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ETHICS IN JUVENILE CASES

A PRESENTATION BY
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Ethics in Juvenile Proceedings

A. The Defense Perspective

1. Overview

The defense attorney in juvenile cases is charged with the responsibility of representing his or her client zealously within the bounds of the law (Preamble: Texas Disciplinary Rules of Professional Conduct, Paragraph 2). It is the intent of this paper to discuss the parameters of ethics concerning the roles of the defense attorney.

2. Duties and Responsibilities of Counsel

All persons licensed to practice law in Texas are bound by the regulations of the State Bar Act and by the Rules governing the State Bar that are adopted by the Supreme Court. (Govt. C. Sec. 81.051(a), **McGregor v. Clawson**, 506 S.W.2d 922, (Civ. App.-Waco, 1974, no writ). The Rules include the Disciplinary Rules of Professional Conduct.

a. Perjury by Client

An attorney must not offer evidence that he or she knows to be false. (Texas Rules of Professional Conduct, Rule 3.03(a)(5)). This means that an attorney must not permit a respondent to testify when the attorney knows that the resulting testimony will constitute perjury. The problem develops because the respondent has an absolute right to testify and the right to effective assistance of counsel. The possibility of perjured testimony by a respondent presents unique problems for the practitioner. There is a difference between what the defense counsel knows to be false and what he or she believes to be false. The ethical rule is not triggered by potential testimony the defense attorney believes to be false and all doubts in this regard are to be resolved in the respondent's favor and testimony presented. (Texas Rules of Professional Conduct, Rule 3.03.

If the defense attorney determines that the testimony will constitute perjury then the first duty is to attempt to dissuade the respondent from such course of conduct. **Nix v. Whiteside**, 475 U. S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). If the client insists on testifying falsely then the defense attorney, outside the presence of the jury can state to the Court that the respondent is testifying over the objection of counsel and wishes to give a narrative statement. The defense attorney should refrain from referring to the perjured testimony during final argument. Another method of dealing with perjured testimony is to advise the respondent and his parents that it is counsel's obligation to either withdraw from representation or report to the Court that the testimony is false. Such action has been found to fall within the accepted standards of professional conduct. See **Nix v. Whiteside**, id.

The Texas Disciplinary Rules of Professional Conduct also require that counsel take remedial measures if counsel becomes aware of perjured testimony after it has been presented. In this event counsel must make a good faith effort to persuade the respondent not to perjure himself or to authorize the attorney to correct or withdraw the perjured testimony. If not permitted by the respondent then counsel must take other remedial measures, which might include disclosure of the true facts. (Texas Disciplinary Rules of Professional Conduct, Rule 3.03(b)). A strict interpretation of the rules requires counsel to reveal the respondent's perjury to the Court if all other remedial measures fail.

b. Representation of Multiple Respondents

Undivided loyalty is an essential element in counsel's representation of the client. (Texas Disciplinary Rules of Professional Conduct, Rule 1.06). Therefore, an attorney must not represent one respondent if that respondent's interests are materially and directly adverse to the interests of another respondent represented by the attorney. (Texas Disciplinary Rules of Professional Conduct, Rule 1.06). An attorney may represent multiple respondents if it is clear that the attorney can adequately represent the interests of each and if each co-respondent and their parents consent to the representation after full disclosure of the possible effect of such representation on the exercise of the attorney's independent judgment. (Texas Disciplinary Rules of Professional Conduct, Rule 1.06). *Alamanzar v. State*, 702 S.W.2d 653 (Crim. App. 1986).

c. Evidence

An attorney must not knowingly offer or use evidence that he or she knows to be false. (Texas Disciplinary Rules of Professional Conduct, Rule 3.03(a)(5)). Counsel should refuse to offer any evidence that is known to be false, even if the client requests that the evidence be tendered. (Texas Disciplinary Rules of Professional Conduct, Rule 3.03). When a lawyer comes to know of the falsity of material evidence after it has been offered the attorney must make a good faith effort to persuade the respondent to permit counsel to correct or withdraw the evidence. If these efforts are unsuccessful, and then counsel must take remedial efforts, which may include disclosure of the true facts. (Texas Disciplinary Rules of Professional Conduct, Rule 3.03(b)).

