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Cover Page Footnote

Alumni Professional Skills Professor of Law, University of South Carolina School of Law. I am indebted to Betsy Polk who assisted me throughout the production of this Article and to Kris McVey who conducted a state-by-state search with Ms. Polk to discover that virtually no states recognize a testimonial privilege protecting communications between guardians ad litem and the children they represent. I also thank my colleague Jane Aiken for her insightful comments.

GUARDIANS *AD LITEM* AS SURROGATE PARENTS: IMPLICATIONS FOR ROLE DEFINITION AND CONFIDENTIALITY

Roy T. Stuckey*

Guardian. A person lawfully invested with the power, and charged with the duty of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. . . .

. . . .
A *guardian ad litem* is 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, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.¹

INTRODUCTION

AS the natural guardians of their children, parents may ordinarily serve as guardians *ad litem* for their own children.² However, when parents have a conflict of interest, are unavailable, or when some other reason exists to believe parents might not act in their children's best interests, courts will appoint guardians *ad litem*.³ There are more situations today than ever before in which courts find a need to appoint guardians *ad litem* for children.⁴ Despite the frequency

* Alumni Professional Skills Professor of Law, University of South Carolina School of Law. I am indebted to Betsy Polk who assisted me throughout the production of this Article and to Kris McVey who conducted a state-by-state search with Ms. Polk to discover that virtually no states recognize a testimonial privilege protecting communications between guardians *ad litem* and the children they represent. I also thank my colleague Jane Aiken for her insightful comments.

1. Black's Law Dictionary 706 (6th ed. 1990).

2. 42 Am. Jur. 2d *Infants* § 174 (1969); see also *Stewart v. Superior Court*, 787 P.2d 126, 127 (Ariz. Ct. App. 1989) (stating that without special circumstances parents usually serve as guardians *ad litem* for their children); *Orr v. Knowles*, 337 N.W.2d 699, 705 (Neb. 1983) (explaining that parents are the natural guardians of their children); *In re Lisa G.*, 504 A.2d 1, 5 (N.H. 1986) (providing that unless they are "unable or unwilling to act in the child's best interests" parents will serve as guardians *ad litem* for their children).

3. Appointments of guardians *ad litem* are generally authorized by legislation. Even in the absence of such authorization, however, courts have consistently ruled that they have the inherent power to appoint guardians *ad litem* if they believe they are needed to protect the interests of children. *Welch v. Fox*, 91 N.E. 145, 145 (Mass. 1910); *Lisa G.*, 504 A.2d at 4; *Moore v. Roxbury*, 159 A. 357, 359 (N.H. 1932); 43 C.J.S. *Infants* § 228 (1978).

4. Some types of litigation in which guardians *ad litem* are commonly appointed for children include: abuse and neglect proceedings against one or both parents, criminal sexual conduct involving the child, divorce-custody disputes, termination of

with which guardians *ad litem* are appointed for children, problems persist which have not yet been adequately addressed. Role definition and confidentiality issues are two of these problems.

Role definition issues include uncertainty and inconsistency about the general responsibilities of guardians *ad litem* for children and about the specific tasks they are expected to perform. The universally acknowledged responsibility of guardians *ad litem* is "to represent the best interests" of children who are involved in litigation.⁵ Beyond this general charge, the responsibilities of guardians *ad litem* and the rules governing their relationships with their wards are not commonly stated with sufficient specificity in legislation or appointment orders. Even when these matters are made clear, courts and legislatures are inconsistent in defining society's expectations of guardians *ad litem* for children. Guardians *ad litem* are frequently assigned conflicting responsibilities, for example, to determine and pursue the best interests of children, to be advocates for children, and to serve as investigators for courts.

Confidentiality issues present two questions: whether guardians *ad litem* are permitted to disclose secrets of their wards and whether guardians *ad litem* may be compelled to disclose secrets of their wards. These matters are seldom addressed in legislation or court opinions. Many lawyers and guardians *ad litem* are inadequately informed about the status of confidentiality issues in their jurisdictions. Thus, they have not considered the potential consequences on their roles or on relationships among themselves and the children they represent.

Role definition and confidentiality issues can arise whenever attorneys are appointed to serve as guardians *ad litem*; however, they become even more complex when an attorney is appointed to serve as both the attorney and the guardian *ad litem* for a child.⁶ Lawyers are trained to perform as counselors and advocates, and their conduct is governed by a code of professional ethics. As guardians *ad litem*, however, lawyers are called upon to fulfill significantly different roles in the litigation process than they fulfill as lawyers, and their conduct is regulated by other rules. Often guardians *ad litem* are required to act in the best interests of children even if this conflicts with the chil-

parental rights proceedings, adoptions, juvenile delinquency, cases involving medical and mental treatment issues (e.g., commitment proceedings), abortions without parental consent, and other civil lawsuits where parents are dead or are opposing parties.

5. Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. Rev. 633, 633 (1990); Edward Sokolnicki, Note, *The Attorney as Guardian Ad Litem for a Child in Connecticut*, 5 Conn. Prob. L. J. 237, 250 (1991).

6. See Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 Yale L.J. 1126, 1127-28 & n.8, 1140 & n.63 (1978). In some jurisdictions, this hybrid is referred to as a law guardian. *In re Maraziti*, 559 A.2d 447, 450 (N.J. Super. Ct. App. Div. 1989); *Bentley v. Bentley*, 448 N.Y.S.2d 559, 560 (App. Div. 1982).

dren's wishes, to serve as fact investigators for courts, or both. Neither of these functions is compatible with a lawyer's normal responsibility to be a zealous advocate for a client. Some lawyers are not sufficiently knowledgeable about or sensitive to the differences between the responsibilities of guardians *ad litem* and attorneys, and some pay too little attention to the possible conflicts which are created by these differences.

The central thesis of this Article is that society's interests would be better served if we view guardians *ad litem* as surrogate parents and if we reconsider their roles and relationships from this perspective. Accordingly, I propose that guardians *ad litem* for children should be asked to do what good parents would do in similar situations, and no more. Specifically, they should be expected to assist children in making litigation-related decisions and to protect the children's best interests. I also conclude that it is inappropriate to ask guardians *ad litem* to serve as lawyers for children or as fact finders for courts because their functions inherently conflict with those of a guardian *ad litem* charged with determining and pursuing the best interests of a child.

In addition, I propose that the question of confidentiality, i.e., whether guardians *ad litem* may disclose the secrets of their wards, should also be answered by viewing guardians as surrogate parents. Consequently, a total prohibition on voluntary disclosure of children's statements is not appropriate, although guardians *ad litem* should not be allowed to disclose their wards' statements except in relation to the court proceedings for which they are appointed. Finally, I submit that an evidentiary privilege should be recognized which will permit guardians *ad litem* to refuse to repeat what their wards have told them in confidence, absent compelling circumstances.

I. THE DUTIES OF GUARDIANS *AD LITEM*: THE PROBLEM OF ROLE DEFINITION

The precise functions to be performed by guardians *ad litem* are not usually defined clearly in legislation, and courts and legislators have assigned a wide variety of often conflicting tasks to be performed by guardians *ad litem*.⁷ Ignoring semantic differences and overlaps, these can be consolidated into two categories for our discussion: (1) to serve as advocates for the best interests of children, and (2) to serve as fact finders for courts.⁸

As an advocate, a guardian *ad litem* is expected to determine and recommend to the court those alternatives that the guardian *ad litem*

7. For the most complete lists of tasks assigned to guardians *ad litem*, see Landsman & Minow, *supra* note 6, at 1138 n.52; Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. Fam. L. 1, 8-9 (1977-78).

8. Landsman & Minow, *supra* note 6, at 1138.

believes are in the best interests of the child.⁹ There has been no significant criticism about the appropriateness of a guardian *ad litem* being an advocate for the best interests of a child. The manner in which this charge should be interpreted and carried out, however, has been hotly debated.

One unresolved debate concerns who should determine what is in the child's best interests—the child or the guardian *ad litem*, or the lawyer when there is no guardian *ad litem*.¹⁰ This becomes a particularly volatile issue when the guardian *ad litem* also happens to be a lawyer, especially when the legal representative is required to serve both as lawyer and guardian *ad litem*. The conflict is clear. Lawyers are required to “abide by a client's decisions concerning the objectives of representation,”¹¹ irrespective of whether the lawyer believes it is in a child client's best interests. A guardian *ad litem* charged with the responsibility to protect the best interests of a child is more likely to be permitted to disregard the child's wishes and argue for a result preferred by the guardian.

