Conflicts of Interests in the Representation of Children in Dependency Cases

Christopher N. Wu
CONFLICTS OF INTEREST IN THE REPRESENTATION OF CHILDREN IN DEPENDENCY CASES

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INTRODUCTION

ONE of the few cases involving the representation of children to achieve public discussion arose in 1992. A twelve-year-old Chicago girl told her court-appointed lawyer that she wished to return home from placement with her maternal grandmother to her mother’s custody. Her mother, however, lived with the girl’s stepfather who had recently finished a four-year prison term for sexually molesting the girl. The stepfather now reportedly recanted his confession and denied sexual abuse. Rather than advocate for her return home, as the girl wished, her attorney actively advocated against reunification.

The girl contacted a different attorney who agreed to represent her and to advocate for the result she desired. The new attorney asked the court to allow her to represent the child and replace the current court-appointed lawyer. The court-appointed attorney, from the Cook County Public Guardian’s Office, refused to step aside, arguing that the office was properly representing the girl’s “best interests” and that she lacked the right to retain counsel of her own choosing.

Did the client have the right to demand that her lawyer advocate the result she desired? Or at least that the attorney not advocate a result she expressly opposed? In the language of legal ethics, what is the attorney’s duty of loyalty to a client when the client is a child?

A major component of an attorney’s duty of loyalty is the mandate that the attorney avoid conflicts of interest, either between multiple clients or between a client and the attorney’s own interests. This Article discusses conflicts of interest an attorney may confront in the course of representing children in dependency cases, such as the one described above.

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2. Id.
Child protection, or dependency cases, represent a large and important aspect of children's legal representation. This Article focuses on dependency cases rather than delinquency matters, status offenses (such as running away or being “incorrigible”), or other custody actions. The conclusions drawn about the lawyer's ethical duties, however, are applicable in any forum.

Appointing independent counsel for a child recognizes that the child has interests in the litigation separate from the state and the parents or guardians. Dependency cases, thus, almost always involve a form of litigation with at least three major parties. In some jurisdictions the court designates the child's independent advocate as a guardian ad litem. Some states require that the guardian ad litem must be an attorney. In others, a lay person may serve as guardian ad litem. In some jurisdictions, the court may appoint an attorney for a child in a dependency case, but that attorney is not the child's guardian ad litem.

5. Cases will often have more than three major sides due to the participation of, for example, parents whose interests differ from each other, multiple siblings, grandparents or other relatives, foster parents, or Court Appointed Special Advocates. See infra note 17.

6. Black's Law Dictionary defines guardian ad litem as “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation.” Black's Law Dictionary 706 (6th ed. 1990).

7. See, e.g., D.C. Code Ann. § 16-2304(b)(3) (1989) (“The Superior Court shall in every case involving a neglected child which results in a judicial proceeding ... appoint a guardian ad litem who is an attorney to represent the child in the proceedings.”); Utah Code Ann. § 78-3a-44.5(1) (Supp. 1995) (“The court may appoint an attorney guardian ad litem to represent the best interest of a child involved in any case before the court, and shall consider only the best interest of a child in determining whether to appoint a guardian ad litem.”).

8. The court shall appoint a guardian ad litem to protect the interests of a child ... in a juvenile court proceeding. ...

(C)(1) When the guardian ad litem is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist[s]. ... 

(3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian ad litem, the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian ad litem.

Ohio R. Juv. P. R. 4(B)-(C) (Page Supp. 1994); see also Fla. R. Juv. P. R. 8.215(b)-(c), (f) (West 1995) (“The court shall appoint a guardian ad litem to represent the child ... The guardian ad litem shall be an attorney or other responsible adult ... The duties of lay guardians shall not include the practice of law.”).

