

# RECOMMENDATIONS OF THE FORDHAM CONFERENCE ON ETHICAL ISSUES IN THE LEGAL REPRESENTATION OF CHILDREN\*

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## I. THE ROLE OF LAWYERS FOR CHILDREN

A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer.

The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labeled, be it as guardian *ad litem*, attorney *ad litem*, law guardian, or other. The lawyer should not serve as the child's guardian *ad litem* or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.

The role of the child's lawyer will vary, however, depending on whether the child has capacity to direct the representation. The lawyer for a child who is not impaired (i.e., who has capacity to direct the representation) must allow the child to set the goals of the representation as would an adult client.

When representing a preverbal child or a child who otherwise lacks capacity to direct the representation, a lawyer should make decisions in the representation in accordance with the Recommendations set forth in Part IV. When a lawyer believes that a verbal child may lack capacity to direct the representation, the lawyer's determination concerning the child's capacity should be guided by the Recommendations set forth in Part V.

Whether representing an unimpaired child or an impaired or preverbal child, the child's lawyer should be guided by the Recommendations in Parts II, III, and VII, concerning interviewing and counseling, confidentiality, and conflicts of interest.

On occasions when, contrary to the Recommendations of this Conference, a lawyer is required to serve as a child's guardian *ad litem* and in that role to undertake responsibilities that are inconsistent with those of a lawyer for a child, the lawyer should be guided by the Recommendations set forth in Part VI.

To enable children to receive ethical and competent representation of counsel in contexts in which legal representation is appropriate, courts and other legal authorities should be guided by the Recommendations set forth in Part VIII.

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A. *Recommendations for Changes in the Law:*

1. Laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child's guardian *ad litem* should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding.
2. Laws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.

B. *Recommendations for Practice Guidelines:*

1. When it is uncertain whether a lawyer has been appointed to represent a child as the child's lawyer, to serve as the child's guardian *ad litem*, to serve in a dual lawyer/guardian *ad litem* role, or to serve the child in some other role, the lawyer should elect to represent the child as a lawyer. Similarly, when the lawyer is appointed to serve in a role other than as lawyer, but it is unclear or unspecified what obligations and responsibilities that role entails, the lawyer should assume the obligations and responsibilities of a child's lawyer.
2. A lawyer should not serve as both a child's lawyer and guardian *ad litem*. When a lawyer has been appointed to serve in both roles, the lawyer should elect to represent the child as a lawyer and not to serve as guardian *ad litem*. If that is not permissible, the lawyer should elect to decline the appointment where feasible.

II. THE OBLIGATIONS OF LAWYERS FOR CHILDREN:  
INTERVIEWING AND COUNSELING

A. *Recommendations for Practice Guidelines:*

The following is a nonexclusive list of Recommendations concerning how lawyers should interview and counsel child clients.

1. Contact with child clients:
  - a. Every child should be seen except in those rare instances where it is physically impossible for the lawyer to see the child.
  - b. A lawyer should not represent a communicative child on any substantive matter before speaking with the child.
  - c. For all children, the lawyer should see the client as soon as possible and, in most instances, before the first hearing. In certain instances—for example, before an emergency hearing—the child's lawyer may proceed without seeing the client, although in that event, the lawyer should at least see the child before the next hearing.
2. Context of contact:
  - a. Contact with the child should occur where and when such contact is comfortable for the child, not merely where and when it is convenient for the lawyer.
  - b. The lawyer should take into account the role of the environment and timing in helping the child understand the lawyer's role and the court process.
3. Frequency of contact:
  - a. The lawyer should meet with the child at least prior to any substantive court hearings and other proceedings or events at which important decisions are being made regarding the child or which are relevant to the lawyer's representation of the child.
  - b. The lawyer should meet with the child often enough to maintain and develop the lawyer-client relationship.
4. Substance of contact with verbal child:

