

REPORT OF THE WORKING GROUP ON THE ROLE OF RACE, ETHNICITY, AND CLASS*

This Working Group considered the role of race, ethnicity, and class (hereinafter "REC") in the attorney-client relationship. Participants recognize that, in American society, children in the child welfare and juvenile justice systems are disproportionately poor and of color while the lawyers for those children and the decision makers are overwhelmingly white and middle class. This racial disparity may affect attorney client communication, perpetuate stereotypes, foster distrust of the legal system and contribute to bad outcomes for the affected children and families. Issues related to REC, which often are ignored both in the attorney client relationship and more generally in the administration of justice, must be identified, confronted, and resolved.

Increasing the racial and ethnic diversity of the child advocacy and justice professional community (i.e. attorneys, judges, legal academics and clinicians, policy analysts, institutions, and public interest organizations, etc.) is a step in the right direction. As important, some would argue even more important, is training and education regarding the impact of REC on all those engaged in the policy and decision-making processes. Including more people with personal experience with the child advocacy community can help in understanding how REC affects advocacy. Finally, children's advocates, concurrent with individual representation, must also be engaged in the struggle to eliminate poverty and racism and broaden their advocacy to support youth in their efforts to become educated and productive citizens. The following recommendations are offered in the spirit of enabling all poor youth and youth of color to receive fairness and equity in the fullest sense of those words.¹

I. INTRODUCTION

In considering the role of REC in the attorney-client relationship, participants first identified those areas that must be addressed in order to eliminate, or at least to ameliorate, the existence of REC bias in the child welfare and juvenile delinquency systems. Several themes emerged during the course of this session, including the following: the impact on advocacy of systemic inequalities in public resources based on REC; the importance of developing a relationship with the child, not just with his/her particular case; the need for children's advocates to be fully involved in educational transformation issues to improve

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¹ The included commentary summarizes the Group's discussions and reasoning regarding these recommendations.

schools, education and employment prospects for children of color and children living in poverty; and the goal that every children's advocate be trained and competent in the area of REC so that every child, regardless of his or her REC, receives just and fair treatment in our child welfare and juvenile justice systems.

In addition to these themes, participants posited several questions for further discussion, including: whether technical legal competence is sufficient, or whether a child's attorney should also be competent with respect to REC issues; whether the system considers the child's preference differently based on REC; whether the legal profession is doing enough to assist advocates with too many cases and too few resources; whether it is important to distinguish between race and class in the context of representing children; whether we know how to work competently with under-resourced families to empower them to advocate for their children so that they do not feel as though their children have to get locked up to get services; and whether we know how to change the criminalization of adolescence, to change the sense among poor youth and youth of color that simply by living their everyday lives contact with law enforcement is inevitable.

II. RECOMMENDATIONS FOR CHANGES IN LAW AND POLICY

Preface: The ABA Standards of Practice for Lawyers Representing Children in Abuse and Neglect Proceedings provide a minimum standard of representation for children. Understanding the REC of the client will enhance the Standards of Practice and quality of representation.

Recommendation One: The rules of professional responsibility should be revised to create a model rule that attorneys shall consider the REC of the client in the attorney client relationship and representation.

Commentary: As attorneys, we need to be better informed and be in touch with the lives of our clients. The attorney, with the client's consent, should meet with the client in the client's environment, and talk to appropriate individuals in the client's school, place of worship, and neighborhood in order to get a better understanding of the child's world and the role of REC in it. The attorney should understand the client's REC background and reality so that she can help guide the client to make appropriate decisions in both dependency and delinquency cases. Just as criminal defense attorneys are required to investigate the scene of a crime, a child's attorney should be required to investigate the child's world. If the attorney does not meet this minimum level of professional responsibility, and does not address REC issues, the attorney is not carrying out competent representation.

Recommendation Two: The rules of professional conduct should be revised to require a finding on the record that the court has considered the child's REC and environment prior to imposing any conditions on that child.

