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Report of the Working Group on Confidentiality

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REPORT OF THE WORKING GROUP ON CONFIDENTIALITY

INTRODUCTION

This Working Group[1] considered the extent to which an individual acting as the advocate[2] for a child, either as attorney or guardian *ad litem*, must preserve the child's confidences. The scope of the advocate's duty to keep confidences may give rise to ethical dilemmas when the advocate learns confidential information that suggests that the child may be at some risk of harm, but the child refuses to grant permission to disclose confidences. Ethical issues regarding limitations on disclosure of information are complicated not only by the insufficient focus of lawyers' ethical rules on the representation of children, but also more broadly by a pervasive lack of clarity in the definition of the role of the child advocate. This lack of clarity engenders great uncertainty as to whether and when ethical rules for lawyers even apply.

The Working Group used variations of the following hypothetical to explore the extent of the child advocate's duty to keep confidences of the child:

> A preadolescent child runs away from his foster home and, having nowhere to turn, finds himself late on a cold winter night in a violent and unfamiliar neighborhood plagued by drug dealing and gang violence. He finds a public phone booth and places a collect call to the advocate appointed by the juvenile court to represent his interests. The child informs the advocate that he has been abused in his foster home and will not return there. He does not know what to do or where to go. Fearful, however, that no one will believe him and he will be forcibly returned to the home, the child is adamant that he does not want anyone other than the advocate to know his whereabouts, and he insists that nothing he has shared with his advocate may be repeated to anyone under any circumstances. The advocate has good cause to fear for the child's immediate safety and health, and believes rightly that police or child welfare officials should be notified immediately of the child's situation in order to assure his well-being.

The extent to which disclosure may be allowed in the above scenario will turn largely on the nature of the advocate's role. Considering a

1. Discussion leader: Anthony Davis. Author: Bruce Boyer. Recorder: Fern Salka. Participants: Helaine Barnett, David Katner, Judith Larsen, Randi Sue Mandelbaum, Tara Mulhauser, Kevin Ryan, and Roy Stuckey.

2. The term "advocate," as used herein, is meant to encompass broadly the full range of possible roles that may be assumed by an individual assigned responsibility for representing the interests of a child in court proceedings. Editor's Note: This terminology may not always be consistent with that utilized by other Working Groups.

variety of possible definitions in the role of the child advocate, the Working Group discussed whether existing ethical or statutory rules now provide sufficient guidance as to when disclosure of confidences is permitted or required, and what ethical or statutory changes are necessary to fill in existing gaps in the law.

I. The Problem of Role Definition

Enormous confusion exists regarding the roles and responsibilities of advocates appointed to represent the interests of children in judicial proceedings. Much of this confusion stems from a pervasive lack of clarity in the definition of roles for child advocates. While courts may appoint lawyers for children to act in a traditional lawyer-client relationship, lawyers may also be assigned responsibilities outside of this traditional role. Lawyers may be charged with serving the "best interests" of a child, either apart from or in addition to their obligations to act in a traditional attorney role. Further, much inconsistency pervades the understanding of the obligations of a traditional guardian *ad litem*, whose function may range from that of an independent advocate for the child's interests, to an investigator for the court whose loyalty lies with the appointing judge. Each of these variants has differing implications as to the ethical responsibilities of the advocate, both with specific regard to the duty to keep the child's confidences and more broadly.

If appointed to act as a lawyer, the advocate must look to lawyers' ethical rules for guidance. If a lawyer is appointed to act solely as a guardian *ad litem*, or in some other nonlawyer capacity, determining the extent to which the legal professional remains bound by ethical rules for lawyers becomes more difficult. Still more complications arise when the court assigns a single individual multiple responsibilities that may lead to potential or actual conflicts of role. In the above scenario, therefore, ascertaining at the outset the capacity in which the advocate is acting is critical.

To deal with this dilemma, the Working Group identified and distinguished three possible roles for the child advocate, each having different ramifications as to the child's proper expectation of privacy and confidentiality. The Working Group recommended that: (1) these three separate roles be formally recognized; (2) the appointing authority clearly indicate at the outset what type of representation is expected of the advocate; and (3) whatever role is chosen, the lawyer should explain the advocate's obligations and the child's legitimate expectations in appropriate detail to the child at the very beginning of the relationship, as part of any discussion about the scope of confidentiality.