d. Attorney as Witness

An attorney who testifies, other than to attorney's fees, concerning a contested matter in the case is playing the roles of both advocate and witness. Therefore, an attorney must not accept or continue employment if the attorney knows or believes that the attorney may be a witness necessary to establish an essential fact on behalf of the client. (Texas Disciplinary Rules of Professional Conduct, Rule 3.08(a)).

e. Attorney-Client Privilege

The attorney-client privilege protects confidential communications made for the purpose of facilitating the rendition of professional services to a client. (T. R. Cr. Evid. 503(b)). There is no privilege under the rule if the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should know to be a crime or fraud. (T. R. Cr. Evid. 503(d)(1)). It is imperative that the attorney adhere to the attorney-client privilege. This includes revealing anything within the privilege to the district attorney without the client's express permission, even in settlement negotiations or plea bargain negotiations.

f. Withdrawal of Counsel

An attorney must withdraw from representation of a respondent when the representation will result in the violation of Rule 3.08 of the Disciplinary Rules of Professional Conduct. Texas Disciplinary Rules of Professional Conduct, Rule 3.08), the attorney's physical, mental or psychological condition materially impairs his or her fitness to represent the respondent, or the attorney is discharged by the client with or without good cause. An attorney may seek permission from the Court to withdraw from a case if such withdrawal can be accomplished without material adverse effect on the client, the client persists in a course of action involving the attorney's services that the attorney reasonably believes may be criminal or fraudulent, or the attorneys services were used to

perpetrate a crime or fraud, the respondent insists on pursuing an objective that counsel considers repugnant or imprudent or with which counsel has fundamental disagreement, the representation will result in an unreasonable financial burden or has been rendered unreasonably difficult by the respondent or his parents, the respondent or his parents have failed to substantially fulfill an obligation to counsel for his or her services, or other good cause. (Texas Disciplinary Rules of Professional Conduct, Rule 1.15(b)).

g. Dealings with the District Attorney

It is imperative in the representation of the respondent that you deal honestly and at arms length with the district attorney in representing the respondent in the juvenile case. As we all know, in the practice of law the only thing that we really have, as an asset is our word. If you misrepresent facts to the district attorney you lose their trust. More importantly, as an officer of the court you are ethically bound to speak the truth to all other officers of the court.

h. Special Obligations in Juvenile Cases

The defense attorney has a special obligation to his client in juvenile cases from the outset of the case. The first and foremost obligation is to advise the client of his constitutional rights and his right to remain silent. This is important for several reasons. This first reason is that the juvenile court may order psychological and psychiatric evaluations of the client. The court will also order a family background history and social evaluation. Probation officers, court representatives and mental health professionals will all have contact with the client, whether he is in custody or not. The defense attorney also has a duty to advise the client that he has the right to have the attorney present for all testing and any interviews, which may be given.

The defense attorney also has a duty to determine the mental capacity of the client. In many of the cases which transfer motions are filed in there is a real question of the competency and/or mental health of the client. In the event that the attorney feels that there is an issue regarding the client's fitness to proceed then the attorney must raise this issue and request an evaluation to determine such fitness.

The defense attorney also has the duty to investigate the facts. This includes reading the State's file, interviewing witnesses and interviewing the client in a secure environment away from parents, probation officers and any other persons who might influence the candor of the client.

The other unique situation in juvenile cases is the obligation to the respondent, after adjudication, to insure the proper placement for the respondent to succeed on probation. It is also the obligation of the practitioner to be cognizant of the sanction lever assigned to the respondent and that the proper sanction level is assigned.

B. The Prosecution Perspective

(Special thanks to Kris Moore of the Harris County District Attorney's Office for the use of her paper which she presented at the 19th Annual Robert O. Dawson Juvenile Law Institute. Her paper is included verbatim below)

1. Special Provision for Prosecutors

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Texas Code of Criminal Procedure, Art. 2.01.

Although all attorneys are covered under the Texas Disciplinary Rules of Professional Conduct, only ONE group of attorneys is singled out for disciplinary rules specific to that group: Prosecuting Attorneys. As is pointed out in Comment 1 to Rule 3.09, “A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations.”