Commentary: This Working Group was concerned about the disconnect between the conditions imposed on children by courts and the reality that children face on a daily basis. Too often, courts order children to complete specific programs that are culturally and/or economically impossible for the child to attend. For example, a judge in a delinquency case may require a child to

receive counseling at a particular location without knowing that in order to get to this location, the child would have to cross into rival gang territory and put his life at risk. In civil cases, judges should be required to hear and consider the child's preference. In juvenile delinquency cases, the judge should be required to ask specific questions that get to the heart of who the child is, including, but not limited to, how things are for the child at home, whether he/she is having any problems at school or with people in the neighborhood, whether there are issues at school that keep the child from fully engaging, what type of services the child thinks he/she needs to rehabilitate, and what the child's educational and other goals are.

Recommendation Three: There should be a mandatory CLE requirement for all lawyers involved in children's advocacy and justice to identify and eliminate REC bias in the legal profession.

Commentary: Attorneys involved in children's advocacy and justice should be mindful of the bias in the legal profession with respect to REC and work toward the elimination of such bias. At a minimum, lawyers for children should be trained to identify REC bias, and provided with information and tools to address and combat any REC bias that arises during their representation of the child.

Recommendation Four: The legal profession shall encourage that judges, prosecutors, public defenders, and children's lawyers are REC diverse and knowledgeable about REC. Where there are gaps in the knowledge about REC, the court shall employ the appropriate resource to address those issues.

Commentary: The Working Group recognized the evolving gap between lawyers and the children they represent. It is not always possible to pair a client with an advocate who shares the client's REC. Nor is it desirable to engage in tokenism for the purpose of pairing a client with an attorney of the same race. The Working Group acknowledged that because of the expense of law school, there is an economic gap between lawyers who represent poor people and people of color and that the clients know it and feel it; and that too often, the experience for these clients is that the decision-makers can be so removed from understanding the client's REC that it presents a problem. The Working Group debated whether truly understanding a client's REC is necessary to the representation of the child, or whether competency in the courtroom is sufficient. The Group agreed that, in order to represent the child competently, the attorney need not be of the same REC as the client. However, the attorney must, at a minimum, actively consider REC, work to understand REC from the client's perspective, and strive to eliminate any REC barriers for the client throughout the course of the representation. Children's attorneys who are well informed and genuine can help clients make the best decisions for themselves. Some would argue that the attorney's own REC is not as important to the representation as whether the attorney lets the child talk, whether the attorney really listens, and whether the attorney understands the client's life story and the significance of the decisions that the child must make.

Recommendation Five: Law school curricula should include courses focused on children's law as well as an appropriate number of credits that are earmarked to identify and understand the role that race, ethnicity, and class play in the lawyer's relationship with and advocacy for the client.

Commentary: As noted above, it may not be possible or necessarily desirable to pair every child with an attorney who is the same REC as the child. As a result, it is imperative that all individuals who are going to work with children be thoroughly trained in this area while in law school, as well as in practice.

Recommendation Six: In consideration of the issues of REC, and to help lawyers in the trenches, the organized bar and the judiciary should take the lead in addressing the lack of resources commensurate with caseload demands in the area of children's law consistent with existing ABA Standards.

Commentary: REC heightens the importance of the ABA Standards of Practice. Not only lawyers but also all those involved in the child advocacy and justice system should be trained with respect to these standards. In addition, children's advocates should refuse to take on unrealistic caseloads. Instead, children's advocates should be active in fighting for reasonable caseloads so that they can effectively assist their clients.

Recommendation Seven: The ABA and state bar associations should honor practitioners and educators who have made significant steps in the study and practice of the elimination of REC bias in the field of child law.

III. RECOMMENDATIONS FOR PRACTICE

Preface: Race, ethnicity, and class have implications that go beyond the attorney client relationship and must be dealt with to address the quality of justice available to children, particularly children of color and children living in poverty. Children's advocates should recognize that traditional litigation and advocacy in court will not by themselves be adequate to achieve significant improvement in the quality of justice afforded to children. Advocates should strive to make concrete improvements in children's lives, and give families a sense of their own power.