The first role is that of the *attorney representing the child.* Children represented by lawyers acting in this capacity are entitled to the normal client expectations of privacy and confidentiality, consistent with

Rule 1.6 of the Model Rules of Professional Conduct.[3] As discussed below, the Working Group proposed amendments to Model Rule 1.6 to account for difficulties of representation that are peculiar to the child client.

With respect to the latter two roles, the Group acknowledged that the traditional court-appointed guardian *ad litem* often shoulders many different roles and serves a variety of functions. For ease and clarity, the Group divided these many responsibilities into two categories: *best interests guardian ad litem* (or BIGAL) and *judicially-designated investigator* (JDI).

The Group adopted the term *best interests guardian ad litem* to describe the second role that the attorney for the child can play. This role bears many common labels and encompasses many of the traditional functions of the court-appointed guardian *ad litem.* As to this role, the child should have a qualified expectation of confidentiality or privacy. The BIGAL, however, should have rights similar to those of a parent or surrogate parent,[4] including the right to determine whether or when otherwise confidential information shall be disclosed to third parties. Existing laws generally do not address the extent of a BIGAL's duty of confidentiality; accordingly, the group proposed a model statute describing a limited duty.

The Group labelled the third role as *judicially designated investigator*, described as a person acting as the eyes and ears of the appointing authority. As to this role, the Group concluded that there should be no expectation of privacy or confidentiality as to communications between the child and the advocate. The Group also proposed model statutory language designed to create a clear understanding of the JDI's obligation to the court and accompanying responsibility to disclose information that the child prefers be kept in confidence.

II. Lawyer for the Child

A. *Conflict Between Model Rule 1.6 and Existing Practice*

The lawyer acting for the child, however engaged or appointed, should owe her exclusive allegiance to the child client, as to any other client. In the hypothetical above, the lawyer must start with the presumption that ordinary requirements of confidentiality apply and that the child's insistence on confidentiality warrants deference. Preservation of the child's confidences furthers the important goal of giving the child a voice in and control over legal processes in which she has a compelling interest.

3. Model Rules of Professional Conduct Rule 1.6 (1983) [hereinafter Model Rules].

4. One Group member would prefer a definition that did not analogize the BIGAL's role to that of a parent, but simply endowed the BIGAL with authority to take any action necessary to further the best interests of the child.

The Group also recognized, however, that the goal of empowering the child client may at times be at odds with the goal of protecting the child. Model Rule 1.6(b)(1) bars the lawyer from revealing the child's confidences, except to prevent the client from committing an act the lawyer believes is likely to result in imminent death or substantial bodily harm.[5] The Group believed that disclosure is clearly not permitted under Model Rule 1.6(b)(1) simply because the child, through lack of judgment or understanding, places himself at risk. The Working Group agreed generally, however, that ethical limitations on disclosure in circumstances such as the above hypothetical are commonly respected in the breach; many lawyers faced with the possibility that a child client may come to harm unless confidential information is disclosed regularly violate the dictates of Model Rule 1.6 in the interests of protecting their clients' safety. Most of the Group agreed that the inconsistency between the Model Rules and existing practices raises a serious cause for concern, warranting revision of Rule 1.6.

At least two significant aspects characterize the problems arising from the lack of fit between Model Rule 1.6 and existing practice, when the lawyer believes that the child's insistence on confidentiality is ill-considered and may pose an immediate threat to the child's safety or well-being. First, the limitation on disclosure creates a moral dilemma between obeisance to ethical rules and protection of the child. Ethical rules that regularly require a lawyer to choose between disciplinary action and following a course that may leave a child in jeopardy defeat their underlying purpose of providing consistent principled guidance.

Second, several members of the Working Group expressed concern about the potential tort liability of the lawyer for failure to disclose information that might have prevented harm to a child. The Group discussed the application of a general duty to warn in a situation where an advocate learns of a threat to a child, giving rise to the possibility that a lawyer who abides by a duty of confidentiality may be found liable in tort for subsequent harm to the child. The group recognized that the principles of tort liability embodied in the leading case of *Tarasoff v. Regents of the University of California*[6] and its progeny have not been clearly extended to circumstances comparable to the above hypothetical. The Group also felt generally that the above

5. Rule 1.6(b)(2) contains a second exception to the confidentiality requirement. *See* Model Rules, *supra* note 4, Rule 1.6(b)(2) (allowing a lawyer to disclose confidences to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"). Disclosure of a child's threatened suicide would be clearly permissible under Model Rule 1.6 in any jurisdiction where suicide is criminal. New York State Bar Ass'n Comm. on Professional Ethics, Op. 486 (1978).