When assigned the role of independent fact finder, a guardian *ad litem* is expected to act as an agent of the court and to function as an expert witness about those aspects of the litigation which touch the child's interests.¹² Some scholars have criticized this use of guardians *ad litem*, particularly on the basis that it gives the guardians too much power and usurps the role of the judge.¹³ It is clear that some judges view the investigative function as an important and appropriate role for guardians *ad litem*. As one judge stated:

[A]t least in custody matters, the guardian *ad litem* has traditionally been viewed as functioning as an agent or arm of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client. . . . In essence, the guardian *ad litem* role fills a void inherent in the procedures required for the adjudication of custody disputes. Absent the assistance of a guardian *ad litem*, the trial court, charged with rendering a decision in the “best interests of the child,” has no practical or effective means to assure itself

9. *In re Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988).

10. Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, Boston B.J., Jan.-Feb. 1991, at 6 (1991); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. Fam. L. 607, 612-16 (1982-83); Gary Solomon, *The Role and Ethical Responsibilities of the Law Guardian, in Child Abuse, Neglect, and the Foster Care System*: 1995, at 1 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4210, 1995); Angela D. Lurie, Note, *Representing the Child-Client: Kids are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. Sch. J. Hum. Rts. 205, 205-07 (1993).

11. Model Rules of Professional Conduct Rule 1.2(a) (1983) [hereinafter Model Rules].

12. Cf. Landsman & Minow, *supra* note 6, at 1140-42 (explaining a guardian *ad litem*'s role as fact finder).

13. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation For Children*, 59 N.Y.U. L. Rev. 76, 76-79 (1984).

that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents. Unhampered by the *ex parte* and other restrictions that prevent the court from conducting its own investigation of the facts, the guardian *ad litem* essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision—i.e., the "best interests of the child."¹⁴

It is difficult to determine the extent to which this view is subscribed by other judges. My sense is that it has widespread support among the judiciary. If so, this is a departure from traditional American notions of adversarial justice and a movement toward a system that more closely resembles the European model where judges play an active investigative role. I will leave it to other commentators to discuss the wisdom of such a shift.

The expectation that guardians *ad litem* should function as these independent fact finders for courts, however, does not necessarily promote the best interests of society. In the first place, it causes guardians *ad litem* to focus on the needs of the court, not the needs of the children.¹⁵ For example, the expectation that a guardian *ad litem* will bring "all of the requisite information bearing on the question" to the attention of the court creates a conflict with the guardian *ad litem*'s duty to represent the best interests of the guardian's ward in those cases in which the guardian *ad litem* believes the best interests of a child are best served by bringing only some of the relevant information to the attention of the court.

The following discussion will help illustrate some of the issues of role definition which might arise between children and their legal representatives. Consider the following facts:

John, a thirteen-year-old, is the subject of a custody dispute,¹⁶ and he has a strong preference to live with his father.

John has a court appointed guardian *ad litem* who also serves as his attorney. There is evidence that the father is a pedophile and that he once fondled John during an unsupervised overnight visit. After fully investigating the case, the legal representative concludes that giving the father custody would not be in John's best interests. John demands that the legal representative advocate for custody with the father.

14. State *ex rel.* Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993) (citations omitted).

15. See Landsman & Minow, *supra* note 6, at 1135.

16. A child custody dispute is used for these examples because role definition issues occur most frequently in custody-visitation and abuse and neglect cases. Similar issues, however, can arise in most other situations in which guardians *ad litem* are appointed to represent children, though not in all. For example, guardians *ad litem* for children who are plaintiffs or defendants in tort litigation do not face an expectation that they will be independent fact finders for the court. The degree of the problem also varies from case to case.

What should the lawyer-guardian *ad litem* present to the court?

The answer depends on how the particular jurisdiction defines the primary role of the legal representative. If the lawyer-guardian *ad litem* is expected to be a pure advocate for the child, the lawyer is probably bound to advocate the child client's position, irrespective of the lawyer's personal opinion. If, however, the lawyer is expected to be a pure fact finder-agent of the court, the lawyer may be compelled to express a personal opinion about the best interests of the child. It is often the case, of course, that the legal representative's role is either not clearly defined or it is defined as both fact finder and advocate.

In Maryland, each trial judge is expected to tell appointed attorneys which role they are expected to play on a case-by-case basis: pure advocate, pure fact finder, or a combination.¹⁷ In a Maryland case involving facts similar to those posed in this hypothetical, the trial judge did not tell a lawyer appointed to represent a child which role he was to play. Without guidance from the court, the lawyer decided to tell the court that giving the father custody would not be best for John, present all relevant factors, and tell the court what John wanted. The appellate court held that the lawyer had acted appropriately under the circumstances.¹⁸ In effect, the lawyer acted as an investigator for the court who also offered an opinion on the ultimate question in the case. Presumably, if the court had instructed the lawyer to be a pure advocate for John, the lawyer would have been expected to advocate John's position. If the lawyer had acted solely as a best-interest guardian *ad litem*, he would have advocated the position he believed to be in John's best interests, and he may have decided not to present any other information to the court, including John's stated custody preference.

Consider slightly different facts. Assume that the legal representative is the only person other than John and his father who knows about the father's pedophilia and his fondling of John. Further, the legal representative has concluded that, despite this problem, the father should be awarded custody.

Is the lawyer-guardian *ad litem* required to inform the court about the sexual contact when making a recommendation about custody?

The answer varies among the states, but it is likely that the guardian *ad litem* would be expected to include that information, especially in those states that view the guardian *ad litem* as an independent fact finder for the court with a duty to bring all relevant information to the attention of the court.

Would the guardian *ad litem* be expected or required to report the sexual contact to investigative agencies?

17. Leary v. Leary, 627 A.2d 30, 39 (Md. Ct. Spec. App. 1993).

18. John O. v. Jane O., 601 A.2d 149, 163 (Md. Ct. Spec. App. 1992).

Again, it depends on the laws of the state in which the case arises, and the rules differ. States, however, are increasingly requiring guardians *ad litem* to report this information. If John has both a lawyer and a guardian *ad litem*, the guardian would be expected to report this possible child abuse in most states, but the lawyer would not.¹⁹ Thus, there is an inherent conflict of role.

As a final variation on the facts, assume that John has both a guardian *ad litem* and an attorney who independently investigate the case and come to different conclusions. The guardian *ad litem* agrees with John that the father should have custody; the lawyer favors the mother.

Who controls what is presented to the court?

Under the Model Rules of Professional Conduct, the litigation is to be directed by the guardian.²⁰ Thus, the lawyer should follow the guardian's instructions and advocate giving custody to the father.

Courts recognize the existence of role definition problems,²¹ but their attempts to resolve such problems have produced inconsistent results. This, in turn, has inspired numerous writers to study the issues and to propose a range of solutions,²² none of them fully adequate.

19. *But see* Utah Code Ann. § 62A-4-503 (1994) (requiring lawyers to report possible sex abuse, even if the information is received from clients whose interests may be jeopardized by such disclosures). *See also* 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, 217 & n.40 (1992) (listing the states that require attorneys to report child abuse).

20. Model Rules, *supra* note 11, Rule 1.14 cmt. ("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.")

21. *See, e.g.*, S.S. v. D.M., 597 A.2d 870, 877 (D.C. 1991) ("The definition of the precise roles of the attorney and the guardian *ad litem* for children is still evolving and not without difficulty."); Leary v. Leary, 627 A.2d 30, 37 (Md. Ct. Spec. App. 1993) ("A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred.")

22. *See, e.g.*, Elder, *supra* note 10, at 9-10 (suggesting that lawyers should advocate a child client's express wishes); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 Fam. L.Q. 53, 69 (1992) (advocating the establishment of a publicly funded child-counsel program to protect children's interests); Guggenheim, *supra* note 13, at 79 (explaining the ethical dilemma of a lawyer for a young child); Long, *supra* note 10, at 611 (suggesting that each child client's situation be viewed on a case-by-case basis); Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. Am. Acad. Matrim. Law. 45, 48 (1993) (suggesting that there is no one solution to the dilemma faced by an attorney representing a young child); Richard K. Schwartz, *A New Role for the Guardian Ad Litem*, 3 Ohio St. J. on Disp. Resol. 117, 117 (1987) (contending that a guardian *ad litem* should represent the child's best interests); Solomon, *supra* note 10, at 1 (suggesting that lawyers should present all relevant evidence of a child's interests); Lurie, *supra* note 10, at 207 (contending that lawyers should represent a child's desires); Robyn-Marie Lyon, Comment, *Speaking of Children: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 682 (1987) (suggesting that an attorney act as her child client's agent); Sokolnicki, *supra* note 5, at 260-61 (advocating a best interest approach).

