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The Duties and Responsibilities of Minor's Counsel Under Family Code Section 3042

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Introduction

In March of 2017, I co-authored and moderated a webinar with the Honorable Timothy Staffel of the Santa Barbara County Superior Court (available through the Family Law Section's MCLE on demand). The program addressed the issues raised by California Family Code section 3042, the statute that requires consideration of a minor's preferences regarding custody and visitation. This article focuses on how to carry out your obligations as counsel for a minor when your client has a custodial preference. Your duties and responsibilities are set forth under both section 3042 and the Rules of Court.

How Old Is Your Minor Client?

Minor's counsel obligations under Family Code section 3042 start with a simple inquiry: how old is your client? Under section 3042(c), if your client is fourteen years of age or older and wants to address the court regarding custody or visitation, he or she must be permitted to do so unless the court makes a finding that to do so would not be in the child's best interests. The court must state its reasons for that finding on the record.

If your minor client is under fourteen, that does not prevent the court from considering his or her preferences. As a practical matter, a court would be hard pressed not to consider the preferences of a stable, mature thirteen-and-one-half-year-old who is getting good grades in school. The authority to consider the custodial preferences of a minor who is less than fourteen years old is found in Family Code section 3042(d), which states that nothing in the section precludes the court from considering the preferences under fourteen years old if the court determines that it would be appropriate to do so "pursuant to the child's best interests."

Your Client is Old Enough, But You Do Not Agree with Their Preferences

If you have already been appointed as minor's counsel and learned from your client that he or she wants to address the court, Family Code section 3042(f) requires you to indicate to the court that the child has a preference. This mandatory duty triggered an interesting discussion during the 2016 Minor's Counsel Training in San Luis Obispo County.

I posed a hypothetical situation in which your fifteen-year-old minor client had a preference to live with one parent. As counsel, you believe that this preference was based on the preferred parent having a more lenient and lax home environment. That lax environment allowed the child to leave the home late at night, after curfew, during which time your client reveled to you they were using alcohol and drugs and having sex. To me, this situation creates a three-way tug of war between the mandate to communicate to the court that your minor client has a custodial preference, your role as minor's counsel to advance the best interests of your child client, and your ethical duty to maintain the confidentiality of attorney-client communications.

After much debate at the training, the consensus was not unanimous. My personal position was that I would communicate to the court that my client had a preference, but that as minor's counsel I disagreed with the preference and therefore was asking the court to give no weight to the preference. My proposed gatekeeper role was rejected by several seasoned attorneys who are regularly appointed as minor's counsel. I concluded there is no

single, appropriate response to my hypothetical. Further, regardless of questions you have regarding the basis for the minor's preferences, the mandatory obligation to advise the court that your minor client has a preference cannot be ignored.

To Testify or Not to Testify, That Is the Question

It has been my experience that judicial officers prefer not to have children testifying in court. However, it is also my understanding that the practice is more common in other jurisdictions.

Family Code section 3042 and the Rules of Court outline alternative procedures that can be used in lieu of testimony. Those procedures include having counseling or court professionals interview the child. However, having a third party testify about what a child said could be challenged as inadmissible hearsay. Further, resorting to a custody evaluation (either under Family Code section 3111 or Evidence Code section 730) does not resolve that issue, because it is unclear whether the expert writing such a report can rely on hearsay statements after the decision in *People v. Sanchez*, 26 Cal. 4th 834, 111 Cal. Rptr. 2d 129 (2002).

If you want to interview a child to determine preference in lieu of testimony, I would elicit a stipulation from all counsel. The stipulation would recite that to avoid the strain and emotional burden the child would experience by testifying in front of their parents in court, an interview will be ordered and admitted into evidence, with a waiver of all hearsay objections to the resulting interview report. However, the stipulation would also provide that the interviewer is subject to cross-examination regarding the interview report.

