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## **CHAPTER 2: THE LAWYER’S ROLE AND ETHICAL OBLIGATIONS**

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### **A. OVERVIEW**

A child has a due-process right to be heard through independent legal counsel in a minor guardianship proceeding.

The Fourteenth Amendment to the U.S. Constitution requires that due-process protections be afforded to anyone who is threatened with loss of liberty or property. This is the case in minor guardianship proceedings. The prevailing petitioner in a minor guardianship gains complete control over where a protected minor lives, health care to be received, and finances and assets, among other things. Indeed, the outcome of a minor guardianship proceeding influences the protected minor’s entire future. Aside from the criminal context, few other interests in court rival the interest of a child in her own guardianship proceeding.

Nevada law affords due-process protections in minor guardianship matters, in part, by allowing the court to appoint an attorney for the proposed protected minor. It is the attorney’s job to protect the legal rights of the proposed protected minor and advocate strenuously for the client’s wishes. If the attorney does not do this, or ignores what the client is saying, the proposed protected minor has no voice in the proceedings at all. This zealous advocacy is the obligation of the attorney as an officer of the court and under the Nevada Rules of Professional Conduct. A protected minor’s legal counsel must vocalize a minor’s wishes and where the minor’s wishes cannot be determined due to age or disability, the attorney must advocate for the minor’s legal interests.

### **B. THE STATUTORY BASIS FOR APPOINTMENT OF COUNSEL**

Under Nevada law, when a petition for guardianship is filed, the court may appoint an attorney for the proposed protected minor.<sup>1</sup>

If Legal Aid Center of Southern Nevada, Inc. is able to accept the case, the court will appoint a Legal Aid attorney to represent the proposed protected minor.<sup>2</sup> The Legal Aid attorney will represent the protected minor until relieved of that duty by court order.<sup>3</sup> The proposed protected minor always has the right to substitute private counsel for an appointed Legal Aid attorney.

If Legal Aid is unable to accept the court’s appointment, the court will decide whether the proposed protected minor can afford to pay for an attorney and, if the minor can, will order an

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<sup>1</sup> NRS 159A.045(1).

<sup>2</sup> NRS 159A.045(1). If the guardianship case was filed outside Clark County, an attorney for another legal aid organization that provides services for protected minors (such as Washoe Legal Services) could be appointed.

<sup>3</sup> NRS 159A.045(1)(b).

attorney to represent the proposed protected minor for compensation from the proposed protected minor's estate.<sup>4</sup>

### C. THE "TRADITIONAL" MODEL OF REPRESENTATION<sup>5</sup>

A minor has a due-process right to be heard through independent legal counsel in a minor guardianship proceeding.<sup>6</sup> A right to be heard is one of the most fundamental requirements of due process.<sup>7</sup> But given a minor's age and abilities, courts cannot require a minor to communicate his legal interest without the assistance of legal counsel.<sup>8</sup> Due process instead requires that independent legal counsel be appointed in minor guardianship proceedings to assert the minor's wishes and to protect the minor's legal interests. The American Bar Association ("ABA") and other leading family law scholars and experts advocate for the same.<sup>9</sup>

A minor may not be able to effectively represent himself in a minor guardianship hearing given their age and inexperience, even without other obstacles. The need for independent legal counsel is amplified where a party is not capable of speaking effectively for himself.<sup>10</sup> Counsel's guidance also helps the proposed protected minor cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to protect and assert the minor's legal rights.<sup>11</sup>

As a proposed protected minor has a due-process right to independent legal counsel in a minor guardianship proceeding, what form should that representation take? There are three

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<sup>4</sup> NRS 159A.045(2). The court might similarly appoint an attorney who is to be paid from the proposed protected minor's estate if the case is filed in a county where there is no program that provides legal services to proposed protected minors.

<sup>5</sup>This chapter relies heavily upon two well-researched and persuasive articles, both of which are highly recommended reading: Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687 (2002), and Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 Wash. L. Rev. 581 (2016).