II. DISCLOSURE OF CHILDREN'S STATEMENTS: THE PROBLEM OF CONFIDENTIALITY

Although related to role definition issues, the problems of confidentiality between children and their guardians *ad litem* require separate consideration. The confidentiality of conversations between children and their guardians *ad litem* was not protected under the common law, nor is it today in most jurisdictions.²³ In fact, guardians *ad litem* who are expected to serve as independent fact finders for courts may even have a responsibility to disclose all relevant comments made by the children they represent. Also, most jurisdictions do not recognize a guardian *ad litem*-child privilege which would prevent judges or litigants from compelling guardians *ad litem* to reveal what their wards say to them, even if the guardians *ad litem* do not believe it is in their wards' best interests to do so.

It is unlikely that children understand when they talk to guardians *ad litem* that their words might be repeated and, perhaps, even used against their interests by litigants who compel disclosure by guardians *ad litem*. It is natural and probably necessary for guardians *ad litem* to encourage children to confide in them. Effective guardians *ad litem* have developed techniques for creating trusting relationships with their wards. It is doubtful, however, that many guardians *ad litem* warn their wards that their secrets might be disclosed.

Given the purposes served by guardians *ad litem*, it is surprising that so few states have enacted laws to give some protection to the communications between children and guardians *ad litem*. Most jurisdictions do not have any rules that regulate the circumstances under which guardians may disclose what their wards tell them, nor do they prevent litigants from compelling guardians to repeat statements made by their children.

Some issues of confidentiality which might arise between children and their legal representatives can be illustrated by considering the same situation discussed in connection with role definition problems:

John, a thirteen-year-old, is the subject of a custody dispute, and he has a strong preference to live with his father.

Assume that John was appointed both a guardian *ad litem* and an attorney and there is general information in the court's file about the father being a pedophile. However, the only information about his fondling John is what John told his guardian *ad litem* and his lawyer in two separate conversations.

23. See, e.g., *State v. Good*, 417 S.E.2d 643, 645 (S.C. Ct. App. 1992) (holding that there was no privilege in the common law or statutes of South Carolina to prevent a guardian *ad litem* for two minor brothers from testifying that one of the children told him that the other child had the gun which was used to murder their father and grandmother).

If, while making recommendations to the court, the guardian *ad litem* is asked by the mother's attorney on cross examination if the guardian knows of any sexual contact between the father and John, must the information be disclosed?

Unless an evidentiary privilege is recognized in that jurisdiction—and most jurisdictions do not recognize such a privilege—the guardian *ad litem* must answer the question (absent a sustained objection on hearsay grounds by John's attorney). On the other hand, the attorney-client privilege would prevent the lawyer from being compelled to repeat what John said.

If the information about the father's fondling of John comes out during a meeting at which both the lawyer and the guardian *ad litem* are present, would the attorney-client privilege be lost by the presence of the guardian *ad litem*?

Although guardians *ad litem* are expected to help children make decisions about their options in litigation, questions about the impact of their presence during otherwise privileged conversations between lawyers and their child clients is unsettled in most jurisdictions, and confidentiality is unlikely to be protected in the absence of a privilege.²⁴ Of course, if the communication is protected by the attorney-client privilege, the guardian would not be required to reveal the information if asked about it on cross-examination.

The lack of consistency about roles and confidentiality is likely to confuse participants in the litigation process and produce uncertainty and risks where none should exist. There is also an issue as to whether fundamental justice is being served. Philosophers teach us that treating essentially similar situations in the same manner is the central element of our society's definition of justice.²⁵ Thus, the existence of conflicting and inconsistent solutions to essentially similar problems involving guardians *ad litem* is something that must be addressed.

III. RESOLVING ROLE DEFINITION PROBLEMS

The inconsistent responses to issues involving guardians *ad litem* suggest that legislators and judges may have paid insufficient attention to the basic purposes for appointing guardians *ad litem* and that they have overlooked evidence about the manner in which effective guardians *ad litem* actually go about performing their jobs.

Although it is difficult to pinpoint the precise time of its inception, the idea of appointing guardians for the limited purpose of assisting

24. See Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 Fam. L.Q. 1, 24-27 (1982).

25. See Chaim Perelman, *Justice, Law and Argument* 83 (1967); Ray D. Dearin, *Justice and Justification in the New Rhetoric*, in *Practical Reasoning in Human Affairs* 155, 176 (James L. Golden & Joseph J. Pilotta eds., 1986).

children is certainly not novel. It appears to have originated under Roman Law,²⁶ then became a part of medieval law, and was eventually incorporated into the common law of England.²⁷

The government's claim of authority to insert itself into children's lives by appointing guardians *ad litem* is based on the doctrine of *parens patriae*, which maintains that the government, like a parent, has a general responsibility for the welfare of its infant children and a resulting duty to act to protect that welfare when there is reason to believe that natural parents will not do so.²⁸

The appointment of a guardian *ad litem* for a child is different from those situations in which a guardian *ad litem* or a guardian may be needed for an adult. Children have never been entitled under the law to make their own decisions. They are legally obligated to follow the directions of their parents except when it would conflict with their

26. Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 Tex. Tech. L. Rev. 619, 619 (1976); Landsman & Minow, *supra* note 6, at 1135 n.36.

27. 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 436-47 (2d ed. 1959).

28. The origins of the *parens patriae* justification are traced to England during the reign of Edward I (1272-1307). King Edward claimed wardship over children whose fathers (but not necessarily their mothers) had died or had otherwise become incapacitated, particularly those children with large estates. See Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195, 195 (1978); see also George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 Depaul L. Rev. 895, 895 (1976) (discussing the history of the doctrine of *parens patriae*). Children without property were not usually provided general guardians:

The law, at all events the temporal law, was not at pains to designate any permanent guardians for children who owned no land. . . .

.....
This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorial claims, and the king's court has felt itself so strong that it has had no need to reconstruct a comprehensive law of wardship. That the king should protect all who have no other protector, that he is the guardian above all guardians, is an idea which has become exceptionally prominent in this much governed country. The king's justices see no great reason why every infant should have a permanent guardian, because they believe they can do full justice to infants. The proceedings of self-constituted 'next friends' can be watched, and a guardian *ad litem* can be appointed whenever there is a need of one.

Pollock & Maitland, *supra* note 27, at 444-45.

The King claimed the right to appoint guardians for fatherless children with estates as part of the feudal tenurial system, not as *parens patriae*. His motivation was financial, not protective. See Custer, *supra*, at 195-200. A *parens patriae* justification based on the conception of the King as the father of the country who has a duty to protect the welfare of his infant citizens was not advanced until the eighteenth century. *Id.* at 202-03 (citing *Eyre v. Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722)). The judiciary's jurisdiction over the care of infants and its right to exercise *parens patriae* power on behalf of the King did not become entrenched during the late seventeenth and early eighteenth centuries. Custer, *supra*, at 204-05 (citing another Court of Chancery case involving the Shaftsbury family, *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121 (Ch. 1725)).

fundamental interests or with important interests of the state.²⁹ This distinguishes children from adults who were once competent to direct their own lives, but who have become incompetent due to mental illness or injury. It also distinguishes children from people such as prisoners who have guardians *ad litem* because of presumed restrictions on their ability to participate fully in litigation.

It is not the child whose disability has caused the state to intervene in her life and appoint a guardian *ad litem*. Rather, it is the parent who "is considered incapable of administering his own affairs," the "affairs" being the responsibility for looking after the best interests of a child involved in litigation. The capabilities of the child have remained the same. A guardian *ad litem* is needed only because of the declared incapacity of the parent to act in the best interests of the child. Indeed, the same purposes of appointing a guardian *ad litem* for a child could be accomplished by appointing a guardian *ad litem* for the child's parents. A guardian *ad litem* actually acts on behalf of the parents in pursuit of the best interests of their child in litigation, not on behalf of the child.

The appointment of a guardian *ad litem* represents a judgment by society that a child's parents cannot be expected to act in the child's best interests and that someone else should assume parental authority and responsibility to protect the interests of the child in the matter being litigated. Thus, a guardian *ad litem* acts *in loco parentis*; it is the guardian *ad litem* who is acting *in loco parentis*, not the government and not the judge.³⁰ In effect, a guardian *ad litem* is a surrogate parent with limited duties.

