

Law Office

VAN DER MUSSELE ERIC *
VANDEN BOSCH YOLANDA *

2000 ANTWERP
STOOPSTRAAT, 1 BUS 10

Phone. 00 32 (0)3-237.40.88
FAX. 00 32 (0)3-248.09.75

Antwerp 10 March 2007

Lawyers for Minors

Building stones from a distant past,
and 20 years of initiatives from the Flemish field of action

I INTRODUCTION:

1. Lawyers who provide legal advice to minors and who intervene on their behalf, do experience that it is not evident to assist minors in the same way as adults seeking justice. Certain questions and doubts arise in the mind of the minors themselves, their parents, social workers, teachers, institutions, magistrates and colleague-lawyers.

Since the coming into effect of the new Act on Judicial Assistance of 23 November 1998, in which minors are included as persons coming under a certain jurisdiction who are irrefutably deemed to be of limited means and who are automatically entitled to legal aid, efforts have been made within the Legal Aid Agencies (Bureaus voor Juridische Bijstand, BJB) at the various bars and within the Flemish Bar Association to find the appropriate arrangements.

2. Within the field of professional rules one rightly asks the question whether specially trained lawyers for minors will continue to act in the same way as other lawyers do for their clients, bound by the same rules of professional practice and ethics. If this must necessarily be the case in principle, a number of classical aspects of professional practice and ethics must be further specified for those lawyers who accept the charge to defend minors and for the professional partners who must associate with the lawyers of minors ¹.

3. Below a position is taken in which the interest of the minor seeking justice is given maximum priority over that of the other parties involved, including that of the lawyers for minors themselves.

¹ G. RIGO, "L'avocat devant le tribunal de la jeunesse – aspects déontologiques de l'intervention de l'avocat pour assurer la défense des intérêts d'un mineur d'âge", in: *Regards sur les règles déontologiques et professionnelles de l'avocat*, SBL éditions du jeune barreau de Liège, 249 et ff..

In this respect the use of the term 'youth lawyers' does not refer to a legally delineated group of specialised lawyers. It is only an indication of those lawyers who aim *de facto* at training voluntarily and specifically in the field of juvenile law and related paralegal disciplines to be able to offer assistance to minors on a continuous basis from the first claim, until the cancellation of all sanctions or until majority. This is applicable both in case of facts described as a crime and in matters involving problematic education.

II. Stages in the evolution towards an overall legal framework and a uniform organisation:

II.§1. Task and image of youth lawyers – evolving views:

4. If one decides to offer assistance and advice to the minor, also as a lawyer one must be careful not to fill in the point of view oneself concretely. On the contrary, one should see to it that the point of view of the minor is passed on very clearly and is discussed in the debate ², at least in so far the minor has sufficient judgment. In the French-speaking part of the country to assistance by a lawyer for this purpose is considered to be appropriate.³ For assignments within the framework of *ex officio* appointments e.g. before the Justice of the Peace this point of view is acquired.⁴ The situation used to be quite different.⁵

5. In another article that outlines a pedagogical approach of this role problem for the youth advocate, the author gives a rough sketch of the three current opinions⁶:

² P. DE LOOF, "Jeugdadvocaat: een advocaat in drijfzand?", *TJK*, 2002/1, 2 and 4.

³ A. DE TERWAGNE: Proposition de loi instituant les avocats des mineurs- Un texte Perfectible; *Journal du Droit des Jeunes*, nr.200, p.1;

⁴ Rép. Prat. de Droit Belge, tw. Avocat, nr.456: "Il doit se borner à exposer la prétention du client, sans l'appuyer de ses propres convictions, sans la déconsidérer aux yeux des juges."⁴[He must restrict himself to submit the expectations of the client, without adding his own beliefs, without discrediting it in the eyes of the judges].

⁵ L. GARDENAT, *Traité de la profession d'avocat*, Parijs, 1931. "il est des cas ou l'avocat (des mineurs) devra solliciter du tribunal l'internement dans une maison de correction, s'il voit que là seulement est le salut.[There are cases where the youth lawyer will have to request the court to intern the minor in a remand home, if he considers that this is his only salvation].

