



Ethical Considerations in Juvenile Court: Child Participation and Representation

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Learning Objectives

- Recognize the ethical obligations that are required for and the unique challenges inherent in the representing of children
- Emphasize the importance of the child's participation and voice in his/her case
- Recognize the court's role in ensuring high-quality representation



Representation – How will this training apply to you?

- Adversary Counsel
 - Stated Interest
- Guardian ad Litem
 - Best Interest
- District Attorney/Corporation Counsel
 - Best interest of the agency (in acting in the child's best interest)
 - Legal Interest, potentially
 - Child as victim



What about judicial officers?

- Best Interest
 - Legislative intent
 - § 48.01(1): In construing this chapter, the **best interests** of the child or unborn child shall always be of paramount consideration.
 - CHIPS, UCHIPS, and TPR requirements
 - Ability of the court to act as intake worker
 - § 938.01(2)(f): To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's **best interest** and protection of the public, by allowing the court to utilize the most effective dispositional option.



What about judicial officers?

- Holding accountable the attorneys who practice before you
- GAL oversight function of the court
 - *Paige KB v. Molepske*, 580 NW 2d 289 - Wis: Supreme Court 1998.
 - In overseeing the conduct of a GAL, the circuit court plays a vital role, for in a custody dispute, the circuit court must be the vanguard for the best interests of the child. Accordingly, the circuit court must not idly wait for or blindly rely on a GAL's recommendation. Rather, the court, at each stage of the proceeding, should inquire into the method of analysis utilized by the GAL, the time and effort expended by the GAL, and the reasons supporting the GAL's actions and recommendations.



The (Very) Basics

- SCR 20:1.1 – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Seems pretty straightforward...
- End of presentation! Thank you all for attending!



Representing Children and Juveniles

- The Wisconsin Supreme Court Rules (SCR) recognize and distinguish the differences in representing children and juveniles
- SCR incorporates many of the ABA Model Rules and associated comments, including many distinguishing practice for children and juveniles



All “Competent Representation” is Not Equal

- Representing children is inherently different
 - How they interpret, respond to, and provide information is different than adults
- Communication is key...
- ...SCR 20:1.4 – Communication, to be exact:
 - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Communicating with the Child

- ABA Comment 6 to Rule 1.4
 - *Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.*
 - ...fully informing the client according to this standard may be impracticable, for example, where the client is a **child** or suffers from diminished capacity (emphasis added). *See Rule 1.14.*



Capacity of the Child

- SCR 20:1.14 – Client with Diminished Capacity
 - (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of **minority**, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client lawyer relationship with the client.



Capacity of the Child

- ABA Comment 1 to Rule 1.14
 - When the client is a minor or suffers from a diminished mental capacity...the ordinary client-lawyer relationship may not be possible in all respects. [Nonetheless,] a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.
 - *For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody* (emphasis added).



Capacity of the Child

- ABA Comment 6 to Rule 1.14
 - In determining the extent of the client's diminished capacity (including the cognitive and emotional development of a child/juvenile –ed.), the lawyer should consider and balance such factors as:
 - the client's ability to articulate reasoning leading to a decision,
 - variability of state of mind, and
 - ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.
 - In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.



Capacity of the Child

- Use other resources to gain insight into the capacity and development of the individual child/juvenile:
 - Permanency plans
 - Service providers
 - School records
 - Evaluations
 - Talk to caseworkers, teachers, family members
 - While maintaining confidentiality



Capacity of the Child

- Trauma history must be considered
- Building an attorney-client relationship with children/juveniles in CHIPS, JIPS, TPR, and delinquency will have added challenges:
 - Impaired sense of safety
 - Lack of trust
 - Impaired communication, ability to process information and make decisions
 - Inability to regulate emotions



What does competent communication with a child/juvenile client look like?

- At the most basic, it means explaining the rights of the child/juvenile:
 - To be in court (or not, when applicable)
 - To testify (or not)
 - To meet the judge
 - To be seen and heard and of course their right
 - To have the attorney speak on his or her behalf



What does competent communication with a child/juvenile client look like?

