ETHICAL REPRESENTATION OF JUVENILES
(IT'S MY PARTY & I'LL CRY IF I WANT TO)

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State Bar of Texas
26th ANNUAL ROBERT O. DAWSON
JUVENILE LAW INSTITUTE
February 11-13, 2013
San Antonio

CHAPTER 10

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ETHICAL REPRESENTATION OF JUVENILES (IT'S MY PARTY & I'LL CRY IF I WANT TO)

Juvenile Law, like all other aspects of the law practice, requires ethical representation of the client. We all know that an **ABSOLUTE** duty is owed to the **CLIENT** in undertaking to represent anyone in any situation, be it criminal, civil, family or any other area of law.[1] The lines of **WHO** is the client often get a bit blurry. For instance, in a corporate situation, does the duty go to the entity or any one of many individuals making up the entity. In almost all areas, a natural tension can arise between who is the client and who is paying the lawyer's bill.

In the Juvenile Law area this becomes almost a given scenario. Most juveniles are unable to pay their own legal bills (or any other bill for that matter). They cannot borrow money or contract on their own until they are eighteen and have to rely on someone else to take care of their financial responsibilities. The only ability they have to pay comes from work they might do to offset any expense. In the legal field, there is not much they can do to help defray their expenses for legal representation (nor should they as they are usually protected by child labor laws).

Therefore, your legal bill will most likely be paid by someone else. Sometimes (if you find clients able) the parents/family will be responsible for the legal expenses. As often as not, the State is going to be paying your bill because so many juvenile cases are handled by court-appointment. In either event, the duty still adheres to the **CLIENT**. This becomes very difficult to maintain a perspective due to the nature of the area. Since you take your orders from the **CLIENT** (unless is involves an obvious perjury or fraud on the Court) you will find yourself in the middle of several prevailing influences.

If you have practiced much juvenile law at all, you will come into contact with the situation where the **CLIENT** (the juvenile) will instruct you to handle the matter in a certain specific way (ie., trial or plea) that is contrary to the wishes of the parents or family. The **CLIENT** will also instruct you to not tell the parents or family anything about the case. You will also find that the specific wishes of the client are often in direct opposition to the desires and wishes of the Juvenile Probation Officer and Prosecutor (State). Additionally, after reviewing the situation and the applicable law, the path chosen by the client is against your better judgment (both legal and practical). **IT DOES NOT MATTER!!**

Your job is to explain the legal options available to the **CLIENT** (and the family), answer any questions they have about the procedures and possible outcomes and then to let the client decide which course best suits them. As I have often told my clients, "You got yourself into this situation, so you get to decide how you want to get out of it. I am here to back you up and do my best job for you, however you decide how to handle this." When you break it down into its most basic terms, this is the only way to view any representation. Unfortunately, I have witnessed a lot of situations where this does not happen. We have all seen the situation where the Juvenile Probation Officer or parent "tells" the juvenile what to do with their case. I have also seen a number of lawyers "tell" their clients how the case is going to be handled, including how the juvenile will plead to the allegations. As we all know, there are certain decisions that the attorney cannot (and should not) make for their client (either juvenile or adult). Paramount of those is **HOW TO PLEAD.**[2]

This is not to say that you do not explain the ramifications of any course of action to the **CLIENT** and his family. If there is a risk that the **CLIENT** will not fare as well with a particular course of action, it is your duty to inform them of that possibility. In discussing the options available to the **CLIENT**, you have to accurately describe the prevailing influences on any case. For instance, we all know that the interests of society will often prevail over the individual's rights, especially if the individual presents a danger to society. This becomes particularly important when the behavior is related to a school setting or presents a problem for the school system. Also, the notion of punishment, although not a viable component of the juvenile system since rehabilitation is the bottom line focus for juveniles, plays a crucial part in the minds of the State and the Court. In this context, I usually ask my juvenile clients the question: "What did you expect to happen when you did _____?" This gives them an opportunity to examine their behavior (and the consequences) form an outside perspective (if they can).

In addition, everyone **MUST** remember that juveniles do not develop or mature evenly. While it may appear that the juvenile is mature, the juvenile brain does not fully develop until the mid-twenties. Particularly important is that the frontal lobe (the rational decision making part of the brain) develops last.[3] Therefore, most juvenile decision making revolves around their emotional state. Anyone who has dealt with kids knows that being far-sighted is not in their ability for quite some time. Kids want to know the immediate consequences of their decisions. A good

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[1] Tex.DisciplinaryR.Prof.Conduct Rule 1.01

[2] Tex.DisciplinaryR.Prof.Conduct Rule 1.02

[3] Dr. Michael Nerney, Dr. Bruce D. Perry, el al

example would be the child who is in detention on a charge that may be difficult for the State to prove, but the plea offer involves release and supervision. That child will invariably choose the option of release without thinking of the consequences of the plea, much less the requirements of the supervision. Often, that child will be released only to be detained again on a violation of supervision they could not adhere to (nor would be required to if the adjudication had been avoided). The explanation process needs to be complete prior to any plea, including the requirements of any supervision. We have all had clients that have come back into detention under the above scenario who regret the initial plea due to their current circumstances. We also know that any complaints about the initial plea and supervision agreement do not hold any merit, as that is "water under the bridge".