6. 551 P.2d 334, 347 (1976). In *Tarasoff*, the Supreme Court of California held that when a psychotherapist knows or should know that his patient presents a serious danger of violence to an identified individual, the psychotherapist has a duty to take affirmative steps to warn the intended victim.

hypothetical might easily be distinguished from the circumstances of *Tarasoff*. Some participants, however, expressed significant concern that such liability might easily be found based on a relatively modest extension of existing principles of law.

B. *Proposed Amendment to Model Rule 1.6*

The Working Group undertook to draft changes that would bring the Model Rules into line with current practice and moral norms without going any further than absolutely necessary in disempowering the child client. Most Group members agreed that, as suggested by the example of the preadolescent runaway, the provisions of the Model Rules must be changed to permit limited disclosure of confidential information in order to protect the child, or as otherwise required by law. The Group regarded as essential that any authorization of disclosure of confidences should be drafted as narrowly as possible. The Working Group extensively debated the appropriate scope of this exception to the normal rules of confidentiality. The Group considered, without resolving, the question of whether permissive disclosure should be limited to circumstances where the child faces imminent death, or extended to include imminent risk of substantial bodily harm.

Ultimately, the Group proposed that section 1.6(b)(2) be renumbered as 1.6(b)(3), and that the following new sections be added to Model Rule 1.6:[7]

> **1.6(b)(2)** to prevent a client who is a(n) (unemancipated) minor from engaging in conduct likely to result in imminent death [or substantial bodily harm] to the client. The lawyer may reveal only the minimum information needed to prevent the harm, and shall do so in a manner designed to limit the disclosure to the people who reasonably need to know such information.
>
> **1.6(c)** A lawyer may reveal such information as is required by law.

C. *Proposed Amendment to Comments to Model Rule 1.6*

The Working Group also felt that several other cautions were sufficiently important to warrant additions to the Comments to Model Rule 1.6, and accordingly proposed the following:

> [14.] At the outset of the relationship, lawyers should carefully explain to their clients the extent to which their conversations are confidential and under which circumstances they are allowed, or may be compelled, to disclose confidential information told to them by the client.

7. Bracketed language in the text of the proposed amendments reflects alternative language.

[15.] Where practical, the lawyer should seek to persuade the client to take suitable action prior to making disclosure pursuant to 1.6(b)(2).

D. *Model Rule 1.14*

The Group discussed the extent to which a lawyer acting as lawyer for the child has the ability or obligation to treat a parent, guardian, or BIGAL as within the umbrella of confidentiality. The Working Group felt that this issue was too complex for it to make any complete recommendation because it touched on so many peripheral and related issues involving other ethical obligations.

One segment of the Group was inclined towards the position that the lawyer for the child should not reveal confidences, even to a BIGAL, parent, or guardian absent consent of the child or pursuant to Rule 1.6 as amended, while the rest of the Group was not ready to go so far. This issue clearly demands further consideration.

III. BEST INTEREST GUARDIAN *Ad Litem*

A. *The Need for Definition of a Limited Statutory Privilege*

As understood by the Working Group, the term BIGAL refers to the role of an individual assigned many of the traditional functions of a guardian *ad litem*. The BIGAL is assigned to represent the child's best interests, and her principal loyalty lies in serving the interests of the child. In the performance of this role, the BIGAL will normally seek to foster an atmosphere of trust and an understanding by the child that confidences will be kept, in order to facilitate the gathering of information from the child critical to understanding the child's needs and interests. When, however, a confidence implicates the risk of death or serious harm to the child, a BIGAL's overriding obligation to serve the child's interests may compel disclosure. A BIGAL who encourages a child to believe without qualification that confidences will be kept may thus be deceiving the child.

