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CHILDREN'S LAW CENTER OF MINNESOTA

Ethics and Best Practices When Representing Youth

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AUTHORITY

- ▶ Minnesota Rules of Professional Conduct (2022)
- ▶ ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996)
- ▶ ABA Model Act Governing the Representation of Children in Abuse and Neglect Cases (2011)



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WHEN DO LAWYERS REPRESENT YOUTH?

- ▶ Children in abuse and neglect (CHIPS) proceedings
- ▶ Adoptions
- ▶ Intervention in family court matters:
 - ▶ 3rd party custody actions;
 - ▶ Orders for Protection; and
 - ▶ Custody disputes.



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ATTORNEY'S DUTIES TO CHILD CLIENTS

- ▶ SAME DUTIES AS THOSE OWED TO ADULT CLIENTS
 - ▶ Duties of Competence, Diligence, Communication & Deference
 - ▶ Advocate and Counselor Roles
 - ▶ Duty of Confidentiality of Information



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DUTIES OF COMPETENCY & DILIGENCE

- ▶ A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skills, thoroughness and preparation reasonably necessary for the representation. MINNESOTA RULES OF PROF'L CONDUCT, R 1.1 (2023) (HEREINAFTER MRPC)
- ▶ A lawyer shall act with reasonable diligence and promptness in representing a client. MRPC R 1.3
- ▶ A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. MRPC R 1.3 cmt 1.



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DUTY OF COMMUNICATION

- ▶ A lawyer shall:
 - ▶ Promptly inform the client of any decision or circumstance with respect to which the client's "informed consent" [agreement to proposed course of conduct] is required;
 - ▶ Reasonably consult with client regarding the means by which the client's objections are to be accomplished;
 - ▶ Keep client reasonably informed about the status of the matter;
 - ▶ Promptly comply with reasonable requests for information; and
 - ▶ Consult with client regarding limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rule of Profession Conduct. MRPC R 1.4



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COMMUNICATION

- ▶ A lawyer SHALL explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation MRPC 1.4 (emphasis added).
- ▶ In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer MAY NOT withhold information to serve the lawyer's own interest or convenience OR the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders. MRPC R1.4, cmt 7 (emphasis added).



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EXPLAINING THE ATTORNEY ROLE TO A CHILD CLIENT

Developmentally appropriate manner

Not just one conversation



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EXPRESS WISHES VS. BEST INTEREST

Deference duty

“As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child’s decision.’

Model Rule B-4 cmt. (emphasis added).



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EXPRESS WISHES

- ▶ A lawyer SHALL abide by a client's decision concerning the objectives of representation and, ... SHALL consult with the client as to the means by which they are to be pursued. MRPC 1.2 (a)



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ADVOCATE AND COUNSELOR

- ▶ ADVOCATE ROLE INCLUDES DUTIES OF DILIGENCE & DEFERENCE. “ZEALOUS REPRESENTATION” See also, MRPC R. 3
- ▶ COUNSELOR - MRPC Rule 2
 - ▶ Obligation to render “candid” advice
 - ▶ A client is “entitled to straightforward advice expressing the lawyer’s honest assessment.” MRPC R. 2, cmt 1.
 - ▶ “As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation.” Model Rule B-4 cmt.



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PRIVILEGE

Duty of Confidentiality of Information:

A lawyer SHALL NOT knowingly reveal information relating to the representation of a client. MRPC R1.6(a) (emphasis added).



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PRIVILEGE

- ▶ The privilege is critical to the trust between lawyers and clients. In fact, a primary purpose of the privilege is to encourage full and frank communication between lawyers and clients. *MRCP R.1.6, cmt 2.*
- ▶ Trust is critical for abused and neglected youth.
- ▶ It is helpful to clearly explain the privilege, continually revisit the concept and use simple understandable language.



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EXCEPTIONS

informed consent, implied authorization to carry out the representation, prevent or mitigate damages from a crime or fraud, substantial bodily harm, necessary to secure legal advice about the lawyers compliance with the rule of professional conduct, defending against claims regarding the lawyers representation and compliance with other laws or court order. MRPC r.1.6 (1)-(10)

- ▶ Consent
- ▶ Substantial Bodily Harm



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CONSENT

- ▶ Informed Consent – MRPC Rule 1.6 (b)
- ▶ "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. MRPC 1.0 (f)
- ▶ **Best Practice- Explicit Authorization.** See also, Children's Law Center Practice Point, Protecting Confidentiality in Child Protection Cases, Kyle Fisher and Lori Semke, November 12, 2010.



