

1996

Report of the Working Group on the Judicial Role

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Recommended Citation

Kathleen McCree Lewis, *Report of the Working Group on the Judicial Role*, 64 Fordham L. Rev. 1389 (1996).
Available at: <http://ir.lawnet.fordham.edu/flr/vol64/iss4/10>

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REPORT OF THE WORKING GROUP ON THE JUDICIAL ROLE

INTRODUCTION

The Working Group on the Judicial Role¹ faced the novel task of exploring judges' and courts' roles and responsibilities with respect to the representation of children.² While the Working Group did not have Conference documents written by judges to use as a point of departure for discussion,³ the three judges who were members willingly shared information about proceedings in their courts and court systems, insights into their judicial relationships with lawyers, child protection agencies, and other advocates who appear before them, and their varied experiences in the courtroom. Their amenability to share this information and their creativity in imagining innovations to the court system provided an invaluable resource. In addition to the input of the participants, the Working Group consulted the judicial viewpoint expressed in *Resource Guidelines: Improving Court Practices in Child Abuse & Neglect Cases*.⁴

I. THE SCOPE OF THE WORKING GROUP'S INQUIRY, WORKING ASSUMPTIONS, AND RECURRING THEMES

A. Determining the Scope of Inquiry

The Working Group reached a consensus on the scope of its inquiry early in its work. During the first session, the Group sought to raise questions about the judicial role in the ethical representation of children. In this effort, Group members referred to the sources provided by the Conference organizers⁵ and consulted outside sources that dis-

1. Group Leader: Kathleen McCree Lewis. Recorder: Hon. Howard Lipsey. Author: Kathleen McCree Lewis. Participants: Howard Davidson, Justine Dunlap, Hon. Jose Fuentes, Hon. Katharine Sweeney Hayden, Krista Johns, Professor Robert Levy, Dean Wallace Mlyniec, Beth Schwartz, and Shari Shink.

2. Exploration of ethical issues tends to focus on the participants' and advocates' roles rather than the role of the judge. See, e.g., *Recommendations of the Conference on Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 989 (1994) (investigating ethical issues of client and attorney roles, but not ethical issues of the judicial role, in representing older clients).

3. The absence of writings on the judicial role by judges themselves may result from the fact that many states' canons of judicial ethics do not allow sitting judges to engage in public policy advocacy.

4. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (1995) [hereinafter *Resource Guidelines*].

5. See Memorandum from Bernardine Dohrn, Katherine Hunt Federle, and Bruce Green to Participants in the Conference on Ethical Issues in the Legal Representation of Children 4 (Oct. 19, 1995) [hereinafter *Memorandum to Conference Participants*] (on file with the *Fordham Law Review*); Conference on Ethical Issues in the Legal Representation of Children, *Outline of Issues* 7 (Dec. 1-3, 1995) [hereinafter *Outline of Issues*] (on file with the *Fordham Law Review*); Memorandum from How-

cuss the role of judges.⁶ Beginning with the questions and case scenarios provided by the Conference organizers, the Working Group quickly recognized that the scope of inquiry as originally presented was overbroad.

After reflecting on the broad questions posed in an early Conference memorandum,⁷ the participants decided the Working Group could not answer all the issues the memorandum raised. It left to other Conference Working Groups, or recommended for further study, the questions of what role the appointed lawyer should be asked to serve, how judges should make decisions relating to children, and how judges should take into account preferences expressed by children.⁸ Ultimately the Working Group focused on developing circumstances that would promote ethical and vigorous representation for children as the objective of its investigation.

Next the Working Group examined the questions posed by a later Conference memorandum, *Outline of Issues*.⁹ The questions in this memo included how a judge should exercise her discretion regarding whether to provide counsel to a child, the standards that guide the exercise of that discretion, and the implications for the discharge of the judge's responsibilities in the absence of counsel for a child. The participants quickly reached the consensus that a child without counsel would be beyond the scope of their investigation and, in fact, beyond the literal title of the Conference. The Working Group, however, agreed that it should address the issue of whether a child should be able to waive her right to counsel in juvenile delinquency proceedings.