⁶ J. VAN DORPE, "De rol van de jeugdadvocaat: een pedagogische benadering", *TJK*, 2004/3, 156. – De "*guardian ad litem*" die op zoek gaat naar de "beste oplossing" voor de minderjarige, maar zich niet beperkt tot diens vraag.[who is looking for the best possible solution for the minor, but does not restrict himself to his request]

In the light of the bill the author clearly distinguishes the task of the youth advocate⁷, as the task to look for the personal interest of the minor and in this respect he quotes the text of the bill itself: *"It is not the task of the youth advocate to think in lieu of the child, but to assist the child to formulate its opinion and make it known."*

That does not mean that in a confidential discussion other points of view and solutions cannot be brought up as well as problems that may be a consequence of opinions and ideas of the minor. Neither will imitation or servile rattling off be also out of the question. In the French-speaking part of Belgium this is also the prevailing opinion.⁸

A clear point of view along these lines can be found on the Internet under: US-Youth Imperative.Inc.: <http://youthimperative.us/gpage7.htm>.

A more articulate point of view which also takes into consideration those minors who do not have power of discernment and judgment can be found in the NACC Recommendations for Representation of Children in Abuse and Neglect Cases⁹ in which the "Child's Attorney ABA/NACC-model" is elaborated because in marginal cases the strict model of the "avocat défenseur" or 'defending advocate/attorney' does not allow to intervene.

– *De "amicus curiae"* die doet wat de eerste deed en bovendien een rol van informator en tussenpersoon inneemt tussen alle betrokkenen en de rechter, om deze laatste te behoeden voor verkeerde informatie omtrent de feiten.[who does what the first one did and moreover plays a part of informer and intermediary between all the parties involved and the judge, to protect the latter against false factual information].

– *"L'avocat défenseur"* die zoals voor meerderjarige cliënten de rechten van de minderjarige bewaakt en zijn woordvoerder is, maar daarom niet steeds dezelfde mening heeft als de minderjarige zelf. Ten aanzien van de andere actoren echter zegt hij wat de minderjarige belangrijk vindt en helpt hij om dit gepast te verwoorden. [who like for clients of age, safeguards the rights of the minor and is his spokesperson, but not necessarily shares the opinion of the minor. With regard to the other intervening parties he says what the minor considers to be important and helps to use the rights words for it]

⁷ Wetsvoorstel LINDEKENS tot instelling van jeugdadvocaten voor minderjarigen, 22 december 1999, *Parl. St.* Senaat 1999-2000, nr. 2-256/1.

⁸ A. DE TERWAGNE: o.c.; p.2

⁹ D. KATNER , Ph. McCARTHY, Jr., M. ROLLIN , M. VENTRELL, NACC Recommendations for Representation of Children in Abuse and Neglect Cases, document adopted by a unanimous vote of the NACC Board of Directors on April 28, 2001, 14: *"This child's attorney model places the attorney in the role of traditional attorney and addresses the needs of the young child through the application of best interest evaluation in limited situations."*

II.§2. Historical marginal comments on minors, courts and lawyers:

6. There are few historical sources showing lawyers that work for minors. Without any research in the source material one can only discover in the general works on the subject whether minors had to appear before the *court*, in order to find an indication of the need/possibility of defence and legal aid of minors during the period under consideration. A small selection of the material does immediately yield a number of principles regarding legal aid to minors which will only resurface in the 19th century and today.

Ex officio assistance by lawyers appointed and controlled by the court that are free of charge for the persons also minors seeking assistance but given a limited compensation by the State dates back to the Roman period in both criminal and civil matters;

In the Middle Ages after the reinstatement of the former Bar Association legal trainees are "écouteurs" and they do not act themselves;

In Canon Law there is the personal counsel for minors the "*procurator*" or the "*curator*" who must act for and with minors in civil and "spiritual" matters, without representation or approval of the parents

7. Legal aid in the imperial decree of 14 December 1810 orders that matters of legal aid must be handled without compensation. This decree regulated the practice of the legal profession by a lawyer and the professional discipline of the Bar Association.

It stipulates under Article 24 that the Bar Association must provide legal aid to the persons of limited means for which a "Free Legal Aid Office" must be set up which meets every week.. This Office must pass on the cases it considers justified together with a legal opinion to the Disciplinary Council, which then distributed the cases among the lawyers 'in turns'¹⁰.

