

Proposed Ethics Opinion about Interviewing Child Witnesses

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Last month, the State Bar issued a proposed ethics opinion regarding contact between prosecutors and defense lawyers, on the one hand, and children who are prosecuting witnesses in criminal cases involving allegations of physical or sexual abuse, on the other. The proposed opinion, which is available [here](#), concludes that a lawyer "may not interview a child who is the prosecuting witness in a criminal case alleging physical or sexual abuse if the child is younger than . . . 14 . . . unless the lawyer has the consent or authorization of a non-accused parent or guardian or a court order." The opinion focuses on unrepresented children; in keeping with general principles, represented children are treated differently. I have some concerns about the proposed opinion, which I'll mention below, but I wanted to start by setting out the reasoning in the opinion.

The opinion addresses a recurrent and important topic. As the proposed opinion puts it, child abuse cases pose "a difficult dilemma for a lawyer who has a duty to prepare competently by investigating each case and interviewing key witnesses, but who does not wish to cause further harm to a child who may have been traumatized by physical or sexual abuse."

In resolving this dilemma, "the Ethics Committee received input from mental health professionals and child advocates," who stated that repeated interviews may be traumatic for a child; that interviews are best conducted by professionals; and that it is generally helpful for a family member to be present during interviews. The Committee concluded that children often "are inexperienced in legal matters and will not understand the role of a lawyer who seeks an interview," may defer to a lawyer's apparent authority, and may be vulnerable to suggestion. Thus, the opinion concludes that certain children may be interviewed only with the consent of a parent or guardian, or with a court order.

But which children? The opinion states that "the emotional and intellectual sophistication of a child cannot be determined by a lawyer or established by an opinion of the Ethics Committee. However, the General Assembly has determined that a child at a certain age is legally mature for the analogous purpose of responding to an in-custody interrogation." Citing [G.S. 7B-2101](#), which effectively provides that police may engage in custodial interrogation of a suspect under age 14 only when the child's parent, guardian, custodian, or attorney is present, the proposed opinion adopts 14 as the cutoff below which an attorney may not interview a child without consent or a court order. The proposed opinion allows lawyers to interview children older than 14 without consent or a court order, provided that the lawyer makes certain disclosures about the lawyer's role and the child's rights during the interview, and the lawyer "reasonably determines that the child is sufficiently mature to understand the disclosures."

I've already mentioned that this is a difficult and important issue. In addition to the potential harm to children from ill-advised interviews, "[s]ocial science evidence of children's suggestibility indicates that persistent pretrial interrogation of child witnesses can impair the search for truth in litigation." Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: the Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 92 (1993). However, I have some concerns about both the timing and the content of the proposed opinion.

As to the timing, the United States Supreme Court has recently granted certiorari in *Camreta v. Greene*, a case about interviewing child witnesses. (More information about the case is available [here](#).) Although the case concerns interviews by law enforcement, rather than lawyers, it may well result in guidance about interviewing children in criminal

cases generally. Further, given that the proposed opinion relies heavily on statutory rules regarding interviews by law enforcement as support for its conclusions about when lawyers may conduct interviews, it may be worth waiting for the Supreme Court's opinion before finalizing any ethics opinion.

As to the content of the proposed opinion, I am troubled by its reliance on the so-called juvenile *Miranda* rules as a basis for the regulation of lawyers' professional conduct. The proposed opinion's basis for importing the age 14 cutoff from those statutes is that "the emotional and intellectual sophistication of a child cannot be determined by a lawyer or established by an opinion of the Ethics Committee." The proposed opinion does not explain why the General Assembly is better suited to addressing this issue. But more importantly, the General Assembly *hasn't* addressed the issue: the juvenile *Miranda* statutes govern police conduct regarding young suspects in the inherently coercive setting of a custodial interrogation. They simply have nothing to do with whether a lawyer should be allowed to interview a young witness in non-custodial circumstances. It may be that age 14 is a reasonable cutoff, but if so, it isn't because that is the cutoff in G.S. 7B-2101.

In fact, I am not sure that any bright-line rule is possible or desirable. The proposed opinion implicitly recognizes this when it permits interviews of children over 14 only once the lawyer "determines that the child is sufficiently mature to understand the disclosures" required by the opinion. If a lawyer is able to determine the maturity and comprehension of a 15 year old, why is the same lawyer unable to determine the maturity and comprehension of a 13 year old? A commentator discussing the permissibility of child interviews in connection with custody cases puts the point simply: "If a minor is mature enough to understand the nature of a lawyer and comprehend the proceedings," an interview is permissible; otherwise, it is not. Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases*, 15 J. Am. Acad. Matrim. Law. 33 (1998).

Finally, the proposed opinion is vague in several important respects. For example, it allows lawyers to interview children under 14 pursuant to a court order, but never explains what type of order is contemplated. Similarly, the proposed opinion states that even with children over 14, a lawyer "should err on the side of giving notice to the parent or guardian—and preferably obtaining the consent of the parent or guardian—unless circumstances are such that the lawyer has a good faith belief that the child's candor may be affected by the knowledge of the parent." It is not clear whether this creates an ethical requirement, or is simply well-meaning dicta. Likewise, the proposed opinion states that a lawyer "may not engage in emotional manipulation or other forms of undue influence, coercion, or intimidation that may inhibit or alter the witness's testimony." Presumably this is true with respect to all witnesses, not just children. If the opinion is establishing a different standard for influencing child witnesses, it should say so more clearly. If not, this passage creates a needless confusion about the permissibility of common interviewing techniques such as questioning a witness's veracity or confronting the witness with inconsistent facts.

It is easy to be a Monday morning quarterback with respect to ethics opinions. They tend to address difficult situations, and this one is especially complex. Readers, what do you think? Does the proposed opinion strike the right balance, or is it not quite ready for prime time?