

# ETHICAL CONSIDERATIONS OF THE TENNESSEE RULES OF JUVENILE PRACTICE AND PROCEDURE

Presented by the  
Tennessee Administrative Office of the Courts

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## Roadmap

Ethics Refreshers

Ethics under new TRJPP

Sticky Ethical Issues

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## Ethics and Professionalism

The practice of law is a profession, one of the original professions, along with theology and medicine. “This is the essence of professionalism: to labor in a manner and for an outcome that is consistent with the greater good.” It is not hard to see the greater good in the practice of children’s law.

NITA, *Trial Advocacy for the Child Welfare Lawyer*, 2<sup>nd</sup> ed. 2017.

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## Challenges to Professionalism In The Juvenile Court Process

- Overworked
- Underpaid
- Judges can be intolerant
- Children and parents can be difficult
- Bureaucracies can be rigid
- Opposing counsel can confuse advocacy with belligerence

And yet.....

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## Children and Families are Entitled to the Rule of Law!

### KNOW AND APPRECIATE THE LAW

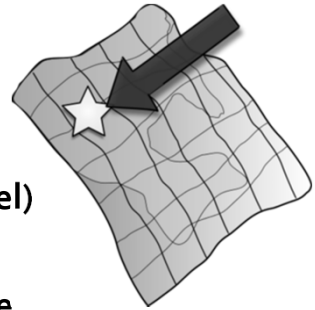
- Statutes
- Case Law
- Rules of Practice and Procedure



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# Ethics Roadmaps in Juvenile Court Practice

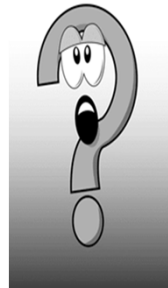
- Tennessee Rules of Professional Conduct, Sup. Ct. Rule 8
- Tennessee Sup. Ct. Rule 40 (GAL)
- Tennessee Sup. Ct. Rule 13 (court appointed counsel)
- Tennessee Rules of Juvenile Practice and Procedure



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# Reminders: Most Common Ethical Issues

- Competence (Rule 1.1)
- Diligence (Rule 1.3)
- Scope & Allocation of Authority (Rule 1.2)
- Loyalty & Conflicts (Rules 1.7-1.11)
- Confidentiality (Rule 1.6)
- Client with diminished capacity (Rule 1.14)
- Communication with parties (Rule 4.2-4.4)



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## Reminders: Most Common Ethical Issues

### ▪ FAIRNESS AS AN ADVOCATE

- Meritorious claims and contentions (Rule 3.1)
- Expediting litigation (Rule 3.2)
- Candor towards the Tribunal (Rule 3.3)
- Fairness to opposing counsel and party (Rule 3.4)
- Impartiality and Decorum of the Tribunal (Rule 3.5)
- Trial Publicity (Rule 3.6)



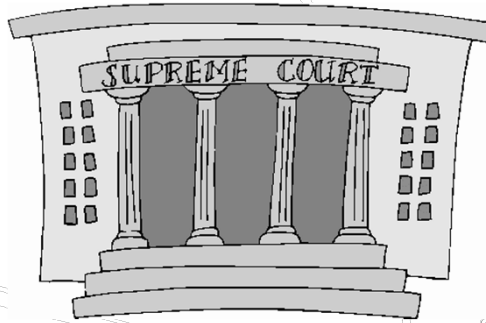
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## More Refresher Issues

- ▶ Professional Independence of Lawyer
  - ▶ Rule 5.4
- ▶ Accepting Court Appointments
  - ▶ Rule 6.2
  - ▶ Right to Counsel (Rule 13)
  - ▶ Right to Effective Counsel (Rule 13)



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**Tennessee Rules of  
Juvenile Practice and Procedure  
Effective July 1, 2016**

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**Focus on Competence  
(Tenn. S. Ct. Rule 8, RPC 1.1)**

**New Rules pose greater competency challenges.**

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## 2016 Rules Separate Types of Cases

- ✓ General Provisions
- ✓ Delinquency/Unruly
- ✓ Dependent/Neglected
- ✓ Foster Care Proceedings

**CASES ARE NOT THE SAME!**

Be competent in each area in which you practice.



