



National Juvenile Defender Center

Juvenile Defense: the Art of Advocacy

The Role and Ethics of the Juvenile Defender

Pathways for Promising Futures Conference
June 13, 2012
Dover, Delaware

Mary Ann Scali, JD, MSW
Deputy Director
National Juvenile Defender Center

ensuring excellence in juvenile defense & promoting justice for all children

Role of Juvenile Defense Counsel



- ▣ Requires a Complex and Challenging Skill Set

Gauge audience – full time juvenile defense, years of experience

What makes juvenile defense a specialized area of practice?

Differences for defenders in PD offices vs. K attys?



Juvenile Defense is a SPECIALTY

- ▣ Knowledge and courtroom skills of a criminal defense attorney PLUS specialized practice considerations:
 - Interrogations
 - Confessions
 - Competency
 - Detention
 - Disposition
 - Expungement
 - Post-Disposition (appeals, re-entry, etc.)
 - Mens Rea
 - Transfer/Waiver

Specialized hearings – detention, dispo, transfer, juv comp

Reid implications for juvenile interrogations (youth more susceptible to coercion)

Confessions and juveniles interest in conforming to what adults want

Competence – the basis may be different (13 states with juv comp laws)

-- and new law looking at immaturity as equivalent to a disability, i.e.

-- In re Carey 615 NW 2d 742 (Mich Ct App 2000). Says it is possible a juvenile may be unable to understand the proceedings merely because of youthfulness

-- Timothy J v Sacramento County, 150 Cal App 847 (Cal Ct App 2007). Says no significant difference between a an incompetent adult who functions at the 10 or 11 year level due to disability and that of a normal 11 yr old whose development and capacity is not equal to that of a normal adult.

-- In the interest of AB, 2006 Iowa App. LEXIS 189 (Iowa Ct. App Mar 1, 2006) Says that limiting determinations of incompetency to cases where the ability to appreciate, understand, and assist is based on disability would offend due process. (other states, AZ, FL, DC have similar cases)

•Detention, Dispo, Transfer – law is unique to juvenile practice (adult defenders do not do these hearings)

- Expungement and Collateral Consequences (see PA checklist)
- Mens Rea – can be unique for specific intent offenses



Juvenile Defense is a SPECIALTY

- ▣ Knowledge and courtroom skills of a criminal defense attorney PLUS specialized practice considerations:
 - Time Frames
 - Motions
 - Client Interviews
 - Attorney-Client Relationship
 - Parents
 - Collateral Consequences
 - Adolescent Development
 - Special Education
 - Adolescent Mental Health

- Time Frames for hearings are unique to juvenile
- Motions – there are motions for juvenile practice regarding release, shackling, competency that have unique arguments for juvenile
- Client interviews – role of counsel
- Parents
- An understanding of adolescent development
- Knowledge of community based programs
- A firm grasp on the intricacies of mental health AND special education law
- The ability to communicate long and short term collateral consequences of a juvenile adjudication
- Adol development – S. Ct. recognition of

differences (*Roper* slide next)

Adolescent Development

The Supreme Court has said that youth are categorically less culpable than the average adult offender because they:

- ▣ Lack maturity and responsibility
- ▣ Are more vulnerable + susceptible to outside influences (particularly negative peer influences)
- ▣ Are not as well formed in character + personality, and
- ▣ Have a much greater potential for rehabilitation than adults
 - *See Roper v. Simmons*, 543 U.S. 551, 569-570 (2005).

Be careful with this information in court – does not mean children cannot make good decisions – means they need certain conditions to make good decisions:

-Time

-- weighing pros and cons

-Less stress

-E.g. adult can get plea on day of trial – for a child – you cannot do that, they need more time, need to discuss pros and cons and have a thorough conversation about it. Does not mean they will make a bad decision

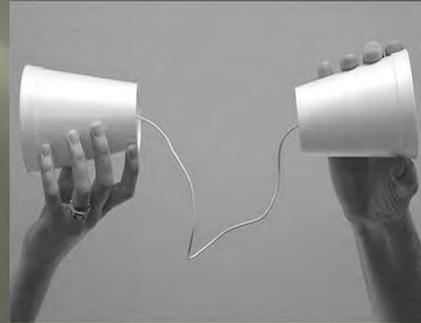
Diminished Capacity/ Adolescent Development

