

ETHICAL PITFALLS OF JUVENILE PRACTICE

“WAH WAH WAH WAH”

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RESUMES

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I

PURPOSE OF PRESENTATION

To examine the ethical problems encountered by attorneys who practice in the juvenile area.

The purpose of this presentation is to take this short period of time to discuss with you the objective of protecting yourself, your office, your license, clients and the public. You have all spent a great deal of time, money and effort getting to this point in your life and practice and you don't need to complicate your life with unnecessary unethical problems. In this light, there are sources available to answer or avoid ethical problems. The State Bar of Texas has a website www.texasbar.com and other resources such as the Commission for Lawyer Discipline Annual Report and the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure pamphlets for your use.

Today, we will cover some basic statutes, rules and procedures in reference to Juvenile practice. However, this presentation is only my review of these matters in this area and I am not a spokesman for the State Bar. For specific guidance, you should call the State Bar or call the Ethics helpline at 1-800-532-7347.

A. Why We're Here

The purpose of this presentation is to take this short period of time to discuss with you the objective of protecting yourself, your office, your license, clients and the public. You have all spent a great deal of time, money and effort getting to this point in your life and practice and you don't need to mess or complicate your life with unnecessary unethical problems. In this light, there are sources available to answer or avoid ethical problems. The State Bar of Texas' [website](#) and other resources such as the [Commission for Lawyer Discipline Annual Report](#) and the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure are available for anyone to use.

Today, we will cover some basic items to keep in mind while dealing with juveniles in the system.

B. Juvenile, Mental Health and Probate All Have "Unusual" Clients

These practice areas may seem somewhat dissimilar, but we all deal with the same thing every day – clients who are disabled in some fashion, whether it be by operation of law, medical infirmity, or death. The common thread between these, then, is pretty obvious – in each case, there is the potentiality that the lawyer will have to represent someone who is not fully capable of assisting you, and in any event, every case will, at minimum, mean taking on additional burdens to the client which lawyers in other fields may not have to deal with.

It's important to recall that juvenile lawyers act as many different things in the course of representation. The term "counselor" is never more appropriate, as one will frequently find themselves serving in an auxiliary capacity as a therapist, family mediator, confidant and – even in cases where the parents are fully involved – a step-parent for hire.

Keeping these different hats arranged in a manner which doesn't offend the ethical haberdasher is something we all do every day without really realizing we're engaged in such a process. Nevertheless, it is vital to keep the ethical lines perfectly clear, and ensure both that we are effective advocates for our clients and that there remains certain boundaries as to what we can do, both in the ethical and in the practical sense.

C. The Trombone Problem

The biggest challenge in fulfilling this duty is, as always, effective communication. However, the nature of our work offers a unique set of problems, and as someone who has spent time in the system as a child, I'd like to offer my unique perspective:



It may be a somewhat dated cartoon, but in a world with ever more distractions and diversity, the problem has only worsened.

After hearing my story, I hope you understand – just a bit – what the perspective of our clients are. A large part of this problem is that we're not really sure what amount of knowledge a juvenile actually has about what's going on around them. Much of what a judge or an attorney explains to a juvenile is done in a manner which is legally compliant but entirely unhelpful. The rights which juveniles regularly waive are not truly understood – just as we have a "sane enough to try" standard for some mental health violators, we also have a "tried to explain enough to not be completely ignorant" standard when it comes to these rights.

Unfortunately, the rights we lawyers must explain to our juvenile clients can be difficult for even the average adult citizen to fully comprehend – to say nothing of someone more interested in Minions than in *Miranda*. Of the for basic rights which the US Supreme Court has held that all juveniles are entitled to, almost none of those are truly understandable to a juvenile. Specifically in the case of *Miranda* rights, studies show that while 80-90% of juveniles waive those rights, only 20.9% of juveniles even understand what they are waiving.¹ Some developmental psychologists go even further – arguing that it is impossible for a juvenile to give a “knowing, intelligent and voluntary” waiver of their rights.²

The problem is exemplified by the ongoing effort to define when, exactly, one is a juvenile. Depending on the context and to some extent on public perception, adulthood can begin anywhere between 12 years of age and twenty-six years of age.³ A juvenile’s age is absolutely relevant to the voluntariness of such waivers, but given the uncertainty over age highlighted above, it is unclear whether a juvenile can ever truly knowingly waive their rights. Due to the unusual duality of this area of law, this question has come before both the Texas Supreme Court and, indirectly, the Court of Criminal Appeals.