Recommendation One: In addition to using traditional litigation tools, children's advocates should, where possible:

1. Engage in broad-based coalition building, including reaching out to stakeholders who traditionally have not taken part in the child advocacy and justice arena;
2. Utilize creative, multi-disciplinary research and analyses, including financial analyses, demographic analyses, and historical patterns of discrimination;
3. Undertake advocacy outside the courts, including through legislative reform, the planning and administrative process, and community organizing; and
4. Engage in strategic media campaigns.

Commentary: Participants acknowledge that it is optimal to resolve the issues facing the client prior to the child ever stepping inside a courtroom. To that end, children's advocates should be knowledgeable about and seek out front-end alternatives and engage the community in problem solving.

Recommendation Two: In order to close the gap between the professional class and clients they are serving, advocates, with the consent of their clients, must learn what is important to their clients as it relates to the client's REC, including:

1. Interviewing the client before appearing in court and reserving at least an hour to get to know the client;
2. Meeting the client in the client's environment;
3. Interviewing significant individuals in the client's school and community;

4. Becoming familiar with the client's cultural environment;
5. Understanding the court-imposed conditions on the child and whether the conditions can be fairly and safely imposed consistent with REC;
6. Engaging competent interpreters to facilitate communication; and
7. Collaborating with people whom can help the advocates learn how to build relationships, build trust, interpret body language, and communicate effectively with respect to REC issues.

Commentary: As noted above in the section on Recommendations for Changes in Law and Policy,² the Group discussed the issue of conditions imposed on children, particularly in the juvenile justice system. Too often, courts impose conditions that are impossible for the client to meet. For example, the court might require the child to attend a counseling session that is held in a rival gang territory, or require the child to attend a particular school when the child has been expelled from that school. The advocate must be aware of the barriers for the child, and the resources, if any, that are available to the child so that the advocate can inform the court when certain conditions cannot be met through no fault of the child. The advocate must also recognize his/her own limitations and, where possible, partner with other professionals such as social workers, educators, community leaders, and health care professionals, to educate the court about the child's REC, and to ensure that any court-imposed conditions are appropriate for the particular child.

Recommendation Three: Developing a relationship with the individual client is an integral part of carrying out the representation. Advocates should integrate other disciplines such as social work, education, and mental health into their representation of the client in order to illuminate the impact of REC on the individual client.

Commentary: Competent representation requires the attorney to advocate for her child client both in and out of the courtroom. Attorneys must be knowledgeable about and advocate for the client with respect to the client's school status, mental health status, and other related issues. To the extent the attorney lacks expertise in these areas, the attorney should reach out to other professionals in the child advocacy and justice community for assistance. Key to holistic representation is the belief that the attorney should develop a relationship with the client, not just handle a case. To do so requires a multi-disciplinary approach, including understanding the child's genealogy and social history, assessing the child's educational status, and obtaining information about the child's mental health history.

Recommendation Four: In order to represent their clients effectively, advocates must listen to the child about the role of REC in the child's world.³ This includes actively engaging in training, developing culturally competent child interviewing skills, and, when possible, engaging the entire family to help them understand what to do, how to do it, and what to expect from the justice system.⁴

² *Supra*, Part II.

³ Again, the attorney should obtain the consent of the client.

⁴ Regarding the issues of listening to the child in the context of class actions and systemic reform, see *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, pt. II.C.3 (1996)

Recommendation Five: Practitioners shall become competent in the Indian Child Welfare Act (“ICWA”) and its requirements and be trained in its intricacies so that identified children who come within its ambit receive the full benefits of ICWA.

Recommendation Six: Practitioners shall become competent in helping to identify children who are newcomers to this country whose status needs to be regularized so that they can refer the children to immigration lawyers who can help them. Practitioners shall be knowledgeable about immigration law and policy to help children who fall under the jurisdiction of these applicable laws.

IV. RECOMMENDATIONS FOR EDUCATION

Recommendation One: REC training should be mandatory for all attorneys involved in child advocacy and justice, beginning in law school.