An ensuing, impassioned discussion on the issue of waiver of the right to counsel in juvenile delinquency proceedings further clarified

ard Davidson to Kathleen McCree Lewis and Bruce Green (Nov. 21, 1995) (on file with the *Fordham Law Review*).

6. These sources include *In re Jeffrey R.L.*, 435 S.E. 2d 162 (W.V. 1993); *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties* (Institute of Judicial Admin. Am. Bar. Assoc. 1980); *Model Rules of Professional Conduct* (1983); *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (National Council of Juvenile & Family Court Judges 1995); *Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* (American Academy of Matrimonial Lawyers 1995); *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 *Family L.Q.* 375 (1995) [hereinafter *Proposed Child Abuse and Neglect Standards*].

7. The suggested questions included: When should judges appoint lawyers to serve children and what role should the lawyers be asked to serve? How can judges most effectively facilitate—and avoid undermining or interfering with—the provision of effective and appropriate representation to children? As ethical decision makers, how should judges make decisions relating to children and, in particular, how should judges take into account the choices or preferences expressed by children? See Memorandum to Conference Participants, *supra* note 5.

8. For an excellent discussion on this last issue, see Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *Fordham L. Rev.* 1873 (1996).

9. *Outline of Issues*, *supra* note 5.

the area of investigation. While discussing how judges should deal with waivers, the participants reached a common view: A judge cannot discharge her responsibility unless all parties have ethical counsel advocating for their rights. This view focused the Working Group's inquiry on providing children with ethical¹⁰ and vigorous representation. Thus, in the balance of its work, whether in raising questions, identifying options, reaching consensus, or developing recommendations, the Working Group concentrated on when, how, and with what types of institutional supports the legal system should provide children with counsel so as to maximize the lawyers' ethical performance of their job.

Reflecting the assumptions laid out in the *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* ("*Proposed Child Abuse Standards*"),¹¹ the Working Group participants agreed that judicial officers have a great ability to influence the quality of the legal representation of children through their ability to create, define, or participate in the system of appointing counsel. The Working Group thus discussed systems for the appointment of counsel, and reached an early consensus on the characteristics such a system should have to promote ethical representation by lawyers and decision making by judges. Conference Recommendation VIII.B sets out these characteristics.¹²

B. Working Assumptions

As it clarified the scope of its inquiry, the Working Group realized that its participants shared an assumption about the role the court-appointed attorney plays. The Working Group determined that the attorney would follow the *Proposed Child Abuse Standards*, i.e., she would counsel and advocate for the child.¹³

C. Recurring Themes

During the discussion on a child's right to waive counsel in juvenile delinquency proceedings, certain issues surfaced which recurred in later discussions. The issues—protection versus empowerment as a guiding principle in the courts' dealings with older children; judicial neutrality versus judicial activism (or proactivism) in cases involving children; and the necessity of educating judges and lawyers about research on child development—reflected areas of tension in the judicial role in the representation of children. Investigating these areas helped the Working Group formulate and refine its recommendations.

10. Ethical representation as defined by the Conference's other working groups.

11. *Proposed Child Abuse and Neglect Standards*, *supra* note 6.

12. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1301 (1996) [hereinafter *Recommendations of the Conference*] (part VIII.B.).

13. *Proposed Child Abuse and Neglect Standards*, *supra* note 6.

Ultimately, the Working Group favored the empowerment view over the protectionist perspective. As a result, the Group adopted Wallace Mlyniec's suggestion that judges apply the findings of child development research in determining a child's capacity to waive counsel, and that, assuming a rigorous informed consent dialogue, they allow the choice of a child older than thirteen years to govern.¹⁴ The protectionist view, on the other hand, argued that judges never should allow juveniles to waive counsel.¹⁵ While the Working Group's recommendations reflect the empowerment view,¹⁶ a minority expressed a strong protectionist dissent.

