REPORT; TIME TO REPORT.
- (a) A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter” (emphasis added).

In Texas, the law specifically states: “The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney...”. Tex. Fam. Code §261.101(c)
Mandatory Reporting

• How do I make a report?
  • Reports can be made to the DFPS hotline, 1-800-252-5400, or via their online form:
    • https://www.txabusehotline.org/Login/Default.aspx

• Do I have to tell my client?
• Will I be liable if it isn’t true?
• Is there a penalty for not reporting?
• Check out CILA’s Mandatory Reporting FAQs
Stated Interests vs. Best Interests

Texas Rule 1.02: “a lawyer shall abide by a client's decisions...concerning the objectives and general methods of representation...”

“The Attorney shall provide the Child with legal advice and zealously advocate for the Child’s legal interests, as directed by the Child’s expressed wishes. The Attorney’s obligation is to represent the Child’s expressed wishes, even if they conflict with those of the parent or other adult, and regardless of who engaged the Attorney to represent the Child.

“Standards for the... Legal Representation... of Unaccompanied Alien Children in the U.S. (ABA 2018), V(A)(1)(d) at pg.16.
Mental Competency vs. Child Capacity

**Mental Competency**
- Mental competency is a legal construct tied to due process in a proceeding.
- Children’s cases can be evaluated under this framework, but there are additional considerations about children that can impact due process.

**Child Capacity**
- Capacity is a broad concept that refers to an individual’s ability to make a decision or perform a task in a given context.
- A child is presumed to have capacity and to be capable of expressing his/her point of view and wishes.
- A child’s capacity can be impacted by intellectual and cognitive disabilities, mental health disorders, and child development.
Confidentiality

Texas Disciplinary Rules of Prof’l Conduct R. 1.05

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege.... Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by [several exceptions], a lawyer shall not knowingly:
(1) Reveal confidential information of a client or a former client to:
   (i) a person that the client has instructed is not to receive the information; or
   (ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.
1.01 Competent and Diligent Representation

• (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence...

• Comment 6: Competent and Diligent Representation
  • Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.
1.15 Declining or Terminating Representation

• (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
  • (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
Texas Lawyer’s Creed

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

• I am passionately proud of my profession. Therefore, "My word is my bond."
• I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
• I commit myself to an adequate and effective pro bono program.
• I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
• I will always be conscious of my duty to the judicial system
Preamble: A Lawyer’s Responsibilities

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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Model Rules of Professional Conduct: Rule 8.4 (g)

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
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