

LOYALTY, PATERNALISM, AND RIGHTS: CLIENT
COUNSELING THEORY AND THE ROLE OF CHILD'S
COUNSEL IN DELINQUENCY CASES

*Kristin Henning**

ABSTRACT

As clarified by the Supreme Court in the 1967 case *In re Gault*, the due process clause of the Fourteenth Amendment guarantees an accused child the right to appointed counsel in delinquency cases. Since *Gault*, numerous scholars and leaders in the juvenile justice community have interpreted the right to counsel as a right to traditional, client-directed advocacy. Yet, despite the weight of opinion in the academy, the role of zealous, expressed-interest advocate is far from uniform in juvenile practice. Practitioners routinely advocate in the best interest of the child, discounting the wishes of their client and substituting their own views about what is most appropriate for the care or rehabilitation of the child.

The long adherence to best interest advocacy may be attributed to any number of systemic or normative variables including significant limitations in the language and holding of *Gault*; the inadequacy of state statutes implementing the juvenile's right to counsel; the deeply entrenched history of paternalism in the juvenile justice system and normative objections to ceding autonomy to children. Cognitive and psychosocial limitations in children and adolescents further perpetuate best interest models. Unfortunately, the Model Rules of Professional Conduct have been only marginally useful in providing guidance to attorneys who represent clients of diminished cognitive capacity.

In this article, Professor Henning seeks to identify an attorney-child framework that will (1) give substantive meaning to the child's Constitutional right to counsel in delinquency cases, (2) satisfy the ethical mandates of the Model Rules of Professional Conduct, (3) have the flexibility to accommodate cognitive limitations while enhancing the

* Associate Professor of Law, Georgetown University Law Center; Deputy Director, Juvenile Justice Clinic; J.D., Yale Law School; L.L.M., Georgetown Law Center; A.B. Duke University. I thank Wally Mlyniec and Annette Appell for careful reading and detailed commentary on early drafts and I thank Angela Serranzana and Kathleen Pirozzolo for their invaluable research assistance.

decision-making capacity of children and adolescents, and (4) engage parents in various aspects of the delinquency case without compromising the sanctity of the attorney-client relationship or sacrificing the fundamental rights, dignity and autonomy of the child client. Given the breadth and complexity of factors that must be considered in selecting an appropriate attorney-client framework in a delinquency case, it is clear that we can no longer look at the attorney-client dyad through the binary lens of best-interest versus traditional, expressed-interest advocacy.