<sup>6</sup> See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing a tripartite test to determine federal due process demands: (1) the individual's private interests at stake; (2) the government's interests; and (3) the risk of erroneous decision under the procedures afforded to the individual); *Application of Gault*, 387 U.S. 1, 13 (1967) (establishing a child's due process rights to counsel in delinquency proceedings); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (holding that a child in a dependency or a termination-of-parental rights proceedings has a due-process right to counsel).

<sup>7</sup> See *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962).

<sup>8</sup> See *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) ("[C]hildren generally are less mature and responsible than adults[.]" (internal citation omitted)).

<sup>9</sup> See ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, §7(d) & Commentary (The Model Act succeeds the ABA's previous standards, in which the ABA also advocated for a child's right to counsel, *See also Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L. Q. 375, 376 (1995)). *See also*, Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 Pace L. Rev. 869, 887 (2007); Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, *supra*, at 1030; Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Proceedings*, *supra*, at 493-94; *Recommendations of the Conference on Ethical Issues in Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996).

<sup>10</sup> See *Gagnon v. Scrapelli*, 411 U.S. 778, 791 (1973).

<sup>11</sup> See *Application of Gault*, 387 U.S. 1, 37 (1967).

primary models of representation that could potentially be utilized when representing a client subject to a minor guardianship:

- (1) “Derivative” representation, in which the guardian is considered the primary client and the minor subject to guardianship is considered the derivative client;
- (2) “Best interest” representation, in which the attorney’s obligation is to assess and advocate for the best interests of the minor subject to guardianship; and
- (3) “Traditional” representation (sometimes also called “expressed interest,” “normal relationship,” or “client-directed” representation), in which the attorney maintains the traditional advocacy role even when a client is subject to a guardianship.

Legal Aid Center of Southern Nevada, Inc. adheres to the “traditional” representation model, which finds support not only in the Nevada Rules of Professional Conduct (as discussed more fully below) but also in the case and statutory law of other jurisdictions<sup>12</sup> and a substantial body of authoritative and scholarly commentary.<sup>13</sup>

Under the “traditional” representation model, the attorney shall maintain a normal attorney-client relationship with the client to the greatest extent possible. The attorney shall meet with the client and, if the client is able to communicate the client’s wishes, shall comply with the client’s directions regarding the objectives of the representation and consult with the client regarding the means of achieving those objectives. The attorney shall, at all times, keep communications confidential, ensure that the client stays reasonably informed about the status of the matter, and provide competent legal advice and services. Unless the client instructs the attorney to take action that is unlawful or frivolous, the attorney shall advocate for the client’s stated preferences regardless of whether they correspond with the attorney’s or others’ perceptions of what might be in the client’s best interest.

Representing a minor can be a challenge because determining the minor client’s wishes is often difficult. The client may be confused about some things, but not about others. The client may

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<sup>12</sup> See, e.g., Vt. Stat. Ann. tit. 14, § 3065; see also, e.g., *In re Lee*, 754 A.2d 426, 438-439 (Md. Ct. Spec. App. 2000) (“It is the role of an attorney to explain the proceedings to his client and advise him of his rights, keep his confidences, advocate his position, and protect his interests. Due process demands nothing less, particularly, as here, when the alleged disabled person faces significant and usually permanent loss of his basic rights and liberties”); *In re Guardianship of L.H.*, 3 N.E.3d 92, 106 (Mass. App. Ct. 2014) (“The adversarial model does not place counsel for a mentally ill or even incompetent client in an ethical quandary. In the adversarial model, there will be a decision by a neutral and detached judge that is the product of evidence produced with the aid of vigorous advocacy from a petitioner’s counsel and a client’s counsel . . . . It is simply not the role of the client’s counsel to assume responsibilities that belong to others.”); *In re Guardianship of Henderson*, 838 A.2d 1277 (N.H. 2003) (“Even when representing a client with a disability, legal counsel must, as far as reasonably possible, carry out the client’s decisions.”); *In re M.R.*, 638 A.2d 1274 (N.J. 1994) (“Advocacy that is diluted by excessive concern for the client’s best interests would raise troubling questions for attorneys in an adversarial system. An attorney proceeds without well-defined standards if he or she forsakes a client’s instructions for the attorney’s perception of the client’s best interests.”). For a relevant ethics opinion, see Alaska Bar Assoc. Ethics Op. 94-3 (1994), available at [https://www.alaskabar.org/servlet/content/indexes\\_aoet\\_\\_94\\_3.html](https://www.alaskabar.org/servlet/content/indexes_aoet__94_3.html).