9. California Welfare and Institutions Code § 317(c) states: “In any case in which it appears to the court that the minor would benefit from the appointment of counsel the court shall appoint counsel for the minor ...” Cal. Welf. & Inst. Code § 317(c) (West Supp. 1995).
Other commentators have noted the conceptual difference between acting as a child's attorney and as guardian *ad litem.* This Article focuses on the role of the child's attorney. The fundamental responsibilities of the child's attorney have historically been difficult to pin down. Other authors in this Conference also discuss major aspects of this role-definition problem.

The fundamental problem of defining the attorney's role in representing a child concerns the issue of who has the authority to make final decisions about the goals of representation when the attorney and the client disagree. Is the attorney bound by the client's decision regarding the goals of advocacy when, for instance, the attorney feels the client's goals are not in the client's best interests? This Article does not seek to resolve this issue. The role that the attorney takes on in the context of decision making, however, dramatically influences the analysis of conflict of interest.

Increasingly, the academic literature reveals a growing consensus that the proper role of an attorney for a child is to represent the client's wishes (as opposed to the attorney's conception of the minor's best interests) consistent with the minor's age and cognitive ability.


13. See, e.g., Edwards & Sagatun, *supra* note 4, at 74 (stating, inter alia, that the child advocate must inform the court about the child's desires); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question,*
Part I of this Article discusses the attorney-client privilege, specifically the attorney's duty of loyalty. Part II examines the conflicts of interest that arise when representing multiple siblings. Part III looks at the conflicts of interest that arise when representing the child and the child welfare agency. Part IV addresses the conflict of representing both parents and their children.

This Article concludes that if the attorney for the child conceives of his or her role as representing the attorney's view of the child's best interests, even if the client disagrees, then the attorney will never have a conflict of interest with the client. Any potential conflict of interest will be reconcilable under the rubric of "the best interest of the child." This result, however, should not be viewed as some sort of "safe harbor" for the practitioner. Rather, it should be seen as a strong signal that the attorney is engaged in some function other than the practice of law. This Article argues that children should be provided independent counsel in dependency cases and that the attorney should be bound by the rules of attorney-client loyalty and privilege, which ultimately require deference to the client's wishes regarding the goals of representation.

I. ATTORNEY-CLIENT PRIVILEGE—THE CONCEPT OF LOYALTY

This analysis begins with an examination of the duty of loyalty when representing children. In particular, this part focuses on how the duty of loyalty cannot be reconciled easily with the "best interest" model of advocacy.

The commentary to the American Bar Association's Model Rules of Professional Conduct ("Model Rules") 1.7 begins with the statement, "Loyalty is an essential element in the lawyer's relationship to the client." The Model Rules deem the need for the attorney to
have undivided loyalty to the client to be so important that the lawyer is *forbidden* by Rule 1.7 from representing a client whose interests conflict with those of another client, a third party, or the attorney’s own interests.

This duty of loyalty raises special concerns in the context of representing children. For example, what does the concept of loyalty mean in the context of representing a child in a dependency case? Under the attorney model of advocacy, if the client is old enough to express his or her wishes regarding the goals of the case, the lawyer’s duty calls for advocating these goals. This model reflects the familiar loyalty of the attorney-client relationship and its general terms require no further discussion.

On the other hand, under the “best interest” model of lawyering, if an attorney for a child conceives of his or her role as advocating the attorney’s conception of the child’s best interests, then the attorney’s loyalty shifts away from the client and to that conception. This model of the attorney-client relationship permits the attorney to advocate a position to which the client may be explicitly opposed.

The notion that an attorney might zealously advocate for a result opposed by the client clearly sets the representation of children apart from the normal context in which attorneys operate. The legal community, for example, would deem it unacceptable for a criminal defense attorney to explain to the court that: “My client wishes to plead not guilty, but in my opinion it would be in his best interests for him to spend a little time in jail.” Attorneys for children in dependency cases frequently make the functional equivalent of such a statement.