## Coverage of New Rules

### TRJPP

- Dependent and Neglect Proceedings
- Unruly
- Delinquency



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## BUT... Tennessee Rules of Civil Procedure

- Termination of parental rights
- Parentage
- Guardianship and mental health commitments of children
- Grandparent visitation
- Civil contempt

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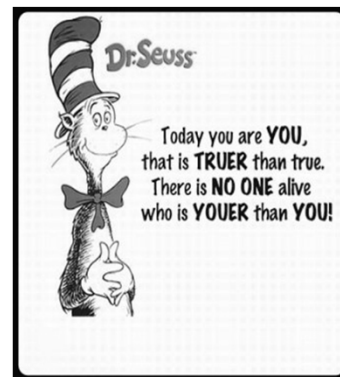
## BUT... Tennessee Rules of Criminal Procedure

- Child abuse prosecutions
- Nonsupport of children
- Contributing to delinquency/unruly
- Contributing to dependency
- Offenses of adults in school truancy
- Criminal contempt

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## What is your role? Who are you? Loyalty?

- Dependency and Neglect
- Delinquency
- Custody, Parentage, Child Support
- Other children's cases



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# Dependency and Neglect Roles

- Parent's Attorney: Rules of Professional Conduct: Client Wishes
- Child's GAL: Rule 40 + Rules of Professional Conduct: Default to Best Interests
- DCS Attorney: Rules of Professional Conduct: DCS Caseworker Direction
- Attorney ad Litem for Incompetent Parent: RPC 1.14: Best interests
- Attorneys for Other Parties: Rules of Professional Conduct: Client Wishes

TRJPP ALSO APPLY TO ALL ROLES; SOMETIMES RULE 13



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# Delinquency Roles

- Child's Defender: Rules of Professional Conduct: Expressed Wishes
- Prosecutor: Rules of Professional Conduct: The "State"
- Child's GAL (if appointed): RPC 1.14: Best interests
- DCS (when relevant): Rules of Professional Conduct: DCS caseworker



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# Competence

New TRJPP required  
heightened competence  
when matters affect children



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## Taking Children's Testimony on Civil Side: Rule 306

### COURTROOM DECORUM

- Child's age and developmental level
- Recorded
- In chambers or courtroom
- Accommodations
- Motion of any party or court's own motion
- Standard is best interests of the child



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## **Taking Children's Testimony: Rule 306**

### **ACCOMMODATION OPTIONS**

- Arrange courtroom or chambers so as to limit visibility of "scary" people
- Exclude parties
- Only written questions & answers
- Closed circuit testimony or other audio-visual transmission
- Judge asks questions
- Comfort animal, stuffed animal, comfort toy, support person (not a witness)

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## **Taking Children's Testimony: Rule 306**

### **DUE PROCESS FOR ADULTS IF FORUM IS CLEARED**

- Counsel for parties & child are present
- Court examines child
- Counsel can submit written questions in advance
- Objections: raise hand and submit objection in writing; responses in writing
- Court takes recess to permit counsel to talk to client about additional questions

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## **Ethical Issues in Child Testimony: Rule 306**

- **GAL: Strategic use of rules for best interests of child**
  - **Parent's attorney: timely, proper representation of client when present and in absentia**
  - **Court: if courtroom is cleared, informs unrepresented persons of right to be represented by counsel, appoints counsel for indigent; gives time to prepare.**
- (NOTE: Comments to rule address alleged perpetrators who are not parties)**

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## **Delinquency Side: Rule 201**

### **PRELIMINARY HEARING AND INFORMAL ADJUSTMENT**

- **Court officer must inquire if child wants counsel; child can waive counsel. Query: should any child be allowed to waive counsel?**
- **Court officer may give "counsel and advice" to parties. Query: unauthorized practice of law?**
- **Child and parent must consent to informal adjustment. Query: does that violate child's rights?**
- **Similar issues with Rule 203: pretrial diversion**

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## Regarding Rule 803(25)

Please be advised that the Rules of Evidence, Rule 803(25) regarding Hearsay Exceptions, Children's Statements does not apply to children age thirteen (13) or older at the time of the hearing. (The presenters erroneously state the rule just prior to this slide). Under Rule 803(25), children age thirteen (13) or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their 'extrajudicial statements'.

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## Delinquency Side: Rule 204

### USE OF RESTRAINTS ON CHILDREN IN THE COURTROOM

Defense counsel: request to be heard on grounds, which are:

- Threat to safety of self or other
  
- Substantial risk of flight
  
- No less restrictive alternatives to prevent harm or flight
  
- Request findings of fact on the record!