<sup>13</sup> See, e.g., *supra* note 9.

change her mind depending on which party she spoke with last. The client may make bad decisions and insist that the lawyer advocate for those decisions, or the client may demand that the lawyer defend a seemingly indefensible position. But advocating for a minor does not mean that all of the attorney's usual resources are not in play. The attorney can use any of the tools in the attorney's arsenal to achieve a favorable settlement or outcome for the client. When the attorney has no reports, favorable testimony, or any other evidence to support the client's position, one of the best things to do is to allow the client to speak to the judge. Putting the minor client's wishes in their own words before the court is a powerful tool when other evidence is unavailable.

**D. LEGAL RIGHTS/INTERESTS**

Where a minor has no physical voice, either because they are pre-verbal or simply due to their young age, you may hear the term "substituted judgment" as a model of representation employed by the minor's attorney. In Nevada, this model of representation is not indoctrinated in statutory or case law. However, Nevada does afford a minor the statutory right to counsel through NRS 159A.0483 and NRS 159A.045. The plain language of these provisions establishes that a minor's independent legal counsel advocates for their legal and constitutional rights with the same authority and in the same manner as an attorney representing any other party in the proceedings.<sup>14</sup>

The substituted judgment model encourages representation, and thus the traditional client-lawyer relationship, by encouraging determinations be made from a client's perspective. And Nevada has already approved of this model of representation as it comports with the Nevada Rules of Professional Conduct.<sup>15</sup>

The substituted judgment model of representation allows for an attorney to consider objective and subjective criteria to determine a proposed protected minor's actual interests. The model instructs an attorney to formulate a substituted judgment on behalf of the child that is (a)

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<sup>14</sup> "[A]n attorney[...] may not serve as a guardian ad litem or an advocate for the best interests of a protected minor or proposed protected minor." NRS 159A.045(3). *See also* legislative history of NRS 432B.420(2) (establishing independent legal counsel in dependency proceedings regardless of a child's age or nonverbal status. Legal Aid Center of Southern Nevada's executive director, Barbara Buckley, testified in support of A.B. 305. *See* Min. of A. Comm. On Judiciary 79<sup>th</sup> Sess., at 33 (May 15, 2017). The Nevada Assembly questioned Ms. Buckley on whether the mandate of independent counsel applied to children of all ages, including those that "may not be in a position [to] express ... their wishes." Ms. Buckley responded: "This bill applies to every child, no matter how old... Fortunately, the ABA Center of Children and the Law spent years figuring out how an attorney represents a preverbal or nonverbal child, let us say a child with severe autism who is eight who cannot communicate with you. What they have concluded is we follow the rules of ethics with regard to trying the best we can to establish that relationship, and then otherwise you represent their legal interests and constitutional rights. [...] It is sometimes called a substituted judgment model).

<sup>15</sup> *See Order Approving Additional Statewide Rules for Guardianship*, ADKT No 0507, Rule 9 (Nov. 7, 2019) (under Guardianship Rule 9, a protected person "has a right to legal representation." Rule 9(A). The attorney, in turn, has the right to act on behalf of her client to waive legal rights so long as the actions do not contradict the client's express wishes. Rule 9(G). Under all circumstances, the attorney must protect her client's legal rights. Rule 9(H)-(J).).

child-centered, (b) research-informed, (c) permanency-driven, and (d) holistic.<sup>16</sup> These four pillars of the substituted judgment determination assists counsel in understanding the child’s situation through the child’s perspective.<sup>17</sup> The attorney must also take into consideration the child’s legal interests.<sup>18</sup> Together, the pillars encourage a determination that replicates the client’s wishes, as opposed to emphasizing the attorney’s own personal, subjective judgment, as to what’s best for the client.<sup>19</sup>

Even where a minor does not have the ability to express their wishes, the attorney must still work to protect their legal rights and interests, just as the attorney would for any other client. The attorney, even with little or no guidance from the client, can ensure, among numerous other things, that the minor’s legal interests are protected.