Where the attorney sets the goals of the litigation, as described above, an attorney would likely *never* declare a conflict of interest. The subsequent sections of this Article, however, discuss in greater detail specific types of situations in which conflicts arise for an attorney representing a child.

The question remains then: If client loyalty is at the heart of an attorney’s ethical duties such that the attorney is mandated to avoid conflict of interest situations, and the attorney’s role in representing children *precludes* the possibility of a conflict of interest, then in what way is the advocate who adopts a best interest approach really functioning as a lawyer? More specifically in the context of dependency cases, how does the attorney’s function differ from that of the judge,
the social worker, or, if one exists, the Court Appointed Special Advocate? Thus, as shown, the duty of loyalty presents special concerns when representing children, in particular if the attorney adopts the "best interests" model. A closer look at the possible conflicts of interest which might be encountered between the child and the other parties will give us a better perspective from which to analyze the issue of the attorney's role.

II. CONFLICTS OF INTEREST BETWEEN MULTIPLE SIBLINGS

The duty of loyalty can arise in a number of situations. For example, as mentioned previously, dependency cases can involve multiple parties, some or all of whom may be represented by independent counsel. When multiple siblings are made dependents in the same action, an attorney may be appointed to represent more than one of the siblings at the same time. More often than not, the attorney will not encounter an actual conflict of interest during the course of the representation.

Issues involving potential conflict situations may arise, however. For example, what if a lawyer is appointed to represent two siblings and one of the clients claims she was abused by the other client? What if one child is removed from the home due to self-reported abuse by parents and another is still at home and denies any abuse ever took place?

If a conflict of interest arises between multiple siblings represented by the same attorney, must that attorney withdraw from representing any of the clients? That was the result mandated by a New York court in In re H. Children. In that case, a Law Guardian was appointed to represent Rhomonia, age sixteen, and Christopher, age fourteen. The State of New York accused their father of sexually abusing Rhomonia. The court described the attorney's problem as follows:

[Rhomonia and Christopher] have divergent views as to the existence of the alleged sex abuse and the relief that ultimately should

17. Court Appointed Special Advocates ("CASA") are specially-trained lay advocates who are usually assigned on a one-to-one basis to children in foster care. CASAs spend a substantial amount of time with their clients and, in addition, regularly make written reports to the court and appear at hearings. As of July 1995, there were 610 local CASA programs in the United States. Telephone Interview with Roberta Gonzalez, CASA National Office in Seattle, Wash. (Oct. 17, 1995).

18. Arguably, the mere potential of these types of conflict situations occurring makes reasonable the conclusion that, if counsel is to be routinely appointed to children in dependency cases, each child should have separate counsel. On the other hand, could that ever be a sensible result when dependency cases dealing with six or more children at a time are not uncommon?


be granted by the court. In fact, the law guardian believes that Christopher may be called as a witness by respondent at the fact-finding hearing and that she may be required to cross-examine the child.\textsuperscript{21}

After interviewing both children, the Law Guardian stated that she found each of them “mature, intelligent and articulate.”\textsuperscript{22}

Perceiving a conflict of interest, the Law Guardian moved to withdraw as counsel for Christopher, but wished to remain as counsel for Rhomonia. The respondent father agreed that there existed a conflict of interest, but argued that the Law Guardian should be totally disqualified from representing either child.

The court agreed with the father and ruled that the Law Guardian must withdraw from representing both children.\textsuperscript{23} The court held that there is a “reasonable probability” that Christopher confided information to the Law Guardian relevant to the litigation related to the alleged sex abuse. The court identified an irreconcilable conflict between the attorney’s duty of loyalty to Christopher and to Rhomonia. If he did reveal such information, the court reasoned, the Law Guardian would be in the dilemma of having to use the information to Rhomonia’s advantage, thus violating ethical precepts against revealing client confidences;\textsuperscript{24} alternatively, not using the information would result in a violation of ethical mandates to zealously represent Rhomonia.\textsuperscript{25} The court went so far as to state that continued representation of Rhomonia, as requested by the Law Guardian, would create an “appearance of impropriety” which could only be avoided by complete withdrawal of the Law Guardian and appointment of new and separate counsel for the children.\textsuperscript{26}

The New York court’s analysis contrasts sharply with that of the Iowa Supreme Court’s in \textit{In re J.P.B. and C.R.B.}\textsuperscript{27} In the Iowa case, the expressed wishes of two children differed regarding perhaps the most important substantive issue dealt with in the context of dependency cases—termination of parental rights.