- a. Presence of others at the meeting:
  - i. In most instances, the lawyer should meet one-on-one with the client.
  - ii. The lawyer should exercise judgment when considering whether the presence of a third person (e.g., social worker, family member, interpreter) would make the child more comfortable when speaking with the lawyer.
  - iii. When discussing all potentially confidential matters, the lawyer should ensure that the attorney-client privilege will not be jeopardized by the presence of a third person.
- b. Nature of discussion:
  - i. With the requisite training, the lawyer should use developmentally appropriate language.
  - iii. The lawyer should be trained, and take the time to establish rapport with the child client.
  - iii. When discussing the case with the client, the lawyer should use concrete examples and hypotheticals and should provide the client with a “road map” of the interview and the legal process.
  - iv. The lawyer should employ appropriate listening techniques and provide nonjudgmental support. Such techniques should be culturally competent.<sup>1</sup>
  - v. Questions should be noncoercive and culturally competent.
  - vi. The lawyer conducting the interview should explain the lawyer’s role and make it clear to the child client that the judge, rather than the lawyer or the client, is the ultimate decision maker.
  - vii. The lawyer should explain in detail, in a manner understandable to the child, whether and to what extent the child’s communications will be kept in confidence. (See III.A.2.)
  - viii. The lawyer also should explain the court or legal process, the issue(s) to be considered by the court, the options available to the client, and the consequences of those options. If appropriate, the lawyer should explain to the child that the child has the option of taking no position on an issue to be decided by the court or to defer to another’s judgment. (Whether the client may defer to the lawyer’s judgment, however, is a question left for further study.)
  - ix. The lawyer should provide the child with ample time and opportunity to raise any questions or concerns the child may have. The lawyer also should direct specific questions to the child except when such questioning would be inappropriate.
  - x. The lawyer should discuss with the child the lawyer’s access to documents, records, and materials, as well as to witnesses or professionals, and should request the client’s permission to access other confidential materials, if such materials exist.
  - xi. The lawyer should discuss the client’s position.
  - xii. When developmentally appropriate, the lawyer should collaborate on the identification and selection of case strategies.
  - xiii. The lawyer should prepare a child for cross-examination, if cross-examination is a possibility.

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<sup>1</sup> See, e.g., Richard H. Dana, *Multicultural Assessment Perspectives for Professional Psychology* (1993) (providing guidance to psychologists regarding culturally competent treatment and counseling); Michael L. Lindsey, *Ethical Interviewing, Counseling, and Use of Psychological Data With Child and Adolescent Clients*, 64 *FORDHAM L. REV.* 2035 (1996) (outlining issues related to culturally competent lawyering that lawyers should consider in serving children).

- xiv. The lawyer should summarize the interview and review the client's decisions to verify the accuracy of the lawyer's understanding.
- 5. Substance of contact with nonverbal child:
  - a. The lawyer should always "lay eyes" on the client.
  - b. The lawyer should see the client in the living environment, where possible. If it is not possible for the lawyer to see the child in the living environment, a qualified designee should see the child in the living environment.
  - c. The lawyer should make extensive use of experts (e.g., social workers, psychologists) as well as other interested persons (e.g., family members) in assessing the child's circumstances.
  - d. Representation of a noncommunicative client should include obtaining information on the child's living environment.
- 6. Access to Materials/People with Information:
  - a. The lawyer should review all court documents before meeting with the client whenever possible and, in any event, as soon as possible.
  - b. The lawyer should review all materials and speak to all people accessible to the parties with the client's full knowledge unless waiting to do so would jeopardize the adequacy of the representation.
  - c. The lawyer should obtain the unimpaired client's consent before accessing other confidential information.
  - d. The lawyer should not give undue weight to reports or evaluations regarding the client.
  - e. The lawyer should ask the following questions when assessing the accuracy or usefulness of evaluations or reports:
    - i. What are the norms of the tests (e.g., were ethnic minorities assessed)?
    - ii. Are there any ethnically appropriate tests available that were not used?
    - iii. Did the evaluator have any special clinical or graduate training in the assessment of ethnic minority children? What are the specific details of that training?
    - iv. Has the evaluator had any continuing education in the area of ethnic minority assessments?
    - v. What are the life and professional experiences of the evaluator with this cultural group?
    - vi. Were the test protocols modified in any way given the child's culture? Are those modifications reflected in the report or evaluation?
    - vii. Who provided the training on ways to modify testing procedures for clients from different cultures?
    - viii. What is the impact of different cultural backgrounds of the client and the clinician on the overall assessment picture?
  - f. The lawyer should refer the client for independent evaluations and request independent evaluations of the client when necessary and appropriate, subject to the approval of the unimpaired client.

## *B. Recommendations for Education:*

- 1. A lawyer who represents children should be certified as a "child advocate" by an oversight body on the state or national level. Candidates for certification should be mentored by more experienced lawyers. The certification process should include training, through simulations and by other appropriate means, in the following subjects:
  - a. Interviewing, counseling, negotiation.
  - b. Cultural competence (directed at client population).

- c. Role of the lawyer and guardian *ad litem* (ethical issues).
  - d. Child development and psychology.
  - e. The impact on children of the abuse and neglect system.
  - f. The merits of a professional team approach.
  - g. Substantive law and procedure (as necessary for effective interviewing and counseling).
2. Upon certification, child advocates should receive continuing legal education.
  3. Family court judges should also receive ongoing training in cultural competence, the role of the lawyer, child development and psychology, the impact on the child of the abuse and neglect system, the merits of a professional team approach, and substantive law and procedure.
  4. Law school curricula should be broadened to include the study of ethical issues pertaining to the representation of all clients, including children. Moreover, law schools should mandate training in legal interviewing, counseling, and negotiation skills. Finally, law schools should broaden clinical course offerings to include the representation of children by law students in clinical settings either through the establishment of a law school clinic, or through externships with child advocacy organizations.