The Group discussed without clearly resolving the extent to which a BIGAL who is a member of the bar, but who is not appointed to act as lawyer for the child, remains bound by lawyers' codes of ethics. The Group, however, generally agreed that currently, no clear rules govern the scope of a BIGAL's duty of confidentiality, and that the law-trained BIGAL cannot clearly be said to be bound by lawyers' rules of ethics. Accordingly, the Group proposed the adoption of a model statute defining a limited privilege. Conceptually, this privilege resembles that held by a parent or surrogate parent who is normally expected to keep the confidences of the child, but who is free to make a disclosure when the parent believes such disclosure to be necessary to secure the child's interests. The critical distinction between the attorney-client privilege and the privilege contemplated for a BIGAL is

that the latter privilege belongs not to the child, but rather to the BIGAL. The BIGAL should listen to, account for, and when possible respect the informed judgment of a minor who seeks to preserve confidences, but the decision whether to disclose ultimately belongs to the BIGAL. The proposed model statute also emphasizes that any disclosure of confidences required to protect the interests of the child should be kept to a minimum.

The scope of the BIGAL's duties and responsibilities must be understood as clearly as possible by all concerned, especially the child, at the outset of representation. Thus, the proposed model statute also emphasizes the importance of communicating to the child client at the outset of proceedings a clear and accurate understanding of the bounds of confidentiality, in an age-appropriate manner. The Working Group's recommendations as to the confidentiality obligations and expectations with respect to this category of representative for the child are taken from Professor Roy Stuckey's paper prepared for this Conference.

B. *Proposed Model Statute for BIGALs*

Enactment of the following statutory provisions would resolve many of the problems discussed and would produce more consistent results among the states:

1. Responsibilities Upon Appointment With Respect To Children.

A BIGAL should carefully explain to the child the extent to which their conversations are not confidential and under which circumstances they are allowed, or may be compelled, to disclose secrets and confidences told to them by the children.

2. Confidentiality.

A BIGAL should strive to protect confidential communications with her child client. A BIGAL should only disclose confidential communications when disclosure is in the best interest of the child, and then only in relation to the proceedings for which the BIGAL is appointed.

3. Privilege.

A BIGAL has a privilege to refuse to disclose and to prevent any other person except the minor child from disclosing confidential communications which were:

(a) made by a minor child represented by the BIGAL; and

(b) made within the context of such representation.

A presumption of confidentiality attaches to all communications between a child and a BIGAL, and the opponent of the privilege has the burden of proving that the relevant communication is not privileged or that compelling reasons exist to compel disclosure.

4. When Disclosure Allowed.

A BIGAL may reveal confidential communications to the extent the BIGAL believes necessary:

(a) to serve the child's interests;

(b) to prevent the child or someone else from committing a criminal or fraudulent act;

(c) to rectify the consequences of the child client's criminal or fraudulent act, in the commission of which the BIGAL's services had been used;

(d) to establish a claim or defense on behalf of a BIGAL in a controversy between the BIGAL and the child, or to establish a defense to a criminal charge or civil claim against the BIGAL based upon conduct in which the child was involved; or

(e) to comply with the orders of a court or the rules of law.

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

IV. Judicially Designated Investigator

The final role discussed by the Group, referred to as a Judicially Designated Investigator, or JDI, is that of an individual whose principal role is to serve as the eyes and ears of the appointing authority, to gather information to share with the court, and to aid in making judicial decisions affecting the disposition of the child. The principal responsibility of the JDI lies in serving the needs of the court rather than the interests of the child. Any information shared with a person acting in this capacity should be communicated to the court, regardless of the desire of the individual child to keep such information confidential. As a result, a child has no legitimate expectation that any communication with a JDI be kept in confidence.

Here again, the Working Group emphasized the importance of communicating the specific nature of the JDI's assignment to the child to avoid misleading the child into a false sense of privacy. The Group recognized that the ability of a JDI to gather information may be impaired if she makes clear at the outset of any conversation with the child that all communications may be disclosed to the court. The Group felt generally, however, that the potential cost of warning a child that the JDI will not hold secrets in confidence is the necessary price of assuring that the child's expectations of privacy and confidentiality are realistic.

The Group proposed the following model statutory language to clarify the limits of a JDI's obligation to keep a child's confidences:

A. Definitions.

Judicially-designated investigator (JDI)—any person whose function is to investigate, make proposed findings of facts, and to report to the court, including but not limited to investigators stipulated by the parties.

