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Report of the Working Group on Conflicts of Interest

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REPORT OF THE WORKING GROUP ON CONFLICTS OF INTEREST

INTRODUCTION

The Working Group¹ addressed conflicts of interest that arise in the course of representing children.² It sought to develop recommendations that would provide a practical framework for addressing this problem. The framework would be designed to assist lawyers in recognizing potential conflicts of interest, to suggest appropriate steps for avoiding conflicts of interest, and to identify the procedure for addressing potential conflicts of interest.

I. ISSUES RAISED

The Working Group identified a variety of scenarios giving rise to potential conflicts of interest in the course of representing children. The Working Group drew liberally on the articles prepared for the Conference by Nancy Moore and Christopher Wu, as well as on the participants' own experiences.

The most prevalent problems identified by participants arose in four categories of cases: (1) cases in which the lawyer may have obligations both to the child and to a parent; (2) cases in which the lawyer may have obligations both to a child and to a child welfare agency or other government agency; (3) cases in which the lawyer may have obligations to two or more children or to a child and another jointly represented client other than a parent or government agency; and (4) cases in which the lawyer has been appointed to serve simultaneously as the child's lawyer and as the child's guardian *ad litem*.

A. *Conflicting Obligations to Child and Parent*

The following scenarios provide examples of a lawyer's possibly conflicting obligations to a child and to the child's parent(s), and reflect situations in which there may at least be confusion as to whether such a conflict exists:

1. A lawyer in a legal service agency meets with a parent and agrees to undertake various legal work to address the family's legal needs, which include access to government benefits, shelter, educational opportunities, and the like. The members of the family initially appear to share the same legal interests, but it later appears they do not. For

1. Group Leader: Daniel Manning. Author: Bruce Green. Recorder: Bruce Kaufman. Participants: Annette Appell, Noy Davis, Zona Hofstetler, Nancy Moore, Ronald Richter, Seth Rosner, and Christopher Wu.

2. *See, e.g.*, Model Code of Professional Responsibility DR 5-101 (1981) [hereinafter Model Code] (setting out conflict-of-interest rules); Model Rules of Professional Conduct Rule 1.7 (1983) [hereinafter Model Rules] (same).

example, the mother may seek legal assistance in obtaining housing for which she is eligible only if she will be residing with her child. The child, however, may develop an opportunity to live with a relative in an area with access to excellent schools. The shelter to which the mother seeks to relocate offers less than optimal educational opportunities.

2. A father retains the lawyer to represent his child as plaintiff in a personal injury action arising out of an automobile accident. The law of the jurisdiction authorizes the parent as "next friend" to direct the child's representation. In the course of the representation, the parent directs the lawyer to take steps that appear to be contrary to the child's desires or best interests. Thus, the father's goals in the representation may come to conflict with the goals or legal interests of the child.

3. A mother retains the lawyer to represent her and her child as plaintiffs in a personal injury action arising out of an automobile accident in which both were injured. During the course of the representation, the lawyer learns that the defendant has a limited amount of funds out of which any settlement or judgment would be paid. Thus, maximizing the mother's recovery may mean minimizing the child's recovery, and vice versa.

4. A father retains the lawyer to represent his child in a delinquency proceeding. Thereafter, the father indicates that he expects the lawyer to take direction from him and to share with him the child's confidences.

5. A mother retains the lawyer to represent her child in a delinquency proceeding. She seeks to retain the lawyer to represent her also for the purpose of providing legal advice concerning the proceeding.

6. The lawyer is engaged to challenge a school's placement of a child in a special education program. Over the course of the representation, the lawyer determines that the parents' goal of removing the child from the program is contrary either to the child's desires or, in the case of an impaired child, to what the lawyer believes to be in the child's best interests.

7. The lawyer undertakes to represent both a parent and a child in connection with an allegation and investigation of parental abuse prior to the initiation of formal proceedings. Both the parent and the child assure the lawyer that the allegation is utterly lacking in foundation. The lawyer learns later in the representation, however, that there is substance to the allegation.

B. *Conflicting Obligations to Child and Agency*

In some jurisdictions, as discussed in Christopher Wu's article, a child welfare agency's lawyer may undertake to represent the child as

well as the agency in abuse and neglect proceedings. Similarly, an agency's lawyer may represent the child in seeking Social Security Insurance benefits or other benefits. The agency's position in these cases may be influenced by policy, ideological, or financial considerations as well as by agency employees' misjudgments concerning what is in a particular child's best interests. The agency's position may be contrary to the child's wishes, or to the child's best interests, or both as they would appropriately be perceived by an independent lawyer for the child.