- SCR 20:2.1 – Advisor
 - In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.
- You have an obligation to *candidly* advise regarding your representation
- But be careful not to be judgmental of the child's decision



Trauma-Informed Representation

- Boundaries are the foundation
 - A sense of professional identity and self-definition that has consistency and cohesion over time
 - The framework within which the lawyer/client relationship occurs
 - The line between the self of client and self of lawyer
 - A clear understanding of the limits and responsibility of your role



Trauma-Informed Representation

- Boundaries:
 - Provides a sense of safety
 - Reduces anxiety about roles and expectations
 - Provides a baseline for clients to determine reliability
 - Establishes a sense of predictability
 - Decreases likelihood of re-traumatization
 - Models for the client healthy communication and interaction
 - Prevents “rescuing” or dependency that ultimately leads to loss
 - Increases well-being of the lawyer



Trauma-Informed Representation

- Effect of poor boundaries:
 - Potential for increased stress or re-traumatization to the client
 - Poor decision-making ability by client; deference to the attorney
 - Decreased attorney effectiveness
 - Secondary trauma
- Important to clearly state the boundaries at the beginning of the attorney-client relationship
 - Children WILL test boundaries—it is what they do, it is how they develop



Being a Diligent Lawyer

- SCR 20:1.3 – Diligence
 - A lawyer shall act with reasonable diligence and promptness in representing a client.
 - Penalty on the field: using a word to define itself! 5 yard penalty and loss of down!



Being a Diligent Lawyer for a Child

- Wisconsin SCR does not address
- ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases, C-1 to C-6 define diligent representation to include:
 - Meet with the child and establish a relationship
 - Conduct thorough, continuing, and independent investigations of the child's case and circumstances
 - File pleadings for services and visitation
 - Request services to meet the individual needs of your child client—even when no hearing is filed—through informal or formal means
 - Ensure a child with special needs receives appropriate services to address those special needs
 - Negotiate settlements to seek "expeditious resolution of the case," including using mediation
- ABA also promulgates standards regarding representation of parents and of the child welfare agency



GAL Requirements in CHIPS & JIPS Cases

- Under §48.235(3)/§938.235(3), unless granted leave by the court:
 - Meet with the child (or trained designee)
 - Assess the appropriateness and safety of child's environment (or trained designee)
 - If child old enough to communicate, interview the child and determine the child's goals and concerns regarding his/her placement (or trained designee)
 - Make clear and specific recommendations to the court
- See Statement of Guardian ad Litem, JD-1799



Poll

- In your primary county of practice, how frequently do children (**12 years or older**) appear in court in CHIPS cases?
 - Routinely
 - Occasionally
 - Rarely



Poll

- In your primary county of practice, how frequently do children (**under 12 years old**) appear in court in CHIPS cases?
 - Routinely
 - Occasionally
 - Rarely

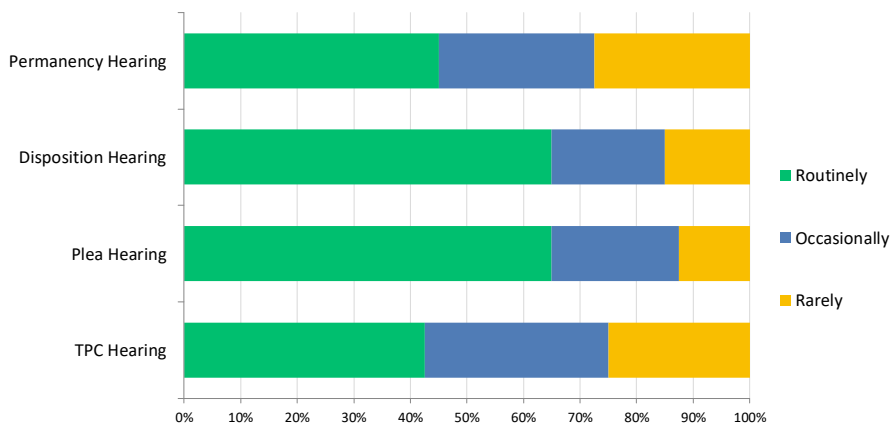


Current Wisconsin Practice

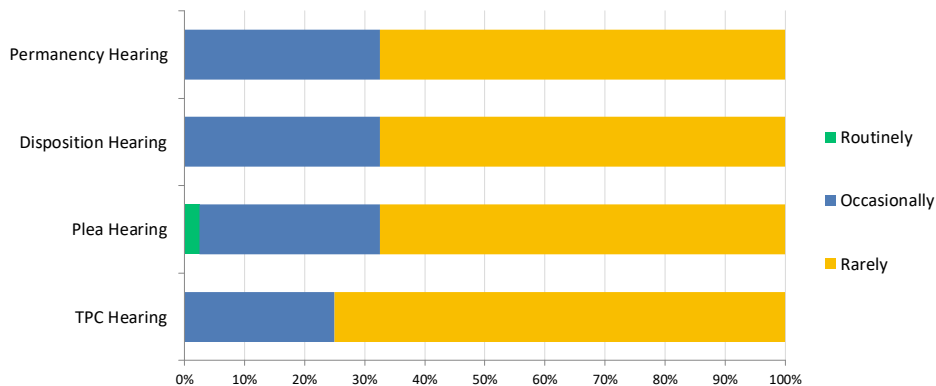
- Juvenile Court Practice Survey (January 2020)
 - Survey sent to juvenile clerks across the state regarding juvenile court practices.
 - Some questions related to children attending hearings.
 - Received responses from 41 counties.



