



Child Protection Services Pro Se Help Kit
Video Series

#6 – Working With Your Attorney

Family Preservation Foundation, Inc.

- Hello, I'm Dwight Mitchell the founder of Family Preservation Foundation. Welcome to our Child Protection Services Pro Se Help Kit video series.
- I hope you enjoy the content and it allows you to better understand your rights and options while involved with CPS.

- After a 22-month battle, I successfully defeated Dakota County Social Services in Minnesota State court and had my children returned. Although filled with anguish, it was an education to say the least, and I will be passing on the benefit of my knowledge, and “Lessons Learned”, while cross referencing Minnesota State Statutes, and case law which is readily available on Google Scholar.

- I would like to advise you that I am not an attorney, licensed to practice law, nor am I providing legal services. I recommend you obtain your own attorney if possible and review my video in this series titled “Working with your Attorney”. This is a very important unit in our series, and will assist you in not being misguide like I was, by my attorney’s legal strategy, incompetence and/or greed.

- This video series is for education purposes only. I will go over the beginning, middle and the end of the CPS process and what you can do in your defense and fight against CPS! This will be hard work for you, and a lot of reading, but nothing worthwhile in life is free. The Minnesota templates I provide are examples only and must not be used as is.

- You must create your own court filings while acting in a Pro Se capacity. I do not have examples of everything, but ask other group members, because they may be able to help you. **BUT REMEMBER**, you are not allowed to stand in court and say that someone helped you, or told you to do it a certain way. You are doing this for yourself. You must read, review and submit court filings for yourself.

Working With Your Private Or Court Appointed Attorney

- Distinguish your client role based upon your CPS education and understanding.
- Confidentiality – Assure your attorney instills feeling this in you.
- Both you and your attorney must be reasonably accessible to each other.
- You must be honest with your attorney and vice versa.
- Always ask questions, until you understand thoroughly your case. Ask for examples, state statutes, and case law.

- Have your attorney articulate their goals, and keep revisiting this through the case to see if you are being successful.
- Articulate your goals, and keep revisiting this through the case to see if your attorney is on track.
- Ask questions to help you further define your client goals.
- You can ask your attorney for advice as you continue to re-evaluate your goals, but you are not obligated to take their advice.
- **DO NOT ALLOW YOUR ATTORNEY TO BULLY YOU!**

DEFINING ATTORNEY'S SCOPE OF REPRESENTATION



- Have your attorney explain their role in your CHIPS case.
- Have them explain about existence of collateral legal issues that may impact their CHIPs case
 - Criminal charges
 - Maltreatment determination / licensing issues
- Define the scope of what your attorney is willing to do for you.
- Discuss appeal / preserving the right to appeal on your behalf.
- **Put scope of representation in writing.**

- Honesty is essential
- You must understand all your options in order to make good choices
- Sometimes it takes time to make a decision, so don't allow your attorney to rush you.
- Talk to people you trusts to help with difficult choices when appropriate. I don't mean your best friend. I speaking about parents, grandparents, aunts, uncles, clergy and others who are older wiser and might have more experience.

- In order to be a zealous, ethical attorney, your attorney should talk with you between court hearings
- Develop a communication plan, depending on that your circumstances and access to phone, email, meetings
- Document important dates and times to client in writing

- Punctuality
- Attire – Always wear your Sunday best. Your first impression on the Judge is a lasting one.
- Demeanor (posture, facial expressions) Stay composed.
- Communication in the courtroom. Be respectful.
- Emotionality – Even if CPS is not telling the truth, be calm and let your attorney tell the Judge that the statements are not true.
- Interaction with children – Being a loving parent!

KEY POINTS ON CASE & VISITATION PLAN

- Do not start a case plan until after your 60-day, and only do so if ordered by the court
- Do start a visitation plan immediately and do not miss any days. CPS will try and use this against you.
- Do not sign any forms unless they relate to a visitation plan. Do not sign any blank documents. Make sure all forms are filled in and apply to one subject only.
- Review all forms with your attorney first.
- Not even a judge can make your sign a form. All forms are legally binding contracts. If you sign it you must do it.

KEY POINTS ON CASE & VISITATION PLAN



- Case plan goals are measured by indicators of your growing self-awareness and ability to change unsafe behavior.
- County and court want you to experience real changes –not just go through the motions of case plan to complete a task.
- Real change in behavior or awareness is sometimes hard to measure or see.
- Self reflection about what you have / are learning through process may be helpful.
- Create a record of your changes you have accomplished. Document everything you have done relating to your case plan in a note book, and have your case worker, visitation supervisor, doctor, lab tech, sign each line.

- Rule 1.2 (a) of the Minnesota Rules of Professional Conduct provides the general rule allocating decision making authority in an attorney-client relationship:
- Rule Text:
 - (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 a jury trial and whether the client will testify.