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct is entitled “SPECIAL RESPONSIBILITIES OF A PROSECUTOR” and requires that a prosecutor “shall” do the following:

- (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not to initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pretrial, trial, or post-trial rights;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when a prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.07.

2. Duties and Responsibilities of Juvenile Prosecutors

The adversarial model contemplated by the rules pits the defense attorney against the prosecuting attorney, with both of the attorneys governed by the rules of court and the disciplinary rules. While the new rules also represent an effort to discourage abusive adversarial tactics, the adversarial model continues to be firmly established in the juvenile court as well as the other courts. This model is somewhat at odds with the historical context and purpose of the juvenile court, which had been created as a court separate from adult court with the ideals of “rehabilitation” of the juvenile and “protection” of the public as worthy goals. (See the purpose as set out in Sec 51.01 of the Family Code). In this “ideal” juvenile court, all parties, the state, the judge, the parents, the juvenile social worker, and everyone in the process are presumed to have the same goal and interest in the child’s welfare.

The nature of the “defendant” juvenile is such that our law has recognized certain protections and privileges that are not accorded to adult defendants. Thus, the lawyers, defense as well as prosecution, are required to be aware of these special protections and apply them in the context of the other rules and procedures. A few of these protections (you can probably think of others) are:

- (a) Confidentiality of the records. Sec. 58.005 of the Family Code limits who may be permitted to access and inspect juvenile court records. Also Sec. 58.007 limits access to the records and files concerning juveniles. This covers prosecutor’s files, as well as probation department files and law enforcement records and provides that they shall not be disclosed to the public.
- (b) The court can limit public access to hearings. Sec. 54.08 provides that for “good cause shown” the public can be excluded from a juvenile court hearing and requires closed hearings for juveniles under 14.

- (c) Limitations on who can collect and keep information regarding juveniles, and what they can do with the information. Family Code Chapter 58.
- (d) While not exempted from registration as a Sexual Offender, juveniles have some special provisions regarding the circumstances of their registration (deferred decision until counseling completed and then alternatives where the court can excuse registration, order non-public registration or after registration is ordered, allow un-registration or de-registration). Also there are some protections as to who has access to the information provided when the juvenile is registered. (See Chapter 62 and Subchapters G and H of the Code of Criminal Procedure).

Prosecutors need to aware of not only the Rules of Court and the Disciplinary Rules, but the specific provisions in the Texas Family Code that govern their dealings with the various parties and persons involved with the juvenile case. These rules and provisions affect not only the prosecutor's dealing with the defense attorney and the judge, but also with the parents (who are "parties"), law enforcement, probation, the schools, victims and even jurors!

3. Ethical Problems Confronted by Prosecutors

Here is a "top ten" list of disciplinary rules situations that are raised with respect to prosecutors. Usually either the prosecutor has been accused of violating the rule, or the prosecutor finds him/herself in a situation where they wonder if their conduct would constitute a violation:

- (1) Suppression of exculpatory evidence. See Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct; Brady v. Maryland, 373 U.S. 73 (1963). Note that "mitigating" evidence must be disclosed as well. The evidence need not establish innocence to be "exculpatory."
- (2) Improper statement to the press. See Rule 3.07. This includes public criticism of judges controlled by Rule 8.02. Prosecutors enjoy "prosecutorial immunity" for statements made in the courtroom (Marrero v. City of Hialeah, 625 F. 2d 499(5th Cir. 1980) cert. denied 450 U.S. 913 (1981), but only "qualified immunity" for other public statements within the scope of their duties (see Marrero (supra); Wyse v. Dept. of Public Safety, 733 S.W. 2d (Tex. App-Waco, 1986, writ ref. N.R.E.). There is NO immunity for statements not within the scope of duties, and none for incorrect out-of-court statements motivated by bad faith or malice. (see Wyse, supra.). If your juvenile case is open to the public, it is always a good idea to urge the media to come and hear the case for themselves as testimony is presented in the courtroom.
- (3) Ex parte communication with the trial court . Rule 3.05(b); and Canons 3(A)(5) and 8(K), Code of Judicial Conduct.
- (4) Prosecuting or threatening to prosecute a case unsupported by probable cause. Rule 3.09(a)
- (5) Knowing use of false evidence. Rule 3.03(5)
- (6) Communications with a party represented by counsel concerning the subject of that representation. Rule 4.02(a). In juvenile cases, "parents, spouses, guardians, and guardians-ad-litem" are "parties" under the definition in Sec. 51.02(10). Keep this in mind when the parents call you and want to discuss the case.
- (7) False statements of material fact. Rules 3.03 (concerning statements made to the court) and 4.01(a) (statements made to anyone else).