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PREVENTION OF SUBSTANTIAL BODILY HARM

- ▶ Attorneys for children are NOT mandated reporters; HOWEVER, an attorney MAY break confidentiality if the attorney is reasonably certain that substantial bodily harm will result from not doing so. ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES §B-4 (3) cmt. See also, Protecting Confidentiality in Child Protection Case, Kyle Fisher & Lori Semke, Children's Law Center Practice Point, No 10, November 12, 2010.
- ▶ Do not forget your counseling role to discuss the youth's legal options, consequences of specific behavior choices, and safety concerns. *Id.*
- ▶ If there is disclosure, ensure the disclosure is limited to that which is necessary and narrow in scope. *Id.*, citing Lisa G. Lerman & Philip G. Schrag, *Ethical Problems in the Practice of Law*, 162 (2d ed. 2008).



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CONFLICTS OF INTEREST

- ▶ Current Clients (Rule 1.7)
 - ▶ Representation is directly adverse to another client
 - ▶ Significant risk that representation is materially limited by responsibilities to another client, former client, or by personal interests
- ▶ Internal CLC check and each volunteer completes a conflict check



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CONFLICTS OF INTEREST

- ▶ Sibling Representation
- ▶ Case-by-case analysis
 - ▶ Physical abuse
 - ▶ Sexual abuse
 - ▶ Rule 1.8(b): information relating to representation of client to client's disadvantage
- ▶ Cautious about conflicts – comment 4 to Rule 1.7:
 - ▶ If a conflict arises after representation has been undertaken, lawyer ordinarily withdraws or gets informed consent in writing



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CONFLICTS OF INTEREST

- ▶ Rule 1.7 (b): Exceptions to Concurrent Conflicts
 - ▶ Lawyer reasonably believes they can provide competent and diligent representation to each affected client
 - ▶ Informed, written consent by each client
 - ▶ Based on developmental age of client



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CONFLICTS OF INTEREST

- ▶ Rule 1.9: Former Clients and Conflicts
 - ▶ Former representation of parents as CHIPS youth
 - ▶ Needs informed, written consent of former client to represent a new client in the same or substantially related matter in which new client's interests are materially adverse to former client's
 - ▶ Lawyer's prior firm & lawyer acquired information – informed, written consent required



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CONFLICTS OF INTEREST

- ▶ Ethical Walls (Rule 1.10- imputation of conflicts)
 - ▶ When a lawyer brings in a conflict, screening measures can be taken to prevent disclosure of confidential information & prevent involvement
 - ▶ Notice to affected clients.



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COMMUNICATION WITH REPRESENTED PERSONS

- ▶ Rule 4.2: No direct communication with represented parties
 - ▶ Social workers (as the social services department) is represented by the assistant county attorney
 - ▶ Permission is sometimes given by ACA
 - ▶ GALs are typically not represented (only in contested issues do GALs have counsel)
 - ▶ Parents are typically represented
 - ▶ Foster parents are not represented (not parties to the matter)



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BOUNDARIES WHEN REPRESENTING ABUSED AND NEGLECTED CHILD CLIENTS

Gifts and meals

Navigating Boundaries



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- ▶ Remember that you are the child's lawyer. You are not the child's parent, foster parent, case worker or therapist.
- ▶ Strong attorney client relationships are based on your advocacy, not your finances.
- ▶ Ask yourself whether you would you do this for your adult clients. If not, you have your answer.
- ▶ If your child client is asking for specific items, use it as an opportunity to discuss what services or materials are not being provided and advocate for the client's requests.
- ▶ Use the opportunity to discuss the attorney/client relationship.

TIPS TO HELP NAVIGATE BOUNDARIES



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DUTY OF PUBLIC SERVICE

Minnesota's Rules of Professional Conduct Rule 6.1 states:

“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono public legal services per year. ... In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”



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“Children and youth deserve a voice when important and life-altering decisions are being made about them. They deserve to have their opinions heard, valued and considered. ... [T]hey deserve ethical representation.”

American Bar Association Model Act Governing the Representation of Children in Abuse and Neglect Cases, 22 adopted August 8, 2011.



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QUESTIONS

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