### C. *Recommendations for Further Study:*

1. *Race, Ethnicity, Culture, and Class.* Further study should be made of how differences in race, ethnicity, culture, or class may affect communications between lawyers and children and how lawyers should take those differences into account in communicating with children.
2. *Interviewing and counseling.* Further study should be given to the following questions:
  - a. When and how often should a child attend a court hearing? What is the relationship between attendance and child development? What effect will the child's presence have on the interpersonal dynamics of the family?
  - b. What is the impact of the type of representation on the psychological and emotional well-being of the child? This question applies for each type of case (custody, neglect, abuse, delinquency). Is there a need for a longitudinal study?
  - c. What is the impact of the type of representation on case outcomes for each type of case?
  - d. What are the pros and cons of continuity of representation versus specialization in terms of the child's perception and case outcomes?
  - e. What strategies minimize the negative impact of lack of continuity on representation of children?
  - f. Should a guardian *ad litem* who is also a lawyer be governed by the professional norms applicable to lawyers (e.g., Model Rules or Model Code)?
  - g. What is a reasonable caseload for each type of case?
  - h. What are the boundaries of appropriate lawyer-client contact, including financial assistance and physical touching?
  - i. What standards should be developed to address the screening hiring, training, and supervision of staff coming into contact with child clients?
  - j. Should evaluations be conducted of alternative approaches to the delivery of legal services to children?
  - k. How does a lawyer effectively communicate his role to the child client?
  - l. To what extent should the lawyer share personal and moral views and biases with the child?
  - m. Should the child have the option of permitting the lawyer to make decisions for the child?

- n. How should lawyers and social workers function together as a team? Is it appropriate for social workers to conduct some interviews? Under what circumstances? How does this affect the confidentiality issues? How often should the social worker and lawyer consult? What is the role of nonlawyer team members for children who cannot communicate?
  - o. What is the appropriate role for interpreters? How does the use of an interpreter affect confidentiality issues?
3. *Lawyers representing children as a class.* Further study should be given to the lawyer's role and obligations in representing a class that includes children. Among other things, study should be given to the following questions:
- a. Does the lawyer for children in class-action cases have a duty of candor concerning the lawyer's responsibility to seek the best outcome for the class as a whole, and not to act on instructions from clients?
  - b. Does the lawyer for children in class-action cases have a duty to communicate and consult with as many differently situated class members as possible? Does the lawyer have a duty to listen and consult with as many adults (potential surrogates) as possible (but not be controlled by them)?
  - c. Does the lawyer for children in class-action cases have a duty of disclosure as to potential conflicts of interest in the class, a duty to try to resolve the conflicts, and a duty to ask for separate counsel to represent irreconcilable conflicting interests, if necessary?

### III. THE OBLIGATIONS OF LAWYERS FOR CHILDREN: CONFIDENTIALITY

#### A. *Recommendations for Practice Guidelines:*

- 1. A lawyer representing a child should comply with the rules of professional conduct governing client confidentiality.
- 2. A lawyer representing a child should explain in detail, in a manner understandable to the child, whether and to what extent the child's communications will be kept in confidence.

#### B. *Recommendations for Further Study:*

- 1. Further study should be given to the question of whether Model Rule 1.6 of the ABA Model Rules of Professional Conduct, governing client confidentiality, should be amended to permit the lawyer for a child to disclose confidences to the limited extent necessary to prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the client.
- 2. Further study should be given to the question of whether lawyers for children should be mandatory reporters.

### IV. THE OBLIGATIONS OF LAWYERS FOR PREVERBAL AND IMPAIRED CHILDREN

#### A. *Recommendation for Changes in the Law:*

State laws that are inconsistent with the practice guidelines set forth in Part B of this section should be modified accordingly.

### *B. Recommendations for Practice Guidelines:*

These Practice Guidelines apply only for clients who lack capacity to direct representation on their behalf for the issue at hand. In these cases, judges and lawyers should adhere to these standards of practice, regardless of the term used to denote the legal representative of the child.

1. Although other issues remain unresolved, the profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including “best interests” determinations. Practitioners have found also that there are currently few principles guiding their choices among a myriad of possible legal outcomes for their clients in any given case. The guidelines below would limit the permissible discretion that lawyers for children may exercise on behalf of their clients. They also would help practitioners to arrive in a principled way at a position or a range of positions which they may present to the fact finder or decision maker.

2. Decision making on behalf of a child must be made in a contextual, self-aware, deliberate, and principled manner. Lawyers should approach decision making on behalf of their clients with extreme caution. Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients. References to the lawyer’s own childhood, stereotypical views of clients whose backgrounds differ from the lawyers, and the lawyer’s lay understanding of child development and children’s needs should be considered highly suspect bases for decision making on behalf of her client.

