

REPORT OF THE WORKING GROUP ON THE BEST INTERESTS OF THE CHILD AND THE ROLE OF THE ATTORNEY*

I. INTRODUCTION

This Working Group's primary task was defined as "explor[ing] the role of children's attorneys in assessing best interests and protecting their clients." Participants recognize that ten years after *Fordham*, "best interests" advocacy and best interests models of representation frequent many jurisdictions and individual attorney practices when the client is a child.¹ The Group acknowledges that some attorneys are subject to statutory mandates or judicial expectations to serve as a best interests guardian *ad litem* that may conflict with the client-directed role. Other attorneys decline to use a traditional client-directed model and advocate for what is in the child's best interests because: (a) it is a familiar role that emulates the normative parent/child relationship;² (b) they believe their role is to "take care of" of the child, or they despair at the inability of the state protective system to perform its role adequately and, therefore conclude it is their responsibility to protect the child from harm by advocating for what they (or a social worker, therapist, or other third party) believe is in the child's best interests; (c) attorneys like to win and best interests advocacy is perceived to be the least risky approach and the position that is most likely to please judges; d) ambivalence about the wisdom and efficacy of giving "voice" to young children or to youths with complex backgrounds, multiple and competing influences, and limited emotional or intellectual capacities; and/or e) attorneys have different awareness or perhaps lack understanding of developmental issues and the impact that race, ethnicity, class and culture may have on the child's decision making. Group members agreed that too many attorneys are insufficiently trained and do not recognize the distinctions between the client-directed versus attorney-directed roles.

Participants unanimously reaffirmed the *Fordham* commitment to client-directed representation. In order to ensure the actualization of the *Fordham*

* This Working Group consisted of the following members: Barbara Kaban (Primary Report Preparer and Group Reporter), Frank Cervone (Group Moderator), Annette Appell, Elizabeth Calvin, Chris Gottlieb, David Kozlowski, Catherine Krebs, Wallace Mlyniec, Stacey Platt, Jennifer Renne, Mary Ann Scali, and Marvin Ventrell.

¹ Although Group members agreed that the advocating for the child's best interests instead of the child's expressed wishes is never appropriate in delinquency representation, there are states (e.g., Tennessee and Wyoming) that are reported to authorize or at least tolerate such advocacy in delinquency representation.

² The Group articulated various possible motivations for "acting like the parent" in a best interests role, including: seeking to protect the child or to offer a protective position; distinguishing the respective authority levels of parent and child; or advancing a view of child-raising in which adults are assumed to "know best" or in which children may have a limited "voice" in important matters.

model, the organized bar and contracting agencies that oversee or supervise attorneys in each state must instill the client-directed ethic, require and provide the specialized training and support necessary for attorneys working in this complex field, and monitor behavior and results to ensure that client directed representation is the norm.

The following report outlines the Group's recommendations. The corresponding commentary summarizes Group discussions and reasoning as participants arrived at the recommendations.

II. RECOMMENDATIONS

Recommendation One: A lawyer appointed or retained to represent a child in a legal proceeding should serve as the child's lawyer, regardless of how the lawyer's role is labeled or the age of the child.

Commentary: Ten years after *Fordham* and the promulgation of ethical guidelines that recognize a child's right to an attorney who advocates for the child's expressed wishes, there still exists a pervasive lack of clarity about the attorney's role when the client is a child. While some courts and state laws recognize a child's right to a zealous advocate acting in the traditional attorney-client role, others mandate that attorneys represent children's "best interests." Participants in this working Group were clear that *best interests per se* is not an acceptable standard to define the scope, goals or duties of legal representation, but may be one among many factors taken into account during representation.

Participants debated when *best interests* might be viewed as an appropriate consideration. All agreed that it has no place in delinquency litigation although some participants proposed that it might be a consideration at disposition.

The application of client-directed lawyering to dependency representation was more problematic. The Group struggled with this premise: when the child articulates a stated position, the child is defining what she believes is in her best interests. One participant argued the best interests is not just a role, but also a legal standard. Others argued that effective client-directed advocacy includes reconciling and integrating best interests with the child's expressed wishes. Some jurisdictions require the attorney to exercise substituted judgment or to act as a best-interests guardian *ad litem*. The Group agreed that client direction is the preferred approach even in best interests representation. The Group resolved the dilemma by developing practice guidelines to assist all attorneys, regardless of the label applied to the attorney's role.