Both courts have dealt with the question in different ways. The Supreme Court was able to avoid the question, because it was asked to review a case where, impressively, a relatively precocious juvenile actually did ask for a lawyer, a fact which allowed the Texas Supreme Court to decide the most recent case on point without addressing this vital question.⁴ By contrast, the Court of Criminal

Appeals has set what some would say is a relatively low standard. In *Bizzari v. State*, the Court noted approvingly its precedent that a “‘mentally deficient person between a moron and an imbecile’ who had a ‘mental age of 4 years and 7 months’” was nevertheless capable of knowingly waiving their rights.⁵ While the Texas Supreme Court has jurisdiction over juvenile appeals, it is nevertheless concerning that Texas precedent exists to find a knowing waiver at such a young mental age.

D. Your Ethical Duties

The question therefore presents itself: if there’s such uncertainty as to whether or not our clients can even understand what is going on, how can I properly discharge my duties as their attorney? This because especially acute because lawyers are charged with keeping their client informed in a manner which allows the client to participate in the case in an informed manner.⁶

Fortunately, the ethical guidelines are not nearly as unclear as the mental ones. Unlike the courts the Bar has expressly provided that we must ensure that, when communicating with a juvenile, we take into consideration their capacity to understand what is going on.⁷ Of course, diminished capacity does not mean offering our clients a diminished level of attention or respect, but it does mean making sure we establish a way to communicate in whatever manner practicable. However, if it appears that a juvenile suffers from a disability which is not being addressed, it is the duty of the lawyer to at least make some effort to address the deficiency.⁸

¹ Albert G. Mendoza, *“Do You Understand These Rights?” A Juvenile Perspective of Miranda*, 49 U. Pac. L. Rev. 235, 249–51 (2017)

² *Juvenile Miranda Waiver and Parental Rights*, 126 Harv. L. Rev. 2359, 2360 (2013)

³ David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles As Adults in an Era of Extended Adolescence*, 46 Tex. Tech L. Rev. 71, 84–85 (2013)

⁴ See *In re H.V.*, 252 S.W.3d 319, 326–27 (Tex. 2008)

⁵ *Bizzari v. State*, 492 S.W.2d 944, 946 (Tex. Crim. App. 1973) quoting *Casias v. State*, 452 S.W.2d 483, 488 (Tex. Crim. App. 1970).

⁶ *McIntyre v. Comm’n for Lawyer Discipline*, 169 S.W.3d 803, 810 (Tex. App.—Dallas 2005, pet. denied)

⁷ TX ST RPC Rule 1.03 comment 2

⁸ TX ST RPC Rule 1.02(g)

The opposite of giving a client too little representation is giving them too much, and in the case of information this become especially poignant when dealing with juveniles. Helpfully, the Texas Rules of Professional Conduct anticipated this eventuality, and it is a provision a lawyer can sue to great effect: when informing a client of something would be imprudent, it may be that the ethical thing to do is to withhold such information for a time.⁹ The traditional rule of “absolute and perfect candor,” then, has been qualified by the understanding that different cases and different clients justify different, yet still ethical approaches.¹⁰ Obviously, in the case of juvenile law, this becomes a practical necessity.

Ethical representation, then, merges with the awareness we must all generally have about juveniles in the system. I don’t remember the attorney who handled my case in El Paso County all those years ago. I barely remember the building. For a juvenile anywhere in the system, whether it is a case of delinquency, truancy or a CPS case, we must keep in mind that the juvenile’s perception of events will be far different from ours. I don’t remember much of what happened legally, but I do remember being on a bus on my way to Omaha and my placement, and stopping at a bus station outside of Dallas, in a small railroad town called Carrollton, Texas.