3. Lawyers for children who must identify, determine, and advocate for their client’s interests at any given moment in the representation should employ the following process. This process is intended to assist the child’s lawyer in identifying the legal interest or interests to be pursued. The process by which a lawyer acquires understanding of a child’s interests and needs is not linear but should be dynamic and evolving over the course of the case or relationship. This process of inquiry always begins and ends with the child-in-context. It is critical to note that, at almost any point in the analysis, this process may leave only one legal interest, at which point the lawyer is constrained to pursue that legal interest.

a. The child client has a universe of possible needs and interests, as defined by any and all persons involved in the child’s life. The lawyer must first narrow the area of inquiry by determining the legal interests of the child. A legal interest is any interest that the legal proceeding has authority to address. Even when many statutes and decisions require the lawyer to address a child client’s best interests, these guidelines require a lawyer in those circumstances to address something that can be more appropriately characterized as a child’s legal interests. In other contexts, a child’s legal interests could include, for instance, a child’s right to “appropriate education,” “least restrictive alternative,” “least detrimental alternative,” as well as children’s interests in procedural rights.

b. The process must then focus on the child in her context. It is the lawyer’s responsibility to carry out a full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client’s unique personality, her family system, history, and daily life. This process should include the client’s own words, stories, and desires at every possible point. Even where the lawyer has determined that the child cannot fully understand or express desires about the legal issues of the case, there will be very few verbal children who cannot express some views about their own lives. As the lawyer gathers information from her client and other sources, the lawyer should organize those facts using devices such as genograms, chronologies, and daily schedules to

ensure that the lawyer is working from a thickly detailed view of the child client as an unique individual.

c. Essential to the process is also a snapshot of the child at the moment of the determination. How is the child developing? How is the child behaving? How is the child benefiting or suffering from her current living arrangement? A lawyer should generally obtain this snapshot in part through ongoing current contact with the client.

d. The lawyer must go further and consider the actual alternative options available to the child. The lawyer should understand these options concretely and understand as specifically as possible how that option will be experienced by the child.

i. These options must include all legally available options, including good faith options for seeking modification of the law. The lawyer must continually reevaluate, however, whether these options for law reform are actually attainable given the current legal climate.

ii. These options must also include all options available in the community to the child. These options should be realistically available or obtainable through advocacy, however, and not based on speculation of what the system might some day be able to make available.

e. In considering the actually available options that the lawyer and client have identified, the lawyer should examine each option in light of important paradigms that directly related nonlegal disciplines are considering. These paradigms should be determined through interdisciplinary research identified in the Recommendations for Further Study.

f. There will be cases in which the analysis becomes too complex and lawyers should consult experts for guidance. Lawyers may need to retain experts to aid them in deciding which of the remaining legal interests to pursue. Since much of the data upon which the decision is based will be confidential lawyer-client information, the retained consultant is sometimes the optimal, and only ethically acceptable, guide. When lack of resources or other factors make such a consultant impracticable, the lawyer may look to experts already involved with the client, experts retained by other parties, or occasionally court-appointed experts. These latter experts, however, do not share the lawyer's duty of advocacy with respect to the child client's wishes and perspectives, often have other institutional loyalties, may have important ongoing relationships with the child that must not be damaged, or may not offer opinions to the lawyer in a timely fashion.

g. At this point in the process of determining which legal interest to pursue, there still may be no definitively preferable option for the child.

i. At this point the lawyer should return to the thickly detailed understanding of the child, with reference to the child's needs and interests as outlined in the proposed ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Section B-5 and its Commentary. The lawyer again should seek any information or opinions the child can offer about the options remaining.

ii. The lawyer then should ensure that evidence is presented on the remaining options to the court, and in opposition to all options that were actually available but that have been eliminated from the child's legal interest through the preceding analysis.

C. *Recommendations for Education:*

Lawyers for children should receive specialized training in:

1. Skills for interviewing and counseling children.
2. The state of the art of the debate in interdisciplinary substantive fields directly related to the child's legal interest. This training should not attempt to convert the lawyer to one particular theory in the discipline, but rather to educate the lawyer about the universe of competing paradigms that address the issue. This training should help the lawyer understand the debates going on in these disciplines and the ways in which various paradigms have been discussed and challenged. In particular, this training should address the degree to which competing paradigms address the needs of children of diverse ethnic, racial, and class backgrounds. Comparison of the child client's context to the universe of competing paradigms may help lawyers determine whether options available to the client conform to the state-of-the-art learning in the child welfare arena.<sup>2</sup> Other useful areas of inquiry would include: special educational theory, medical treatment of various childhood conditions (e.g., pediatric HIV, childhood diabetes), and psychiatric treatment of childhood conditions (e.g., ADHD).

D. *Recommendations for Further Study:*

The twelve sponsoring agencies should solicit actively from m experts in other disciplines, research and writing supporting the training outlined in Part IV.C above.