How frequently do children (12 years or older) appear in court in CHIPS cases?



How frequently do children (under 12 years old) appear in court in CHIPS cases?



Wisconsin Statutory Requirements

- §48.299(3) – If the court finds that it is in the best interest of the child, and if the child’s counsel or guardian ad litem consents, the child may be temporarily excluded by the court from a hearing on a petition alleging that the child is in need of protection or services. If the court finds that the child under 7 years of age is too young to comprehend the hearing, and that it is in the best interest of the child, the child may be excluded from the entire hearing.
- §48.38(5)(bm)2 / § 48.38 (5)(c)2 – If the child’s permanency plan includes a statement indicating that the child’s age and developmental level are sufficient for the court/panel to consult with the child regarding the child’s permanency plan or if the court/panel determines that consultation with the child would be in the best interests of the child, the court/panel shall consult with the child, in an age-appropriate and developmentally appropriate manner, regarding the child’s permanency plan and any other matters the court/panel finds appropriate.



Federal Requirements

- The 2006 Child and Family Services Improvement Act requires:
 - “procedural safeguards to be put in place to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.”



Research

- Children who attended their court hearings were more likely to report they trusted the judge to do what was best for them than children who did not attend their hearings.
 - They also felt that the judge knew enough to make the right decisions.
- The children who did not attend their court hearings were not as convinced the judge knew enough information about their case.

Weisz, V., Wingrove, T., Beal, S., Faith-Slaker, A. (2011). Children's participation in foster care hearings.
Child Abuse & Neglect, 35(4), 267-272.



Ethical Requirements

- To provide competent (20:1.1) and diligent (20:1.3) representation of a child, one must effectively communicate (20:1.4) with the child client, including regarding his/her rights; taking into account individual capacity (20:1.14)
- This right includes the right to be heard (even if this communication is non-verbal); therefore, the child should be in court (even if only briefly) whenever possible, unless the child makes the decision not to appear



What about the role of the judge?

- SCR 60.02 A judge shall uphold the integrity and independence of the judiciary.
 - An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. This chapter applies to every aspect of judicial behavior except purely legal decisions. Legal decisions made in the course of judicial duty on the record are subject solely to judicial review.



What about the role of the judge?

- SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently.
 - The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.



What about the role of the judge?

- Basically: be impartial and hold yourself (and others) to a high ethical standard
- A philosophical issue re: role of judge
 - Passive
 - Traditionalist viewpoint
 - Judge as decision-maker only
 - Active
 - Using the judicial position to impact court practice
 - Neither is explicitly endorsed in the Code of Judicial Conduct (SCR 60), except...



The Case for an Active Judiciary

- SCR 60.04(1)(g)6.
 - A judge may initiate, permit, engage in or consider ex parte communications knowingly waived by a participant when the judge is assigned to a therapeutic, treatment or problem-solving docket in which the judge must assume a more interactive role with participants, treatment providers, probation officers, social workers, prosecutors, defense counsel, and others.
- Juvenile court is the original problem-solving court!



The Case for an Active Judiciary

- Comment to SCR 60.05 – A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
 - As a judicial officer and person specially learned in the law, *a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal **and juvenile** justice* (emphasis added).



Judicial Considerations for Children in Court

- Regardless of whether a court prescribes to an active or passive role:
 - A child's presence at each hearing provides the judge with an opportunity to be as fully-informed as possible to make important decisions regarding the child's safety, permanency, and well-being.
- In-court observations of the child help to understand the reports and recommendations made by the various stakeholders.



Judicial Considerations for Children in Court

- Benefits to having children in court:
 - Infant or Toddler
 - The judge can see how the young child interacts with parent/caregiver.
 - Parent and child have an opportunity to visit together if the child is placed outside the home.
 - Child / Youth
 - The judge can observe the strength of the relationship between the parent and child.
 - The judge can emphasize how quickly the child is growing up and how important the parent's behavioral changes are for the child to be returned home or obtain permanency.
 - All Children
 - Courtroom observations, in addition to the information provided by the parties, can also aid the judge to make informed decisions about placement, visitation, or services.



