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RESPONSIBILITIES OF RESPONDENT PARENTS' ATTORNEYS IN DEPENDENCY AND NEGLECT PROCEEDINGS

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This opinion addresses attorneys' ethical responsibilities to clients in the dependency and neglect[1] and other juvenile arenas. Many of these attorneys are appointed attorneys, paid by the state, representing unsophisticated clients, and facing unusual challenges. Although it is clear that the Rules of Professional Conduct apply to respondent parents' attorneys, the Committee addresses the application of those rules to recurring dependency and neglect issues.

Issues

1. How does an appointed attorney pursue the client's objectives when the client fails to attend court hearings and provide direction to the attorney?

2. May an attorney provide a written statement advising the client that presentation of evidence is conditioned on the client's continued communication with the attorney and attendance at court hearings?

3. May the attorney stipulate to offers of proof or otherwise bind the client in the client's absence?

4. In a Title 19 dependency and neglect matter, is the respondent parent's attorney required to file a notice of appeal if an appeal under C.A.R. 3.4 is groundless or frivolous?

Summary of Opinion

Court-appointed attorneys must assure that there is a written communication to each new client that the attorney has been appointed to provide representation without cost to the client.

The attorney should communicate in writing the nature of the representation. That writing may outline what happens if the client doesn't come to court and doesn't communicate with the attorney. However, the attorney may not decline to advocate for the client simply because the client does not come to hearings or provide direction.

The attorney may agree to, or not object to, presentation of evidence by offers of proof if the client does not attend a hearing.

The attorney must file a notice of appeal from termination of parental rights upon request of the client even if the attorney believes the merits of the appeal are groundless or frivolous.

Analysis

There is no bright line in attorney-client representation that delineates how an attorney must represent his or her client at hearings or at trials. Each representation is different depending on the agreement of the client and attorney, or if there is no formal agreement, by the disclosure by the attorney to the client as to how the attorney will provide representation. Generally, the client determines trial scope and objectives.[2] With a few exceptions, the attorney decides the tactics of hearings and trials.[3]

Colorado Rule of Professional Conduct (Colo. RPC) 1.5(b) requires that the basis of the fee agreement shall be communicated to the client before commencing or within a reasonable time of commencing the representation. The writing need not be formal and need not be signed by the client.[4] There is nothing in the rule or its comments that excludes from this requirement either a *pro bono* fee agreement or payment by the state or other third party on behalf of the client.[5] In fact, the client with an appointed attorney must agree, after consultation, to the attorney being paid by the state,[6] though the circumstances of the unique court-appointed, third-party-paid representation generally assure the client's implicit agreement.[7]

Pursuing the Objectives of an Uncooperative Client

Unsophisticated clients, especially clients with appointed attorneys, may easily misunderstand the nature of the relationship and the nature of the fee. A writing early in an attorney-client relationship must at least briefly communicate the nature of the fee,[8] but also may present to the attorney the opportunity to detail the nature of the representation, and give the client something to refresh his or her memory at a later time.[9] When an attorney is appointed, there may not be a meeting of minds as to the client's expectations of the attorney. The client may have unreasonable expectations of the attorney.

One method to present the required writing, for attorneys who regularly take court appointments, may be to present to the client a standard form, which may be modified as necessary, and may be presented to the client at the time of appointment. Often, clients of attorneys practicing in these areas of the law are transient and difficult to reach. An immediate writing can outline for the remainder of the case what happens if the client doesn't come to court and doesn't communicate. The writing may state that, should the attorney not be in contact with the client, the attorney will follow the client's most recent instructions, or alternately may state that the attorney will use his or her best judgment in making decisions for the client.

In creating a standard or individual writing, appointed attorneys should remember that to a certain extent the nature of this unusual attorney-client relationship is fixed. Clients with appointed attorneys cannot initially negotiate the terms of the representation prior to selecting an attorney, nor in any case choose whom to select and, thus, the attorney may not unreasonably limit the terms of the representation. For instance, while Colo. RPC 1.2(c) allows an attorney to limit the scope or objectives of the representation with the client's consent after consultation, because the client with an appointed attorney cannot negotiate at arms length, it would be an unusual circumstance when the attorney could limit the general nature of the defense, no matter how repugnant the nature of the defense to the appointed attorney,[10] or limit a client's unreasonable desire to reach a certain goal.[11]

Even if the respondent parent does not attend court hearings or provide direction to the attorney beyond that originally discussed, the attorney has a continuing ethical obligation to provide competent

representation.[12] In providing representation, the attorney may present witnesses on behalf of his or her client and vigorously cross-examine witnesses presented by the county department of social services.

