

No Stone Unturned: Investigatory Practice for Attorneys & Advocates Representing Children with Special Needs

I) Ethics – Therapeutic Jurisprudence

- a. Brief explanation of Therapeutic Jurisprudence
 - i. Focuses on the consequences of law on psychological functioning and emotional well-being of the people affected;
 - ii. Lawyers should affirm inherent value of the child;
 - iii. Identify not just legal issues involved, but also those that may be pursued in the future by or on behalf of the client.
- b. Standards published by the Legal Needs Of Children Committee

II) Identify Necessary Records in Child's Case

- a. Case management file
- b. Placement's records (*ie group home's records*)
- c. GAL file
- d. School records
- e. Medical/Mental Health records
- f. Law Enforcement/DJJ records

III) Break Out Groups/Hypothetical

IV) Identify and discuss some of the various persons that may need to be interviewed.

- a. The child client
 - i. Initial Conversation with Child
 - ii. Issues and Advice for non-verbal children
- b. Caregivers

V) Strategies to use if/when informal discovery attempts hit obstacles

VI) Group Sharing/Q and A

Other Gems (Resources and References) that may be mentioned in this presentation:

- Smith v. Benson, 703 F. Supp. 2d 1262 (the Medicaid Diaper Decision)
- Wickr – an android and Iphone app for sending end-to-end encrypted messages. Any message sent through Wickr automatically erases itself within 24 hours of being viewed. The app strips meta-data and geo-tagging out of the messages, and app is free to download.

<http://www.floridaschildrenfirst.org/wp-content/uploads/2011/06/Standards.FLLawyers.pdf>

Pertinent parts that will be addressed in this presentation are:

A-1. The Child's Attorney. The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and zealous representation to the child as is due an adult client.

Commentary — These Guidelines explicitly recognize that the child is a separate individual with potentially discrete and independent views. In Florida, the term “attorney ad litem” is often used in these proceedings. These guidelines assume that an “attorney ad litem” shall function as the “child’s attorney.” To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with Florida Rules of Professional Conduct, Rule 4-1.14(a). In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. Such counsel is protected by the attorney-client privilege. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

C. ACTIONS TO BE TAKEN

C-1. Meet With Child. A lawyer should conduct a client interview as soon as possible after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning the representation and the case proceedings. Furthermore, establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child. The age and developmental level of the child dictate the type of contact. The type of contact will range from observation of a very young or otherwise nonverbal child and the child’s caretaker to a more typical client interview with an older child. A lawyer shall promptly comply with child-client’s requests for contact and assistance. At the initial meeting and thereafter as appropriate, the child’s attorney should specifically:

- 1. explain the nature of the attorney-client relationship to the child, including the requirements of confidentiality;**
- 2. explain how and when to contact the attorney;**
- 3. ensure the child understands that he or she has the right to speak with the attorney;**
- 4. role of each player in the system;**
- 5. keep the child informed of the nature and status of the proceeding on an ongoing basis;**
- 6. counsel the child on options and decisions to be made.**

Commentary — This guideline minimally requires visits with the child at certain specific times in the proceedings. An attorney should conduct the initial interview with the child as soon as possible, preferably within 48 hours, and sufficiently before any court proceeding so as to be prepared for that proceeding. Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. An attorney should meet with the child-client often to stay informed of the circumstances impacting the child's legal interest. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child 10 clients, including a preverbal child. See, e.g., JAMES GARBARINO, ET AL, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

The last sentence in Guideline C-1 is in compliance Rule 4-1.4 of the Florida Rules of Professional Conduct. A lawyer should ensure that a child-client has the ability to contact a lawyer without interference by a custodian or others. Some of the in-person meetings with the child client should held at the child's residence. However, the attorney should take appropriate steps to ensure that the propriety of the attorney-client relationship could not be called into question.

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to: (1) Obtaining and reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

Commentary — Thorough, independent investigation of cases at every stage of the proceedings is a key aspect of providing competent representation to children. The lawyer should ensure the order of appointment for the child authorizes access to all the child's records. The lawyer should take steps to ensure that the child's records are maintained as confidential. Protecting these records includes keeping them from other parties who may not have access including a parent, the Department or guardian ad litem. Due to the confidential nature of the attorney-client relationship, the attorney may be entitled to records that others may not be entitled to receive. If the order appointing the lawyer for the child does not provide explicit authorization for the lawyer's obtaining necessary records, the lawyer should pursue records with the authority granted pursuant to FLA. STAT. § 39.202(d)(2005). Even if it is not required, an older child should be asked to sign authorizations for release of his or her own records, because such a request demonstrates the lawyer's respect for the client's authority over information. The lawyer may need to use subpoenas or other discovery or motion procedures to obtain the relevant records which pertain to the other parties. (2) Seeking experts, as needed, to assist counsel in preparation of the case;