- ▣ MINORITY does not automatically constitute diminished capacity, but does affect the **scope** of the attorney-client relationship

Understanding Adolescent Development

- ▣ Communicating Effectively with Clients
 - Long + short term collateral consequences of adjudication
 - Advise clients on likely advantages + disadvantages
 - Empower clients to make informed decisions about their case

- ▣ Evaluate Clients' Maturity and Competency

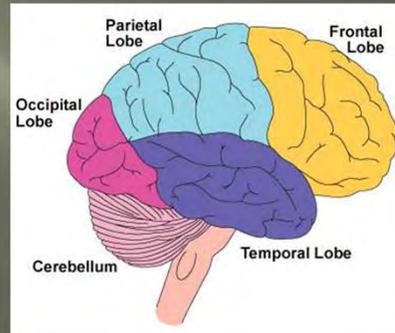


Counsel = teaching how to make effective decisions = modeling good decision-making

Adolescent Development

In light of recent brain research, juvenile defenders must be adept at using

- ▣ Age-appropriate language
- ▣ Specialized interviewing
- ▣ Visual aids
- ▣ And other techniques effective in communicating with children



Children are more impulsive and less able to weigh risks and outcomes

Impulsivity

Sensation seeking

Preference for risk ALL DECREASE WITH AGE

Future orientation

Willingness to delay gratification

Taking more time to think b/f reaction ALL INCREASE WITH AGE

Teens can be frustrating b/c they are so impulsive and don't plan well. There is a practical physical reason for this – the brains of teens are still developing.

The Frontal Lobe – which controls the executive functions (planning, impulse control) is the last part of the brain to mature



Holistic Representation

Juvenile Defenders should assist in ancillary areas of law that intersect juvenile indigent defense, such as:

- ▣ Special Education Advocacy
- ▣ School Disciplinary Matters
- ▣ Immigration
- ▣ Abuse, Dependency & Neglect
- ▣ Public Benefits
- ▣ Housing
- ▣ Expungement

Padilla (397 US 759) decision issues – attorneys have to advise clients when deportation is a possible plea consequence

Describe School fact sheet and the law

SPED –adjudication of offenses related to special education needs requires specialized knowledge and advocacy

Zealous Advocacy

- ▣ Representing Client's Expressed Interests
 - ▣ RPC 1.2(a) abide by client's decisions concerning objective of representation
 - ▣ RPC 1.4(a)(2) consult regarding means to accomplish client's objectives
 - ▣ RPC 1.4(b) explain matters to permit client to make informed decisions
 - ▣ RPC 1.6(a): Duty to seek client's informed consent to reveal information related to the representation

Zealous advocacy is the role of the juvenile defender.

An essential piece of this is expressed interest which is supported throughout the rules of professional conduct.



Representing the Client's Expressed Interests

- *ABA Model Rules of Professional Conduct: Preamble; 1.14(a) Client with Diminished Capacity*
- *1.2(a) Scope of Representation and Allocation of Authority between Client and Lawyer*

NJ adopted ABA model rules of professional conduct in 1984

1.14a 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.

Expressed Interests v. Best Interests



- A Juvenile Defender MUST act as the client's VOICE in the proceedings
 - NOT in accordance with what is in the client's best interests as determined by counsel, the client's parents or guardian, or any court professionals

Hypos:

RP is a 15 year old boy who has been arrested for sexual assault. He does not want to go home because he says he deserves to be punished and asks that you not oppose detention. What do you do?

ANSWER: the issue is really about counseling your client and establishing an effective atty-client rel'p. But ultimately, after you have counseled effectively, if the client wants to go to detention you cannot make an argument against your client's wishes.

Same case, prosecutor files for transfer, this is the first time your client has been arrested and he wants to be transferred. What do you do?

Client wants to live with druggie dad _ from hypo at end



Zealous Advocacy

- *ABA Model Rules of Professional Conduct: 1.1 Competence; 1.3 Diligence*
 - A juvenile defense attorney provides Competent, prompt, and Diligent representation based in:
 - Legal knowledge,
 - Skill,
 - Thorough preparation, and
 - Ongoing training.