Also remember that kids are quite literal in their interpretation of what you are telling them. After discussing the ramifications of detention with a child after an initial appointment (ie., that he would be detained for ten "working" days) the child inquired about the type of "work" he would have to do for those ten days. I have also had a child who was in violation of supervision for smoking marijuana that when asked how many times he thought he could smoke marijuana while he was on probation just shrugged. When I held up my hand with a zero indicated, he saw my remaining three fingers and asked if three times would be okay.

All of the above concerns have been contemplated and addressed by the legislature by allowing the Court to appoint a Guardian ad Litem in any situation where the best interests of the child are in question.[4] In situations where the allegations concern intra-family incidents, where the child is obviously in a self-destructive path or the family obviously does not or cannot keep the child's best interests in mind, the Guardian ad Litem is a valuable and essential tool to utilize. Any party, or the Court on its own motion can request the appointment of a Guardian ad Litem. That person's sole responsibility is to advise the Court from the perspective of the best interest of the child. Do not be hesitant to request a Guardian ad Litem in any case it appears to be appropriate. However, a caveat is in order here as the Family Code allows the child's attorney to be appointed as the Guardian ad Litem at a detention hearing in the event the parents or guardians cannot attend.[5] In that scenario, you still have the paramount duty to the **CLIENT'S** wishes at the hearing, even if as a Guardian you think another course is appropriate. This can create a conflict situation that you must try to avoid by timely informing the Court of the conflict.

I had a young man in trouble for drinking under age and after placing him on supervision and reading the conditions (specifically that he could not consume alcohol) the child's father approached the Judge (who was still on the bench filling out the paperwork) to ask if that included when the family went deer hunting, because "they always drank whiskey while deer hunting." In that case, the Judge was swift and firm in telling the father that the supervision rules meant exactly that. Subsequently, at a later violation of probation hearing, a Guardian ad Litem was appointed as there was an apparent lack of adequate adult supervision and guidance in the household. Another instance involved two brothers that were being sent to alcohol/drug rehabilitation inpatient treatment. Prior to their reporting to the rehabilitation facility on a Monday, the Judge allowed them to spend the weekend at home to make any final necessary arrangements. Over that weekend, their mother threw them and their friends a "keg party" to send them off properly. In that case, a Guardian ad Litem was appointed for any later hearings due to the lack of parental responsibility and appropriate guidance. I am sure that all juvenile practitioners have had similar experiences and have petitioned the Court for a Guardian ad Litem for neutral and appropriate guidance.

When you are representing juveniles, it becomes important to utilize the services of many professionals to obtain the best result. Remember, it takes a Village to raise a child.[6] The front line professionals involved are the Juvenile Probation Officers and Department.

They gather and provide the bulk of the information provided to you and the Court in determining the best course for any particular child. You need to be involved in the process of obtaining the pertinent information as early as possible to best serve your **CLIENT**. If there are specific individuals (ie., family, teachers, neighbors, etc.) that would help shed light on the child's situation, let the Probation Officer know as soon as possible to allow that input. If the child has mental issues, let the Probation Officer know as soon as possible to obtain the information necessary to make appropriate recommendations for the child. If the child had mental issues, you must be aware of your duty to pursue any relevant Fitness to Proceed procedures necessary to protect the **CLIENT.**[7]

In this light, any attorney that practices any Juvenile Law should join the Juvenile Law Section of the State Bar of Texas.[8] The cost is minimal and the benefits are substantial. As a member you receive quarterly newsletters

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[4] TXFAMILY CODE, 51.11

[5] TXFAMILY CODE, 51.11

[6] See book by H. Clinton

[7] TXFAMILY CODE, CHAPTER 55

[8] juvenilelaw.org

updating you on the changes and developments in the Juvenile Law field. Additionally, the section notifies members of seminars that are invaluable in keeping up to speed when practicing Juvenile Law. Probably the most important aspect of membership comes from the contacts statewide with other Juvenile Law Practitioners involved in the section. When a specific problem arises that you are uncertain how to handle, help is only a telephone call or e-mail away from another section member. The camaraderie amongst the section members is truly unique.