For example, with or without input from their client, the attorney for the minor, ensures that proper due-process procedures are followed and Nevada law is adhered to; that no substantial rights of the minors are waived; that the petitioner proves the allegations in any petition by clear and convincing evidence (or the applicable standard of proof governing the matter currently before the court); that the proposed guardian is (and remains) a suitable person and qualified to serve; that all orders are least restrictive under the circumstances and leave the client with as much autonomy and personal freedom as possible consistent with the need for supervision; that appropriate safeguards are ordered to protect the client’s assets and guardianship estate; and that all requests for fees or other expenditures from the client’s assets and guardianship estate are reasonable, verifiable, and appropriate.

When the attorney assumes this role, the minor client receives the due-process protection promised the client by the Constitution. The minor client has a zealous advocate who can speak knowledgeably for them, put them on the stand if willing, cross-examine expert and other witnesses, ensure that the evidence proves the need for guardianship under a clear and convincing standard, and ensure the guardian is fit to handle the tasks of being a guardian.

The specifics of a lawyer’s duties and special issues facing the lawyer are covered in more detail in later chapters of this manual.

## **E. NEVADA ETHICAL RULES**

Broadly speaking, every lawyer is a representative of the client. As such, the lawyer has a duty to explain to the client the client’s legal rights and obligations; represent the client zealously

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<sup>16</sup> See ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, §7(d) & Commentary.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Yael Zakai Cannon, *Who’s the Boss?: The Need for Thoughtful Identification of the Client’s in Special Education Cases*, 20 AM. U. J. Gender Soc. Pol’y & L. 1, 41-42 (2011).

and assert the client’s position under the rules of the adversary system; be competent, prompt, and diligent; maintain open communication with the client; and maintain the client’s confidences.<sup>20</sup>

More specifically, there are a number of ethical rules in the Nevada Rules of Professional Conduct (“NRPC”) to help guide your representation of a minor facing or under guardianship.<sup>21</sup>

### **1. RULE 1.14: MINOR CLIENT**

The Nevada Rules of Professional Conduct address the question of how an attorney is to act when a client is a minor. Rule 1.14(a) says that, when a client’s decision-making ability is impaired due to “minority, mental impairment[,] or for some other reason,” an attorney must, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

In addition, an attorney “may take reasonably necessary protective action” with respect to a client only 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 that the client “cannot adequately act in the client’s own interest.”<sup>22</sup> Even when taking protective action, the lawyer must keep information relating to the representation confidential and can reveal information only to the extent reasonably necessary to protect the client’s interest.<sup>23</sup>

Typically, in a minor guardianship case, because a petitioner already has filed for guardianship, the attorney need not “take other protective action.” The role of the attorney is to maintain, to the greatest extent possible, the normal client-lawyer relationship, keep the client’s confidences, and treat the client with attention and respect.<sup>24</sup>

The comment to the ABA Model Rule 1.14 says that the normal client-lawyer relationship is based on the fact that, when the client is advised about the client’s rights and obligations, the client can make a decision about the course of the representation.<sup>25</sup> When the client is a minor or suffers from a mental or physical disability, maintaining the ordinary client-lawyer relationship might become difficult. However, a client who lacks legal capacity might still be able “to understand, deliberate upon, and reach conclusions about” the client’s own well-being.<sup>26</sup>

Thus, the primary role of the attorney for the proposed protected minor in a minor guardianship action is to treat the client as any other client, to try to maintain a normal client-lawyer relationship, and to keep the client’s confidences that would injure the client if disclosed.<sup>27</sup>

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<sup>20</sup> See ABA Model R. Prof. Conduct preamble 1-21. “The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by the [Nevada Rules of Professional Conduct] but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments.” NRPC 1.0A.

<sup>21</sup> Appendix C to this manual contains select rules from the Nevada Rules of Professional Conduct.

<sup>22</sup> NRPC 1.14(b).