All parties in \textit{J.P.B. and C.R.B.} agreed that the state produced sufficient evidence at trial to support the termination of parental rights over C.B., age thirteen, and J.B., age nine.\textsuperscript{28} An attorney named Preacher represented both children at trial. C.B. was opposed to the termination of her mother’s rights and joined her mother in appeal of

\textsuperscript{21} \textit{In re H. Children}, 608 N.Y.S.2d at 785.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 786.
\textsuperscript{24} \textit{Id.} at 785 (citing Model Code of Professional Responsibility EC 4-1 (1980); Model Code of Professional Responsibility DR 4-101 (1980)).
\textsuperscript{25} \textit{Id.} (citing Model Code of Professional Responsibility EC 7-1 (1980); Model Code of Professional Responsibility DR 7-101 (1980)).
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} 419 N.W.2d 387 (Iowa 1988).
\textsuperscript{28} \textit{Id.} at 388-89.
the decision. J.B., on the other hand, favored termination; his statements alleging ongoing abuse became a "primary factor" in the trial court's findings that return of custody of either child was unsafe. At trial, Preacher presented the opposing views of C.B. and J.B., but called no witnesses (C.B. was later called as a witness by their mother). C.B. and her mother claimed that C.B. was denied effective assistance of counsel due to the conflict of views between C.B. and J.B. Preacher's conflict of interest was the sole issue on appeal.

The Iowa Supreme Court found no actual or potential conflict of interest to exist. The court's review of the record showed that Preacher vigorously cross-examined the state's witnesses and elicited testimony corroborating C.B.'s denial of ongoing abuse. "If anything," the court concluded, "the record reveals a substantial effort on Preacher's part to discredit J.B.'s testimony to the benefit of C.B."

The court went on to detail its most fundamental argument against finding a conflict:

[T]he very reason for contested custody proceedings is that the children involved are not yet mature enough to be self-determining. It is the best interests of these minor children, not their wishes, which determine the outcome of the case. In other words, their real interests are not inconsistent or mutually exclusive.

The court distinguishes, in this argument, between children-clients' interests and "real interests" or "best interests." The court concludes that an attorney for a child whose interests conflict with her own view of the child's best interests can avoid a claim of ineffective assistance of counsel by informing the court of the child's stated interests and the attorney's view of the child's best interests.

Conflict of interest situations are rarely as clearly demarcated as the J.P.B. and C.R.B. case. In that case, the court explicitly observed that the attorney may have "discredited" one of his client's positions through his advocacy of another client's position. If an attorney need not withdraw in this circumstance, what conflict of interest situation would require withdrawal? Apparently, as long as the attorney discloses the clients' wishes, he or she may advocate any position that the attorney believes to be in their best interests. The conflict between multiple child clients, or at least the significance of conflict, simply disappears if the attorney presents his position in the context of the

29. Id. at 390-91.
30. Id. at 389.
31. Id. at 390.
32. Id. at 391. The court reasoned that Preacher made such a strong argument on C.B.'s behalf that if anyone has cause to complain about the attorney's loyalty, it is J.B. Of course, as to J.B., the error, if any, would be deemed harmless. Id.
33. Id. (emphasis added).
34. Id.
35. Id. at 391-92 (citing In re Marriage of Rolfe, 699 P.2d 79, 86-87 (Mont. 1985)).
children's "best interests." Thus, the Iowa Supreme Court found no significant conflict of interest, unlike the New York court in \textit{H. Children}, which would surely find an "appearance of impropriety" that would mandate the attorney's withdrawal from the case.