The judges' descriptions of their own experiences with waivers and attempted waivers reflected a strong activist role: For example, a participant related the tactic of granting a child's waiver but appointing a lawyer to sit with the child as a resource if the child felt she needed it. Further, the Working Group noted with approval the National Council of Juvenile and Family Court Judges' recommendation that judges play such a proactive role.¹⁷

The Working Group reached a consensus that an effective system of appointing counsel for children requires continuing education for lawyers and judges. In particular, the judicial responsibility for making appropriate appointments and utilizing lawyers effectively requires training.¹⁸

II. FOCUSING ON WHEN CHILDREN NEED COUNSEL

In its first session, as the Working Group worked through the Conference organizers' suggested questions and case scenarios, it began to identify the types of proceedings in which lawyers are appointed for children in most jurisdictions. During the discussion of domestic relations cases, in which lawyers tend not to be appointed, a guiding principle emerged: When private ordering succeeds, a child may not need

14. See Mlyniec, *supra* note 8.

15. The advocates of the protectionist view referred for support to the research of Barry Feld on what happens to children who waive the right to counsel. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185 (1989).

16. See *Recommendations of the Conference, supra* note 12, part VIII.A.

17. See Resource Guidelines, *supra* note 4.

18. The members of the Group agreed that the process by which attorneys for children are appointed can be a significant determination of the quality of representation for children. Many members of the Group, including the three members of the judiciary, believed that an appointment process that relieves judges of the responsibility for selecting and monitoring attorneys may be an appropriate step in assuring high quality representation for children.

The Group was particularly concerned about the unethical practices of appointing attorneys who already have unmanageably large caseloads; appointing attorneys who consistently "rubber stamp" the department of social services' or agency's recommendations; appointing attorneys who, to maintain the judges' patronage, will not advocate zealously or "rock the boat"; and the practice of refusing to appoint attorneys who are likely to challenge policies and practices that negatively impact children.

appointed counsel. For example, in nearly all divorce custodial disputes, parties resolve the dispute without going to court, and no need exists for the routine appointment of counsel for the child. The Working Group agreed, however, to refer for further study the determination of criteria for appointing counsel for children in custody disputes that reach litigation.¹⁹

During the second session, the Working Group refined the focus of its inquiry into when children need lawyers. It listed the types of matters in which children may appear before courts and identified twenty-two types of such proceedings. The Working Group then listed, generally, reasons why children should have lawyers and reasons why they should not. From these listing exercises and the earlier discussion, the participants distilled the common needs of children as parties, of judges as decision makers, and of lawyers as advocates, which spanned the twenty-two types of proceedings. The identified needs confirmed the earlier consensus on the characteristics of a system for appointing counsel and on the necessity for continuing legal education for judges and lawyers. As a result of these discussions, the Working Group also agreed that judges have a responsibility to children that is not satisfied simply by appointing counsel for those children who appear in matters before them. Conference Recommendation VIII.C.6 lists seven examples of judges' further responsibilities, including the speedy resolution of cases and advocacy for the adoption and funding of systems to appoint, train, and evaluate lawyers for children.²⁰

In the third session, the Working Group reached consensus on the categories of cases in which counsel should be appointed for children. As Conference Recommendation VIII.A.1 reflects, the Working Group identified six areas of mandatory appointment of counsel.²¹ Two members of the Working Group, however, dissented from the recommendation that, in child abuse and neglect cases, counsel should be appointed as soon as the judicial process begins. One dissenter argued that at the initiation of the proceedings the judge should require a Court Appointed Special Advocate to represent the child, rather than a lawyer. The second dissent advocated that the judge should have the discretion to appoint either a lawyer or a CASA at the initiation of the proceedings. Other than these two dissents, the Working Group reached unanimous conclusions.

19. See *Recommendations of the Conference*, *supra* note 12, part VIII.D.

20. *Id.* part VIII.C.6.

21. *Id.* part VIII.A.1 (child protection proceedings, termination of parental rights proceedings, foster care proceedings, delinquency cases, status offenses within juvenile court jurisdiction, and mental health commitment cases).

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