Client Communication and Attendance at Hearings

An attorney may not decline to advocate on behalf of the client simply because the client does not attend court hearings or provide direction to the attorney.[13] An attorney must still exercise professional judgment as to how to advocate for the client's best interests. To avoid making such decisions without input from the client, an attorney may, at the outset of the representation, advise the client that he or she will exercise his or her independent professional judgment in determining an appropriate trial strategy if the client does not maintain communication with the attorney or attend court hearings.[14]

Stipulation to Offers of Proof

The attorney may agree to, or not object to, the presentation of evidence by offers of proof[15] if the client is not present at court, even if the attorney has no recent or unambiguous directions from the client. The Comment to Colo. RPC 1.2. clarifies that in questions of means, the lawyer should assume responsibility for technical and legal tactical issues. Agreement to offers of proof is similar to other trial tactics that are within the ambit of attorney choices,[16] and does not rise to the level of attorney interference with the objectives of the case.[17]

Lawyer's Obligation to Pursue Appeal

When a respondent parent in a dependency and neglect proceeding requests his or her court-appointed lawyer to appeal a judgment terminating the client's parental rights, the lawyer must file a timely notice of appeal. Colo. RPC 1.2(a) provides that a lawyer shall abide by a client's decisions concerning the scope and objectives of representation subject to specified exceptions. While Colo. RPC 3.1 says "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law", the Colorado Supreme Court has determined that in a dependency and neglect respondent's appeal, "[s]o long as the [court-appointed] attorney does not misstate the facts or controlling law, she is free to present her client's arguments to the court as well as her client's desire to prevail."[18] Accordingly, the Supreme Court has concluded that in appealing a judgment terminating the client's parental rights, the appointed lawyer does not have an ethical dilemma as to whether the appeal might be frivolous.

In dependency and neglect proceedings, as in other areas of practice, a lawyer must provide competent representation to a client.[19] When an appointed lawyer represents an indigent parent in a dependency and neglect proceeding, the lawyer may be subject to claims of ineffective assistance of counsel based on *Strickland v. Washington*.[20] Under *Strickland*, a respondent parent must show that the lawyer's representation fell below an objective standard of reasonableness and that the lawyer's deficient performance prejudiced the parent.

In *Roe v. Flores-Ortega*, the United States Supreme Court held that Strickland applies to claims of ineffective assistance of appellate counsel, and that the defendant need not show a likelihood of success on appeal.[21] The Court characterized filing a notice of appeal as a purely ministerial task, and held that the failure to file a notice of appeal reflects inattention to the defendant's wishes and gives rise to a claim of ineffective assistance of counsel.[22]

Thus, the Committee concludes that when a lawyer is requested to file an appeal of a judgment terminating parental rights, he or she must do so, without regard to the likelihood of success on appeal. This is consistent with a lawyer's duty to abide by a client's decisions concerning the scope and objectives of representation under Colo. RPC 1.2.

Nevertheless, nothing in Colo. RPC 1.2 prevents the lawyer from discussing with the client the merits and likely success of pursuing an appeal. Colo. RPC 1.2(c) provides that a lawyer may limit the scope or objectives of representation if the client consents after consultation. Thus, if a client explicitly tells the lawyer he or she does not wish to appeal, the client could not later complain that the lawyer provided ineffective assistance by not filing a notice of appeal. Additionally, if, after consultation with the lawyer, a client consents to a determination not to appeal, the lawyer would not be required to file a notice of appeal.

However, assuming that after consultation with the lawyer, the client determines that an appeal should be filed, the lawyer has an ethical obligation to do so. This is particularly so because of the short timelines under C.A.R. 3.4(b)(1), which provide that a notice of appeal must be filed within twenty-one days after the entry of an order terminating parental rights. [23]

NOTES

1. This opinion applies equally to the ethical obligations of attorneys for dependency and neglect respondents other than natural parents, *e.g.*, grandparents who are legal guardians. The opinion may provide guidance for attorneys representing special respondents in dependency and neglect proceedings.

2. Colo. RPC 1.2. (A lawyer shall abide by client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e).)

3. *Id*. at Comment (in questions of means, the lawyer should assume responsibility for technical and legal tactical issues); *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981) (the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client).

4. *Id*.

5. Attorney/respondent representing juvenile under prepaid legal plan failed to send Rule 1.5(b) fee writing (in part), *Matters Resulting in Diversion and Private Admonition*, 35 *The Colorado Lawyer* 155 (Jan. 2006).

6. Colo. RPC 1.8(f) (if an attorney is paid by a third party, the client must consent, there must be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and the attorney may not reveal confidences to the third party).

7. If, upon appointment, the attorney is aware that the court provided to the client a document that adequately communicates the basis or rate of the fee, the attorney's obligation under Colo. RPC 1.5(b) is satisfied.

8. *See* Colo. RPC 1.5(b) and Colo. RPC 1.4; Comment, Paragraph 4 as to fees. (It is strongly recommended that all these communications be in writing.)

9. Many indigent clients do not have a high level of education and may have trouble reading or understanding the writing. Appointed attorneys should offer to read the writing if there is any question.

10. *But see* Colo. RPC 6.2(c) (accepting court appointments.) It is implicit in Colo. RPC 1.7(b) that the attorney has the option of refusing the entire appointment or moving to withdraw. Colo. RPC 1.16 allows the attorney to withdraw for other reasons.