V. DETERMINING WHETHER A VERBAL CHILD IS CAPABLE OF DIRECTING THE REPRESENTATION

A. *Recommendations for Practice Guidelines:*

1. As with adults, lawyers have an ethical obligation to advocate the position of a child unless there is independent evidence that the child is unable to express a reasoned choice. Where such evidence exists, a lawyer must engage in additional fact finding to determine whether the child has or may develop the capacity to direct the lawyer's action.
2. A lawyer representing a child should make the decision of whether the child client has the capacity to express a reasoned position. It is also the lawyer's responsibility to recognize, facilitate, and maximize the child's capacities.
3. In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals and others including family members, probation officers, school officials, clergy, and other concerned parties.
4. The weight given to the factors in the determination of capacity may vary depending on the issue or the nature of the proceeding.
5. Training is imperative for the lawyer representing children in order to determine capacity. Appropriate training minimally includes being familiar with child development and basic skills involved in interviewing children.
6. A lawyer should be aware of the risk that biases based on cultural, race, ethnicity, or class differences between the lawyer and child client may inappropriately influence the lawyer's perception of the child's capacity to direct the representation. Choices that initially might appear irrational might be rooted in a child's cultural,

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<sup>2</sup> See, e.g., Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996).

racial, ethnic, or class background, which a lawyer should respect. A lawyer therefore has an obligation to become educated about the role of culture, race, ethnicity, and class in the choices that a child client might make.

7. A lawyer should strive to learn all material information about the child that gives context to the choices the child might make. The relevant contextual factors include the child's individual life experiences, family background, and medical history.

8. When capacity becomes an issue the lawyer should consider the following factors for assessing capacity. Much of this analysis should occur regularly in the normal lawyering process:

- a. Child's developmental stage
  - i. Cognitive ability
  - ii. Socialization
  - iii. Emotional development
- b. Child's expression of a relevant position
  - i. Ability to communicate with lawyer
  - ii. Ability to articulate reasons
- c. Child's individual decision-making process
  - i. Influence - Coercion - Exploitation
  - ii. Conformity
  - iii. Variability and Consistency
- d. Child's ability to understand consequences
  - i. Risk of harm
  - ii. Finality of decision

#### B. *Recommendations for Further Study:*

1. Further study should be given to the question of whether Rule 1.14 of the ABA Model Rules of Professional Conduct, governing incapacitated clients, adequately addresses the representation of children. Among other things, consideration might be given to amending Model Rule 1.14 to delete the term "minority," and to adopting a separate Model Rule to address the representation of children, which would reflect the Recommendations made in Part A above and other Recommendations contained herein.

2. Further study should be made of how differences in race, ethnicity, culture, or class may affect children's decision making with respect to legal representation, and of how lawyers may properly take that into account in determining a child's capacity to direct the representation.

### VI. OBLIGATIONS OF GUARDIANS *AD LITEM*

Notwithstanding this Conference's Recommendation that lawyers serve on behalf of children exclusively in the role of lawyer (see Part I, *supra*), there may be times that a lawyer is appointed to serve in a different role, including as guardian *ad litem* or as court-appointed investigator, with specific direction to act contrary to the obligations of a lawyer representing a client. In particular, the guardian *ad litem* may be directed to advocate for what he or she believes is best for the child, without regard to (in the case of a verbal child) the child's wishes. The following Recommendations address guardians *ad litem* under such circumstances:

### A. *Recommendation for Changes in the Law:*

1. Any law that is intended to provide for the appointment of a lawyer to serve on behalf of a child in a role other than as lawyer (e.g., as guardian *ad litem* or court-appointed investigator) should clearly identify the role in which the lawyer is required to serve, and the attendant responsibilities.
2. Laws governing the responsibilities of guardians *ad litem* should permit guardians *ad litem* to practice in accordance with the guidelines recommended in Part VI.B, below.
3. Rules of evidence should provide that a guardian *ad litem* for a child has a privilege to refuse to disclose and to prevent any other person except the minor child from disclosing confidential communications that were (a) made by a minor child represented by the guardian *ad litem* and (b) made within the context of such representation. A presumption of confidentiality should attach to all communications between a child and a guardian *ad litem*, and the opponent of the privilege should have the burden of proving that the relevant communication is not privileged or that compelling reasons exist to compel disclosure.

### B. *Recommendations for Practice Guidelines:*

The following Recommendations address lawyers serving as guardians *ad litem* on behalf of children, where that role (contrary to the Recommendations in Part I) entails advocacy for what the guardian *ad litem* believes is best for the child.