Same case with RP – after several conversation with him you think there may be a competency issue.

You have never done a competency hearing before but you file a motion for a competency hearing and are able to secure an independent evaluation. You school up on competency, read the relevant case law, and proceed to hearing. The hearing commences and the prosecutor and the judge immediately begin to speak in competency jargon that you do not understand. You are afraid to tell them you don't understand because you do not want to lose face in court, especially in front of this judge who you recently appeared before and made a faulty detention argument based on irrelevant case law. What do you do?

ANSWER: you ask for a continuance until you can get someone who knows competency to assist you with the proceeding

Duties of Competence + Diligence

- ▣ Include the OBLIGATIONS to:
 - ▣ Investigate
 - ▣ Zealously protect the child's due process rights from arrest through the close of the case
 - ▣ Engage in dispositional advocacy
 - ▣ Access ancillary services

Investigation

- ▣ The duty to investigate obligates an attorney to:
 - ▣ Promptly take the necessary steps to obtain DISCOVERY, including:
 - ▣ Filing discovery requests,
 - ▣ Filing *Brady* motions, and
 - ▣ Filing motions to compel if the prosecutor does not comply with requests





Investigation

- The duty to investigate obligates an attorney to:
 - Conduct independent investigations of, *inter ali*,
 - Allegations against the client,
 - Police conduct
 - Witnesses' backgrounds, and
 - Any and all possible defenses and mitigating factors for disposition
 - Review the evidence in the government's file, pursuing possible exculpatory investigation leads and providing fair and informed assessment of strength's and weaknesses of government's case.

Hypo:

Same case. You are with RP at the initial detention hearing and right before the hearing begins the prosecutor makes you a plea offer. You have not reviewed the facts nor the evidence but RP has said he wants to go detention because he should be punished. You take the offer to RP and tell him that the offer is pretty good.

At this point, what is your duty to investigate?

Protection of Pretrial Due Process Rights

- ▣ Juvenile defense attorneys should file pretrial motions:
 - seeking release,
 - advocating for individualized plans offering the least restrictive set of conditions,
 - that guard against infringement of the client's constitutional rights before and during arrest,
 - that clarify points of law, and
 - that block the admission into evidence of inadmissible or prejudicial information

Protecting Due Process Rights at Adjudicatory Hearings:

- ▣ A juvenile Defender is obligated to:
 - Conduct adjudicatory hearings as adversarial proceedings in which the state bears the burden to prove its case beyond a reasonable doubt.
 - Litigate cases vigorously consistent with the presumption of innocence
 - Litigate aware of the elements of each charged allegation, the lesser-includes for each charge, all possible defenses, and relevant case law
 - Adhere to the rules of evidence
 - Explain the right to testify and help the client identify and weigh the advantages and disadvantages of testifying

Dispositional Advocacy

- ▣ At the earliest opportunity, counsel should investigate disposition alternatives beyond those available and considered by probations, drawing on community-based resources, according to client's wishes
- ▣ Counsel should include and engage child in disposition planning
- ▣ In preparing for disposition, counsel should consult with mitigation specialists, social workers, mental health, special education, and other experts to develop a plan consistent with the client's expressed interests

Juvenile defenders should be aware of all dispositional options and should come to court with an independent defense plan for disposition.



Post-Disposition Advocacy

- ▣ Juvenile defenders have a duty to understand the legal rights to which a client is entitled and the legal options available post-disposition

Review state specific authority for post-dispo representation for states.