That the essential reason for appointing a guardian *ad litem* is to have someone stand in the shoes of a child's parents is seldom expressed in legislation or acknowledged by the courts. More commonly, legislators and courts refer to a guardian *ad litem* as someone

29. 67A C.J.S. *Parent and Child* § 10 (1978).

30. I recognize that many judges believe that their charge to protect the best interests of children who appear before them imposes a responsibility to do more than simply base their rulings on the evidence presented to them in an adversarial proceeding and they think this requires them to act *in loco parentis*. Some scholars have embraced this as an appropriate role for judges. See Dana E. Prescott, *The Liability of Lawyers as Guardians Ad Litem: The Best Defense is a Good Offense*, 11 J. Am. Acad. Matrim. Law. 65, 69 (1993) ("This delegation [of authority to guardians *ad litem*] is for the purpose of assisting the court to act in the best interests of the child as a 'wise, affectionate and careful parent.'") (citations omitted).

I question whether legislators really intend for judges to stand in the shoes of parents, rather than to use the doctrine of *parens patriae* to delegate the protection of children's interests to guardians *ad litem*. If so, the implications for redefining judges' roles and that of guardians *ad litem* is even more significant than I am suggesting. A policy requiring judges to act toward children as parents would affect their impartiality and interfere with the performance of their adjudicative responsibilities to other parties in litigation, whether they acted alone or with the assistance of an investigator/guardian *ad litem*.

who stands in the shoes of a child, not those of her parents.³¹ A more insightful perspective is provided by a Nebraska judge:

"The father and mother are the natural guardians of their minor children and are equally entitled to their custody and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other. The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order."³²

The powers of such a guardian are the same as a parent. The legal guardian then is much the same as a parent.

A guardian *ad litem* . . . is different than a parent or legal guardian. . . . [T]he guardian *ad litem* only has the power to act in the single situation for which he or she is appointed.³³

Other courts also recognize that the role of a guardian *ad litem* is to function as a surrogate parent for a particular purpose. "In such a case,³⁴ the guardian *ad litem* will act as a substitute decision maker for the juvenile. A second role of a guardian *ad litem* in a CHINS³⁵ case is to represent the child's best interest as would a concerned parent."³⁶

The perception of the guardian *ad litem* as a surrogate parent is a useful tool for examining the appropriate functions for guardians *ad litem*. It is also consistent with the evidence concerning how conscientious guardians *ad litem* actually perform their duties.

When we try to categorize guardians *ad litem* as primarily advocates or fact finders, we ignore the realities of how they actually function in practice. The results of a study reported in 1977 demonstrate that guardians *ad litem* perform a variety of roles, even when the guardians identify themselves primarily as advocates or fact finders:

Attorneys who identified themselves as advocates had clear conceptions of that role. An advocate should work to persuade the court to follow the client's preference by making motions, asserting arguments, drawing stipulations, and taking appeals if necessary. An advocate should help the adversary process by freeing parents' lawyers to give their own clients undiluted loyalty. In practice, however, these attorneys performed in ways not suggested by their own role conceptions. They ignored, evaluated, or rejected the preference of the child; they worked to gather all available facts and

31. See, e.g., *In re M.M.*, 431 N.W.2d 611, 612 (Neb. 1988) (stating that a guardian *ad litem* "appears to be an individual who steps into the position of the minor").

32. Although this paragraph quotes Neb. Rev. Stat. § 30-2608 (1979), it reflects the common law. 67A C.J.S. *Parent and Child* § 16 (1978).

33. *Orr v. Knowles*, 337 N.W.2d 699, 705 (Neb. 1983) (citations omitted).

34. Where a child is too immature to comprehend and participate in legal proceedings.

35. *Child In Need of Support*.

36. *In re Lisa G.*, 504 A.2d 1, 4 (N.H. 1986).

sometimes did not advance a position to the court; they mediated between and counseled parents and tried to help them develop realistic perspectives. By responding to the needs of children in the process as well as in the outcome of adjudications, these attorneys may have advanced the interests of their clients more than would an attorney who limits himself to advocacy.

....

Attorneys who identified their principal task as finding facts to help the judge also showed that, in particular situations, they felt it was necessary to take on advocacy, counseling, and mediating responsibilities. . . .

....

In sum, attorneys who labeled themselves fact finders frequently described ways in which they evaluated evidence, shaped an argument for the court, decided to curtail an investigation, and negotiated settlements. The one attorney who confined himself to investigation concluded that this failed to protect the interests of the child. For the other attorneys, who went ahead and took on duties other than fact finding, the theoretical role conceptions proved simply irrelevant and were discarded unnoticed as the attorneys responded to their perceptions of the child's interests.³⁷

It appears, therefore, that conscientious guardians *ad litem* undertake whatever functions they believe are necessary to determine and protect the best interests of their wards. The particular needs of each child are determined on a case-by-case basis, and the options and opportunities for helping a child are not always obvious at the beginning of a guardian's term. The activities of guardians *ad litem* in practice in many ways reflect what one would expect a concerned parent to do. This is consistent with the concept that guardians *ad litem* are acting *in loco parentis*. It is also consistent with evidence concerning how children perceive their legal representatives and what they expect from them.³⁸

How then should society define the responsibilities of guardians *ad litem* for children?

Guardians *ad litem* should be expected to function as surrogate parents in litigation and society should require no more of them, and no less. The responsibility of the parents of a child involved in litigation is to help the child make litigation-related decisions or in some cases

37. Landsman & Minow, *supra* note 6, at 1150, 1150-53 (citations omitted).

38. See Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report of Seven Interviews*, 64 Fordham L. Rev. 1763, 1783 (1996). In her article for this Conference, Janet Chaplan states:

The youth's preference of thinking of their lawyers as protectors rather than simple advocates is particularly instructive. Most of them were not asking to be treated strictly as an adult client. Rather, they preferred their lawyers to play the role of responsible adults in their lives. . . . [T]hey often expected their lawyers to act as adults first, and as lawyers second.

to make decisions for the child, i.e., when a child is very young. When a guardian *ad litem* is appointed because the parents are not able to meet this responsibility, the guardian's responsibility should be the same as the parents' would have been, and no more.

A parent is not viewed as an independent investigator for the court, although a concerned parent may determine that the best interests of the child require an independent investigation. A parent is not required to make recommendations to a court about the child's interests in the litigation. Indeed, a parent's communication with the court is normally channeled through the child's attorney whose efforts on behalf of the child are directed by the parents. If a child does not have an attorney and her parents determine that it would be in their child's best interests, the parents should be allowed to speak to the court on behalf of the child and to present relevant evidence, unless the parents permit the child to do so. Parents are not compelled to advocate a result which reflects the wishes of a child, if they believe that such a result would not be in the best interests of their child.³⁹

There is no compelling reason for our society to place greater responsibilities on guardians *ad litem* or to give them broader powers than children's parents have. The appropriate tasks for a guardian *ad litem* should be determined by the guardian on a case-by-case basis against the standard of what a responsible parent would do in a similar situation. A good guardian's decision, like a good parent's, should always involve discussions with the child and respect for the child's views and values.

This vision of the guardian *ad litem* as a surrogate parent is not without risks. There is no reference book to help a guardian *ad litem* distinguish good decisions from bad decisions. What is in the best interests of a child is often a question of judgment, and such decisions are controlled by the values of the decision makers.⁴⁰ Although most people in our society share a common framework of values,⁴¹ our ranking or ordering of these values as they relate to particular decisions are not the same.⁴² It is this hierarchy of values which controls decisions; this hierarchy is not the same among all of us, and it can

39. This view of the relationship between parental rights and children's rights is criticized by some who believe that our society has failed to recognize adequately the rights of children to make their own decisions. I do not intend here to indicate a position about that debate. My goal is to reflect the current state of the law in most jurisdictions. If the law changes, I would advocate that guardians *ad litem* should have the same powers and responsibilities as parents, whatever those happen to be.

40. See Victoria O'Donnell & June Kable, *Persuasion: An Interactive Dependency Approach* 22-23 (1982) [hereinafter *Persuasion*]; Malcom O. Sillars and Patricia Ganer, *Values and Beliefs: A Systematic Basis for Argumentation*, in *Advances in Argumentation Theory and Research* 184 (J. Robert Cox & Charles Arthur Willard eds., 1962).