1. *Candor toward the child.* The lawyer must explain to the child candidly and fully the lawyer's role and legal obligations with respect to the disclosure of confidences.
2. *Interviewing and counseling.* In the case of verbal children, the Recommendations in Part II, *supra*, concerning interviewing and counseling by lawyers, should apply equally to guardians *ad litem* with the following qualifications or additions:
  - a. The guardian *ad litem* should exercise professional judgment in deciding whether others should be present at meetings with the child, whether to seek access to confidential information concerning the child, whether to make use of other experts (e.g., social workers or psychologists to assist in assessing the child's best interests), and whether to refer the child for, or request, independent evaluations.
  - b. The guardian *ad litem* should explain (i) that the role entails advocating for what he or she believes is best for the child, even if it conflicts with the child's wishes; (ii) the possibility of cross-examination (where applicable); and (iii) that the guardian *ad litem* is not obligated to keep the child's secrets.
  - c. The guardian *ad litem* should explain to the child what positions will be taken and why.
1. Confidentiality.
  - a. *Responsibilities upon appointment.* Guardians *ad litem* should explain carefully to children the extent to which their conversations are private and under which circumstances they are allowed, or may be compelled, to disclose secrets told to them by the children.
  - b. *General obligation of confidentiality.* Guardians *ad litem* should strive to protect confidential communications with children. A guardian *ad litem* should disclose confidential communications only when it is in the best interests of the child to do so, and then only in relation to the proceedings for which the guardian *ad litem* is appointed.

c. *Appropriate disclosures.* A guardian *ad litem* appropriately may reveal confidential communications to the extent the guardian *ad litem* reasonably believes necessary:

- i. To serve the child's interests;
- ii. To prevent the child or someone else from committing a criminal or fraudulent act;
- iii. To rectify the consequences of the child's criminal or fraudulent act in the commission of which the guardian *ad litem*'s services had been used;
- iv. To establish a claim or defense on behalf of a guardian *ad litem* in a controversy between the guardian *ad litem* and the child, or to establish a defense to a criminal charge or civil claim against the guardian *ad litem* based upon conduct in which the child was involved; or,
- v. To comply with the orders of a court or the rules of law.

However, if appropriate under the circumstances and to the extent possible in light of a child's age and maturity, a guardian *ad litem* should discuss with the minor child any intention to disclose confidential communications and the reasons for doing so, and a guardian *ad litem* should give appropriate deference to the wishes of the child in making this decision, absent a good reason for doing otherwise.

### C. *Recommendations for Further Study:*

Further consideration should be given to the appropriate relationship between a child's guardian *ad litem* and a parent or guardian who is not in an adverse relationship with the child, including (1) whether and when it may be appropriate for the guardian *ad litem* to disclose otherwise confidential information to the parent or guardian and (2) the appropriate role of the parent or guardian with respect to decisions that are to be made by the guardian *ad litem* on behalf of the child.

## VII. IDENTIFYING AND RESOLVING CONFLICTS OF INTEREST

### A. *Recommendations for Practice Guidelines:*

Like lawyers serving in other contexts, a lawyer serving in legal matters involving children must determine at the outset whether the lawyer would be undertaking representation that may present a conflict of interest. Among other things, the lawyer must assess whether duties owed to one client may be inconsistent with duties owed to other clients or third persons or with other interests the lawyer must or may be inclined to serve. In legal contexts involving children, the lawyer's conflict-of-interest determination often will be difficult because of uncertainty concerning three questions: (a) What is the lawyer's role and what duties does that role entail? (b) Whom, if anyone, does the lawyer represent as a client? (c) Who makes decisions on behalf of the client?

1. *Clarification of role and responsibilities.* When serving in legal matters involving children, a lawyer should determine at the outset:
  - a. *Identity of client:* If the lawyer is serving in a representational capacity, whom does the lawyer represent (e.g., (i) one or more children; (ii) a parent; (iii) a legal guardian; (iv) a government agency).
  - b. *Lawyer's role:* In what role does the lawyer serve (e.g., as lawyer for a client, as guardian *ad litem*) and what duties does that role involve? Where the

lawyer's role is ambiguous, or where the lawyer has discretion to do so, the lawyer should elect to serve as lawyer for the child (see Part I, *supra*).

- c. *Identity of decision maker*: If the lawyer is serving in a representational capacity on behalf of a child, who makes decisions concerning the representation that would ordinarily be made by the client (e.g., (i) the child; (ii) a parent or legal guardian on behalf of the child;<sup>3</sup> (iii) the lawyer on behalf of the child), and what are the limitations on that individual's authority to make decisions?
2. *Resolving uncertainties*. A lawyer should seek to resolve uncertainties concerning the lawyer's role, the identity of the client or clients, and the allocation of decision-making authority.
    - a. When the lawyer is retained, the lawyer should seek to resolve uncertainties at the time of the lawyer's retention.
    - b. When the lawyer is appointed by the court, the lawyer should seek necessary clarification from the appointing authority.
    - c. When uncertainties are a result of legislation or decisional law, the bar should seek clarification through appropriate means (e.g., legislative amendment, judicial interpretation).
  3. *Communicating lawyer's role and responsibilities*. In matters involving children, a lawyer must make clear to all interested persons (e.g., child, parents, court, and others), as necessary, the lawyer's role, the identity of the client, and the allocation of decision making.
  4. *Addressing potential conflicts of interest*. In light of the considerations described above, the lawyer must determine whether the lawyer would be undertaking representation that entails a conflict of interest and, if so, the lawyer must address that concern in light of the applicable law and professional norms. Among other things, conflicts of interest may arise out of:
    - a. The lawyer's undertaking of inconsistent roles in a single matter (e.g., as lawyer and guardian *ad litem*).
    - b. The lawyer's representation of multiple clients, for example:
      - i. A child and a government agency.
      - ii. Multiple children.
      - iii. A child and a parent.
      - iiii. A child and a guardian or proposed guardian.
      - v. Codefendants/respondents-Copaintiffs/petitioners.
      - vi. The lawyer's representation of a former client.
      - vii. The lawyer's own interest.
      - viii. The interests of a third-party payor.
  5. *Representation of multiple clients*. At times a lawyer may consider simultaneously undertaking representation of a child and another client. In certain categories of cases, however, joint representation is inappropriate for a variety of reasons, including the strong likelihood that a conflict of interest would arise, the difficulty of getting informed waiver from the child, and the disruption that would occur in the likely event that withdrawal would later be required.
    - a. *Prohibited representations: parent and child*. A lawyer should not undertake representation of child and parent or person in the role of parent in the following contexts:
      - i. Delinquency.
      - ii. Termination of parental rights.
      - iii. Child protection (e.g., abuse and neglect, dependency).