C. *Conflicting Obligations to Child Client and Another Jointly Represented Client*

In a variety of contexts, the possibility may arise for a lawyer to represent two or more children in a single proceeding or a child and another co-client in a single proceeding. The most obvious possibilities include: (1) representation of siblings in an abuse and neglect proceeding; (2) representation of siblings in a custody proceeding; and (3) representation of multiple respondents in a delinquency proceeding.

D. *Conflicting Obligations Arising Out of Role as Lawyer and Guardian Ad Litem*

In some jurisdictions, the lawyer may be assigned to serve simultaneously as a child's lawyer and a child's guardian *ad litem*. Depending on how those different roles are defined, and on the expectations for a lawyer serving in both roles simultaneously, this presents the possibility of having conflicting sets of obligations. For example, the role of the child's lawyer may be to advocate for what the child wishes, while the role of the guardian *ad litem* may be to advocate for what the guardian *ad litem* personally believes to be in the child's best interests. When the child's wishes differ from what the lawyer perceives to be in the child's best interests, the lawyer serving in both roles will be obligated to advocate for inconsistent positions.

II. IDENTIFYING CONFLICTS OF INTEREST

The Working Group recognized that many potential conflicts of interest arise because of uncertainty at the outset of the representation concerning the identity of the client or clients, the lawyer's role in the representation, and the identity of those entitled to make decisions in the representation. For example, in the scenario involving a legal services lawyer seeking services for a family whose members have inconsistent interests,³ the parties may be uncertain as to whether the lawyer is representing only the parent, on one hand, or the parent and

3. See *supra* part I.A.1.

child jointly, on the other. If the lawyer is representing only the parent, then the lawyer's obligation would be to take direction from the parent, and no conflict of interest would exist. If, however, the lawyer had also agreed to represent the child, or if, by failing to make clear during a meeting with the child that the child was not a client, the lawyer led the child reasonably to believe that she also represents the child, the lawyer may have conflicting obligations to the child and the parent.

As this example illustrates, a determination at the very outset about whom the lawyer represents is important for several reasons. First, in that way, the lawyer can make plain to all concerned who the client is and is not, and thereby avoid establishing an attorney-client relationship with an individual whom the lawyer does not intend to represent. Second, the lawyer can thus determine who is entitled to direct the representation. Third, the lawyer can further evaluate, as required prior to undertaking representation of a client,⁴ whether the applicable conflict-of-interest rules permit the representation, forbid the representation, or require informed consent of the client(s) before undertaking the representation.

Accordingly, the Working Group developed recommendations that were ultimately adopted by the Conference and incorporated in Part VII of the *Recommendations of the Conference*.⁵ In sum, this set of Recommendations advises lawyers serving in legal matters involving children to take the following steps before undertaking the representation: (1) clarify the lawyer's role and responsibilities; (2) seek to resolve uncertainties concerning the lawyer's role, the identity of the client or clients, and the allocation of decision-making authority; (3) make clear to all interested persons, as necessary, the lawyer's role, the identity of the client, and the allocation of decision making; and (4) in light of these considerations, determine whether the lawyer would be undertaking representation that entails a conflict of interest and, if so, address that concern in light of the applicable law and professional norms.

4. See, e.g., Model Rules, *supra* note 2, Rule 1.7 & cmt. (stating that "[a]n impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined," and that "[t]he lawyer should adopt reasonable procedures . . . to determine . . . whether there are actual or potential conflicts of interest"); Model Code, *supra* note 2, DR 5-105(A) (requiring that "[a] lawyer . . . decline proffered employment if the exercise of [her] independent professional judgment in behalf of a client will be or is likely to be adversely affected").

5. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) (part VII).

III. REPRESENTATION OF MULTIPLE CLIENTS

A. *Contexts in Which Joint Representation Should Never Be Undertaken*

The Working Group recognized that cases will exist in which a lawyer should decline to represent multiple clients because the clients' interests conflict or are inordinately likely to conflict at a later point in the representation. The Working Group considered a first factor: the likelihood that the goals of the respective clients would conflict. As an obvious example, in an abuse and neglect case, a lawyer could not properly represent the parent who is seeking to retain custody of the child and the child who desires to remain in foster care, because the lawyer would then be advocating for inconsistent positions. Moreover, to undertake the representation of a parent and child in this legal setting would invariably be inappropriate because the lawyer could never discount the possibility that a conflict of this nature would emerge at some point in the representation. The Working Group considered a second factor: the likelihood that a child would seek to confide information in the lawyer that would be important to the other client but which the child would not want the other client to know. For example, a child client might seek to confide information that she does not want to be shared with a government agency or parent, thereby creating a conflict in a case in which the agency or parent is jointly represented.