Post-Disposition Advocacy

- ▣ A Juvenile Defender is OBLIGATED to:
 - ▣ File timely notices of appeals, writs of *habeas corpus*
 - ▣ Periodically check in with the client, with an eye towards averting any potential problems with the client's successful completion of disposition conditions
 - ▣ Encourage post-disposition review hearings by filing motions to review
 - ▣ Prepare for probation and parole revocation hearings
 - ▣ Help incarcerated clients maintain contact with family
 - ▣ Help client expunge juvenile adjudications from client's record



Duty of Confidentiality and Privilege

- ▣ *ABA Model Rules of Professional Conduct: 1.6 Confidentiality of Information*
- ▣ Juvenile Defenders are bound by attorney-client confidentiality and privilege. This Duty Includes:
 - NO Exception for Parents or Guardians
 - No Exception for Client's Best Interests
 - Private Meeting Space for conducting interviews

Hypo:

In your first full interview with R.P. after he has been detained, after you have spent some time building rapport and eventually start discussing the allegations, he candidly tells you that he touched the complainant on purpose, knew he should not have done it while he was doing it, but he could not help himself. To let him know you're not judging him and to encourage him to continue to be so forthright, you tell him that it is very helpful to you for him to be so candid.

When you start to discuss how it will be important to have his mother's involvement in the case to help him abide by his release conditions, he interrupts you, and, in a rush, says, "Please, please, please do not tell my mom. She keeps asking me and so I told her I didn't do it. Please, you cannot talk to her about this. You can't." You had been planning to ask for him to be placed in an out-patient sex offender treatment program so that he could go home. R.P.'s mother's cooperation in bringing him to and from the program, and in participating in the family counseling component, are critical to whether the judge will allow this change in R.P.'s detention status.

Can you tell R.P.'s mother? Do you?



Client Centered Advocacy

- ▣ Actively seek client's input
- ▣ Convey genuine respect for client's perspective
- ▣ Work to understand client in his/her socioeconomic, familial, sexual orientation or gender identity, and ethnic context

What things do you do that show the client that you represent their interest? What if parent wants something different than the child? What if the parent is paying?

Hypo:

During the course of your investigation, you come to believe that R.P. has a strong defense at trial because all your investigation tells you that R.P. did not have the requisite mens rea to be found involved under the applicable statute. As you get to know R.P., you realize that, although he has some problems, he would never do anything to hurt the complainant. He is very remorseful, but does not think it would be fair for him to plead guilty to a crime when he didn't mean any harm. He would like to go to trial.

R.P. asks you to explain the legal defense to his mother, who is livid to hear you say that R.P. has a chance to win at trial. As it turns out, she knows the complainant's mother, and thinks the right course of action would be for R.P. to apologize, plead guilty, and take his punishment at the next court date.

What do you do? What strategies do you have for addressing these interfamilial issues?



Client Centered Advocacy

- ▣ **Duty of Communication** *ABA Model Rules of Professional Conduct 1.4 Communications*
 - ▣ At every stage of the case, a juvenile defender should keep the client informed of the case's legal progression so that the client is a fully informed and proactive participant in his/her case.

Hypo:

You decided against taking the plea agreement, because R.P. is not competent to plead, and file a motion for dismissal. The court sets a date for a hearing on your motion, at which Dr. Kruh and Nurse Ratchet will testify. In the meantime, the government has hired another expert, Dr. Cy N. Ething, to examine R.P. In the meantime, you have visits scheduled with R.P. to talk with him about his case. R.P. will be expecting you to take time and explain the status of the case to him, as you have been doing since the beginning of the case. But you know that, if you keep R.P. informed about his case, and then he is able to parrot accurate information back to Dr. Ething, it will make him seem competent and his case will go forward.

What, if anything, do you tell R.P. about his case status?



Decision Making

Defenders should enable client to direct the course of the proceedings in *at least* the following areas:

- Acceptance or rejection of Plea offers
- Whether to testify in own defense
- Whether to agree to a specific dispositoinal recommendation
- Whether to coooperate in a consent judgment, diversion or other early disposition plans

Hypo:

RP was ultimately found competent and the case is going to trial. Although RP admits he touched the alleged victim he tells you he meant no harm and thinks the judge will agree with him if he can testify and explain what happened. You know that if RP testifies he will make the case for the prosecution.

What do you do?