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<sup>3</sup> The law of some jurisdictions may provide that, although a lawyer nominally represents the child, the lawyer is legally obligated to accept direction from the child's parent as "next friend" or the child's legal guardian.

- iv. Status.
  - v. Adoption.
  - vi. Abortion.
  - vii. Relinquishment of parental rights by teen parent.
  - viii. Civil commitment where parent is movant.
  - ix. Custody/divorce.
  - x. Where allegations are made of parental misconduct with respect to the child.
- b. *Prohibited representations: child and government agency.* A lawyer should not undertake representation of a child and a government agency in the same matter. For example, a lawyer representing an agency prosecuting a child protection petition or seeking to terminate parental rights should not also represent the child in that proceeding. Similarly, a government agency's lawyer should not represent a child in seeking SSI benefits.
- c. *Prohibited representations: multiple children.* A lawyer should not represent multiple respondents in a delinquency case.
- d. *Where multiple representation may be permissible.* In various categories of cases it may be appropriate for a lawyer to represent a child and another client. Included in this category are cases involving (i) the representation of siblings in abuse and neglect matters, or custody cases, and (ii) the representation of child and parent in cases involving medical decision making, guardianship, education, torts, probate and trust, and contract matters.
- e. In any case where a lawyer considers representing multiple clients including at least one child, the lawyer should have heightened awareness that the possibility of conflict of interest may arise during the representation. Initially, the standards of professional conduct require that the lawyer give particular care to the question of whether the lawyer adequately can represent both clients notwithstanding the conflict of interest. The lawyer must not undertake the representation, unless the lawyer, after having given serious consideration to the matter, concludes that under applicable professional conduct standards it would be permissible to undertake the representation with informed consent. If the lawyer reasonably concludes that the child has capacity to understand the nature of the conflict of interest and the consequences of that joint representation and gives informed consent, then the lawyer may undertake the representation.

## B. Recommendations for Further Study:

1. *Multiple representation when child lacks capacity to consent.* Further study should be given to the question of when and under what circumstances a lawyer may represent multiple clients when informed consent would ordinarily be required under the standards of professional conduct, but the client does not have the capacity to give informed consent or the lawyer is uncertain whether the child has such capacity.
2. *Parent's payment of child's lawyer's fee.* Under Rule 1.8(f) of the Model Rules, a lawyer may not accept compensation from someone other than the client (even with the client's consent) unless "there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship." In addition, "information relating to the representation of the client" must be protected from improper use or disclosure. Study should be given to whether and how this rule should apply when the child's lawyer is retained and compensated by a parent. Among other things, study should be given to whether a comment to this rule should be added to provide that (a) as a general matter, the parent payor is not entitled to direct the representation or to the disclosure of confidences, but that (b) the rule does not pre-

vent parent payors from directing the course of the representation or receiving information relating to the representation in situations in which parents are otherwise entitled to make decisions on behalf of their children.

### VIII. JUDGES' AND COURTS' ROLE AND RESPONSIBILITIES WITH RESPECT TO THE CHILD'S REPRESENTATION

#### A. *Recommendations for Changes in the Law:*

1. State law should provide that lawyers shall be appointed to represent children in the following cases:
  - a. Child protection proceedings.
  - b. Termination of parental rights proceedings.
  - c. Foster care proceedings.
  - d. Delinquency cases.
  - e. Status offenses within juvenile court jurisdiction.
  - f. Mental health commitment cases.
2. State law should provide that upon the arrest or removal of the child to state or county custody before the initiation of legal proceedings including, but not limited to delinquency and child protection proceedings, the child shall have immediate access to a lawyer who will independently represent the child.
3. State law or court rules should require the judiciary to provide the lawyer for the child with the opportunity to adequately interview and counsel the child in a setting conducive to the establishment of an attorney-client relationship.