If a child is called to testify, the court is required to control the examination to protect the child's best interests.[1] The court also has great latitude in setting the conditions of the testimony. As minor's counsel, at a minimum you should request that your client be examined in closed courtroom, which is authorized by Rule of Court 5.250(d)(3)(a).

Under Rule 5.250(d)(3), the court is charged with balancing the necessity of taking testimony from the child in a traditional courtroom setting with the parents and counsel present "with the need to create an environment in which the child can be open and honest." As minor's counsel, I believe that it is your obligation to determine in consultation with your client what environment is most likely to promote "open and honest" testimony.

Rule 5.250(d) goes on to explain the different environments or situations under which the minor's testimony can be taken, including:

- In a closed courtroom or on record in chambers.
- Whether counsel or the parties will be allowed to be present.
- The manner of questioning, e.g. by the judicial officer, by the attorneys, by the parties, by a child advocate or by an expert in child development.
- Whether a listening system will be employed to allow counsel or parties excluded from the examination to hear the questioning.

Whatever method is used, Rule 5.250(d)(6) requires that the child's testimony be received "on the record or in the presence of the parties," a requirement that cannot be waived by stipulation.

Minor's counsel should also be mindful of the limitations and restrictions placed on the questioning of their minor client. Rule 5.250(d)(4) states that

> (i)n taking testimony from a child, the court must take special care to protect the child from harassment or embarrassment and to restrict the unnecessary repetition of questions. The court must also take special care to ensure that questions are stated in a form that is appropriate to the witness's age or cognitive level.

In my opinion, this rule requires minor's counsel to determine the cognitive level of their minor client so that they can object to any questions that would not be appropriate for their client to respond to. Further, the attorney needs to be prepared to object to any questions that might be embarrassing or harassing to their minor client.

Mandatory Duties of Minor's Counsel When the Minor Will Be Participating or Testifying

Rule 5.250 sets out in detail the procedures to be followed when children are to participate or testify in family court proceedings. Several of the Rule's subsections impose mandatory duties on minor's counsel, including:

- Rule 5.250(b): As noted above, minor's counsel is one of the parties required to inform the court that the child wishes to address the court regarding custody and/or visitation.
- Rule 5.250(d)(5)(A): "Provide information to the child in an age-appropriate manner about the

limitations on confidentiality and indicate to the child the possibility that information provided to the court will be on the record and provided to the parties in the case."

- Rule 5.250(d)(5)(B): Requires you to inform your client they can, but are not required, to state a preference regarding child custody or visitation, also referred to as "parenting time." Counsel is also required to explain to the minor client in an age-appropriate manner the "process by which the court will make a decision."
- Rule 5.250(d)(5)(C): Requires you to explain the procedures regarding the child's participation and orient the child to the courtroom in which they will be testifying, if appropriate.

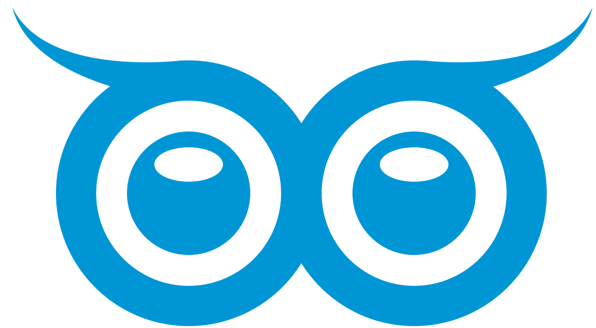
Taken together, these mandatory duties make clear that you have to inform your minor client about the process of testifying, the consequences and limitations regarding the child's testimony and even to acclimate them to the courtroom environment.

Conclusion

This article by no means addresses the full scope and responsibilities of minor's counsel. It is limited to the singular issue of what your obligations are when your minor client has a custodial preference. A more expansive discussion will occur at the Second Annual San Luis Obispo County Family Law Section Minor's Counsel Symposium to be held March 17 and 18, 2018.

Endnotes

1 Cal. Fam. Code § 3042(b).



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