<sup>23</sup> NRPC 1.14(c).

<sup>24</sup> ABA Model R. Prof. Conduct cmt. 1-2.

<sup>25</sup> ABA Model R. Prof. Conduct cmt. 1.

<sup>26</sup> *Id.*

<sup>27</sup> NRPC 1.14.

## **2. RULE 1.2: SCOPE OF REPRESENTATION**

NRPC 1.2(a) says that “a lawyer shall abide by a client’s decision concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.” The lawyer must also “abide by a client’s decision whether to settle a matter.”

However, the lawyer can limit the scope of representation if the limitation is “reasonable under the circumstances” and the client gives “informed consent.”<sup>28</sup> Additionally, the lawyer cannot assist a client in fraudulent or criminal behavior.<sup>29</sup>

Importantly, representation of a client, “including representation by appointment, does not constitute an endorsement of the client’s political, economic, social[,] or moral views or activities.”<sup>30</sup> The comment to ABA Model Rule 1.2 emphasizes that a lawyer’s representation of a client does not signify that the lawyer agrees with what the client is saying.<sup>31</sup> Especially in minor guardianship cases, when the client advocates for a proposed guardian who the lawyer does not believe is the best possible guardian for the proposed minor, the lawyer who represents the client does not need to agree with the client’s position.<sup>32</sup> For the attorney to represent the client, the attorney must make the best case for the client, even if the only evidence of the client’s ability is the client’s own opinion.

## **3. RULE 1.3: DILIGENCE**

The rule regarding diligence in representation requires that an attorney “shall act with reasonable diligence and promptness in representing a client.”<sup>33</sup> A client’s interests can be adversely affected by a lawyer’s delay in handling a case. This is especially true in minor guardianship cases where appointment of a guardian will determine where a protected minor will live, medical treatment to be received, or management of finances or assets, among other things. Unreasonable delay can undermine the client’s confidence in the attorney and might cause the client needless anxiety.

## **4. RULE 1.4: COMMUNICATION**

NRPC 1.4(a) requires, among other things, that the attorney “[k]eep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information.” Moreover, attorneys should “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>34</sup>

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<sup>28</sup> NRPC 1.2(c).

<sup>29</sup> NRPC 1.2(d).

<sup>30</sup> NRPC 1.2(b).

<sup>31</sup> ABA Model R. Prof. Conduct cmt. 3.

<sup>32</sup> *Id.*

<sup>33</sup> NRPC 1.3.

<sup>34</sup> NRPC 1.4(b).

Communication with a proposed protected minor is essential in representing the client. Fully informing the client may be difficult when the client is very young or has a mental disability. Communication may have to be in the simplest of terms. The attorney should speak to those who care for the minor and find if there is a best way to communicate with the minor.

When the attorney explains the guardianship, this should be done in simplified terms to clearly communicate the possibility that another person could make decisions about the client's life and property. The client should have enough information so that the client can participate fully in the representation.

Even in cases in which the proposed protected minor is very young or has some mental incapacity, the lawyer should inform the client of any hearing and determine whether the client wants to attend and speak to the judge. Speaking to the judge gives the client the sought-after day in court and allows the judge to assess the wishes of the proposed protected minor.

#### **5. RULE 1.6: CONFIDENTIALITY OF INFORMATION**

Under NRPC 1.6(a), “[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation,” or the disclosure is reasonably necessary to prevent a criminal act that is likely to result in death or bodily harm.

In minor guardianship cases, where the attorney may be court appointed, the attorney should tell the client that the attorney is on the client's side and will advocated for what the client wishes. The attorney must make clear that the client's confidences will be kept secret unless the client wishes to reveal them. This encourages the client to reveal even embarrassing information that can facilitate proper representation.

#### **6. RULE 1.7: CONFLICT OF INTEREST**

NRPC 1.7 prohibits the attorney from representing a proposed protected minor who has a conflicting interest with another client. This means that the attorney should not represent both the petitioner and the proposed protected minor. Additionally, if an attorney has represented the family of the proposed protected minor in the past, the attorney should not represent the proposed protected minor in a guardianship proceeding.