The Group then considered several proposals arguing for the adoption of bright line age tests for the determination of the role of counsel in dependency cases. A presumptive age test would allow an attorney to assume the client-directed role for children above a certain age while advocating for the younger child's *best interests*. Some argued that this strategy would preserve the older child's "voice" in dependency proceedings. Others countered that by acquiescing to such standards, we are opening the door to the progressive erosion of a child's right to client-directed counsel. The Group rejected all such proposals and reaffirmed that all children, regardless of age, were entitled to an attorney who zealously advocates for their expressed wishes.

After a lengthy discussion, participants concluded that the *Fordham* Recommendations, the ABA/NACC standards and the practice guidelines outlined below provide *all* attorneys representing children with an adequate framework within which to implement the client-directed role. A lawyer appointed or retained to represent a child in a legal proceeding should serve as the child's lawyer—that is, ascertaining and zealously advocating for her wishes, gathering and proffering evidence, eschewing lawyer testimony, declining to issue personal recommendations—regardless of how the lawyer's role is labeled or the age of the child.

A. *Practice Guidelines for Effective Client-Directed Representation*

Effective advocacy entails reconciling what the child wants with what the decision maker may perceive to be in the child's best interests. For example, a good attorney seeks out and advocates for the kind of services that allow the decision maker to arrive at the disposition the child wants. Group members agreed that counseling the child client might include exploring the child's stated position or goal, as well as competing or alternative options as well as the likely outcome of the proceeding; the Group was also clear that this conversation must occur solely within the confines of the confidential attorney-client relationship. Many children have clear preferences about the outcome of their cases. Others, however, require assistance to arrive at a stated position. This should not be a manipulative process, or one in which the attorney presents only what the attorney believes is in the child's best interests. Rather, it consists of a thorough examination of facts, options, and possible outcomes in consultation with the client so that the child may arrive at a reasoned decision. As well, by teaching decision-making, the attorney empowers the child to participate in the process.

1. *Helping the Child Decide*³

- a. Establish a relationship with the child; let the child talk; listen to the child;
- b. Gather information from collaterals including, but not limited to, schools, service providers, foster parents, independent evaluators, kin, and parents (even if no longer in household);
- c. Explain and establish the attorney client relationship (see Jean Koh Peter's article); explain confidentiality;
- d. Encourage the child to speak with others whom they trust (including parents) about the issues in the case [caution: in delinquency cases, a child's inculpatory statements to family and friends could be used against them];
- e. Explore the universe of options available under the circumstances;
- f. Explain the court process to the child;
- g. Ensure that the child is aware of and present at court proceedings unless the child chooses not to participate or the court or the attorney determines that presence in court would be detrimental to the child;
- h. Bring the child to administrative and informal proceedings related to his/her case if the child wants to attend;
- i. Help child to understand s/he has right to have wishes advocated for without attribution;

³ The following practice guidelines are not meant to be an exhaustive list.

- j. Begin with the child's agenda;
- k. Model decision-making by starting with the "smaller" decisions such as visitation schedules and then move on to the larger issues in the case; illustrate possible consequences of the various outcomes associated with each decision;
- l. Help the child understand the different pressures operating on him/her, including negative influences;
- m. Even if the child is not capable of making all decisions, empower the child to make certain decisions;
- n. Assess child's capacity to make decisions about the representation in her case (recognize that this is different from deciding whether you agree with the child's decisions in the case).

2. *Assessing the Child's Capacity to Decide*⁴

The child's attorney must often assess the child's capacity to make decisions or to participate in the attorney-client relationship. When the child: lacks sufficient capacity to communicate (e.g. pre-verbal child) or the capacity to make adequately considered decisions in connection with the representation; or [in dependency cases] if the child's expressed preferences would be seriously injurious, as opposed to merely being contrary to lawyer's opinion of what would be in child's interests; the child's attorney should consider the following factors when assessing the child's capacity to decide:⁵

- a. Child's developmental stage including cognitive, social and emotional development;
- b. Child's capacity to communicate with lawyer (as opposed to child's willingness to communicate) and ability to articulate a reasoned position;
- c. Child's variability and consistency when expressing a relevant position;
- d. Child's ability to understand consequences of the decision including the risk of harm and the finality of the decision.