The section webpage (juvenilelaw.org) also has a section with forms that can be downloaded and utilized, as needed. Additionally, all prior seminar papers are on the webpage for help and research when needed.

If it appears that the child might come under the protection of Chapter 55, you must be able to recognize and request the appropriate evaluation for the **CLIENT**. A caveat is necessary here, as this recognition may be contrary to the child's wishes and specific directives. If you find yourself in this situation, it would be a good time to request a Guardian ad Litem to make the evaluation request to the Court so as not to place yourself in a conflict with the **CLIENT'S** directives. However, if the Court does not or will not appoint a Guardian ad Litem, you still have the duty to bring the Fitness to Proceed issue before the Court (most often the Juvenile Probation Officer can and will do this so you do not have to).

Otherwise, do not hesitate to utilize the services of any appropriate resource of expert. Be creative in investigating possible options for the **CLIENT** that might be better than what has been recommended by the Juvenile Probation Officer. Often an appropriate placement might be located in another part of the state, but the placement does not have a contract with your county. The placement facility might be willing to give your **CLIENT** a reduced rate (as the first placement from your county) in order to try to obtain a contract with your county for future referrals (remember the drug dealer's adage, "the first one is free"). Do not be afraid to ask and to present the options to the Juvenile Probation Department, Prosecutor or Court. Most often, a placement with a relative in another jurisdiction can satisfy the State's desire to rehabilitate the **CLIENT** (in all but the worst fact situations).[9] Do not fall into the trap that we have all heard, "but that is the way we always have handled this type of case here before". **BE CREATIVE!!**

The type of proceeding is also important in how you ethically represent the **CLIENT**. In a detention hearing, the Court looks to five criteria to determine whether to detain or release the **CLIENT**.[10] Any testimony given by the **CLIENT** at that hearing cannot be used against them in future proceedings (except perjury). Therefore, it can be a good practice, both legally and practically, to let the **CLIENT** take the stand in a contested detention hearing and explain to the Judge why they should be released instead of being detained. Sometimes, the **CLIENT** can convince the Court that release would be appropriate and in any event the Court gets to hear the **CLIENT**, their maturity level and the **CLIENT** begins to recognize the seriousness of the procedures. Sometimes a release on conditions can be accomplished at a detention hearing (or soon thereafter). The specific conditions are tailored to the **CLIENT'S** situation, but are usually very similar to the rules of supervision. There have been several situations where the **CLIENT** has been released on conditions and no subsequent adjudication or disposition has occurred due to the **CLIENT'S** satisfactory performance while released. If the **CLIENT** is detained, it will be for ten (10) working days at a time (if the county of jurisdiction does not have a securedetention facility the subsequent detention periods are for fifteen (15) working days). During that time, the Probation Department can release the **CLIENT** with or withoutconditions until a subsequent Court date is set. Therefore, in the event your **CLIENT** is detained, explain to them that their good behavior in detention can result in an early release from detention. In most counties, short-term detention space is limited, so if there is a rash of juvenile delinquency, sometimes a child in detention for a minor offense will be released to make room for a child with more serious allegations.[11]

In some counties (and in increasing numbers) you will find a type of restorative justice program similar to mediation. The program may go by different names, but in essence it allows the juvenile offender and the victim to be brought together with a neutral third party to attempt to resolve the behavior without the necessity of a formal juvenile proceeding. This procedure is normally utilized for first time offenders in an attempt to allow the offender to recognize that their behavior needs to be addressed and modified, because it affects others. Typically, the offender and the victim will get together voluntarily after a referral from the Juvenile Probation Office to discuss the situation. The juvenile must admit to the behavior as a condition to utilizing this procedure. A resolution might involve restitution, community service, behavioral counseling and the juvenile's writing a paper appropriate to their behavior and allegations. Minor shoplifting, criminal mischief, graffiti, curfew violations and certain minor drug and alcohol

[9] What we used to call a "float"

[10] TXFAMILY CODE 54.01

[11] Or the "sausage tube" criteria

offenses are examples of the types of cases normally referred to this kind of procedure. Keep in mind that this procedure is designed to be flexible, so do not hesitate to suggest it, if at all appropriate.