In sum, the choice (or imposition) of the attorney's role, in large part, determines the possibility of a conflict of interest. The Iowa and New York courts' analyses differ, most significantly, in their assumptions regarding the role of children's counsel. The New York court used a "standard" conflict framework to analyze the ethical mandates of loyalty to the client and zealous advocacy. By contrast, the Iowa Supreme Court reasoned that the court's ultimate goal of determining the child's best interests overrides those ethical mandates.

This Article argues that the Iowa court's reasoning is flawed: The court simply assumes that the children's attorney should have the same goal as the court. Clearly, the judge has the duty in dependency cases of determining the child's best interests. If the attorney for the child also has the same primary goals as the judge, then how is the attorney's role distinguished from that of the judge? Of the social worker? Of the parents?

### III. Representing the Child and the Child Welfare Agency

A second conflict of interest situation arises in those jurisdictions where the attorney represents the government child welfare agency as well as the child. A recent survey in California found that in seven counties, the County Counsel offices often jointly represented chil-

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36. \textit{Id.} at 392.


38. \textit{See supra} notes 14-17 and accompanying text; \textit{see also In re Candida S.}, 9 Cal. Rptr. 2d 521, 528 (Ct. App.) (finding no conflict of interest for attorney to represent four minors, some of whom wanted visitation with parents and some of whom did not), \textit{reh'g denied}, 7 Cal. App. 4th 1240 (Ct. App. 1992); \textit{In Re Elizabeth M.}, 283 Cal. Rptr. 483, 491 (Ct. App. 1991) (holding that failure to appoint separate counsel for children with divergent views on visitation was not reversible error absent "miscarriage of justice").

39. For example, California Welfare and Institutions Code § 317(c) states:

In any case in which it appears to the court that the minor would benefit from the appointment of counsel the court shall appoint counsel for the minor . . . . The court shall determine if representation of both the petitioning agency and the minor constitutes a conflict of interest. If the court finds there is a conflict of interest, separate counsel shall be appointed for the minor.

dren and the petitioning Department of Social Services.\textsuperscript{40} California statutes, however, provide that in cases of joint representation, independent counsel for the child shall be appointed in the event of a conflict between the Department of Social Services and the child.\textsuperscript{41}

The survey found that, of the seven counties where county attorneys represented both the social services agency and the child in a substantial portion of cases, the county attorneys "conflicted out" of representing the child very rarely in two of the counties and from twenty-five to almost ninety percent of the time in the other five counties.\textsuperscript{42} Thus, in California, which allows dual representation of the child welfare agency and the child absent a conflict of interest, whether an attorney raises a conflict of interest that would lead to the appointment of separate counsel for the child appears to be a matter of local "culture."

The California statutes mention conflicts of interest between the child welfare agency and the child but nowhere defines it, either by statute or in case law. What possible common definition of "conflict of interest" could result in the California survey's wide disparity of findings between jurisdictions?

Again, the answer must lie in the definition of the attorney's role in the representation of his or her client. Arguably, because protection of the subject child is the government's primary interest in a dependency case, the attorney for the child welfare agency could be said to be acting "in the child's interest." Would it be sufficient evidence of a conflict if the attorney's investigation revealed that the child and the social worker desired different results in a primary issue in the case—e.g., whether or not the child is removed from parental custody? If so, then in those jurisdictions that allow dual representation and reveal low rates of declared conflicts of interest, either an investigation of the child's wishes is not being made, or the child (at least among those old enough to express their wishes) is always in agreement with the social worker. It is safe to assume that the latter situation is not invariably the case.

