



Legal Ethics in Child Welfare Cases

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Please note that the information contained in this presentation is not meant to be construed as legal advice.

Any guidance provided should not override a judge’s decision and authority.

Questions are welcome; however, CCIP is unable to provide input on individual cases.

Thank you!

Continuing Education Credits

Judges & Court Commissioners

- CCIP will report .41 credits to Office of Judicial Education using Zoom attendee report.
- No Certificate of Attendance to complete.

Attorneys

- Approved for 1.5 credits, including Ethics & Professional Responsibility (EPR) credits, GAL-Minor, and GAL-Family.
- Credits based on attendance for full 75 minutes.

For accurate attendance reporting, please ensure that your Zoom screen name reflects your name.

If you cannot change your screen name, email kristen.wetzel@wicourts.gov following the training.

Rules of Professional Conduct for Attorneys (covered in today's training)

- Scope of representation – SCR 20:1.2
- Advisor – SCR 20:2.1
- Competence – SCR 20:1.1
- Communication – SCR 20:1.4
- Diminished capacity – SCR 20:1.14
- Diligence – SCR 20:1.3
- Confidentiality – SCR 20:1.6
- Candor toward the tribunal – SCR 20:3.3
- Conflict of interest – SCR 20:1.7



Supreme Court Rules

- 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



Representation in Juvenile Court



Representation in Child Welfare Proceedings

- Adversary Counsel
 - Stated Interest – § 48.23
- Guardian ad Litem
 - Best Interest – § 48.235
- District Attorney/Corporation Counsel
 - Interests of the public - § 48.09
 - Legal interest, potentially: child as victim



District Attorney/Corporation Counsel – Special Considerations

- Different prosecutor practice county-to-county
 - CHIPS: 42% District Attorney, 58% Corporation Counsel
 - TPR: 36% District Attorney, 52% Corporation Counsel, 12% Contract Attorney
- Is there a conflict of interest when disagreement between county agency and prosecutor?
 - How are the agency's interests represented when disagreement?
 - Is there a difference when it is the DA vs. Corporation Counsel?



What about judicial officers?

- Code of Judicial Conduct – SCR 60
 - “A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially”
 - Reporting violations of rules of professional conduct by attorneys
- Oversight function of the court
 - GAL oversight different: *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.



Judges Meeting with Children in Chambers

SCR 60.04 - (g) A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:

4. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

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.



Best Interest in Child Welfare Cases

- § 48.01(1): In construing this chapter, the **best interests** of the child or unborn child shall always be of paramount consideration.
 - CHIPS, UCHIPS, guardianship, and TPR requirements
 - Ability of the court to act as intake worker



Rules of Professional Conduct for Attorneys



Elements of a Client-Attorney Relationship

- Scope of Representation
- Advisor
- Competence
- Communication
- Diligence
- Confidentiality
- Candor toward the Tribunal



Scope of Representation – SCR 20:1.2

- (a) Subject to paragraphs (c) and (d), a lawyer **shall abide by a client's decisions concerning the objectives of representation** and, as required by Rule 1.4, **shall consult with the client as to the means by which they are to be pursued**. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.



Role of Advisor – SCR 20:2.1

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.



**BREAKOUT ROOM
DISCUSSION**

The Basics of Representation – Competency

- 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...



Key Elements of Quality Representation: Communication

SCR 20:1.4

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent ...
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



All “Competent Representation” is Not Equal

- Representing children is inherently different
 - How they interpret, respond to, and provide information is different than adults
- 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. See Rule 1.14.



Diminished Capacity

- 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

- There are resources available to assist in engaging with children/juveniles and to determine whether they are developed in-line with chronological age.
 - The American Bar Association developed Judicial Bench Cards to Engage Children in the Courtroom.
 - 0-1 years old
 - Toddlers (1-3 years old) and Preschoolers (3-5 years old)
 - School-age children (5-11 years old)
 - Adolescents (12-15 years old)
 - Older Adolescents (16+ years old)



Key Elements of Quality Representation: Diligence

- Diligence - SCR 20:1.3
 - A lawyer shall act with reasonable diligence and promptness in representing a client.
- Wisconsin SCR does not address how to be diligent lawyer for a child.



Being a Diligent Lawyer for a Child

- ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases, 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 created standards regarding representation of parents and of the child welfare agency



GAL Requirements in CHIPS Cases

- Under §48.235(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



Key Elements of Quality Representation: Confidentiality

SCR 20:1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.



Key Elements of Quality Representation: Confidentiality

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably likely death or substantial bodily harm;
- (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (3) to secure legal advice about the lawyer's conduct under these rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law or a court order; or
- (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.



Candor toward the Tribunal – SCR 20.3.3

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.



Candor toward the Tribunal – SCR 20.3.3

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.





BREAKOUT ROOM DISCUSSION

Conflict of Interest



Conflict of Interest Current Clients – SCR 20:1.7

- (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.



Conflict of Interest Current Clients – SCR 20:1.7

- (b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in a writing signed by the client.



Additional Discussion Topics



Resources

- ABA Judicial Bench Cards
 - www.americanbar.org/groups/public_interest/child_law/project-areas/youth-engagementproject/resources
- ABA Practice Standards
 - www.americanbar.org/groups/public_interest/child_law/resources/practice-standards
- CCIP Training Website
 - <https://wicciptraining.com/>
- Ethics Hotline
 - www.wisbar.org/formembers/ethics/Pages/Ethics-Advice.aspx



Thank you!

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