41. Milton Rokeach, *Change and Stability in American Value Systems 1968-1971*, 38 *Pub. Opinion Q.* 222 (1974).

42. *Persuasion*, *supra* note 40, at 25-26.

shift from decision to decision.⁴³ Guardians *ad litem* often come from social, economic, or ethnic cultures different than the families into whose lives they are inserted. They bring their own values into the decision-making process, and their world views and preferences influence their opinions about the best interests of their wards.⁴⁴

The task of determining what is in the best interests of a child is extremely difficult, even for a child's parents:

The determination of the best interest of another person requires an ability that few (indeed, if any) persons possess. It requires a thorough understanding of the physical and psychological inter-relationship of the child and his parents, as well as an ability to make determinations absent specific guidelines regarding which social forms, conventions, and behavior produce the most well-adjusted and socially productive persons. It assumes that a person possesses an ability to foresee the development of the relationships between the child, the custodial parent and the non-custodial parent, and it also assumes that there is a best way to perform this task.⁴⁵

Unlike most parents, guardians *ad litem* have not lived with their wards since birth and they do not bring to their assignments any real knowledge of what might be in the children's best interests. In some cases, it is not difficult to ascertain the best choices among the available options. Other cases require a great deal of effort for guardians *ad litem* to determine how to provide appropriate assistance for children.⁴⁶ Guardians *ad litem* should receive training to help them perform competently as surrogate parents, and it is appropriate to consider establishing uniform general objectives to guide their efforts.⁴⁷

Even with improved knowledge, sensitivity, and training of guardians *ad litem*, we can expect them to function imperfectly in their role as surrogate parents. Sometimes their decisions will not be the same as those that good parents would make when faced with the same facts. However, our society has believed for hundreds of years that

43. *Id.* at 81-82.

44. Guggenheim, *supra* note 13, at 100-07.

45. Mlyniec, *supra* note 7, at 12.

46. Jean Koh Peters describes an integrative approach which guardians *ad litem* could use for determining the best interests of children in her article for this Conference, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *Fordham L. Rev.* 1505 (1996), which will be a chapter in her book, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (forthcoming 1996 from the Michie Company). This will be a valuable resource for guardians *ad litem* who encounter difficulty in determining what is best for the children they represent.

47. See generally Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *Fordham L. Rev.* 1473 (proposing that three substantive factors should inform lawyering for incompetent children: (1) conserving continuity of caregiving, assessed with reference to the status quo before the commencement of legal proceedings; (2) promoting parents' commitment of time to their child's education; and (3) preventing violence against the child or other family members).

children involved in litigation are not always capable of making decisions in their own best interests. In the absence of parents who are capable of assisting them with these decisions, it is appropriate for society to provide guardians *ad litem* to assist them. Unfortunately, we have moved beyond the scope of *in loco parentis* in our expectations of guardians *ad litem*.

We should allow guardians *ad litem* to serve as representatives of children. We should not ask them to serve also as lawyers for children. We should not insert them into families as investigative agents of the court. If courts need independent investigators in cases involving children—and I do not know if they do—legislators should provide for them or judges should appoint them as they appoint experts. The investigative role of guardians *ad litem* should be determined by the needs of the child on a case-by-case basis, not by the needs of the court. The basic objective of a guardian *ad litem*'s investigation should be to learn enough to be able to function as a good parent would in helping the child make litigation-related decisions. This is a different, potentially conflicting, function from an investigation designed to bring to the attention of a court all relevant information regarding a child's best interests.

IV. RESOLVING CONFIDENTIALITY PROBLEMS

There are two topics to be addressed in this section: confidentiality (should guardians *ad litem* be allowed to disclose voluntarily any secrets told to them by their wards?) and privilege (should litigants be allowed to force guardians *ad litem* to repeat what their wards tell them?). My analysis is guided by the philosophy that guardians *ad litem* should be viewed as surrogate parents and their functions in the legal system should normally be the same as those which good parents would serve in similar situations.

A. *Voluntary Disclosure (Confidentiality)*

Should guardians *ad litem* be allowed to disclose voluntarily any secrets told to them by their wards?

Guardians *ad litem* should have the same right as parents to reveal what they have been told, with some qualifications. The only other option is to require absolute confidentiality between children and their guardians *ad litem*, which is impractical. This does not mean, however, that guardians *ad litem* should in fact reveal what their wards have told them in confidence. Most parents would refuse to do so if they believed that disclosure would harm their children. Guardians *ad litem* should be governed by the same standard. They should have the ability to reveal what their charges have told them, if they believe it would serve their wards' best interests. They should not re-

veal anything which they believe might harm the children, absent compelling circumstances.

Admittedly, guardians *ad litem* are not the parents of the children they represent, and in some cases, they might make different judgments about disclosure than their wards' parents would make. Some decisions might serve children's interests better than their parents' decisions, others might not. Within the parameters of our adjudicative system, there is no perfect solution to this conundrum.

It is tempting to suggest that the same rules of confidentiality should be applied as those which govern communications between attorneys and clients. This would guarantee almost absolute confidentiality. There are two reasons not to do this. First, the roles served by attorneys are not the same as those served by guardians *ad litem*. Guardians *ad litem* must be free to pursue the best interests of their charges, as would a parent, even if this means using statements made by their children. Attorneys ordinarily are expected to be advocates for their child clients, and it is not their role to determine what is in their child clients' best interests.

Another reason not to apply the attorney-client rules of confidentiality to guardians *ad litem* is that not all children are competent to determine what is in their best interests. Guardians *ad litem*, like parents, should not be hindered in their efforts to help a child by giving the child absolute power to dictate that confidentiality must be maintained. On the other hand, it is appropriate to require guardians to discuss with their wards any plans they have to repeat statements made in confidence. Guardians should also be instructed to give great deference to the wishes of mature children who ask them not to make such disclosures. Good parents would do the same. Ultimately, however, the final decision should rest with the guardian *ad litem*, not the child.⁴⁸

Guardians *ad litem* should be prohibited from disclosing confidences, except as necessary to represent their wards' interests in the legal proceedings for which they have been appointed. Guardians *ad litem* are surrogate parents only for a limited purpose, and there is no justification for permitting them to repeat what their wards have told them, except for purposes related to their appointments.

Guardians *ad litem* should be guided in deciding whether to disclose confidential information by rules similar to those which govern attor-

48. There are some other children's rights advocates who might argue for even greater autonomy in decision making than I have suggested. See Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DePaul L. Rev. 983, 983 (1993); Mlyniec, *supra* note 7, at 1. My position, however, is consistent with the position taken by those few courts which have recognized a parent-child privilege and with most other commentators. See Comment, *The Child-Parent Privilege: A Proposal*, 47 Fordham L. Rev. 771, 771 (1979) [hereinafter *Child-Parent Privilege*]; *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1450 (1985) [hereinafter *Developments*].

neys in their jurisdictions. The Model Rules of Professional Conduct allow lawyers to reveal a client's confidences to the extent the lawyer believes necessary.⁴⁹ With the suggested modifications to the Model Rules, these would be appropriate guidelines for guardians *ad litem*:

- (1) to serve the client's interests, unless it is information the client has specifically requested not be disclosed;⁵⁰
- (2) to prevent the client from committing a criminal or fraudulent act which the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;⁵¹
- (3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyers' services had been used;
- (4) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or
- (5) to comply with the rules of professional conduct or other law.

B. *Forced Disclosure (Privilege)*

Should litigants be allowed to force guardians *ad litem* to repeat what their wards tell them?

In light of my position that guardians *ad litem* should be able to reveal confidential communications if they believe it would serve the best interests of their wards, this question assumes that a guardian *ad litem* has determined that it would not be in a child's best interest to

49. Model Rules, *supra* note 11, Rule 1.6. In relevant part, Rule 1.6 states that a lawyer may reveal confidences to the extent necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

50. As explained earlier, I believe a guardian *ad litem* should control the ultimate decision to reveal information even if a child has requested that it be kept confidential.

51. Again, I would give a guardian *ad litem* more flexibility than the Model Rules allow lawyers. In some states, lawyers are allowed to reveal information necessary to prevent any crime or fraudulent act. I would embrace this more flexible rule for guardians *ad litem*. I would also go a bit further and endorse a new section of Model Rule 1.6 which was proposed during the Conference and recommended for future study:

- 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.