11. An attorney's violation of Colo. RPC 1.2 by refusing to seek the client's objectives is different from an attorney refusing to present perjured witness testimony at trial. *See Schultheis, supra* note 3.

12. *See* Colo. RPC 1.1.

13. *See* Colo. RPC 1.2 (a lawyer shall abide by client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e)); Colo. RPC 1.1 (a lawyer shall provide competent representation to a client).

14. Colo. RPC 1.2 Comment (in questions of means, the lawyer should assume responsibility for technical and legal tactical issues); *Schultheis, supra* note 3 (the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client).

15. The Children's Code at § 19-1-106(2) says, in part: "Hearings may be conducted in an informal manner." Many Colorado jurisdictions use informal offers of proof to expedite proceedings. These offers of proof are not the offers of proof described in Colorado Rule of Evidence 103(a)(2). The attorney should make clear he or she is not stipulating to the truth of the other parties' offers of proof, and should reserve, if possible, the right to cross-examine the person on whose behalf the offer is made.

16. *See Schleiger v. Schleiger*, 137 Colo. 279, 324 P.2d 370, 373 (1958) (holding that it was within the scope of trial counsel's employment to try the case as his best judgment dictated, and his client is bound by the course of procedure adopted in the trial of the case); *Wilson v. Calder*, 518 P.2d 952, 954 (Colo. App. 1973) (holding that the choice of litigation procedures lies within the scope of an attorney's implied authority, and with regard to such matters the client is bound by the attorney's actions); *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994) (trial counsel must exercise reasonable professional judgment in determining, among other things, trial strategy, including whether to interview witnesses or to rely on other sources of information, or whether to call a particular witness); *People v. Smith*, 77 P.3d 751, 758 (Colo.App. 2003) (the court further advised defendant that he controlled whether to have a trial, whether to plead guilty, and whether to testify; defendant also was advised by the trial court that defense counsel controlled trial strategy and that a disagreement over applicable law was not grounds to dismiss counsel); *People v. Outlaw*, 998 P.2d 20, 25 (Colo.App. 1999) (court observed that substitution of counsel would not solve defendant's dissatisfaction with the rule that an attorney, and not a defendant, determines motion and trial strategy); *People v. Apodaca*, 998 P.2d 25, 29 (Colo.App. 1999) (whether to call a particular witness is a tactical decision within the discretion of trial counsel; further, an attorney's decision not to interview certain witnesses, if made in the exercise of reasonable professional judgment, does not amount to ineffective assistance); *People v. Sparks*, 914 P.2d 544, 548 (Colo. App. 1996) (when and whether trial counsel objects during the trial are matters of trial strategy and technique); ABA *Standards for Criminal Justice*, The Defense Function, provide that defense counsel determines trial strategy and tactical matters. *Standard* 4-5.2(b) states:

> The decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

17. *Cf. People v. Silvola*, 915 P.2d 1281 (Colo. 1996) (attorney filed counter-claim without knowledge of or meeting with client); *Jones v. Feiger, Collison & Kilmer*, 903 P.2d 27 (Colo.App. 1994), reversed on other grounds, 926 P.2d 1244 (Colo. 1996) (client has the right to reject settlement).

18. *People in the Interest of C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010). Subsequent to the original adoption date of this Ethics Opinion 114, in October 2006, the Colorado Supreme Court, in *C.Z.*, disapproved of this Committee's conclusion that after filing a notice of appeal, a respondent's appointed lawyer could move to withdraw if the lawyer determined that a parent's claims on appeal lacked merit. The Court noted that in *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court approved a procedure for lawyers who found no merit in their client's appeal: to file an "*Anders* brief" detailing why there was no appeal issue. But in *C.Z.*, the Colorado Supreme Court determined that the *Anders* brief procedure is neither binding nor appropriate for Colorado dependency and neglect appeals:

> If an attorney cannot discern a meritorious legal argument in support of her client's appeal, she must present those issues her client wishes to be addressed. Where neither law nor facts can be framed in support of an indigent client, a court-appointed attorney's obligation as a zealous advocate is fulfilled by accurately describing the facts of the case, locating and applying controlling law, and presenting the issues her client wishes to be considered.

226 P.3d at 1061.

19. *See* Colo. RPC 1.1.

20. *Strickland v. Washington*, 466 U.S. 668 (1984). *See* C.Z., 226 P.3d at 1063 ("Thus, the obligation of court-appointed attorneys to advocate for indigent parents in termination proceedings is no different from the obligation imposed on counsel appointed to represent criminal defendants on appeal."); *People in Interest of V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989). ("[I]n such cases, a contention of ineffective assistance of counsel requires a determination whether counsel's conduct so undermined the proper functions of the adversarial process that the proceeding cannot be relied on as having produced a just result.")

21. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); see *People v. Long*, 126 P.3d 284 (Colo.App. 2005).

22. *528 U.S. at 477.*

23. After *C.Z.*, it is not clear whether a retained – as opposed to court-appointed – lawyer in a dependency and neglect case has an equivalent duty to file a notice of appeal at his or her client's request without regard to the merits of the appeal.