Commentary: Education with respect to REC should begin in law school and continue through the child advocate’s career. At a minimum, all law schools should: place REC on the curriculum in any courses related to children’s issues including criminal law, family law, and/or lawyering classes; require REC training in all law school clinical curricula; and incorporate REC into all ethics/professional responsibility courses.

Recommendation Two: Organizations involved in child advocacy must commit to developing and implementing REC trainings within five years.

Commentary: Where it is not possible or practical for a child advocacy organization to develop and implement its own REC training, such organizations shall require staff to attend REC trainings, including those that may be provided outside of the traditional CLE formats, and seek CLE certification for attendance at such programs.

Recommendation Three: All decision-makers should receive training on how to identify and consider the REC of the child, how to assess the child’s risks and needs, how to place and treat the child appropriately, and how to eliminate unnecessary detention or out of home placements for children.

Commentary: Decision-makers must be knowledgeable about REC issues in general, as well as specific REC issues as they relate to the particular child, in order to make the best decisions regarding that child. In understanding REC of the child, advocates and decision-makers must understand their own personal views and biases and put those aside in order to make the best decisions for the particular child.

Recommendation Four: We should require accountability of the juvenile justice and child welfare systems through mandated record keeping and public dissemination of disaggregated REC data, including, at a minimum, data disaggregated by race, gender, offense, geography, and ethnicity.

Commentary: Disaggregated REC data is critical to understanding fully the impact that REC has on children in the juvenile justice and child welfare systems. It is also critical to understanding the effectiveness of decisions made about, and conditions imposed on, the children within the system.

V. RECOMMENDATIONS FOR FURTHER STUDY

Recommendation One: We recommend that further study be conducted on how the lack of basic common cultural and social cornerstones affects the quality of representation for poor youth and youth of color. We must also analyze effective ways to close the gap between the professional class and the clients they serve. Minimally, the study should include:

1. Analysis of the effect of establishing a Rule of Professional Responsibility that requires child advocates to personally observe relevant locations and significant neighborhoods central to the child and family; to meet their clients in the client's environment; to consult with individuals in the child's school, church and neighborhood;
2. Proposals for methods that maximize attorneys' ability to be in touch with the lives of their clients in order to improve advocacy, including understanding by decision-makers of any imposed actions on the child, and whether the imposed actions can be met. For example the judge unwittingly ordering counseling that is located in a rival gang territory;
3. Appropriate REC training curricula for child advocates, decision-makers and stakeholders; and
4. Analysis of benefits and harms of opening juvenile court proceedings to the public.

Recommendation Two: We recommend that further study be conducted on alternatives to our current adversarial system that limits us to legal solutions to social problems. Minimally, the study should include:

1. Analysis of the benefits of using a collaborative, multidisciplinary court structure to serve poor youth and youth of color, their families, and communities; and
2. Analysis of the efficacy of non-adversarial models to replace the current legal systems serving poor youth and youth of color, their families and communities, and their impact on public safety.

Recommendation Three: We recommend that further study be conducted on current successful child advocacy practices incorporating REC. Minimally, the study should include:

1. Identification of policies and practices that demonstrate successful life outcomes for poor youth and youth of color, their families, and communities; and
2. Enumeration of the most effective manner of disseminating and garnering support for implementing such policies and practices.

Recommendation Four: We recommend that further study be conducted on the need and mechanism for distinguishing between race and class with regard to representing children, youth and families. Minimally, the study should include:

1. Analysis of how advocates and decision-makers often miss class issues; and
2. Analysis of key system decision-making points to ensure that neither race nor ethnicity nor class result in worse outcomes for poor youth and youth of color, their families and communities.

Recommendation Five: Further study needs to be undertaken on how any recommendations adopted by the *UNLV Conference* will be applied to pro bono practitioners.

Recommendation Six: Further study needs to be undertaken on how any recommendations adopted by *UNLV Conference* will impact the representation of youth subject to the jurisdiction of the Indian Child Welfare Act (“ICWA”).

Recommendation Seven: Further study needs to be undertaken on how any recommendations adopted by *UNLV Conference* will affect the representation of youth subject to the jurisdiction of immigration laws.