Report of the Working Group on Confidentiality, 64 Fordham L. Rev. 1367, 1371 (1996).

repeat in court what the child said. However, unless an evidentiary privilege exists that establishes the guardian's right to decline to provide such evidence, guardians *ad litem* can be compelled to disclose confidential communications, even if they believe it would not be in the best interests of their wards to do so. This is true even if the guardian *ad litem* is also a lawyer.⁵²

The purposes of evidentiary privileges and the reasons why so few have been recognized are summarized in the following statement:

The rule that all relevant evidence is admissible in judicial proceedings serves a strong public policy in favor of full development of the facts in litigation. As such, the rule facilitates the search for truth that lies at the heart of the adversary system in this country. Therefore, states have broad powers to compel their citizens to testify as to matters that may bear upon the outcome of a particular case.

The evidentiary privileges protecting communications between two or more persons are exceptions to the general rule, because they exclude otherwise relevant evidence. Their creation represents a judicial or legislative determination that preserving and fostering certain relationships outweighs the potential benefit to the judicial system of compelled disclosure. Typically, the privileged relationship is a socially desirable one which requires confidentiality to function optimally. By protecting communications made in confidence, a privilege both preserves the privacy of the instant relationship and encourages open communication between others involved in the same type of beneficial association.⁵³

Under the common law, an evidentiary privilege was established when a court determined one should be recognized. Today, courts continue to have the power to recognize the existence of a privilege, but modern courts have shown an increasing reluctance to recognize new privileges unless they have been established through legislation.

According to Wigmore, it is appropriate to recognize an evidentiary privilege when four fundamental conditions exist:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

52. Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 336 (1993).

53. *Child-Parent Privilege*, *supra* note 48, at 771-72 (citations omitted).

Only if these four conditions are present should a privilege be recognized.⁵⁴

C. *The Attorney-Child Client Privilege*

The attorney-client privilege was the first privilege recognized under the common law and is rooted in Roman Law.⁵⁵ It is accepted in every jurisdiction in the United States.⁵⁶ Although this privilege interferes with the judicial fact-finding function, our society places a greater value on the need for attorneys to be able to have full and frank discussions with their clients without those conversations being the subject of compelled disclosure.⁵⁷

While the Model Rules recognize that providing legal representation to minors presents some special challenges, they require a lawyer representing a child to, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁵⁸ A fundamental principle in the attorney-client relationship is that the lawyer maintain confidentiality of information relating to the representation,⁵⁹ and there is no exception provided for lawyer-child client representation.⁶⁰

As a general rule, the attorney-client privilege is lost if the communication in question is made to the attorney in the presence of a third party.⁶¹ Thus, in most jurisdictions it is likely that the attorney-client privilege is lost if a guardian *ad litem* is present during a conversation between an attorney and the guardian's ward. This makes it more difficult for guardians to discharge their responsibility to help children make decisions about their options in litigation and to give instructions to the lawyers. There does not seem to be any public policy served by preventing guardians *ad litem* from participating in confidential discussions between their wards and attorneys.

California allows guardians *ad litem* to be present during attorney-child conferences, although it does not recognize a parent-child privilege. It explicitly acknowledges a guardian *ad litem* as being a third party to whom communication by a child is "reasonably necessary for

54. 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2285 (1961) (emphasis in original).

55. Stanton, *supra* note 24, at 7; Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implication for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226, 1227 (1962) [hereinafter *Functional Overlap*].

56. *Functional Overlap*, *supra* note 55, at 1227.

57. Stanton, *supra* note 24, at 8.

58. Model Rules, *supra* note 11, Rule 1.14.

59. *Id.* Rule 1.6 cmt.

60. Heartz, *supra* note 52, at 335.

61. Graham C. Lilly, *An Introduction to the Law of Evidence* § 9.6 (2d ed. 1987); Charles T. McCormick, *McCormick on Evidence* § 91 (4th ed. 1992).

the transmission of the information [to a lawyer] or the accomplishment of the purpose for which the lawyer [was] consulted."⁶²

Even where there is no specific statutory protection, some courts have held that certain categories of people are within the penumbra of the attorney-client privilege. These include interpreters, physicians, and accountants under the rationale that they help improve the lawyer's understanding of the significance of the client's information.⁶³ Given the nature of a guardian *ad litem*'s responsibilities within the adjudicative system, there is no valid reason why the confidentiality of attorney-child communications should be nullified by the presence of a guardian *ad litem*. However, unless there is specific statutory authorization, the possibility exists that a given court will not find a guardian *ad litem* to be within the penumbra of the attorney-client privilege.

D. *The Parent-Child Privilege*

Although a guardian *ad litem*-child relationship is similar in many ways to an attorney-child client relationship, it also has characteristics of a parent-child relationship. Surprisingly few jurisdictions have enacted laws that establish either a parent-child or family privilege. And courts are reluctant to recognize such privileges in light of legislative inaction. In fact, there is a general reluctance by judges and legislators to recognize a privilege in any nonprofessional relationships other than between husbands and wives.⁶⁴

Despite the reluctance of courts and legislatures to recognize a parent-child privilege, most scholars support the need for a parent-child privilege that would prevent a parent from being forced to provide harmful evidence against a child, or vice versa.⁶⁵ The principal arguments for recognizing this privilege are that there is a constitutional right to one and that public policy supports it—that is, society's inter-

62. Cal. Evid. Code § 952 (West 1994); *see also* De Los Santos v. Superior Court, 161 Cal. Rptr. 899, 901 (1980) (holding that a child's comments to his mother in a delinquency proceeding were protected because the mother was the child's court appointed guardian *ad litem* and the child's comments had mostly been made in response to questions asked at the request of the child's attorney).

63. Stanton, *supra* note 24, at 24-25.

64. *See* Child-Parent Privilege, *supra* note 48, at 786; *see also* Joseph A. Fawal, Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 Cumb. L. Rev. 307, 319 (1976) (criticizing the husband and wife privilege).

65. *See* Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 Dick. L. Rev. 599, 599 (1969-70); Ellen Kandoian, *The Parent-Child Privilege and the Parent-Child Crime: Observations on State v. Delong and In re Agosto*, 36 Me. L. Rev. 59, 59 (1984); Stanton, *supra* note 24, at 25; *Child-Parent Privilege*, *supra* note 48, at 782-91. Of course, not all commentators agree on this. Some favor abolishing all privileges completely and leaving it to judges to determine whether testimony should be allowed on a case-by-case basis. *See* McCormick, *supra* note 61, § 77; Note, *Privileged Communications: A Case by Case Approach*, 23 Me. L. Rev. 443, 445 (1971).

ests would be better served by having the privilege than by not having it.

The constitutional right advocates find support for their claim primarily in a line of cases which discuss issues of family privacy.⁶⁶ These cases involve issues such as the right to be free from government intrusions, the individual's interest in making certain kinds of important decisions, and the individual's interest in avoiding disclosure of information of a personal nature.

The supporters of the proposition that it would be good public policy to recognize a parent-child privilege rely on two basic lines of argument. One contention is that a privilege will facilitate family intimacy and communication⁶⁷ and will improve child development.⁶⁸ Proponents discuss society's interest in maintaining strong family bonds and the importance of mutual trust and fidelity. Opponents argue that a privilege will have no impact on fostering intrafamily relationships.⁶⁹ Their reasoning is that family members' decisions about whether to communicate secrets among themselves will not be affected by the existence or absence of an evidentiary privilege.⁷⁰

The second contention of proponents of a parent-child privilege is that our society feels a natural repugnancy toward compulsory disclosure in the family context, that is, it violates fundamental notions of fair play.⁷¹ They claim that a parent-child privilege would protect family members from being forced to choose between what they believe is morally correct and what is legally compelled. Opponents acknowledge the existence of this repugnancy, but they believe this demonstrates that a parent-child privilege is not needed, arguing that family members who do not want to give harmful testimony will simply refuse to cooperate.⁷²

So far, most courts have refused to recognize a parent-child privilege for any reason, including those based on constitutional arguments.⁷³ The U.S. Supreme Court, however, has not ruled on this question.

66. *Child-Parent Privilege*, *supra* note 48, at 791; Stanton, *supra* note 24, at 13-22.

67. *Developments*, *supra* note 48, at 1589-90.

68. *Child-Parent Privilege*, *supra* note 48, at 782; Stanton, *supra* note 24, at 48-51.

69. It should be noted that the same argument has been leveled against the husband-wife privilege to no effect. *Child-Parent Privilege*, *supra* note 48, at 786-87.

