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A CHILD AND A CHOICE

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Your client is twelve-years-old and charged with first degree murder as an adult. It is alleged that, without a weapon, he beat a six-year-old female playmate to death for no apparent reason. When examined by a neuropsychologist, the twelve-year-old defendant tested as immature for his age with a below average I.Q. The state makes what appears to be a lenient plea offer for a second degree murder conviction—three years of prison to be served in a juvenile facility, followed by a period of one year community control (house arrest) and ten years of probation.

The defendant's mother is a police officer and an army veteran who served in Desert Storm. The defendant's father lives out of state and, for all practical purposes, is out of the decision-making loop. The defendant's mother seems to be intelligent, concerned, and totally preoccupied with the best interests of her son.

Who should make the decision as to whether this twelve-year-old defendant should take the plea offer or risk a trial with a possible sentence of life in prison without parole? This article is written making the dangerous assumption that no issues of competency as to the child client exist, or that it has already been determined by the court that the child is competent.

Who makes the decision to roll the dice of a trial or accept a plea bargain? In the adult world the answer is simple—the defendant, the person accused makes the decision, with the benefit of advice from hopefully competent counsel. The issue is not so simple when the defendant is twelve-years-old, intellectually and socially immature for his age, and charged in adult court with the most serious crime known to man—the killing of a child.

Logic would seem to dictate that the parent would be calling the shots on what would probably be the most important decision to be made during the child's lifetime. Would the child be better off if a court-appointed guardian helped make the decision? What if the independent guardian's advice is different than that of the parent? Should the lawyer interject himself more into the decision-making process if he represents a child instead of an adult? Should the lawyer insist a plea be taken in the face of overwhelming physical

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evidence, such as an autopsy detailing the victim's injuries as multiple and severe, even if the parent and child insist his acts were not intentional? Should the lawyer back up this insistence by withdrawing as attorney of record if the parent and child refuse to enter a plea?

The *ABA Model Rules of Professional Conduct* and more specifically, rule 4-1.4(b) of the *Rules Regulating the Florida Bar*, require an attorney to explain matters to a client to the extent reasonably necessary to permit the client to make informed decisions regarding representation.¹ However, when the client is a child, this standard can become impracticable. Furthermore, when the child is twelve-years-old and immature for his age with a below average I.Q., the standard may become impossible. Does the parent then become the decision-maker by default? Parents in our society make nearly every important decision in a twelve-year-old's life. However, it is probably a parent's natural instinct to hide terrible consequences from his or her twelve-year-old in a situation where the child may face a sentence of life in prison. It is analogous to a mother deciding not to inform her terminally ill son that he has brain cancer and may die within a matter of months. It is also a parent's natural instinct to believe that his child is incapable of murder and therefore, not deserving of being locked up for any significant period of time.

Rule 4-1.14(a) of the *Rules Regulating the Florida Bar* provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client," even if the normal client-lawyer relationship is impaired because of minority or a mental disability of the client.² Theoretically, a lawyer must place himself between the child and the parent to ensure the decision is the true will of the child, not the parent. It is also important for an attorney representing a child client charged with a serious crime not to blur the professional attorney-client relationship with paternalistic feelings towards the client. It is a natural reaction for an attorney to assume the role of the "protector," grimacing at the thought of his child client serving even one minute locked up in a penal institution. If the attorney allows himself to think "what would I do if this was my child," his advice will likely be clouded by emotion instead of professional judgment.

The rules of professional responsibility do not seem to address the rights of parents to direct representation on behalf of their children, especially in an adult criminal proceeding.³ Generally, it is improper to allow a third party to direct or influence the attorney's exercise of independent judgment or to share confidential information with such person except with

1. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003); R. REGULATING FLA. BAR 4-1.4(b).

2. R. REGULATING FLA. BAR 4-1.14(a) cmt.

3. See R. REGULATING FLA. BAR 4-1.14.

the consent of the client.⁴ The factors to be considered in accepting a plea bargain in a murder case can be very complex. Evaluating the strength of the government's case and understanding legal standards of intentional homicide, felony murder, and accidental or excusable homicide are difficult for educated adults to understand, let alone a twelve-year-old child.

Where a parent consults a lawyer on behalf of a young child, it is inconceivable that a lawyer would not defer to the parent for guidance, or that the parent would not reasonably expect the lawyer to do so.⁵ Further, when a child is incapable of comprehending the situation which requires him to make a life-altering decision, the lawyer is arguably compelled "[t]o consult [with the child client's] parent to determine what course of action might be in the child's best interests, even if the parent is not actually directing the course of the representation."⁶

Despite the absence of authority, an argument can be made that "[i]f parents have the right to direct or influence the lawyer representing their child . . . [it is because of their status] as parents,"⁷ the child's "natural guardians."

Conflicts may arise between the interests of the parents and the child in the course of representing a child charged with a crime in adult court. Parents may make unwise decisions out of personal feelings of guilt or out of devotion to the child, clouding the judgment that may be necessary to weigh the consequences of an adverse verdict in adult court. If an actual conflict does exist with the parent, a guardian-ad-litem should be requested by counsel, with the courts appointing a lawyer or non-lawyer to serve in that capacity.⁸ Guardians cannot enter pleas in criminal court on behalf of a child. If the guardian's opinions differ from those of the natural parent, logic dictates that the child would choose the natural parent's opinion. If the conflict between the guardian ad-litem and the parent escalates, a guardian may petition the court to limit access of a parent to a child client, fearing undue influence. Ultimately, the child must choose the advice he will rely upon in making decisions relating to his case. Rule 1.14(b) of the *Model Rules of Professional Responsibility* provides that a lawyer may seek the appointment of a guardian or take other protective action with respect to a client only "when the lawyer reasonable believes that a client . . . cannot adequately act in the

4. R. REGULATING FLA. BAR 4-1.6.

5. Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819, 1846 (1996).

