ETHICAL ISSUES IN JUVENILE COURT
JUNE 3, 2005
LAWRENCE J. FINE, DISTRICT COURT JUDGE

Every lawyer who represents juveniles charged with acts of delinquency sooner or later will be faced with an ethical dilemma. Typically it will manifest itself in the situation where a teenage client does not want to accept your good and reasoned counsel but instead insists on taking a course of action that you, as an experienced lawyer, deem disastrous. Your client is young, immature, undereducated and probably receiving advice from all the wrong people. How can you ethically do what is in the best interest of your client when your client's express interest is to the contrary? The great debate rages on.

On December 10, 2004, Mary Ann Scali, Deputy Director of the Juvenile Justice Center in Georgia, testified before the Georgia Public Defender Standards Council on performance standards for juvenile defense representation on behalf of the American Bar Association. Her complete testimony is attached. I would like to focus on the section entitled Role of Counsel.

There is an unequivocal plea for express interest representation of juveniles. For the majority of cases the lawyer will handle, this is absolutely appropriate. In 1967, the United States Supreme Court in In Re: Gault guaranteed juveniles charged with delinquency offenses the due process rights to counsel, notice and opportunity to be heard, confrontation and cross examination, a transcript and the right to appellate

review. Counsel's role is to represent the legitimate interests of the client and to ensure that the client understands the court process and that all of his or her rights are protected. According to the proposed ABA standards, the juvenile should have the absolute right to decide whether to admit or deny the allegations at adjudication, enter into a consent judgment or early disposition plan, be tried as an adult or juvenile, waive a jury trial or testify. I do not entirely agree that this is the only ethical way to represent a juvenile. Our basic fact pattern will illustrate the discussion.

John is a 15 year old child with an IQ of 68 and diagnosed with attention deficit hyperactivity disorder. Let's say that the prosecutor has offered a plea to a misdemeanor which ensures that the case will remain in juvenile court. The DA also says that should John refuse to admit to the misdemeanor, then she will seek a transfer hearing and try John as an adult. In your professional judgment, John should accept the plea. If he is convicted of the class B1 felony, his presumptive range is 192-240 months, mitigated range is 144-192 months and aggravated range is 240-300 months. All sentences must be an active sentence. When you give John your advice, he tells you that he's not admitting to anything and that he wants a jury trial. Ethically, what are your options?

Our ethical provisions, consistent with the proposed ABA rules state that "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 a jury trial and whether the client will testify." Rule 1.2(a)(1) SCOPE OF REPRESENTATION. Comment [4] to that

section states: ´ In a case in which the client appears to be suffering diminished capacity, the lawyers' duty to abide by the client's decisions is to be guided by reference to Rule 1.14." Rule 1.14(a) states, "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." Rule 1.14: CLIENT WITH DIMINISHED CAPACITY

In previous lectures, I have questioned whether this section means that every juvenile is *per se* a client with diminished capacity. After reading the United States Supreme Court decision in Roper v. Simmons, decided on March 1, 2005, I am convinced that every juvenile should be treated as a client with diminished capacity. In Roper v. Simmons, the high court struck down the death penalty for anyone under the age of 18. In his opinion, Justice Kennedy explored the differences between juveniles under the age of 18 and adults. He found three general differences. First, juveniles lack maturity and have an underdeveloped sense of responsibility. Second, juveniles are more vulnerable or susceptible to negative influences and peer pressure. And third, the character of a juvenile is not as well formed as that of an adult. Justice Kennedy concludes that it would be morally misguided to equate the failings of a minor with those of an adult. It would be ludicrous to suggest that because John is only facing 25 years in jail instead of the death penalty that these differences between adults and juveniles is any less applicable. Understanding these differences, can we really expect the immature irresponsible kid who is getting his advice on the streets to make a

reasoned decision regarding his legitimate interests and follow the guiding hand of counsel? Of course not.

Are you ethically bound to advocate for John's express interest for a jury trial? Here, I differ from the ABA proposed rules that would include the child's right to decide whether to have a jury trial or be tried as an adult. In my opinion, the answer is clearly no. In North Carolina, there is no right to a jury trial for a juvenile and interestingly the *Gault* court did not include the right to a jury trial or the right to be tried as an adult in its opinion. The only way a jury trial could be obtained would be to waive transfer to the superior court and be tried as an adult. Without an express statutory or constitutional mandate, the right to a jury trial would fall under the legal or tactical decision that is left to counsel's discretion rather than to the client. Rule 1.2(3) of the Rules of Professional Conduct states, "In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client." Rule 1.2(3): SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

Are you ethically bound to explain to John that he has the right to have the case removed to superior court, be tried as an adult and have a jury trial? The answer to this question is unclear. The proposed ABA standards would unequivocally answer this query "yes". However, a contrary argument can be made. Rule 1.4 of the Rules of Professional Conduct sets out the requirements for communication with clients. However, the commentary opens the door for another interpretation: "Ordinarily, the

information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, 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..." RULE 1.4 COMMUNICATION. Comment [6].

Are you ethically bound to follow John's request to deny the allegations and risk a transfer hearing? Yes. However, that does not mean that you cannot take protective action in an attempt to persuade John that he is making a mistake. Rule 1.14(b) allows the lawyer to 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 or guardian. RULE 1.14(b) CLIENT WITH DIMINISHED CAPACITY. Subsection (c) of this rule allows the lawyer to reveal confidential information about the client to the extent reasonably necessary to protect the client's interest. Comment [3] to this rule states that if the client wishes to have family members or other persons participate in discussions with the lawyer to assist in the representation on behalf of the client, the presence of that other person would generally not affect the attorney-client evidentiary privilege.

If you wish to enlist the services of John's family to help speak with John to persuade him to follow your advice, you should always seek his consent first. You would be able to disclose the plea offer and other facts about the case, which would ordinarily be privileged, to assist their understanding of the basis for your advice. Should a meeting occur with John and family in your office for the purpose of taking protective action, confidentiality should not be waived. "The client may wish to have

family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of other persons generally does not affect the applicability of the attorney-client privilege." RULE 1.14: CLIENT WITH DIMINISHED CAPACITY, Comment [3].

What if John does not consent to having other family members participate in these discussions? There is a formal ethics opinion that would allow the disclosure of confidential information to a family member: "Opinion rules that a lawyer representing minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation." 2003 FEO 7. Should you decide to pursue this course of action, the information disclosed should be to the extent reasonably necessary to protect the client's interest.

In conclusion, even though I now believe that every juvenile charged with committing an act of delinquency is a client with diminished capacity, this does not give the lawyer *carte blanche* to take protective action for the client. Each client's situation must be considered on a case by case basis before the lawyer resorts to taking protective action. Our rules of conduct gives us guidelines for this also: "In determining the extent of the client's diminished capacity, 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." RULE 1.14 CLIENT WITH DIMINISHED CAPACITY, Comment [6].

Client with diminished capacity