70. See *Developments*, *supra* note 48, at 1578.

71. Kandoian, *supra* note 65, at 72; Stanton, *supra* note 24, at 7.

72. This moral dilemma was relied on in *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983), as one of the factors that supported the court's recognition of a parent-child privilege. The court stated that requiring or coercing testimony "within the realm of the family in all possibility could be a complete exercise in futility." *Id.* at 1309.

73. Cf. *In re Terry W.*, 130 Cal. Rptr. 913, 913-14 (Ct. App. 1976) (rejecting a claim that a parent-child privilege is constitutionally mandated). See also *Child-Parent Privilege*, *supra* note 48, at 797-98 (criticizing the *Terry* decision); *Developments*, *supra* note 48, at 1584 n.154 (discussing the *Terry* court's reluctance to create a parent-child privilege).

E. *The Case for a Guardian Ad Litem-Child Privilege*

The case for a guardian *ad litem*-child privilege is different and stronger than the case for a parent-child privilege. The justifications are much closer to those which support the attorney-client privilege. I have only found one state, however, which may recognize a guardian *ad litem*-child privilege,⁷⁴ and even its statute may apply only to gen-

There have been some exceptions. A U.S. District Court in Nevada not only found support for a parent-child privilege in the Constitution and in the Federal Rules of Evidence, but it also based its recognition of the privilege on the social policy arguments mentioned above. The court's decision barred the interrogation of the adult son of a person who was the target of a grand jury investigation. *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983).

New York appears to recognize a parent-child privilege, but perhaps not in Family Court cases. Although it avoided using the label "privilege," the New York Appellate Division held in 1978 that, if all members of the family seek to prevent disclosure, communications from a child to his parents about his participation in a crime may be constitutionally protected within the "private realm of family life which the state cannot enter." *In re A & M*, 403 N.Y.S.2d 375 (App. Div. 1978). The court in *Harry R. v. Esther R.*, 510 N.Y.S.2d 792 (Fam. Ct. 1986), however, refused to recognize a parent-child privilege in a child visitation case to prevent a father from using tape recordings of conversations with his children. The court stated:

Custody and visitation proceedings particularly require liberal access to all relevant and material evidence, since the court is required to assess not only facts but also emotions, perceptions and attitudes. Imposition of a parent-child privilege could be an odious burden on the court's ability to ascertain the emotional and mental status of the family members involved, and this court declines the respondent's application to create such a privilege.

Id. at 795. Despite its refusal to recognize a privilege, the court did not allow the father to use the tapes:

These children, like any other children, are entitled to feel that they may communicate freely with their parents without fear that those communications will be recorded and revealed later. The court cannot prevent Mr. R from recording these conversations. But it can preclude their use in this proceeding, although otherwise admissible, to protect the spirit of trust and confidence that needs to exist between child and parent in order for the children's emotional health to be safeguarded.

Id. at 796. Although the court discussed *A & M*—especially the fact that it did not specifically recognize a parent-child privilege—it did not mention *People v. Fitzgerald*, 422 N.Y.S.2d 309 (Westchester Cty. Ct. 1979), which recognized a parent-child privilege that would prevent representatives of the State of New York from forcing disclosure of confidential communications between a parent and a child of any age. "In the opinion of this Court such a privilege can and does exist, grounded in law, logic, morality and ethics." *Id.* at 310.

74. Idaho Code § 9-203.7 (1990) provides:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

.....
 7. Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matter [matters] in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor

eral guardians, not to guardians *ad litem*.⁷⁵ Perhaps the reluctance of states to recognize a parent-child privilege is one of the reasons why serious consideration has not been given to the need for a guardian *ad litem*-child privilege. Perhaps people assume that it would be very rare for anyone to try to compel a guardian *ad litem* to repeat statements which might be against the best interests of their wards. It is becoming increasingly likely, however, that these pressures will be brought to bear on guardians by aggressive litigators and zealous prosecutors.

The explanations for the general nonacceptance of a parent-child privilege do not explain the absence of a guardian *ad litem*-child privilege. Unlike the personal parental relationship, the relationship between guardians *ad litem* and children is a professional one. Guardians are appointed to do a specific job. They are not selected by the child, and only sometimes by the parents. Usually, they are selected and imposed by judges acting on behalf of the state.

A guardian *ad litem*-child privilege should be recognized because the four fundamental conditions identified by Wigmore are met:

- (1) The communications must originate in a *confidence* that they will not be disclosed.

A guardian *ad litem*-child privilege would only protect communications related to matters involved in litigation. The guardian *ad litem*'s role, like a lawyer's, is restricted to protecting a child's interests in litigation, not to promoting the child's general welfare. Unlike a parent, a guardian *ad litem* does not usually communicate with a child before litigation has commenced nor about matters that are not relevant to litigation. Thus, any information from a child that a guardian may wish to protect is received after litigation has begun and after the state has imposed the guardian on the child.

Under the view of the guardian *ad litem* as a surrogate parent, there would be no guarantee to the child that confidences would not be disclosed, although nondisclosure would be the normal expectation. The guardian would remain free to breach a confidence if necessary to

does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

Id.

75. *But see Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375, § B-2 (1995) [hereinafter *Proposed Standards*]. The *Proposed Standards*, which were approved by the Council of the ABA Family Law Section on August 5, 1995, incorrectly imply that *Bentley v. Bentley*, 448 N.Y.S.2d 559 (App. Div. 1982), recognizes a privilege between guardians *ad litem* and children in New York. In fact, *Bentley* relies on the standard attorney-client privilege to protect the confidentiality of the communications at issue in light of the fact that New York appoints lawyers to serve as "law guardians" who have the dual responsibility of advocating children's best interests and of serving as their lawyers.

protect the best interests of the child. Such occasions, however, would be rare. Children should feel free to talk to their guardians *ad litem* in confidence and should be able to trust that confidential communications will not be disclosed, especially those which would be against the children's best interests. The relationship, by its inherent nature, frequently produces communications of a confidential nature.

The guardian *ad litem*'s ability to disclose information to protect the best interests of a ward is not inconsistent with the need for a privilege. While children expect their legal representatives to keep their secrets, they believe that there is a higher duty to protect the children, especially from abuse and neglect.⁷⁶ Thus, a guardian *ad litem* can have a trusting relationship with a child even when the guardian has the ability to decide if revealing confidences would protect the best interests of the child.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

The only communications that would be protected by a privilege would be those statements of a child which a guardian and a child both believe should not be disclosed because disclosure would not be in the child's best interests.⁷⁷ If the child does not care if information is disclosed, it is not a secret. If the guardian *ad litem* believes it would be in the best interests of the child to disclose it, the guardian has the option to disclose it. If a child's secrets cannot be protected against compelled disclosure, the child's relationship with the guardian would be impaired, if not destroyed, in many cases. If a child does not trust a guardian *ad litem*, the relationship should be terminated.⁷⁸

76. As evidence of this expectation on behalf of children, see Chaplan, *supra*, note 38, at 1778-80, stating:

All of the youths I spoke with had high regard for their lawyer's ability to keep their secrets and their lawyers' duty to protect them from abuse or neglect. . . . Except for Curtis, all the youths expected their lawyers to report suspected abuse or neglect, even when the rules of confidentiality would require the attorney to keep silent regarding a client confidence. Again, all the youths except for Curtis believed that the lawyer's primary obligation was to protect the client's safety. In response to the hypothetical situation of a client telling of an incident of abuse in confidence, each youth commented that the lawyer should notify the authorities and first protect the child, despite the child's expectation of confidentiality.

Neil added that lawyers should discuss the problem with the child and determine how to protect the child before reporting the suspected abuse or neglect.

Id.

77. See *Child-Parent Privilege*, *supra* note 48, at 805; see also *Developments*, *supra* note 48, at 1576-77 (discussing various approaches to a privilege).

78. See, e.g., *In re Elaine M.*, 601 N.Y.S.2d 481, 482 (App. Div. 1993) (holding that a guardian *ad litem* should be relieved because the child lacked trust in and could not communicate with the guardian *ad litem*).

The universally recognized function of guardians *ad litem* is to protect the best interests of their wards. A child's decision about whether to disclose information to a guardian *ad litem* is more likely to be affected by the existence of a privilege than a child's decision to tell a secret to a parent. Children's lawyers (and guardians *ad litem*) will increasingly feel compelled to advise children not to confide in their guardians *ad litem* if their conversations with them are not protected and could be used against their interests. In fact, due process considerations may require that guardians *ad litem* give notice to their wards that they may not be able to keep any secrets. A guardian will not be able to determine adequately what is in the best interests of a child in many cases unless the child can candidly and openly talk to the guardian. If children will not talk to guardians *ad litem* out of fear that confidentiality will not be maintained, guardians *ad litem* will not be able to achieve the purposes set for them by society. This result would not serve society's best interests.