8. Since 200 years the provisions of the "Civil Code" denied access of minors to the civil court, allegedly because of incapacity to conduct proceedings of the minor. This argument

is challenged today both by legal doctrine and administration of justice.¹¹

¹⁰ "Assistance judiciaire aux indigents", tw. "Belgique", p. 62, in Volume V – *Questions Juridiques 1927* by Publications de la Société des Nations.

¹¹ D.REYNAERT Van een rechtspositioneel verzoog naar een relationeel verzoog over bekwaamheid; TJK,2007/1, p.9, and also in the issue Arbitragehof 27/2006 2-3-06 including explanatory note and Hof Gent 20-6-06 including explanatory note.

9. The classical possibility to prosecute minors under 16 personally and under criminal law provided they had reached the "age of reason" was still provided in the Criminal Codes of 1810 and ¹². There is a comprehensive survey of the numbers and kinds of crimes committed by minors during that period in Belgium¹³.

This possibility of a criminal trial was cancelled by the Child Protection Act of 15 April 1912, after the Criminal Code of 1867 already included a first element of protection for minors and several corrections had been made to the prosecution and detention systems for minors¹⁴.

10. After the *first Child Protection Act of 15 May 1912* followed an evolution via all sorts of discussions between more or less criminally-oriented policymakers towards the Child Protection Act of 8 April 1965.¹⁵

¹² J. SMETS, *Jeugdbeschermingsrecht*, 6, nr. 7-25.

¹³ J. CHRISTIAENS, *o.c.*, 29 plus enclosures at the end. This criminological work contains all the figures on Assizes from 1836-1900, magistrate's courts 1835-1883, court decisions of the Province of Antwerp year IX-1890. Between 1836 and 1885 1.5 million accused appeared before the criminal courts 260,000 of which under 21 and 100,000 under 16. Per year 5,000 children appeared before criminal courts. In that period 15,566 accused of which 1950 persons under 21 and 109 children under 16.

¹⁴ J. CHRISTIAENS, *o.c.*, 21. This is how there was a different regime for minors under 18 in case of vagrancy. A whole range of initiatives afterwards materialised to allow the creation of "a protective system for children". J. Christiaens in this respect mentions as main basic factors: the rise of statistics and development of criminal statistics, social research, the Criminal Code and the prosecution policy in the first half of the 19th century as well as prison reforms from 1830.

¹⁵Minors are no longer governed by the Criminal Code. However, in the newly designed protection procedure the personal authority to act and entitlement to bring action of the minor, as it existed in the earlier criminal procedure, is maintained for the "hearings" and for the sessions in camera. The minor was therefore indeed considered as a party in matters involving facts described as a crime and problematic educational situations (as far as the latter are concerned in so far measures are demanded against him), but there was no question of effective defence since the actual main point of the procedures was not the eventual court hearing but the sessions in camera which preceded the actual court hearing (sometimes one, two years or longer) where no defence by a counsel was allowed.

Exceptionally the juvenile court judges requested the then BCV (today's Legal Aid Agency) were asked to appoint a youth lawyer, although the law itself did not provide it (some 35 times in Antwerp in 1984 according to the figures of the Legal Aid Agency).

Lawyers became compulsory and were provided *ex officio* from 1965 for legal assistance to minors during proceedings but only during the "judicial proceedings" and not during the cabinet meetings **kabinetszittingen**. Nevertheless important decisions were taken in the cabinet during which appeals, revisions etc. were possible. This was the situation until early 1980 and it would not have in many judicial districts.¹⁶

The Public Prosecutor's Office and the juvenile court judges wanted changes.¹⁷

11. Belgian juvenile legislation was adjusted after that¹⁸, and also provided compulsory legal aid by lawyers in the cabinets immediately after arrest so that problems arose in those districts where no permanent legal aid provided by lawyers was available. Under those conditions the most important decision (i.e. the first provisional measure after arrest) had to be taken in the absence of a counsel, which was no longer legal after the change in law.

This problem was finally solved by organising a permanent legal aid system operated by lawyers in all districts.

