

Rules: 1.2, 1.14

Subject: Determining representation objectives; clients with diminished capacity

Summary: Lawyer appointed to represent a child in abuse and neglect proceedings does not have to follow ABA standards which conflict with South Dakota law and can try to protect the interests of a minor child inconsistent with the child's wishes

## **BACKGROUND**

Lawyer is appointed to represent a child in an abuse and neglect proceeding. Child has been adjudicated abused and neglected. A recommendation to terminate parental rights has been made to the court.

Child has expressed a desire to return to Child's parents or to be placed with certain relatives if parental reunification is impossible. Child authorized Lawyer to communicate Child's preferences. Under SDCL § 26-8A-18, Lawyer is required to "represent the child's best interests" in the proceeding. Lawyer believes that termination of parental rights is in the best interests of Child.

Interested Party is also appearing in the proceeding. With leave of the Court, Interested Party asked Lawyer what Child preferred. Based on Child's waiver of any client-lawyer privilege, Lawyer stated Child's desire to reunite or be placed with particular relatives.

Interested Party then asserted that Lawyer had a conflict of interest because of the divergence of Child's preference and Lawyer's assessment of Child's best interest. Interested Party argued that the Lawyer's statutory mandate to represent Child's best interests was trumped by the ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases which direct lawyers to advocate the preference of the child. The Court denied a request by Interested Party to appoint a guardian ad litem for Child.

Lawyer identified Ethics Opinion 2004-05 wherein this Committee concluded that the requirement of SDCL § 26-8A-18 to "represent the child's best interests" allows a lawyer to advocate for a disposition inconsistent with a child's stated wishes. The Committee relied on the fact that, while Rule 1.2 requires a lawyer to follow a client's stated objectives of representation, Rule 1.14 allows lawyers to modify a normal client-lawyer relationship, given the diminished capacity of a minor.

Lawyer has now asked if there is an ethical obligation to comply with the ABA Standards rather than the mandate of SDCL § 26-8A-18.

## ANALYSIS

The question Lawyer presents is simple and specific: is there an ethical obligation to follow the ABA Standards rather than the command of SDCL § 26-8A-18 as to what position to advocate, Child's preference or what Lawyer identifies as Child's best interest? To that question, the Committee can give a simple and specific answer: no. SDCL § 26-8A-18 imposes a substantive obligation on Lawyer to advocate Child's best interests; the non-mandatory guidance of the ABA Standards is not an ethical trump. Failing to comply with the statutory mandate would be less than fully compliant with the duty of candor Lawyer has under Rule 3.3.

The Committee gives a simple answer to this simple question. It also writes, not on a blank slate, but in light of Opinion 2004-05 which dealt much of the substance of this issue. More must be said, however, because Lawyer faces an inherently contradictory choice by virtue of what SDCL § 26-8A-18 requires.

SDCL § 26-8A-18 allows lawyers to be appointed to represent children involved in abuse and neglect proceedings. It then mandates that lawyers so appointed "represent the child's best interests." It is readily foreseeable that, as here, those positions diverge on perhaps the most important issue in a child's life—who will be their primary guardian.

Rule 1.2 assigns the objectives of representation to the client, the means of achieving it to the lawyer in consultation with the client. So, for example, the client decides to take a case to trial, the lawyer discusses a trial strategy but ultimately selects the order of witnesses. In abuse and neglect proceedings, one would expect the child to have control of the objective: whether they remain in the custody of their parents or someone else. But SDCL § 26-8A-18 specifically takes that decision from the child.

Lawyers will often struggle to comply with both client selected objectives or the command of substantive law in this situation. Rule 1.14 provides a means to resolve the tension although not avoid it. A lawyer for a client with diminished capacity, including because of minority, should "as far as reasonably possible" maintain a normal client-lawyer relationship. Rule 1.14(a). Note 5 goes further to discuss what protective steps a lawyer may take to protect a client with diminished capacity. The note indicates that lawyers should consider the wishes of the client, the client's best interests, and attempt to intrude upon client decision making as little as possible. SDCL § 26-8A-18 requires a lawyer to disregard client wishes when they conflict with the lawyer's assessment of the best interests of the client. While the Committee continues to agree that Rule 1.14 allows this ethically, the statute creates an inherent potential for ethical conflict and confusion.

The Committee highlights this for two reasons. First, even when proceeding under Rule 1.14 a lawyer has an obligation to try and protect both the best interests and autonomy of the client. Lawyer has done so here by sharing both Child's preference and Lawyer's assessment of best interests. Second, a revision to SDCL § 26-8A-18 may be appropriate. If lawyers were appointed under that statute as special advocates to the court to assess the best interests of a child, there

would be no conflict. So too if the lawyer, specifically appointed to represent the child, advocated the child's wishes and best interests were addressed by the State or another advocate. While it is not the Committee's place to amend this law, it calls it to the attention of those who can.

### **CONCLUSION**

Lawyer is not ethically obligated to follow the ABA Standards over South Dakota law. Lawyer should balance the mandate of SDCL § 26-8A-18 to represent Child's best interest while, to the degree reasonably possible under Rule 1.14, respecting Child's decision making autonomy and selection of objectives of the representation.