The Oregon Court of Appeals at one time took an approach different than that reflected by the California statute. In 1974, in \textit{State ex rel. Juvenile Department of Multnomah County v. Wade},\textsuperscript{43} the court declared that children in termination of parental rights cases present separate interests and that the court must appoint independent counsel for the children in every case.\textsuperscript{44} The trial court had held that the

\textsuperscript{40} Sharon Kalemkiarian & Susan Duke, Do Children Get Competent Counsel? A 58-County Survey of Standards for Attorneys Representing Children in Juvenile Court 3, 6 (1994).
\textsuperscript{41} Id. at 3.
\textsuperscript{42} Id. at 3, 6.
\textsuperscript{44} Id. at 757.
attorney for the state could also provide "adequate and effective" representation for the children. The district attorney, representing the state child welfare agency, argued that the state's interests were equivalent to the children's.

The appellate court disagreed and held that independent counsel for children must be ordered at all termination of parental rights proceedings. The court reasoned that the state's interest in assuring adoptions, and thereby relieving the state of foster care and other costs,

is clearly a source of potential conflict [of interest] which may prevent the district attorney—whose client in these proceedings is primarily the state—from providing a child with the effective representation of which independent counsel would be capable.

Just a year later, in an opinion by the same judge, the court reversed its holding mandating appointment of counsel to minors. In In re D., the court held that the trial court did not err in having failed to appoint independent counsel for the minor in a private adoption action. Rejecting the inflexible rule enunciated in its earlier case, the court opted for a case-by-case analysis of the need for independent counsel to be conducted by the trial court. The court stated that "developments since Wade" had convinced them that the more restrictive rule was overbroad. The court, however, did not specify the "developments" to which it was referring. The court noted that, in this instance, the child was too young to communicate his own position to his attorney and the record contained abundant evidence of this fact. Finally, the court concluded that independent counsel for the child would not likely have made any significant further contribution.

Where the Wade court found independent representation of children to be essential to due process because of the inherent potential for conflict of interest with other parties, the same court a year later emphasized the need for a flexible approach that takes into account factors of economy, judicial and otherwise. Arguably, the debate

45. Id. at 755.
46. Id. at 757.
47. Id.
49. Id. at 182.
50. Id. at 181.
51. Id. at 180.
52. Id.
53. Id. at 181-82.
54. Id. at 181 n.10 (citing Gagnon v. Scarpelli, 411 U.S. 778, 787-90 (1973), that held that appointment of counsel in probation and parole revocation proceedings should be considered on a case-by-case basis). A rule requiring appointment in every case, while simpler, would, among other things, "impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." Id.
about the prohibitive financial costs of providing representation in every case played a part in the “developments since Wade,” which the court mentioned.

The new Oregon rule requires the trial court to speculate in each case about the contribution an attorney for a child might make. Such speculation will necessarily implicate notions of the duties and responsibilities inherent in the role of children’s counsel. For example, this analysis may ask: when an attorney already represents the child welfare agency in a dependency case, what additional tasks must he perform if he is also appointed to represent the child? The answer depends on how the lawyer views the role of children’s counsel and what, if any, duties are imposed on the attorney by the court. As a practical matter, however, in jurisdictions that permit simultaneous representation of the child and the agency, attorneys will unlikely actually perform any additional tasks beyond their representation of the agency.

Thus, an attorney who represents both the agency and the child confronts two distinct barriers to declaring conflicts of interest: (1) the attorney must be able to distinguish between the two roles of representing the child welfare agency and of representing the child (e.g., are they both to represent the “best interests of the child?”); and (2) the conflict must be brought to the attorney’s attention. The latter question depends, in part, on the extent to which the attorney’s handling of the case is designed to discover conflicts where they exist.55

IV. REPRESENTING PARENTS AND CHILDREN

Finally, a conflict may exist between the interests of the child and the interests of the parent. The author is not, however, aware of any dependency court that allows an attorney to simultaneously represent parents and children in the same case. The rationale behind this practice seems clear: In dependency cases, the state charges parents with the abuse, neglect, or abandonment of their children. Children are the alleged victims and their parents are alleged to be the cause of their suffering. Dual representation would thus present an inherent conflict of interest or at least a strong potential of one.