6. *Id.*

7. *Id.* at 1847, 1849.

8. *Id.* at 1840-41.

client's own interest."⁹ Does that rule call for the appointment of a guardian simply because the child's decision to proceed to trial, refusing a lenient plea offer, seems unwise? Should a lawyer threaten to withdraw as counsel if his client does not agree with the lawyer's advice? The answer to these questions is clearly, no.

The role of the lawyer representing a child in a criminal proceeding is the same as if the lawyer were representing an adult in a criminal proceeding.¹⁰ Lawyers are "[e]thically obligated to seek the objectives of the case as defined by their clients, whether or not the lawyers think those objectives are sound for the client or for society."¹¹

A lawyer should not seek the appointment of a guardian simply because the lawyer is unhappy with a client's decision.¹² Likewise a threat to withdraw or actually withdrawing as counsel of record on these grounds is itself repugnant. Our entire criminal justice system is based on the presumption of innocence and the client's right to maintain his innocence until proven guilty in a court of law. Instead of seeking the appointment of a guardian, the attorney may choose to have an experienced psychologist to consult with both the child and the parent about plea decisions. But it is the lawyer's ultimate responsibility to make sure the child understands all of the options and to have the child make a voluntary choice, free from any undue pressure from any third party.

The normal objective of representing a criminal client, whether the client is a child or an adult, is to avoid the adverse consequences of a conviction (i.e. prison, criminal record, or other restrictions of the client's life). Some clients however proceed to trial seeking vindication or a finding by a jury or the court that their conduct was not criminal. Some clients place principle, which usually means their belief in their own innocence, over the risk of conviction and punishment. While this may seem unwise, counsel's role is to advise a client, not to make his decision. It is the client who determines the objectives of the representation.¹³ Children's attorneys face a significant dilemma when their view of the child's best interest conflicts with the child's expressed wishes concerning the objectives of representation.¹⁴ Generally, a lawyer is an advocate for his client's preferences in a court pro-

9. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

10. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1424 (1996).

11. *Id.*

12. Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 281 (1995).

13. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

14. Ventrell, *supra* note 12, at 280-81.

ceeding, and not what the lawyer believes to be in the child's best interests.¹⁵ When counseling a child client about choices in a criminal proceeding, the child must get the benefit of counsel's independent professional judgment as to the risks of trial, consequences of an adverse verdict, and opportunities for a plea bargain.¹⁶

A parent is often necessary in the attorney-child relationship to bring the child back to reality in making important decisions. It has been my experience that children in the twelve to fifteen age group not only always gravitate toward a choice that has no consequences, but also believe they will win the trial and get to go home immediately. A twelve to fifteen-year-old has limited ability to weigh risks and often believes that destiny or luck is always on his side. The experiences and common sense of the parent may be the only reality check the child can understand. A child client who relates well with his lawyer is apt to think "my lawyer can't lose, he's a great guy." Twelve-year-old children simply do not have enough experience and insight to make rational choices in an adult court setting. No court appointed guardian or team of psychologists can give him that experience or insight.

Marvin R. Ventrell in his 1995 article, Loyola University of Chicago Law Review writes:

[i]f the attorney's view of the child's best interests conflicts with the child's wishes, the lawyer should both consider whether the child's wishes are reasonable and whether the attorney truly knows what is best. Simply disagreeing with a client's directive should not, by itself, cause a dilemma. Attorneys may need to compromise their positions as well and must always remain mindful of their role in the system--a role which requires them to advocate a position, and not to determine the outcome.¹⁷

No client, child or not, should ever be pressured by his lawyer to accept a plea bargain against his will. The court cannot accept a pressured plea even if it's the client's own lawyer who is doing the pressuring.

My twenty-three years as a criminal trial attorney have taught me two important lessons. First, you should never predict the outcome of a criminal trial. The best any lawyer can do is to suggest to his client what he thinks might happen at trial and the likely verdicts. A criminal trial is a dynamic event full of fortune and misfortune. A verdict is often determined by the make up of a jury—and a jury of strangers can do strange things. Second, if you exert too much influence convincing a criminal client to accept a plea bargain you will regret it. The client will blame you when he ultimately vio-

15. *Id.* at 279.

16. *Id.* at 260.

17. *Id.* at 279.

lates probation and goes to prison for a crime he believes he did not commit. You, the lawyer, have ruined his life because you convinced him to take a plea when he believes the case should have gone to trial. On the other hand, if you go to trial in the face of a lenient plea bargain and lose, your client and the world may look at you and ask, “What were you thinking?”

As the Lionel Tate case illustrates, the role of the criminal attorney in representing a young teenager in adult court, charged with a serious crime, is complex. The ultimate decisions must be made by the child client. However, the system is naive if it believes children in this position will not be influenced, or even defer these decisions to the parent. All a lawyer can do is give good advice to the child client and the parent and hope the right decision will become apparent to all.