The Adjudication Hearing is another time to be creative for your client. In situations with older clients (those who have turned seventeen (17) before the adjudication) sometimes an adjudication only hearing can be negotiated. This allows the State to have the behavior documented and preserved for future use in appropriate adult proceedings, but avoids any disposition consequences for the **CLIENT**. If the **CLIENT** does not get in any future criminal trouble, it effectively puts the matter to rest for them. Another obvious method involves negotiating a lesser charge for adjudication. It is always better to be adjudicated for a misdemeanor grade offense than a felony one, particularly in light of any future possible TJJD (or whatever it is called now) commitment. A non-assaultive adjudication is always better than an assaultive adjudication for future use against the **CLIENT.**

Sexual offenses create an entire area for negotiation. The effect of a sexual adjudication can be lessened by the dispositional decision concerning sexual offender registration (either not ordered, deferred or limited registration). However, there is a Federal law (originating from the Adam Walsh case) that will mandate registration for all offenders, both adult and juvenile (over the age of 14). Currently, Texas has opted not to participate in this registration requirement, but there is no guarantee that it will not be enacted in the future in Texas. Therefore, it will be very important to the **CLIENT** that any adjudication is not for a sexual offender registration eligible offense. The sexual offender registration can create insurmountable problems for the **CLIENT** for many years to come. Additionally, even after the registration requirement concludes, the information has already been disseminated and will be impossible to retrieve or cap.[12] This means that either you negotiate a non-sexual adjudication for the **CLIENT** or you have to try the sexual allegation to the fullest extent allowed.

The Disposition Hearing also allows you to exercise your legal and negotiation skill on behalf of the **CLIENT**. If the **CLIENT** is to be placed on supervision, try to get the conditions tailored to the **CLIENT'S** specific needs. Official probation is always better than commitment to a secure facility or TJJD, so sometimes an agreement can be reached for probation in lieu of placement with very strict conditions (ie., intensive supervision, electronic monitoring, restitution, boot camp, etc.). In the event placement outside the home is necessary, always try to negotiate the least restrictive environment possible for the **CLIENT**. Placement options were discussed earlier and no stone should be left unturned in investigating the possible placements for your client, keeping in mind the specific needs of your **CLIENT**.

If a commitment to TJJD in inevitable, be sure to counsel the **CLIENT** on the program. TJJD can keep a child until they reach nineteen (19) before they have to be discharged. Also, be mindful of the required findings that the Court has to make prior to the removal of any juvenile from the home to a placement. Make sure the appropriate findings are made prior to the removal and object if the requisite findings are not present and advocate for something less than removal from the home. If the **CLIENT** is sent to TJJD or other placement, make sure to stress that importance of "working" the program to gain the utmost benefit and earliest release possible. In a lot of placements there are educational and vocational opportunities available that need to be taken advantage of to help in the **CLIENT'S** future.

Another available placement is under a determinate sentence to TJJD. This type of placement places a child in the custody of TJJD for a specific period of time to complete their program successfully and be discharged within their system or to be transferred to TDCJ-ID at a future date. A determinate sentence is a valuable tool, both for the State and the **CLIENT** as it allows the child to still have the protection of the Juvenile System and the State to have a specific punishment available for a serious offender.

The last available option in the Juvenile System takes the matter out of the Juvenile System and makes it an adult offense. The Discretionary Transfer or Certification process is the last resort for juveniles.[13] The procedure effectively makes the behavior that was committed as a juvenile to be handled as an adult criminal matter. This procedure requires specific pleadings and findings before the matter can be transferred. As counsel, it is incumbent that all pleadings be reviewed and procedures scrutinized before sending a child into the adult system. There are times that the **CLIENT** wants to be certified as an adult.Specifically, an adult can obtain a bond and will still be eligible for probation. So, as counsel, if the **CLIENT** requests certification or does not want to resist the procedure, be aware of your job as attorney. Counsel them accordingly, but then do your job in theTransfer Hearing and be a strong advocate for a reasonable bond or plea bargain after certification.

In the event of an adjudication and disposition you must consider the availability of an appeal. Everything in the Juvenile System is subject to a appeal, just as it is in the Adult system. You need to be aware of the appellate process and inform the **CLIENT** of its ramifications and when an appeal is waived (by specific waiver or upon a successful

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[12]It is impossible to put the "smell" back in the skunk

[13] TXFAMILY CODE, 54.02

plea agreement).[14] If so requested, you must be willing and able to prosecute the appeal as vigorously as the initial defense. If you are unable to do so, inform the **CLIENT** so they can obtain appropriate appellate counsel, either by retaining or by appointment.

The last and probably one of the most important areas to remember is the effect of a Juvenile record in the future. Even minor Juvenile offenses can have a lasting and permanent effect on the **CLIENT**. Therefore, you must be aware of the sealing and non-disclosure provisions in the law. At the conclusion of the procedures be sure to explain to the **CLIENT** the availability of the sealing and non-disclosure procedures.

The bottom line is this: **BE AN EFFECTIVE ADVOCATE FOR YOUR CLIENT AND ALWAYS FIGHT THE GOOD FIGHT!!**

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[14] TXFAMILY CODE, CHAPTER 56