There are strong, unresolved policy conflicts in child advocacy, as evidenced by conflicting commentary about parental control over children’s attorneys. For example, several important commentators have concluded that children’s attorneys should presumptively look to par-

55. The chances of discovering a conflict with the child client’s expressed wishes decrease substantially, for example, if the lawyer fails to interview the child. Unfortunately, not all lawyers who represent children see meeting the client as an indispensable element of representation.
ents for guidance in the absence of evidence to overcome that presumption.\textsuperscript{56}

In \textit{Before the Best Interests of the Child}, the Yale team of Joseph Goldstein, Anna Freud, and Albert Solnit ("GF&S"), perhaps the most influential architects of modern child welfare policy, advocated for a parental presumption.\textsuperscript{57} GF&S' scheme proposes that children may only have counsel in one of two ways: either the parents hire an attorney or the court appoints one. These authors argued that to allow children to retain counsel on their own would harm the family integrity to which they are entitled.\textsuperscript{58}

Frequently, when parents hire the attorney, the lawyer's ultimate responsibility requires her to act in accordance with the parents' wishes. GF&S used a case example in which a custodial mother hired the authors as counsel for her children to clarify the custody and visitation situation after a divorce:

\begin{quote}
We accepted her request on the understanding that we would counsel her children, advise her as to their needs—always making clear to them that she, as their custodial parent, had final say both with regard to accepting our advice and to our continuing to provide representation.\textsuperscript{59}
\end{quote}

The authors \textit{presume} that children are incompetent decision makers and require adults to make decisions for them. Thus, GF&S maintain that attorneys who are loyal to the custodial parent (which may be the court), in fact, can best serve children. If the law clearly defined the identity of the "custodial parent" at any particular time, the result would be that "every child before the law [would find] himself in the position where adults 'know best' what is good for him and decide that with or without regard to his wishes."\textsuperscript{60}

In the typical dependency case, however, the court appoints the attorney for the child. GF&S argue that in this case the court's "custody" replaces the presumption of parental autonomy.\textsuperscript{61} Counsel for the child then functions essentially as a guardian \textit{ad litem}—making dispositional recommendations, monitoring the speed of the process, and scrutinizing the child's care.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{56} See, e.g., Joseph Goldstein et al., \textit{Before the Best Interests of the Child} 112 (1979).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 120.
\item \textsuperscript{60} Id. at 121.
\item \textsuperscript{61} Id. at 122.
\item \textsuperscript{62} The attorney looks to the court, not the client, to define the goals of representation. GF&S state: "Counsel cannot turn directly to the children whom he represents for his instructions. Children are by definition persons in need of adult caretakers who determine what is best for them." Id.; see also Guggenheim, \textit{supra} note 11, at 91 n.68 (discussing the impact children's counsel may have on parents' rights and the need to consider parental privacy and autonomy before appointing counsel for children).
\end{itemize}
One commentator recently has proposed a specific amendment to the Model Rules. In a 1993 Symposium on the Rights of Children, Jonathan O. Hafen proposed giving parents a “rebuttable right” to direct the course of representation when a minor is represented by an attorney. The presumption may be overcome if the parents are shown to have a conflict of interest with the child or if the court finds them to be “unfit.” In that case the child’s guardian ad litem directs the course of representation. The court has the discretion to appoint a guardian ad litem if one has not already been appointed. In the alternative, if the child is “sufficiently mature,” the attorney should have a “normal attorney-client relationship with the child.”

Under Hafen’s proposal, a “mature” minor can have a “normal” relationship with his attorney only if the parents are unable to direct the attorney and if the court appoints no guardian ad litem. By contrast, GF&S do not perceive any room for a “normal” attorney-client relationship with a child-client at all.