III. Problems with legal aid by lawyers to minors today:

12. From many points of view the present legal aid for minors by lawyers is new and deserves to be thoroughly scrutinised.

¹⁶ F. MAES (lawyer of the Bar's roll, member of the Secretariat of the trainees in those days), "De jeugdrechtbank en de rechten van de verdediging", *R.W.* 23 June 1979, 2848 After that new initiatives arose in Antwerp and Brussels and systematically after that in other Bar Associations according to the example of the Bar Association of Liège with the former creation of the first "legal aid service on call" at the end of the 70ies.

¹⁷ Y.VANDEN BOSCH, "Permanentie bij de Jeugdrechtbank", in *Vlaams Jurist Vandaag*, 2nd quarter 1990.

¹⁸ Art. 16 and 21 Wijzigingswet 2 February 1994, *B.S.* 17 September 1994. Now an arrested minor (in most cases involving facts described as a crime) also in case of provisional measures must be given immediate assistance by a lawyer if one wishes to comply simultaneously with Article 52ter (Legal Aid Act, WJB) and Article 12 of the Constitution (notification of a provisional measure within 24 hours after imprisonment) . All other minors under 18 who are a party involved in proceedings and who are not necessarily arrested (e.g.) those appearing as a result of a problematic educational situation) must be supplied a counsel who will be appointed within two working days if they have not appointed one themselves (Article 54bis §1 Legal Aid Act).

Lawyers must check in which way and after a period of relative absence of minors before the court they can effectively provide legal aid and defence. This also happens abroad as can be learned from a summary visit to several websites via Google searching for “*Avocat de mineurs*” or “*Youth lawyers*”¹⁹.

13. To make this possible certain guarantees have to be built in for the minors with regard to safeguarding legal rights in the proceedings as well as in the field of professional practice. If in our democratic state under the rule of law today we are (at last) capable of guaranteeing effectively the power to bring an action as well as legal aid by ex officio appointed lawyers in juvenile law, why then is it not possible in family law, and in the other branches and proceedings of civil, criminal and administrative law, to accept a similar arrangement, as is already the case now in other legal systems?

Maybe this will be realised more efficiently if the “youth lawyer” is given shape to systematically commission him with the assistance of minors before the court and before the extra-judiciary authorities;

14. Abundant information can be found under: <http://www.google.com/search>, via the keywords: *avocats de mineurs*, *youth lawyers* or *lawyers for children*.

From the various locations a large number of links can be consulted directly. The initiatives originated from the various participants within the judicial or extra-judicial youth protection.²⁰

IV Recent reactions within the Bar Association and initiatives for youth lawyers:

¹⁹ Also see No 33 and 34, with explanatory note 36.

²⁰ These are sometimes local Bar Associations taking the initiative:

e.g.: France: the Aix-en-Provence Bar Association

http://barreau-aixenprovence.avocat.fr/services_particuliers/serv_avocenfant.html

Sometimes a national organisation of lawyers takes the initiatives: e.g.: US: American Bar Association with the National Juvenile Defender Centre

<http://www.abanet.org/crimjust/juvjus/>

Sometimes it is organised by the Public Prosecutor’s Office: e.g.: Canada: Ontario – Ministère du Procureur Général/bureau de l’Avocat de l’enfant:

<http://www.attorneygeneral.jus.gov.on.ca/french/family/ocl/>

Sometimes by national lawyer’s associations: e.g. : Switzerland: Société Suisse de droit pénal des mineurs:

<http://www.julex.ch/php/uebersicht.php?lang=fr>

Sometimes by associations involving part of the working field: e.g. US: Foster Parent Association, New York State Citizens Coalition for Children, Inc.

<http://www.nysccc.org/FCYouth/lawyer.htm>

Sometimes by pure private associations: e.g.: US: Lawyers for Children America:

<http://www.lawyersforchildrenamerica.org/matriarch/default.asp>

15. In Belgium a legal service with lawyers on call was created for the first time in Liège in 1980 to offer immediate assistance to minors after their arrest and at least when they appeared before the Crown Prosecutor and the juvenile court judge in camera.

Even after the creation of the first similar services in Antwerp and Brussels there was no follow-up of the file, no continuity of the legal aid offered to the minor by one and the same counsel.