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## Client With Diminished Capacity: Rule 1.14

- As far as reasonably possible, maintain a normal client-lawyer relationship
- Take reasonably necessary protective action, such as consulting with individuals or entities who are able to take protective action and/or seek the appointment of a GAL.
- Do not assume a child is incompetent.
- Children are not little adults. Know the stages of child development and what can be expected of children of various ages. Adjust your representation accordingly.



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## Competence: Procedural Issues

### KNOW THE HOW

- Rule 103 Serve Process and Summons
- Rule 104 File Notice of Appearance
- Rules 105 and 106: Know what pleadings to file
- Rule 107: Know how to do a subpoena
- Rules 103-107 and Rule 110: Know the time frames



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# Diligence: The Cousin of Competence

## EXAMPLE

- Rule 111: Scheduling conferences and order
- Attorney must be prepared, must participate in good faith
- Sanctions Available: Dinged with fees



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# Discovery

RPC 1.3 Diligence

RPC 3.4 Fairness to Opposing Counsel and Parties



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## Discovery: Ethics Concerns

- Rule 1.3 Diligence (Comments)
- Pursue a matter for a client despite opposition, obstruction, or personal inconvenience
- Avoid procrastination
- Control workload so as to meet obligations
- Rule 3.4 Fairness
- Prohibits obstruction, alteration, destruction, concealment, falsification
- Prohibits frivolous requests
- Prohibits failure to make a diligent effort to comply with a request

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## Discovery Under the Juvenile Rules

### Rule 206 Delinquency

- Consistent with Rule 16, Tenn. R. Crim. Pro.
- Informal discovery encouraged

### Rule 305 Dependency & Neglect

- Consistent with Civil Rules
- Informal discovery encouraged
- Requires good faith effort to resolve by agreement
- Avoid undue expense and delay

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## Fairness as an Advocate

... PROFESSIONALISM PROVIDING SPEEDY AND INEXPENSIVE PROCEDURES... THAT ASSURE FAIRNESS AND EQUITY AND THAT PROTECT THE RIGHTS OF ALL PARTIES BY PROMOTING UNIFORMITY IN PRACTICE AND PROCEDURE...

TRJPP, Rule 101 (d)

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## Fairness and Equity as an Advocate

RPC, Rule 3.1 Meritorious Claims and Contentions

- Must have basis in law or fact for action
- Or good faith argument for changes in law
- Non-frivolous

RPC, Rule 3.2 Expediting Litigation

- Improper to routinely delay for the convenience of the advocate
- Financial or other benefit to client is not a reason for delay



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# **Sticky Issue #1: Appointed Counsel Can't Find Client**

How should attorney handle this?

Consider:

- Rule 1.16: Declining or termination representation
- Rule 6.2 Accepting Appointments
- S. Ct. Rule 13: Indigent person must request counsel

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# **Sticky Issue #2: Voluntary Plea of Child**

- Is the plea of a child really voluntary?
- Can parent direct or influence a plea? What if parent and child don't agree? Can Defender follow parent's wishes against child's wishes?
- What if parent is complicit in delinquent act? What if parent wants to relinquish custody of child?

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## **Sticky Issue #3: Limits on Discovery**

- Is parent's attorney expected to reveal bad stuff about client?  
Consult RPC 3.4
- Is DCS attorney obligated to collect or share discovery, if DCS is not a party or petitioner?  
Consult RPC 3.4

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## **Sticky Issue #4: Lawyer Has Personal Interest or Conviction**

- GAL: Consider Rule 40 (b) (2): child's best interests requires objective consideration of child's specific needs and preferences
- ALL: RPC 1.7 Conflict of interest includes personal interests; RPC 3.1 Meritorious claims require basis in fact or law; RPC 6.2 Decline court appointment if cause is "repugnant" to lawyer

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## **Sticky Issue #5: Scope of Confidentiality**

- Can a lawyer share information about a case generally?
- Consider RPC 1.6 (a) (2): the disclosure is impliedly authorized in order to carry out the representation

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## **A Final Word**

**“Yet the rigors and reality of day-to-day practice test our professionalism....Remember that it is actually the difficult circumstance that invokes the opportunity to use and measure our professionalism. A lawyer’s integrity is demonstrated when it is challenged.”**

***NITA, Trial Advocacy for the Child Welfare Lawyer***

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