These positions have had little impact on the policy regarding the appointment of counsel for children, particularly in the dependency area, the focus of this Article. Dependency cases in general provide strong grounds for allowing children to have counsel independent from their parents. Children have a strong interest in being protected from abuse, neglect, or abandonment by their parents. A high potential for conflict exists, of course, between children’s interests (however they are defined) and parents’ interests in the dependency context. As a result, juvenile court dependency systems generally recognize a right to counsel for children independent of the representation afforded to parents, but fail to clearly define the attorney’s role.

**Conclusion**

This Article’s primary ambition is to discuss conflicts of interest that commonly arise in the course of the legal representation of children in dependency cases. As a secondary, and somewhat broader ambition, this Article seeks to show how analyses of conflicts of interest in the dependency area hinge on the definition of the attorney-client rela-

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64. Hafen, *supra* note 63, at 462.
65. *Id.*
66. *Id.*
67. “Normal” is not defined by Hafen but is presumed to mean that the attorney will zealously represent the client’s wishes.
68. See *id.*
69. Goldstein et al., *supra* note 56, at 122.
70. See *supra* notes 7-9 and accompanying text for examples of statutes providing for appointment of children’s counsel.
tionship. That relationship is the subject of much commentary and little resolution.

To the extent that the role of the attorney deviates from the traditional one of zealously advocating the client’s expressed wishes, the possibility of conflicts of interest with another party diminishes. But if the prohibition against representing multiple clients whose interests conflict is founded upon both the attorney’s duty of loyalty to the client and the duty to zealously advocate the client’s aims, it seems legitimate to ask how the role assigned to the attorney resembles the practice of law at all.

This question, and the role-definition problem from which it arises, applies to any type of case in which an attorney may be representing a child. If the attorney for a child must independently determine what the attorney believes are the child’s “best interests” before taking a position in the case, what gives the attorney any knowledge or skill in that domain? In the dependency context, determining the child’s best interests would appear to be the primary domain of the court and the child welfare agency. How many parents would say that they too do not want what is in their child’s “best interests”? In other legal contexts, the personnel may change (e.g., mental health professionals in commitment cases, teachers and school staff in education cases, probation staff in delinquency cases), but almost all will base their position in what they believe to be in the child’s best interest.

In other words, everyone in children’s cases already claims some stake in determining the child’s best interests. What can the attorney for the child then bring to the table that is not already “covered” by the other players? Unless the client is protected by the attorney-client privilege, the attorney brings conceptually little to the case.

Sorting out conflicts of interest for children’s attorneys will first require sorting out the role-definition issue. The current situation is a muddled mess. Clearing up that mess will require some difficult policy decisions. Giving children access to counsel may be grounded upon a recognition that they are independent parties to actions that concern them and have independent interests with an equal right to be zealously advocated as are other parties. To move in the opposite di-

71. The Honorable Leonard Edwards points out to me that the child’s attorney is sometimes the only person in the courtroom who raises the important issue of whether the government made reasonable efforts to prevent or eliminate the need to remove the child from the parental home, as is required by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670–679 (1994). Telephone Interview with Hon. Leonard P. Edwards (Nov. 28, 1995). It is true that the child’s lawyer may be a “watchdog” on the process of the child welfare system and reasonable efforts is arguably the most important issue to be “watched.” Under the representation model for which this Article argues, however, the child’s attorney cannot be counted on to raise this or any other “systems issue” consistently. If the child client, for instance, wishes to be placed out of home, the child’s lawyer has no incentive to argue against a finding that reasonable efforts were made, even if reasonable efforts were not made—the lawyer has, rather, the opposite incentive.
rection might define the role of children’s counsel out of existence. It is hoped that devoting greater resources to the theory and practice of representing children will raise both the quantity and quality of truly independent advocacy for children. This Conference represents one step in that direction.