- (8) Threats of criminal prosecution or grievance proceeding intended to influence or discourage a person's service as a witness. Rule 4.04
- (9) Comments made to harass, or "embarrass" or influence the future jury service of a juror who has made the "wrong" decision. Rule 3.06(d).
- (10) Being so eager to "win" or so angry because you didn't that that you allow your judgment to fail and you lose sight of "seeing that justice is done" and done properly.

4. Ethical Problems Special to Juvenile Prosecutors

These hypotheticals are intended for discussion. Every single one of these situations has happened to me. Be warned, some of these answers are strictly my own opinion, and another prosecutor might see things differently:

Hypothetical #1: Filing and Disposing of a Case:

- (1) You are doing intake on an assault case. You know that the victim is now deceased and their death was unrelated to the offense. Do you file the case?

No, I believe it would be unethical to file a case that you know that you cannot make. See Rule 3.09

- (2) Along the same lines, the case is filed, but an element of the offense is missing. For example, in a DWI (or UUMV), you cannot prove the juvenile was operating the vehicle. Do you try to get them to stipulate anyway?

Maybe, it might depend on the circumstances.

- (3) Would you offer deferred prosecution instead?

If the juvenile is "not guilty" he shouldn't be on "deferred prosecution". In addition, even if you have the proper evidence and probable cause to file a DWI, "deferred prosecution" on a DWI is prohibited by the Family Code Sec. 53.03(g)(1).

Hypothetical #2: Advising the Victim/Witness about talking to the other side:

- (1) You are talking to the victim in a case and she tells you the defense attorney has been calling her. She asks whether or not she should talk with the defense attorney or his investigator. What do you tell her?

I would tell her that it was up to her whether she talked to the lawyer or the investigator, and that I could not tell her not to talk to them. However, I would caution her that they would probably record in some way what she said and if she were to testify differently they would ask about it. I would also caution and urge her to be truthful at all times if she did talk to them.

Relevant Rules: 3.04 and 4.03 of the Rules of Professional Conduct

Hypothetical #3: Dealing with the Weak case and/or the Ignorant Defense Attorney:

- (1) You are assigned to prosecute a very weak case – though not so weak that a dismissal is warranted. You know in your mind that if the defense attorney approaches you with a request for a reduction in the charge or a request for a deferred prosecution, you would agree to it. The defense lawyer never bothers to look at your file and never even talks to you about the case. Are you required to tell the defense lawyer about weaknesses in the case?

No, I don't think you are. Besides, his client may have told him what happened and admitted guilt – including facts that you don't even know about.

- (2) Are you obligated to offer a reduction or tell the lawyer about the availability of deferred?

No, I don't believe the prosecutor is obligated to try to talk the lawyer into a reduction of some sort. If you honestly believe that the reduction was warranted, then refile the case with the offense and pleadings that you believe are proper.

I once tried to tell a lawyer about deferred and urged him to consider it, and he ended up writing me a letter threatening to file a grievance on me, because he took it as though I was saying he didn't know what he was doing. Sometimes lawyers won't listen to prosecutors.

- (3) With the above in mind, what if you find yourself dealing with an attorney who normally does not practice juvenile law and it is obvious he doesn't know what he is doing – what is your obligation? What do you do?
- i. Help him by instructing him on the law?
 - ii. Just tell him what to do?
 - iii. Take advantage of him?

What if he admits he doesn't know what he is doing and asks for your help? How much are you obligated to keep him from doing something totally wrong?

Whatever you do, I believe that a prosecutor has a moral duty and a self interest (when the case gets reversed, you have to do it over again!) in keeping a lawyer from doing something totally wrong. When this has happened to me in the past, I have directed lawyers to particular sections of the law. I have tried to explain the law, as I understood it and, on some occasions, I have suggested that the lawyer might want to discuss his options with one of the juvenile attorneys and directed him to one or more of them.