16. In the past few years the awareness slowly grew that access of the youth lawyer to the meetings in camera and assistance to the minor at that time was only the beginning of what was really needed.

In the French-speaking Bar Associations we find the same concerns and objectives.²¹

In this first stage the most important achievement was that every minor who was arrested or called was assisted by and immediately contacted by a lawyer.

17. However, the need for additional and more specialised training became tangible.

In the trainee period (BUBA – Bar exam) an additional and minimal training of 2 hours was provided on juvenile law.

Today, i.e. 20 years after the very first changes, there is an initiative of the OVB, the Association of Flemish Bar Associations to provide youth lawyers in cooperation with university colleges and universities, consisting of 80 hours of courses as well as legal and paralegal courses. In 2005 this training materialised. Besides the necessary theory some practical training was also included with e.g. role play with professional guidance.

18. In Antwerp alone the number of juvenile cases called for 1571 cases in camera and 1414 at hearings in the course of 2003-2004. That year there were 5 appointments for Hergo and 122 for restorative mediation²².

The members of the juvenile lawyers on call were active with 65 volunteers (both Bar members and trainees).

²¹ A. DE TERWAGNE: o.c.; p.3..

²² BJB-Antwerp: Annual Report of the Legal Aid Agency 2003-04. The enormous increase in new pro bono cases results in an increase in the number of cases in which secondary assistance is offered has increased to over 16,703 cases in 2003-2004, only for Antwerp. The number of cases closed nationally amounted to 89.661 for Belgium in 2002-2003), and 434 Bar members and 250 trainees participated in the legal aid, on the whole almost 50% of all Bar members.

19. Most Bar Associations were facing the same problems, at different times, though. As soon as it appeared that it was preferable to call upon motivated and additionally trained volunteers (as moreover is made compulsory by the Judicial Code)²³, it was decided from January 2000 on to entrust the ex officio legal aid to minors exclusively to a group of lawyers-volunteers. In some Bar Association these are both trainee layers and Bar members who have specialised in the subject. Since the introduction of the Legal Aid Act²⁴ an application for judicial review is possible against the refusal by the Supervisory Council /BJB to being listed as candidate legal aid lawyers.

20. In the mean time all the Bar Associations have taken the initiative of legal aid services on call exclusively working with volunteers, after compulsory additional training, and if possible ranging from the compulsory follow-up until the end of the measure.

V. Initiatives within the OVB (Association of Flemish Bar Associations)

21. Since the foundation of the OVB (Association of Flemish Bar Associations) it was first in the BJB Commission and recently in the Youth Lawyer's Commission that the realisation of an effective legal aid system for minors was undertaken.

In this respect the General meeting of the OVB has approved the following recommendation on 7 December 2005.

22. The text of the 4 action points from the recommendation of the OVB reads as follows:

1. *The Supervisory Council, upon having obtained the advice of the Legal Aid Office and of the persons in charge of the legal aid service on call, annually draws up a list of lawyers, that is necessary to represent all appointments or legal aid assignments within the framework of legal aid for minors.*

²³ Within the framework of legal aid Art. 508/7 of the Judicial Code obliges the Bar Association to (par. 2) organise " legal aid on call" (such as permanent services on duty) and to draw up lists with lawyers who "wish" to perform services (par. 3 – voluntary service is therefore provided) stating "preferential subject matters" (par.4) which the lawyers indicate and "prove", or for which they commit themselves to follow a training course to be organised by the Bar Association or the "authorities".

²⁴ Under par. 5 Art. 508/7 Judicial Code provides an administrative possibility of appeal (*cf.* art. 469*bis* Judicial Code) e.g. in case of refusal to add on the roll of lawyers by the Supervisory Council. The appeal must be notified within 15 days after notification to the Secretary of the Bar Association by registered letter, who will then transmit the file to the Secretary of the Supervisory Council .

It also determines, depending on its supervisory action on the quality of the services provided to minors by the lawyers, the minimum number of lawyers needed to meet these appointments.

2. The list includes the lawyers who have followed the training for youth lawyers accredited by the Association of Flemish Bars and possibly those lawyers that appear on the list of Article 508/7 fourth paragraph of the Judicial Code and who have committed themselves to following a training..