#### B. *Recommendations for Structural and Legal Reform:*

A court's appointment of a lawyer for a child should be made within a system with the following characteristics:

1. The agency, which recruits and selects the lawyers, is independent of the court.
2. The lawyers are compensated reasonably, i.e., commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.
3. The lawyers are given access to services and to information needed for effective representation of the child, and are reimbursed for associated supporting costs.
4. Appointments provide for continuity of representation, i.e., the lawyer stays with a case for as long as it is within the court's jurisdiction.<sup>4</sup>
5. Caseloads are appropriate for competent and effective representation of each client.
6. Appointments are based upon objective criteria that promote high quality legal representation.
7. The lawyers are familiar with standards of practice that promote high quality representation.
8. The system engages in ongoing evaluation that focuses on lawyer performance and case outcomes.
9. The lawyer recruitment process includes an aggressive campaign to increase the racial, ethnic, gender, and cultural diversity of the lawyer pool.

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<sup>4</sup> "Continuity of representation" contemplates that a lawyer will continue with a child when a case is transferred, such as when a termination of parental rights proceeding is initiated in a different court from the one in which an abuse and neglect hearing occurred.

C. *Recommendations for Practice Guidelines:*

1. *Appointment of counsel.* When they have authority to do so, judges should appoint lawyers to represent children in the following categories of cases and in other appropriate cases:
  - a. Child protection proceedings.
  - b. Termination of parental rights proceedings and foster care proceedings. If the termination of parental rights proceeding follows an abuse and neglect case, the representation from the earlier proceeding should follow into the termination of parental rights proceeding.
  - c. Delinquency cases. In delinquency cases, judges should be reluctant to accept waivers of counsel by children. Where waivers are at issue, the judge should apply a more rigorous inquiry into the child's knowing and voluntary waiver of counsel than is applied with respect to adult criminal waivers.
  - d. Status offenses within juvenile court jurisdiction. Status offenders should be referred to diversion programs before coming within juvenile court jurisdiction.
  - e. Mental health commitment cases. Judges should recognize that the ethical representation by a lawyer for the child is enhanced when all parties are represented by counsel.
2. *Retained counsel.* The court should permit the child to be represented by a retained private lawyer if the court determines that this lawyer is the child's independent choice.
3. *Substitution of counsel.* The court should allow, at the child's request, the substitution of one state-compensated lawyer for another, for good cause, unless such action would cause undue delay.
4. *Enabling effective representation.* The judge should ensure that the lawyer for the child has timely access to the child, to all relevant information, including reports and records, to witnesses, and to services necessary for effective representation.
5. *Participation of child's lawyer.* The court should not go forward on any substantive matter without the child's lawyer.
6. *Additional judicial responsibilities.* Judges have a responsibility to children that is not satisfied solely by appointing counsel for the child. Their additional responsibilities include the following:
  - a. Judges must recognize their own responsibility for the speedy resolution of cases involving children, and should demonstrate it by effective case management and the minimization of delays.
  - b. Judges should impress upon lawyers and all parties the priority that should be afforded each child's case.
  - c. Judges should advocate the creation of specialized child advocacy programs, law school clinical child advocacy programs, and specialized child advocacy units within legal services and public defender agencies.
  - d. Judges should advocate the adoption and funding of systems (as described elsewhere in these Recommendations) for the appointment, training, and evaluation of lawyers for children.
  - e. Judges have a responsibility in cases involving children to monitor the competent and effective representation of the child.
  - f. Judges should engage in continuing education to enable them effectively to appoint and utilize counsel for children.
  - g. Juvenile and family court judges must be leaders in their communities, state capitals, and at the national level to improve the administration of justice for children and families.

*D. Recommendations for Further Study:*

Further study should be given to the following questions:

1. Whether there should be mandatory appointment of counsel for children in contested adoption cases, based upon criteria related to the child.
2. Whether there should be mandatory appointment of counsel for children in disputed custody and visitation cases, and based upon what criteria.
3. How courts deal with school disciplinary proceedings, and how they utilize lawyers in such proceedings.
4. What criteria should guide courts' exercise of discretion to appoint counsel in the following cases:
  - a. Domestic violence.
  - b. Custody/visitation.
  - c. Adoption.
  - d. Child support.
  - e. Guardianship.
  - f. Medical decisions.
  - g. Abortion.
  - h. Special education.
  - i. Right to marry.
  - j. Emancipation.
  - k. Public benefits.
  - l. Where a child is a witness.
  - m. Asset protection.
  - n. Deportation.
  - o. Tort actions.
  - p. Class actions.
5. In monitoring the effectiveness of representation of children and evaluating lawyer competence, what actions should the judge and lawyer-appointing body take and what criteria should they apply? Study of this question should include consideration of:
  - a. Current and proposed guidelines.
  - b. Gathering information from child clients when possible.
  - c. Other sources.