SUBTOPIC : DOES THE LAWYER KNOW WHAT HE'S DOING?

These dilemmas actually happened to me:

1. You ask for your file back and the lawyer tells you his client "isn't finished reading it."
2. The lawyer takes your file to the clerk of the court and talks the clerk into making him a copy of YOUR file.
3. You ask for your file back, and the lawyer says "I don't know where it is" as he walks out of court with his reset form. (You know for certain that you gave it to him).

Look at Rule 3.03, 3.09 and 4.01 of the Rules of Professional Conduct and Article 2.01 of the Code of Criminal Procedure.

Hypothetical #4: Who represents Who?:

What happens when several of the “parties” have lawyers and you – the prosecutor – are caught in the conflict?

1. Child and parent each have a lawyer and they each want something different.
2. One – or both – parents come to court with their lawyer to make sure that the juvenile isn’t sent home to them!
3. The parents are obviously going to try to use the juvenile case to somehow further or change their ongoing custody battle.
4. The parents come in and file their own pleadings in the case asking that their parental rights be terminated and the child be placed in the custody of the state. (They want to be sure the child knows he can never come home again!)

Look at Rules 4.02 and 4.03. Also Sec. 51.02(10) in the Family Code.

Hypothetical #5: Dealing with the difficult Complainant/Witness:

1. The victim gets up to testify and tells a completely different story. Surprise!!
2. You become aware, prior to any hearing, that the victim/witness is not credible.
 - a. You KNOW he’s lying or planning to lie
 - b. You SUSPECT he’s lying or planning to lie
 - c. Other variations – he’s got his friends, or worse, his gang members to lie for him
3. The victim from Hell:
 - a. The family member victim who, after letting the kid sit in detention for a month awaiting trial, wants to drop the charges, says the police are lying, and/or refuses to come to court.
 - b. The Victim who only filed to get money. This victim suddenly remembers that the briefcase that was taken from his vehicle contained his diamond Rolex watch, \$10,000.00 in cash, and a very expensive camera. He just forgot to tell the police about those items. He also tells the juvenile’s family that he will “drop” the charges if they pay him.
 - c. The Victim who is so upset and angry that he will NOT be happy no matter what you – the prosecutor - do. You could get the “death penalty” and an 8-million dollar settlement and he still wouldn’t be OK.

Look at Rules 3.03, 3.04, 3.09, and 4.01.

Hypothetical #6: Do you have a duty to disclose?

1. The case is set for a plea and you learn that your Victim/Witness
 - a. Is Dead
 - b. Has left the country
 - c. Has a terrible criminal history
 - d. Can’t be located

What is your obligation as far as notifying the defense attorney? The court?

See Rule 3.03, 3.04 and 3.09.

Hypothetical #7: What do you do when you find out that your Victim/Witness has been messed with?

1. By the defense attorney:
 - a. The attorney told the Victim/Witness he was appointed by the court to “investigate” the offense. He just didn’t tell him he represented the juvenile. See Rule 4.01 and 4.03
 - b. The attorney told the Victim/Witness not to come because the juvenile was going to plead guilty and then he announces “ready” for trial. See Rule 4.01
2. By the juvenile defendant.
3. By the juvenile defendant’s friends. What if the friends are gang members?

Hypothetical #8: Dealing with the nightmare case:

1. The juvenile defendant is Mentally Retarded, Mentally Ill, and Dangerous! (He’s also 11 years old and pitiful)
2. The juvenile defendant is someone you REALLY feel sorry for
3. The necessary witness – a police officer -
 - a. Has been fired for professional misconduct unrelated to this case
 - b. Has been killed in the line of duty.

C. Conclusion

The ultimate responsibility of the practitioner in juvenile cases, whether the practitioner is a defense attorney or a prosecutor is to insure that the justice is served, that the respondent receives competent representation within the parameters of the ethical guidelines for the attorney and that the prosecutor engages in ethical prosecution of the case. Although there are many different sub-issues in juvenile law, those are better left to other speakers and writers at this seminar.

Good luck and be careful.