E. How Representative is Our Profession?

Something always to keep in mind is that our profession doesn’t reflect the average citizen in any way, shape or form. This is an important factor in daily practice, and the difference becomes even more acute regarding juveniles. At the end of this presentation I’ve included some demographics to exemplify this point. While our profession has, of late, done a great job of increasing minority representation, we are still a profession somewhat separated from the real-life pressures and concerns which our juvenile clients face, and part

of competent representation includes being fully seized of this fact at all times.

F. Conclusion

Juveniles don’t see the system as we do. Don’t assume that your juvenile really understands what is happening in court. Try to listen first to your juvenile before you try to talk business. Remember, this juvenile may become a lawyer or a judge!

⁹ TX ST RPC Rule 1.03 comment 4

¹⁰ Vincent R. Johnson, *“Absolute and Perfect Candor” to Clients*, 34 St. Mary's L.J. 737, 793 (2003)

**STATE BAR OF TEXAS
DISCIPLINARY RULES OF PROFESSIONAL CONDUCT
AND
TEXAS RULES OF DISCIPLINARY PROCEDURE**

Rule 1.01 Representation

- (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
- (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
 - (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.
- (b) In representing a client, a lawyer shall not:
- (1) neglect a legal matter entrusted to the lawyer; or
 - (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
- (c) As used in this Rule "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Rule 1.02 Scope and Objectives of Representation

- (a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions;
- (1) concerning the objectives and general methods of representation;
 - (2) whether to accept an offer of settlement or a matter, except as otherwise authorized by law;
 - (3) in a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
- (b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.
- (c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.
- (d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.
- (e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.
- (f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.
- (g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Rule 1.03 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.14 Safekeeping Property

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation, a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Rule 8.04 Misconduct

(a) A lawyer shall not:

- (1) Violate these rules, knowingly knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
- (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) engage in conduct constituting obstruction of justice;
- (5) state or imply an ability to influence improperly a government agency or official;
- (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (7) Violate any disciplinary or disability order or judgment;
- (8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;
- (9) engage in conduct that constitutes barratry as defined by the law of this state;
- (10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;
- (11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated, including but not limited to situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or
- (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in in subsection (a)(2) of this Rule, "serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes

III

STATEWIDE ATTORNEY STATISTICAL PROFILE

TABLE I

STATEWIDE ATTORNEY STATISTICAL PROFILE 2017

As compiled by the State Bar of Texas Department of Research and Analysis
Highlighted Summaries

GENDER

Male	57,813	64%
Female	32,306	36%

RACE/ETHNICITY

Caucasian/Anglo	68,235	79%
Hispanic/Latino	8,353	10%
African/American/Black	4,618	<5%
Native American Indian	282	<1%
Other Race	1,036	1%

YEARS LICENSED

2 or less years	6,972	8%
3 to 6 years	10,148	11%
7 to 10 years	9,889	11%
11 to 15 years	11,171	12%
16 to 20 years	9,993	11%
21 to 25 years	9,618	11%
Over 25 years	32,694	36%
Median Years Licensed		19 years

AGE

21 to 25 years	181	<1%
26 to 30 years	6,540	7%
31 to 35 years	10,711	12%
36 to 40 years	11,141	12%
41 to 45 years	9,844	11%
46 to 50 years	10,019	11%
51 to 55 years	8,819	10%
56 to 60 years	9,159	10%
61 to 65 years	8,639	10%
More than 65 years	15,432	17%
Median Age		49 years

LAW SCHOOL ATTENDED

Out of State/Other Law School	23,011	25%
University of Texas	14,740	16%
University of Houston	9,312	10%
South Texas	10,564	12%
Southern Methodist	7,574	8%
St. Mary's	6,972	8%
Baylor	5,479	6%
Texas Tech	6,243	7%
Texas Wesleyan (Tx A&M)	3,317	4%
North Texas Student of Law	23	1%

PRIMARY OCCUPATION

Private Law Practice	48371	65%
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FIRM SIZE

Solo Practioner	17924	24%
2 to 5 Attorneys	11791	16%
25 to 40 Attorneys	1933	3%
41 to 60 Attorneys	132	2%

