

*ETHICS IN JUVENILE CASES*  
**THE DEFENSE PERSPECTIVE**

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# ETHICS IN JUVENILE PROCEEDINGS

## 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.

### **3. CONCLUSION**

The ultimate responsibility of the practitioner in juvenile cases is to insure that the respondent receives competent representation within the parameters of the ethical guidelines for the attorney. 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.