3. *Representing a Client with Diminished Capacity*

When the client lacks the capacity to decide, the attorney may be required to interpose other viewpoints or even to substitute her judgment for that of the client. This important step involves gathering information from a wide range of sources as well as familiarizing oneself with the child's family, community and culture in order to arrive at or to advocate for a decision the child would make if s/he were capable.

To achieve this goal, the attorney should:

- a. Gather information from collaterals including, but not limited to, schools, service providers, foster parents, independent evaluators, kin, and parents (even if no longer in household);
- b. Be familiar with the child's family, community and culture and take precautions to avoid imposing lawyer's personal standards and cultural values;
- c. Respect child's family and social connections;
- d. Adopt a position requiring the least intrusive state intervention;

⁴ The Group agreed with the view that capacity is contextual; the attorney must be prepared to assess the child's capacity at various decision points in the representation.

⁵ See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, pt. V.A.8 (1996); *MODEL RULES OF PROF'L CONDUCT R. 1.14* (2002 Amendments).

- e. In dependency cases, when the child is incapable of expressing a stated position, give due weight to parent's stated preferences in the absence of conflict, parental incapacity or history of serious harm;
- f. Protect the child's legal interests including, but not limited to, (i) in child welfare: sibling visits; parent visits; clothing allowances; right to remain at home unless imminent risk of harm; ensure proper standard is utilized; safety; (ii) in delinquency: speedy trial.

Recommendation Two: Lawyers representing children in delinquency or dependency proceedings must be exempt from mandatory reporting laws.

Commentary: The Group unanimously agreed that attorneys must be exempt from mandatory reporting laws for suspected cases of child abuse. Mandatory reporting can contradict or threaten the attorney's duties of undivided loyalty, confidentiality and effective assistance of counsel due the child client. If the attorney practices in a jurisdiction that prescribes mandated reporting, the attorney must disclose that fact to the child at the outset of the relationship. The discussion highlighted that best interest jurisdictions that seek to elevate reporting over the attorney-client relationship fail to appreciate the detrimental effects of violating the child client's confidence. The discussion also suggested that attorneys should work with colleagues to overturn mandatory reporting statutes that invade the attorney-client relationship.

Recommendation Three: Children should be entitled to counsel in the following cases: Child welfare including status offenses; high conflict custody cases; pre-arraignment proceedings; delinquency cases; expulsion or exclusion from school; and any case where the child could be held in contempt for violating a court order.

Commentary: The Group was concerned about the many types of cases in which children and their interests are involved, but in which the child has no voice. Without legal standing or a constitutional or statutory right to counsel, a child's rights and interests may be litigated in adversarial proceedings though she is neither present nor represented. The Group generated a long list of possible scenarios in which a child might benefit from legal representation including, but not limited to: asset protection, medical decisions, abortion, emancipation, right to marry, public benefits, mental health commitments, domestic violence, immigration, school exclusion, and special education.

The Group then asked: What are the legal interests at stake? To whom do the legal rights belong? What do existing statutory schemes and guidelines say about the child's role in each case?

In all instances except special education, it was clear that the child would be the client. In education and special education matters, it is well-settled law that parents hold the educational rights of the child and thus get to decide the direction of representation. Recognizing that the child has an interest in the outcome of the case, the Group could not agree whether a child should have "party" status in an education or special education case.

The related question as to what to do if the child and parent disagree in an education case resulted in a spirited discussion. One participant suggested that if the parent and child disagree, the attorney must withdraw from the case. Another participant argued against this position, stating that the attorney must continue to represent the child to ensure that the child's voice is heard in the

proceeding. The Group struggled with the tension of “client-directed” advocacy when the client is the parent but the subject matter is the child’s education and the attorney identifies with the child-as-client. Participants agreed that legal advocacy is often required to ensure appropriate educational services for many children. However, the Group decided not to recommend further study of the issue of party status for juveniles in special education cases.

Recommendation Four: CAPTA should be read to include lawyers in all their roles.

Commentary: Participants unanimously agreed that an accurate reading of CAPTA concludes that the appointment of an attorney satisfies the requirement for *best interests* representation. This view is supported by the United States Department of Health and Human Services Children’s Bureau publication entitled “Adoption 2002.”⁶

Recommendations for Further Study

1. Establishing parent/child privilege in delinquency proceedings.
2. Expanding attorney/client privilege to include a third party whom the child trusts and relies upon for guidance.

⁶ United States Dept. of Health & Human Services, Children’s Bureau, *Guidelines for Public Policy and State Legislation Governing Permanence for Children* (1999).