- Client has ultimate authority to determine purpose and objectives.
- Means by which to accomplish objectives is generally left to counsel, after consultation with client.
- Where there is a disagreement, counsel must attempt a mutually agreeable resolution, follow the directions of his client or withdraw from the relationship.
- See the comments to Rule 1.2 of the Minnesota Rules of Professional Conduct for Attorney Representation.

- Comment to Rule 1.2 [4]:

In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Rule 1.14's focus is on maintaining as normal a relationship as possible.

Rule 1.14(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.

- Comment [1] to Rule 1.14:
- “[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”
- Also, if considering action under Rule 1.14(b), must keep information confidential to the extent possible:

- Rule 1.14(c) provides:

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(b)(3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- Rule 1.14 does not authorize a lawyer to substitute his or her judgment for that of the client's.
- An attorney may seek protective action where (1) the lawyer reasonably believes that the client has diminished capacity; (2) the client is at risk of substantial physical, financial or other harm unless action taken; and (3) the client cannot adequately act in his own interest.
- Bottom-line: Authorized to seek out someone who can legally act on the client's behalf but lawyer cannot do so.

- ALI (American Lawyers Institute) Restatement Third of The Law Governing Lawyers at Section 24 provides:
- (2) A lawyer representing a client with diminished capacity as described in Subsection (1) [essentially restating the provisions of 1.14(a)] and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

CONTRARY AUTHORITY (CONT'D)



- The position of the restatement has not been adopted in Minnesota however.
- ABA Opinion 96-404 provides further guidance:
- •Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.' (Emphasis added.) 10

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Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.' (Emphasis added.)

- ABA Op. 96-404 (cont'd)

A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.

- ABA Op. 96-404 (cont'd)

Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions.

Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal" relationship.

- To ensure there are no communication issues make sure you write down all of your communications with your attorney, then send him an email specifying what you agreed upon. **DO EVERYTHING IN WRITING!**
- Rule 1.4, MRPC (Model Rules of Professional Conduct) –Communications with clients
 - Comments:
- [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and

responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

- In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

- Subd. 3. Appointment of counsel.(a) The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court as provided in this subdivision.
- (f) Court-appointed counsel for the parent, guardian, or custodian under this subdivision is at county expense. If the county has contracted with counsel meeting qualifications under paragraph (g), the court shall appoint the counsel retained by the county, unless a conflict of interest exists.

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MINN. STAT. §260C.163 (CONT'D)



If a conflict exists, after consulting with the chief judge of the judicial district or the judge's designee, the county shall contract with competent counsel to provide the necessary representation. The court may appoint only one counsel at public expense for the first court hearing to represent the interests of the parents, guardians, and custodians, unless, at anytime during the proceedings upon petition of a party, the court determines and makes written findings on the record that extraordinary circumstances exist that require counsel to be appointed to represent a separate interest of other parents, guardians, or custodians subject to the jurisdiction of the juvenile court.

- Rule 1.7 comment

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination.

Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible.

JOINT REPRESENTATION (CONT'D)



For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

- [31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

JOINT REPRESENTATION (CONT'D)



The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

State v. Paige

765 N.W. 2d 134 (Minn. App. 2009)

The state and federal constitutions guarantee the right to counsel in criminal trials. U.S. Const. amend. VI; Minn. Const. art. I, §6. **The right to counsel includes the right to effective assistance of counsel.** Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064.

MINNESOTA CASE LAW # 1 (CONT'D)



A lawyer's performance is deficient if he represents a client despite having a conflict of interest. See *Wood v. Georgia*, 450 U.S. 261, 271–72, 101 S.Ct. 1097, 1103–04, 67 L.Ed.2d220 (1981) (noting that defendant had “right to representation that is free from conflicts of interest”). A conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.”

Minn. R. Prof. Conduct 1.7(a)(2). Thus, the existence of a conflict of interest typically depends on whether the lawyer's decisions were "materially limited." Because of this limitation, prejudice to the defendant is generally presumed when the lawyer has a conflict of interest. See *Mickens v. Taylor*, 535 U.S. 162, 167–70, 122 S.Ct. 1237, 1241–43, 152 L.Ed.2d291 (2002) (discussing cases in which deficient performance and prejudice inquiries overlapped).

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- If you represent both parents and the guardian/custodian at only the first hearing, may you continue to represent only one of them in subsequent proceedings?

SHAROODV. HATFIELD 210 N.W. 2d275 (1973)

This court has recognized its inherent power to regulate the practice of law in many decisions. In the syllabus written by the court to the case of *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d515, 516, we said:

‘* * * (T)he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches * * *.’

Rule 1.2 provides that:

- A lawyer may limit the scope of a representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- Note the scope of appointment in order.
- Rule 1.16(c): A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue to representation notwithstanding good cause for terminating the relationship.