3. Every member of the Bar can submit his candidature accompanied by a motivated request.

4. The Supervisory Council takes a motivated decision in case of refusal to register a candidate on the list.

(Approved at the General Meeting of the Association of Flemish Bar Associations of 7 December 2005).

23. The Legal Aid Agency deals with the implementation and follow-up of the Legal Aid Act and among others legal aid to minors.

The Agency consists of a director and of the Legal Aid Agency presidents of all Bar Associations.

One of the initiatives the Agency took towards the uniform implementation of the law regarding legal aid consisted in the publishing of a vademecum²⁵ on legal aid in which the implementation of the Legal Aid Act is introduced and supervised in the same way in the various Bar Associations.

24. The "Youth Lawyers Commission" of the Association of Flemish Bar Associations (which consists of a director-president and youth lawyers from the various bar associations) seeks in the long run to provide legal aid services on call as well as the compulsory free legal aid to minors as much as possible in the same way.

The provisional result of these efforts is drawn up on the basis of 20 problem elements and a provisional solution for these problems per Bar Association and per judicial district in Flanders and Brussels (Dutch-language Bar Association).

25. The points of special interest of the commission for the appointment of youth lawyers have been communicated to the various Bar Associations with the request to communicate the present situation.

The points of special interest and outline with the answers to these questions per Bar Association can be found in the enclosure.

²⁵ OVB, *Juridisch Vademecum tweedelijnsbijstand*, First version May 2002, can be consulted via email rechtshulp.ovb@skynet.be or www.advocaat.be for downloading of modification by Bar members..

26. In the Youth Lawyer's Commission the following problems are discussed besides the initiatives for the uniformity within the Bar Associations in the interest of the minors benefiting from legal aid:

- training of youth lawyers;
- obtaining recognition of the specialised training of youth lawyer within the Association of Flemish Bar Associations;
- advice and follow-up of bills regarding the Legal Aid Act;
- the bills regarding youth lawyers, access of minors to courts and the hearing of minors, in view of a legal recognition of specialised youth lawyers are being examined and recommended in writing to the Minister (see below). These bills are dealt with by the Justice Committee after they were transferred from the former to the present government, among others upon the insistence of the lawyers of the Association of Flemish Bar Associations with a number of lawyers that are Members of Parliament.

27. In 2005 a third and new committee was created within the Association of Flemish Bar Associations regarding youth lawyers: the "*Mixed Commission for the Professional Ethics of Youth Lawyers*", which consists of a number of both existing Youth Lawyer's Commissions on the one hand and the Professional Ethics Commission on the other hand.

It subjected the specific deontological problems concerning youth lawyers to a first scrutiny in view of improved legal aid and uniformity of implementation. The problems that were submitted to this commission are the typical deontological themes.

VI. Final Considerations :

28. A large number of initiatives were recently taken in the field by lawyers, and afterwards by their Bar Associations and the Association of Flemish Bar Associations to offer effective legal aid to minors.

However, the authorities are very slow in developing a legal framework for the recognition and a suitable remuneration of youth lawyers.

29. It is in the interest of minors, their lawyers and the authorities themselves to find out how legal aid for minors is organised in other countries. This can be done within the framework of the International Convention on the Rights of the Child and more specifically Article 9.2. ICRC.²⁶

²⁶ International Convention on the Rights of the Child, New York 20 November 1989 e.g. Art. 9. 2: "In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known..

One could investigate how legal aid is effectively provided to the minors involved in proceedings in order to allow them "*to take part in proceedings and to state their point of view*". *The questions we can ask are the following:*

Is this help being provided by specialised or specially trained lawyers, volunteers or not?

How and in which matters can these lawyers or counsellors act either before the court or before extra-judicial courts of justice?

Do all these actions take place fully independent from other intervening third parties and parents, in compliance with its own professional rules of ethics and also thanks to an appropriate remuneration by third parties?

30. Several among us will undoubtedly be interested in taking part in such research which can be conducted specifically through ILAG.

I would like to end this contribution with these questions while addressing this call for participation of your organisation and thank you for your much-appreciated attention.

Eric Van der Mussele

Advocate, Member of the Antwerp Bar Association