B. Principal Responsibilities.

The principal responsibility of the JDI is to gather information relevant to the court's determination of the best interests of minor children in litigation. The JDI is an agent of the court, not a representative of the children or other parties involved in the litigation.

C. Responsibilities with Respect to the Court.

The JDI is an agent of the court and should follow the instructions of the court.

D. Confidentiality.

Conversations with the JDI are neither privileged nor confidential, and the JDI should carefully explain to the affected child the purpose of their meetings and that the JDI may reveal the substance of their conversations to the judge and to other participants in the litigation. Any reports of the JDI must be provided to all parties in the litigation, and the JDI and her sources are subject to cross-examination during hearings.

V. Obligations of the Court in Appointing a Child Advocate

The Working Group believed that in any appointment by the court a clear indication of which of the models of representation was to be followed was of critical importance. The purpose of this requirement is to insure that all parties to the proceedings will clearly understand from the outset the nature and scope of the advocate's duty of confidentiality, and that expectations of confidentiality conform to existing rules. Similarly, such clarity is necessary in order to enable the appointee to fulfill her functions in explaining these confidentiality obligations and expectations to the affected child at the commencement of their relationship.

The Group recognized that occasions will arise when courts will fail to make the necessary designation among these three models. Under such circumstances, a rule of default should be applied, so that all parties will have clear expectations as to confidentiality even in the absence of specific action by the appointing court. Accordingly, the Group suggested two alternative default models of role definition. A majority of the Working Group favored the first view, though the Group did not reach unanimous agreement on one model. The Group felt that considerably less importance attached to *which* default model

was chosen than to the fact that *some* default condition be clearly understood to apply. The following are the two alternatives discussed:

Alternative 1.

Upon failure of the court to clarify the nature of the appointment of a representative for a child:

(i) if the appointed person is an attorney, then she shall act as the child's lawyer.

(ii) if the appointed person is not an attorney, then she shall act as a BIGAL.

Alternative 2.

Upon failure of the court to clarify the nature of the appointment of a representative for a child, then she shall act as a BIGAL.

VI. Application of Mandatory Reporting Laws

The Working Group discussed briefly whether, as a policy matter, individuals appointed to any of the three roles should be subject to mandatory reporting laws. This problem raises difficult questions about the relationship between laws requiring the reporting of suspected abuse or neglect, on the one hand, and ethical rules, statutory provisions, and common law doctrine that may impose conflicting mandates on a child advocate. A detailed discussion of these complex questions extended beyond the scope of the Group's charge.[8] The Group, however, expressed the general sense that the following rules should apply to the resolution of conflicts between rules of confidentiality and mandatory reporting laws:

1. For lawyers representing children (category 1 above), mandatory reporting laws should *not* apply.

2. For a best interests guardian *ad litem* (BIGAL, category 2 above), mandatory reporting laws should *not* apply, *but*, consistent with the statutory proposal described above, a BIGAL may report suspected abuse or neglect if she determines this to be in the interests of the child.

3. For judicially appointed investigators (JDI, category 3 above), mandatory reporting laws should apply.

VII. Questions for Further Study

The Working Group raised the following questions as subjects for future consideration:

1. What does the differentiation of role mean with respect to rules concerning attorneys' ethical obligations in general, and in particular ethical rules governing communication with represented parties? For

8. For a general discussion of the relationship between ethical and common law rules of confidentiality and mandatory reporting laws, see Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L. J. 203 (1992).

example, must a BIGAL secure permission to talk to other represented parties from the parties' lawyers? Does it matter whether the BIGAL, though not appointed to act as an attorney, is a member of the bar? For another example, does appointment of a BIGAL preclude the lawyers for other parties from speaking with the child without the consent of the BIGAL?

2. To what extent and in what manner should parents, guardians, and BIGALs be involved in directing the work of lawyers appointed to represent children? The Comment to Model Rule 1.14 states, "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[9] Parents typically carry a large measure of responsibility for making decisions on behalf of their children. At what point in a judicial proceeding, where the interests of the parent and child are potentially or actually adverse, should this responsibility be removed from the parent? Who should guide decision making for a child represented by multiple individuals?

9. Model Rules, *supra* note 3, Rule 1.14 cmt.