The Working Group sought to identify categories of cases in which joint representation should never be undertaken because of the strong likelihood that a conflict of interest would arise. The Group recognized that joint representation might be permissible under the applicable conflict-of-interest rules in some individual cases falling within these categories where the lawyer obtained the clients' informed consent. The Group's experience suggested, however, that these cases occur very rarely.

Further, the Working Group's identification of these categories of cases reflected its awareness of the difficulty of obtaining informed consent from a child in cases in which the applicable rules would permit joint representation with client consent. As reflected in articles prepared for the Conference by Emily Buss and Janet Chaplan, children ordinarily have difficulty in understanding the lawyer's role. Many children who generally have capacity to direct the representation will lack the degree of understanding contemplated by the conflict-of-interest rules as a predicate for consent to, or waiver of, potential conflicts. In some contexts, such as a proposed joint representation of a child and government welfare agency, this ordinary difficulty may be compounded. Given the suspicions that children often have toward government agencies, the agency's lawyer will likely develop only with great difficulty the relationship of trust and confidence

necessary to counsel a child adequately concerning the decision to waive the potential conflict.

The Working Group's recommendation of a categorical prohibition against joint representation of a child and another in certain categories of cases also reflected concerns about the harms caused to children when a lawyer must withdraw from representing a client. In some cases in which the lawyer honestly believed that no conflict of interest would arise, the lawyer will have predicted incorrectly. In that event, a lawyer undertaking joint representation would later be required to withdraw from representing one or both clients. This scenario leads to a particularly unfortunate outcome when the client who loses access to the lawyer is a child. For children, forming a relationship of trust and confidence with a lawyer will often be difficult in the first place. Once the child has "been abandoned" by the first lawyer, the difficulty of establishing an adequate lawyer-client relationship with a second lawyer will be all the more difficult.

In light of this discussion, the Working Group developed recommendations (incorporated in Part VII of the Conference's Recommendations) providing that a lawyer should not undertake joint representation in three categories of cases involving children. First, a lawyer should not undertake representation of a child and parent or person in the role of parent in the following contexts: delinquency; termination of parental rights; abuse and neglect; status; adoption; reproductive choice/abortion; relinquishment; civil commitment where the parent is a movant; custody/divorce; or where allegations are made of parental misconduct with respect to the child. Second, a lawyer should not undertake representation of a child and a government agency in the same matter. Finally, a lawyer should not represent multiple respondents in a delinquency case.

In developing this recommendation, the Working Group considered at length the unfortunate reality that forbidding joint representation may mean that, in some jurisdictions at the present time, children will be denied access to counsel altogether. For example, some children who would otherwise be represented by a government agency's lawyer may be assigned no lawyer at all. Given this alternative, one participant suggested, joint representation offers some benefit that is difficult to disregard. A conscientious agency lawyer, upon recognizing a conflict of interest in the course of the joint representation, would seek to withdraw, thus prompting the court possibly to appoint independent counsel for the child. Further, if the lawyer did not seek to withdraw, the child might later have (at least theoretically, if not practically) a cause of action against the lawyer for malpractice. Nonetheless, the Working Group reached a consensus that in these categories of cases, a recommendation that joint representation be avoided altogether was more appropriate.

B. *Contexts in Which Multiple Representation May Be Permissible*

The Working Group recognized that in some cases, while there is a theoretical possibility of a conflict of interest arising out of the representation of multiple clients, a lawyer may be able to satisfy herself at the outset that, as the representation develops, she will in fact be able to represent the multiple clients adequately. Furthermore, in such cases there may be advantages to joint representation which include, but are not limited to, advantages in conserving resources.

For example, in abuse and neglect cases, a possibility always exists that the representation of siblings will eventually involve a conflict of interest, because the siblings may direct the lawyer to seek inconsistent goals (e.g., one will seek to be returned to the home, while the other will seek to remain in foster care). A lawyer may be able, however, upon adequate interviewing and counseling, to ascertain at the outset that this possibility is more theoretical than real, because the siblings clearly share the same goals and almost certainly will continue to do so. In such a case, for the siblings to be represented by a single lawyer may be advantageous, not only to avoid the expense of multiple lawyers, but also because having one lawyer counsel a group of siblings concerning sensitive family issues can increase each child's confidence in the lawyer and increase the siblings' "comfort level" during the representation. Although an individual child may make disclosures that she would not want the lawyer to share with siblings, such disclosures will not necessarily relate to matters that have a bearing on the representation of the siblings. In such a case, the applicable conflict-of-interest rules (e.g., rules based on Model Rule 1.7) may permit the lawyer to undertake the joint representation of siblings with the clients' informed consent.

