

State Bar of South Dakota

Ethics Opinion 2004-5

- **Rules: 1.2, 1.14.**
- **Subject: Representation of minors in Abuse and Neglect actions, client with diminished capacity**
- **Summary: Attorney may represent the "best interests" of a minor if steps are taken to protect the client's interests.**

FACTS

Lawyer has been court-appointed to represent a 16-year old minor in an Abuse and Neglect case pursuant to SDCL 26-8A-18. Client has been adjudicated to be an abused or neglected child. A review hearing is set to determine the permanent placement of the child. The client is requesting that attorney advocate a placement that lawyer believes is not in the child's best interests.

Lawyer questions whether the statutory requirement that he represent the "best interests" of the child conflicts with his obligations under the Rules of Professional Conduct.

DISCUSSION

SDCL 26-8A-18 requires the Court to appoint an attorney for any child alleged to be abused or neglected in any judicial proceeding. The statute further states, "The attorney for the child shall represent the child's best interests..." The statute also allows the court to "designate other persons, including a guardian ad litem or special advocate...to assist the attorney of the child in the performance of the attorney's duties."

Rule 1.2 provides, in part:

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. 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 jury trial and whether the client will testify.

This general rule is modified by Rule 1.14 when the client has diminished capacity. Minority is one factor that may be used to determine whether the client has diminished capacity.

Rule 1.14 states:

Rule 1.14 Client With Diminished Capacity

- (a) 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.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may 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, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

It is the opinion of the Committee that Rule 1.14 can be interpreted to be consistent with the dictates of SDCL 26-8A-18. Lawyer is specifically referred to Comment 5 to Rule 1.14 which states that diminished capacity may include lack of sufficient capacity "to make adequately considered decisions in connection with the representation." When diminished capacity exists, the lawyer may take protective measures, including consultation with groups assisting the client, or appointment of a guardian ad litem. Any protective actions by lawyer "should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

While the Committee can not advise Lawyer on how to resolve the specific issues of his case, it is the opinion of the Committee that an attorney appointed to represent a minor pursuant to SDCL 26-8A-18 may take protective actions including representing the best interests of the child rather than the child's stated wishes, or requesting the appointment of a guardian ad litem, consistently with the Rules of Professional Conduct. Both the Rules and the Committee recognize that Lawyer's position is a difficult one.

Cynthia Howard
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State Bar of South Dakota