SECTION MEMBERSHIP

Litigation	8,188	9%
Real Estate, Probate & Trust Law	8,999	10%
Family Law	6,048	7%
Business Law	4,444	5%
Corporate Counsel	4,307	5%
Labor and Employment Resources	3,148	3%
Oil, Gas and Energy Resources	4,388	5%
Intellectual Property Law	2,258	2%
Construction Law	2,300	3%
Appellate	2,070	2%
Juvenile Law	921	1%

DALLAS COUNTY ATTORNEY PROFILE

As compiled by the State Bar of Texas Department of Research and Analysis
2017-2018

TABLE II

Gender	Male	10,609	64%
	Female	5,889	36%
RACE/ETHNICITY	Caucasian/Anglo	13,022	83%
	Black/African American	942	6%
	Hispanic/Latino	858	5%
	American Indian/Alaskan	56	<1%
	Two or more Races	132	1%
	Other Races	177	1%
Years Licensed	2 or Less years	1377	8%
	3 to 6 years	1944	12%
	7 to 10 years	1850	11 %
	11 to 15 years	2025	12%
	16 to 20 years	1841	11%
	21 to 25 years	1702	10%
	Over 25 years	5815	35%
	Median years licensed	18 years	
Age	21 to 25 years	38	<1%
	26 to 30 years	1459	9%
	31 to 35 years	2132	13%
	36 to 40 years	2118	13%
	41 to 45 years	1823	11%
	46 to 50 years	1770	11%
	51 to 55 years	1636	10%
	56 to 60 years	1755	11%
	61 to 65 years	1475	9 %
	Over 65	2368	14%
Median Age	48		14%
JUVENILE PRACTITIONERS IN DALLAS COUNTY	APP. 130		1%

IV
DISBARMENTS AND SUSPENSION
BAR YEAR 2016-2017
As reported in the Texas Bar Journal

1.

	Action for 2017
Disbarments	20
Resignations	28
Suspensions	126
Public Reprimands	30
Private Reprimands	89
Grievance Referral Program	49
Total	342

2. TOP REASONS FOR DISBARMENT

1. Failure to provide legal services (Rule 1.01 and 1.02 Representation, TDRPC*)
2. Failure to communicate (Rule 1.03, TDRPC)
3. Failure to pay funds (Rule 1.14, TDRPC)

*-Texas Disciplinary Rules of Professional Conduct

V.
2018 JUVENILE DISCIPLINARY ACTIONS

A. Findings

Research of public records revealed no suspensions or disbarments against Juvenile attorneys while acting in the capacity as a juvenile attorney. However, this does not mean that no grievances were filed against juvenile attorneys.

B. Appeal Actions

However, we find a number of instances where juvenile cases were appealed due to “ineffective assistance of Counsel”. The following is a short sample of cases in this area.

1. In the Matter of T.D.B., 10-05-00015CV (Tex. App. [10th Dist] 2006)
2. Johnson v. State, 137 S.W. 3d *III* (Tex. App.-Waco [10th Dist]2004)
3. In the Matter of Y.H., 04-02-00560 (Tex.App. [4th Dist.] 2003)
4. In re K.J.O., 27 S.W. 3d 340 (Tex.App. - Dallas [5th Dist.] 2000)
5. Rodriguez v. State, 975 S.W. 2d 667 (Tex.App. - Texarkana 1998)
6. Strickland v. Washington, 466 U.S. 668 (1984)

C. Discussion and Analysis of State Bar Grievance Process

Crucial Point: if a complaint is filed against you, answer promptly and timely

VI.
STEPS TO AVOIDING OR HANDLING COMPLAINTS

1. Return telephone calls
2. Keep you client apprised of the case. (Know who is your client-child, parent, etc.)
3. Stay actively involved in the process
4. Make sure you know the rules regarding maintaining client accounts and ILOTA funds.
5. Decide how many areas of substantive areas of law you can handle completely.
6. Talk to other attorneys who practice in your areas of substantive law – seek advice.
7. If a grievance is filed against you, answer the Bar.
8. Remember you are a Role model and kids and parents look to you for advice and guidance.