The Working Group discussed the question of whether children may give informed consent. Participants observed that sometimes a sixteen- or seventeen-year-old has the same level of legal understanding as an adult and, therefore, a properly counseled child of that age might clearly be capable of giving informed consent, notwithstanding the complexity of issues involved in joint representation. Accordingly, the Working Group sought to develop a framework for cases in which (a) joint representation would be permissible with the informed consent of the clients and (b) the child client is capable of giving informed consent. The Working Group's proposed practice guidelines were subsequently incorporated in Part VII of the Recommendations of the Conference.

Additionally, the Working Group grappled with the difficult question of how to proceed when the lawyer is reasonably capable of adequately representing a child and another jointly, but the child cannot provide informed consent as ordinarily required by the applicable conflict-of-interest rules. With respect to cases in which the court's approval might substitute for that of a nonverbal child or supplement

that of a verbal child whose consent was given without sufficient understanding, the Working Group proposed a Recommendation that was not ultimately adopted by the Conference:

If the lawyer is uncertain whether the child has capacity to give informed consent, or whether the child's consent to the representation was informed, the lawyer may nevertheless undertake the representation with judicial approval.

Within the Working Group, no agreement could be reached with respect to cases in which the court was unavailable to give approval to the representation. Ultimately, the Conference voted to recommend further study of the entire question of when and whether a lawyer may represent a child and another client when the child is incapable of providing informed consent to the joint representation.

IV. LAWYER SERVING IN MULTIPLE ROLES

Under the present law of some jurisdictions, a lawyer may be appointed to serve a child as both the child's lawyer and as the child's guardian *ad litem*. The Working Group engaged in discussions and proposed recommendations that were ultimately superseded by the Recommendation of the Conference that a lawyer should never serve in both roles simultaneously. The Working Group sought to develop proposals for lawyers serving in these dual roles who might be compelled to represent conflicting interests as a consequence.

The Working Group took the view that whether these multiple roles will potentially result in a conflict depends on how the roles are defined and what responsibilities the roles entail. A potential conflict clearly exists, however, if a lawyer undertakes both (a) to represent the child as advocate for what the child wants and (b) to advocate for objectives that the lawyer believes to be in the child's best interests. At times what the child desires and what the lawyer perceives to be best for the child will coincide. At other times, however, these ends will diverge.

The Working Group proposed the following framework for a lawyer serving in these potentially inconsistent roles:

When a conflict appears to the lawyer to exist between the child's wishes and what the lawyer believes to be in the best interests of the child, then the lawyer should first fully investigate and assess the needs of the child to determine whether the lawyer's belief about the child's best interests should be modified, in light of the child's position and self-knowledge. If the lawyer's best interests assessment still conflicts with what the child wants, then the lawyer should counsel the child concerning the lawyer's position, to see if the child can modify his or her wishes in light of the legal or factual issues informing the lawyer's assessment. When the lawyer and the child can reassess their positions in light of each other's wisdom, many apparent conflicts can be resolved.

When a conflict remains, however, a lawyer may not advocate only for the child's best interests, because doing so would deny the child an advocate. Nor may the lawyer advocate simultaneously for inconsistent positions, because to do so would deny the child an effective advocate.

Ordinarily, the appropriate course will therefore be for the lawyer to withdraw from the "guardian *ad litem*" role in a manner that, insofar as possible, avoids communicating that the lawyer disagrees with the position that the lawyer will be advocating on the child's behalf. In some circumstances, the lawyer may appropriately seek to withdraw from the representation entirely.

The Working Group did not resolve the question of whether a lawyer should avoid undertaking the two roles from the outset in order to avoid the conflict that may later develop. The Group noted, however, that consideration of this question implicates issues in addition to conflicts of interest—e.g., the difficulty of communicating the lawyer's role to the child client—that would be addressed in other Working Groups.

V. PARENTAL PAYMENT OF CHILD'S ATTORNEY'S FEES

The Working Group recognized that a parent's payment of the child's attorney's fee does not in itself entitle the parent to direct the representation or to be privy to information confided in the lawyer. Thus, in the scenario in which a parent retains the lawyer to represent a child in a delinquency proceeding,⁶ the lawyer must regard the child, not the parent, as the client. At the same time, however, in some cases the law may entitle the parent to direct the representation in the role as "next friend." As discussed in Nancy Moore's article, Model Rule 1.8 might be read to forbid the "next friend" who retains counsel from directing the representation as otherwise permitted by law—a result undoubtedly unintended by the drafters.

Accordingly, the Working Group proposed a Recommendation to address this problem:

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. This Rule should not be interpreted to prevent 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.

6. See *supra* part I.A.4.

The Conference, however, did not adopt this proposal, and instead identified the issue as another area meriting further study.