Decision Making

- Decisions left to Defense Counsel include:
 - Case strategy + tactics to pursue client's goals, i.e.,
 - Determination of the theory of the case
 - What witnesses to call
 - What motions to file



Hypo: (Based on a real case)

RP sees that all the white kids cases come first on court days, the judge calls the white children Mr. or Miss and the minority children by their first names, the white children get more time for the hearings and the minority youth get rushed out the door. RP asks you if there is any way to get a different judge. You describe a motion for recusal. RP wants you to file a motion for recusal based on the fact that his hearings always come last and the white kids always come first and he thinks the judge is racist.

What do you do?

Duty to Advise and Counsel

- *ABA Model Rules of Professional Conduct: 2.1 Advisor*
- DISPOSITION: counsel advises client on the advantages + disadvantages of each alternative to adjudication including consequences of non-compliance
- PLEA AGREEMENTS: Counsel ensures that client makes well-considered decisions concerning whether to plead or go to trial
 - Counsel promptly relays plea offers and seeks to ensure that client has sufficient time to review the offer with the client
 - Includes a discussion of long-term collateral consequences of a juvenile adjudication or transfer to adult court



Hypothetical

- You have been appointed to represent Jonathon, a 15-year old boy who has been charged with possession with intent to distribute cocaine. Jonathon was arrested on the corner of 1st and Main Street. This is Jonathon's first contact with the juvenile justice system and on the day of his arraignment, Jonathon identifies his father as his guardian. Jonathon is released to the custody of his father with the condition that he not engage in any criminal activity, abide by curfew, stay away from a one block radius of 1st and Main Streets and attend school regularly.

- During your first post-arraignment interview with Jonathon, you see that he has a black eye. Jonathon tells you that his mother died in childbirth and that he was actually raised by his aunt and his older sister. He admits to you that he lied about his father being his legal guardian because he did not want to tell his aunt about the arrest. Jonathon insists that you not contact his aunt or his sister and tells you that he will be living with his father. Jonathon has been in increasing conflict with his aunt and sister who recently discovered that he has been skipping school to hang out with his father. Jonathon loves his aunt and sister very much and this is the first time he has had any conflict with either of them. He admits that he is very sad about that.



Hypothetical (Ctd.)

- With a signed release by Jonathon and his father, you obtain a copy of Jonathon's school records and begin to review his social history. You learn that up until the start of the last academic year Jonathon was an A-B student, had almost perfect attendance and was college-bound. Teachers described him as obedient, polite and respectful at school. This year, Jonathon has missed many days of school and is failing all classes due to mandatory attendance policies.
- Jonathon gives you permission to meet with his father. When you arrive, Jonathon's father is not at home but the father's girlfriend is. During the conversation with her it becomes clear that the father runs a crack house on Main St. You learn from the girlfriend that Jonathon's father punched Jonathon "for getting caught by the police." The girlfriend says that the father "likes to beat up on Jonathon to make him a man, but its all in love." When the father gets home he is very nice to you but tells you that you don't need to meet with Jonathon anymore because he knows what is best for his son. He then tells you that his son will be pleading guilty and will be living with him.
- Despite the father's message, you go find your client, on the corner of 1st and Main. You carefully ask about his relationship with his father. Jonathon says everything with his dad is great and that his father has never hit him. He also tells you that you should call his father if you want any more information about the case and that you don't need to investigate the allegation in this case because he will be pleading guilty.

QUESTIONS

- ▣ Have you violated any ethical rules by going to find your client?
- ▣ Can you talk to Jonathon's aunt/sister?
- ▣ Can you report the abuse to a hotline?
- ▣ Can you have your intern place an anonymous call to the Child abuse hotline?
- ▣ Does it matter that Jonathon denies any abuse by his father and insists that he wants to live with him?

QUESTIONS

- It is clear that Jonathon will have difficult complying with conditions of release if he continues to reside with his father because his father is interfering with school attendance and insisting that he continue to sell drugs around 1st and Main. You know that Jonathon loves and misses his aunt and sister and believe that it would be “best” for him to live there. What can you do about it?

QUESTIONS

- It is also clear that Jonathon would benefit from counseling and therapy, but he tells you he doesn't want to go because he knows his father will call him a "fag." Can you ask the court to order it?



National Juvenile Defender Center

1350 Connecticut Avenue NW, Suite 304

Washington, DC 20036

Phone: 202-452-0010

www.njdc.info