Older Youth

- They want to be there!
 - Helps youth feel their opinion matters
 - Lets youth know what is going to happen to them
 - Allows youth to voice their opinion or ask questions
 - Involves youth in the decision-making process
 - Judge can view youth interaction with other stakeholders
 - Youth can hear directly from the judge
 - Judge can hear directly from the youth



Supporting the Right to Be Heard: Transportation

- A caseworker, foster parent/caregiver, CASA, or another appropriate supportive person can provide transportation
- The agency can work with parents and relatives to provide transportation
- The agency can also ensure transportation by including it as a contracted responsibility for foster parents or service providers
- Some jurisdictions have enacted a policy to require the child welfare agency to transport the child to court
- The child's guardian ad litem or adversary counsel also file a motion and order to transport the child to court
 - And should, if not otherwise being accounted for



Supporting the Right to Be Heard: Scheduling

- Scheduling hearings before/after school hours for school-aged children
- School holidays or teacher in-service days
- Scheduling the next hearing at the end of each hearing can help to ensure proper accommodations are made regarding the child's schedule
- If the court is running behind schedule, judges should make an effort to call cases with children present first
- Utilize technology to allow a child to participate via video (i.e.-Zoom) from their placement/home or school to avoid disrupting the child's schedule



A brief interlude about remote hearings...

- No more meeting in the hallway before court, for better or worse
 - Attorneys should be sure to utilize the same technology they use for remote court, whenever possible, to meet with child/juvenile clients before court
 - Judges should ensure that the child/juvenile has consulted with the attorney prior to the hearing
- Clear expectations are the best way to effectively use remote hearings
 - Court should make clear at the beginning of each hearing what the purpose of the hearing is (and is not)
 - When scheduling the next hearing in court, also state what is expected to occur at that hearing, even if on a very basic level



Poll

- As a result of remote hearings in your primary county of practice, **parents** have appeared at juvenile court hearings:
 - More Frequently
 - No Change
 - Less Frequently
 - N/A – No Remote Hearings



Poll

- As a result of remote hearings in your primary county of practice, **children 12 and older** have appeared at juvenile court hearings:
 - More Frequently
 - No Change
 - Less Frequently
 - N/A – No Remote Hearings



Poll

- As a result of remote hearings in your primary county of practice, **children under 12 years old** have appeared at juvenile court hearings:
 - More Frequently
 - No Change
 - Less Frequently
 - N/A – No Remote Hearings



Supporting the Right to Be Heard: Partial Hearing Appearance

- A hearing can be bifurcated to allow the child to be heard, then excused for the court to discuss the parent's progress regarding conditions for return and any barriers (drug use, mental illness, or incarceration)
 - Parent's private issues may be detrimental for the child to hear and could reignite trauma
 - But that's not an excuse to exclude the child
- If a child is not comfortable attending court, the child can also meet with the judge in chambers, without parents present, with attorneys for parties and the court reporter



Supporting the Right to Be Heard: Child Unable to Appear

- If a child is unable to or chooses not to attend the court hearing:
 - The child can write a letter to the judge to allow his/her voice to be heard
 - Should be advised that they may do so
 - A disclaimer must be made to the child that the letter will be shared with all parties
 - Say who “all parties” includes



SCR 20:1.6 – Confidentiality

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).
- No express exceptions re: children/juveniles
 - Parent/guardian



Exceptions to Confidentiality

- SCR 20:1.14 – Diminished Capacity
 - (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.



Exceptions to Confidentiality

- SCR 20:1.14 – Diminished Capacity
 - (c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6 (confidentiality). When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



SCR 20:4.2 – Communication with Person Represented by Counsel

- (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- This includes children with a guardian ad litem



SCR 20:4.2 – Communication with Person Represented by Counsel

- *Disciplinary Proceedings Against Kinast*, 192 Wis.2d 36, 530 N.W.2d 387 (1995).
 - Rule 4.2 “protect[s] litigants from being intimidated, confused, or otherwise imposed upon by counsel for an adverse party”
 - The court stressed that children are just as entitled to that protection as adult litigants



SCR 20:4.2 – Communication with Person Represented by Counsel

- *Kinast* has been interpreted outside of Wisconsin to also mean that a child represented by a guardian ad litem has the right to consult with another attorney
 - *Auclair v. Auclair*, 730 A. 2d 1260 - Md: Court of Special Appeals 1999.
- If the child has both a GAL and adversary counsel, each holds the duty of confidentiality separately



Resources

- ABA Judicial Bench Cards
 - https://www.americanbar.org/groups/public_interest/child_law/project-areas/youth-engagement-project/resources/
- ABA Practice Standards
 - https://www.americanbar.org/groups/public_interest/child_law/resources/practice-standards/
- CCIP Training Website
 - <https://wicciptraining.com/>



Please take a few moments to complete
the training evaluation at:

<https://www.surveymonkey.com/r/wiccupethics>

Thank you for attending