Are society's interests served by permitting the state to intrude into the life of a family, place a stranger in charge of important matters in a child's life, encourage the child and the stranger to form a trusting relationship, then allow the use of resulting information from the child against the child's interests?

Not likely. As one commentator noted in writing about the need for a parent-child privilege, "What is 'shocking to our sense of decency' is the coercive nature of such testimony—that the parent can be forced to reveal intimate and potentially incriminating matters about his child."⁷⁹ It is even more shocking that guardians *ad litem* who are appointed to pursue the best interests of a child can be compelled to repeat statements which they believe would be used against the child, not to further her best interests.

Another commentator makes the following observations, in suggesting why claims of parent-child privilege are apparently so rare and the law so undeveloped:

The law of parent-child privilege is perhaps undeveloped because the parent-child bond is so revered in our culture that the thought of using forced testimony of children to prosecute parents has traditionally been considered beyond the bounds of decency in the minds of even the most zealous prosecutors.⁸⁰

If guardians are not allowed to protect confidences of their wards, children's remarks can be used against the children themselves as well as against family members. When a guardian *ad litem* determines that this would not be in a child's best interests, litigants should not be allowed to compel disclosure.

79. *Child-Parent Privilege*, *supra* note 48, at 806 (citation omitted).

80. Kandoian, *supra* note 65, at 82-83.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

Society not only believes this relationship should be fostered, society imposes it upon children.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.

If society does not allow guardians *ad litem* to resist the disclosure of information which would be against their wards' best interests, the affected children's trust in our system of adjudication will be damaged as well as any future relationships with guardians *ad litem* and others who allege they are acting in children's best interests.

V. PROPOSED LEGISLATION

Courts and legislatures should recognize the inherent conflicts among the various roles which guardians *ad litem* are being asked to perform: surrogate parents (best interest guardians *ad litem*), advocates, and judicial investigators. Legislation which calls for guardians *ad litem* and judges who appoint representatives of children should be clear as to which role is to be performed, and no person should be asked to perform more than one role.

Enactment of the following statutes would resolve many of the problems discussed in this Article and would produce more consistent results among the states.

A. *Proposed Statute: Guidelines for Children's Guardians Ad Litem*

A. Definitions.

- (1) "Guardian *ad litem*" means an individual who is appointed by a court to represent the best interests of a minor child.
- (2) "Minor child" means an unemancipated child under the age of eighteen.
- (3) "Parent" means the natural or adoptive parent, the stepparent or foster parent, guardian, or other adult having legal or practical responsibility for the minor child.

B. Basic Responsibilities of Guardians *Ad Litem*.

The principal responsibility of guardians *ad litem* is to protect the best interests of minor children in litigation. Guardians *ad litem* serve, in effect, as surrogate parents for the limited purpose of helping children make decisions about their interests in litigation. They should try to perform such functions as a responsible parent would perform them under similar circumstances.

C. Specific Responsibilities With Respect To Children.

- (1) Guardians *ad litem* should carefully explain to their wards the extent to which their conversations are not confidential

and under which circumstances they are allowed, or may be compelled, to disclose confidences and secrets told to them by the children.⁸¹

- (2) Guardians *ad litem* should communicate frequently and openly with their wards, as appropriate in light of each child's age and maturity. This includes keeping children informed about the issues being litigated and the children's interests in them, and discussing litigation-related decisions with children (before they have been acted on, if possible).
- 3) Guardians *ad litem* should defer to children's wishes, absent a good reason to do otherwise.

D. Responsibilities With Respect To Parents.

A guardian *ad litem* should communicate frequently and openly with the parents of the minor child, unless it would be contrary to the child's best interests or otherwise inappropriate under the circumstances. Unless the parents' interests conflict with those of the child, a guardian *ad litem* should solicit the parents' input before making decisions related to the litigation and should give deference to their wishes, absent a good reason to do otherwise.

E. Responsibilities With Respect To Lawyers.

A guardian *ad litem* should request that a lawyer be appointed (or hired) for the child, if a similarly situated parent would want the child to have legal representation. If a child has a guardian *ad litem* and a lawyer, the guardian *ad litem* is responsible for instructing the lawyer. The presence of a guardian *ad litem* does not nullify the confidentiality of otherwise privileged communications between the attorney and child client.

F. Responsibilities If Guardian *Ad Litem* Must Serve As Lawyer.

If a guardian *ad litem* is required to function both as guardian *ad litem* and as a lawyer for a child, and circumstances arise in which the responsibilities of a guardian *ad litem* would indicate conduct different from that which would be required of a lawyer,

81. It is extremely important that children not be misled by their legal representatives, even though it might appear to be more efficient to do so.

[C]hildren are far less likely than adults to assume that their confidences will be protected. To the extent children's perceptions counsel them to hold their tongues, however, [guardians *ad litem*] will have a strong motivation to foster a relationship that encourages children to speak freely. While scrupulous [guardians *ad litem*] will stop short of promising secrecy (the classic confidentiality protection) when they know they may not be able to honor that promise, they will find it easier to encourage children to believe that they are "on their side"—that they will use the information the child provides to help the child achieve his desired ends. As in the entity context, the child's confidences, gained under false pretenses, can prove invaluable to the [guardian *ad litem*'s] assessment of, and advocacy for, the child's best interests. But the value of the information cannot outweigh the injustice done to the child by using professional smoke and mirrors to trick the child into trusting the [guardian *ad litem*] too much.

Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *Fordham L. Rev.* 1699, 1738-40.

the guardian *ad litem* must give primary allegiance to the responsibilities of a guardian *ad litem*.⁸²

G. Responsibilities With Respect To Courts.

Guardians *ad litem* owe their primary duty of allegiance to the children they represent. They are not agents of courts and should not be expected to serve as independent fact finders for courts. They should be allowed to participate in litigation as children's representatives to the extent that parents would be allowed to participate. Thus, they ordinarily may be called as witnesses by the court or by other parties; and they may either directly or through counsel introduce evidence, examine witnesses, and make presentations to the court. They should not be viewed or used as expert witnesses about issues before the court, unless they can be qualified as experts under the normal rules governing expert witness qualification.

B. *Proposed Statute: Guardian Ad Litem-Child Privilege*

A. Definitions.

- (1) "Guardian *ad litem*" means an individual who is appointed by a court to represent the best interests of a minor child.
- (2) "Minor child" means an unemancipated child under the age of eighteen.
- (3) "Parent" means the natural or adoptive parent, the stepparent or foster parent, guardian or other adult having legal or practical responsibility for the minor child.
- (4) "Communication" means any expression by words, oral, written, or sign language or by express acts intended to convey a meaning or message to another.
- (5) "Confidential communication" means a communication which is made in confidence by a minor child to his or her guardian *ad litem*.

B. Confidentiality.

A guardian *ad litem* should strive to protect confidential communications with his or her ward. A guardian *ad litem* should only

82. The *Proposed Standards*, *supra* note 75, § B-2, state that the lawyer should continue to perform as the child's attorney and withdraw as guardian *ad litem* if a lawyer appointed as a guardian *ad litem* determines that there is a conflict caused by performing both the roles of guardian *ad litem* and child's attorney. *Id.* The participants in discussions at this symposium also appear to favor this default position.

I disagree. If a child involved in litigation has a representative serving both roles who must choose between these roles, I feel that the child's greater need is to have a representative who is charged with protecting the child's best interest, not simply following the child's instructions. Also, if a lawyer chooses to perform the best interest-surrogate parent role, there are no ethical constraints on a person in that role requesting the appointment of a lawyer for the child, if the guardian *ad litem* determines it would be in the child's best interest. It is not clear that a lawyer who assumes the role of a pure advocate would have the same option or that a lawyer could ask for the appointment of a guardian *ad litem* or could do so without sending a message to the court that the lawyer and the child disagree about the direction of the litigation.

disclose confidential communications when it is in the best interests of the guardian's ward to do so, and then only in relation to the proceedings for which the guardian *ad litem* is appointed. The presence of the child's parents or lawyers will not nullify the confidentiality of the communication, nor will the presence of social workers, psychologists, or other persons who have been asked by the guardian *ad litem* to talk with the child in a professional capacity.

C. Privilege.

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

- (1) made by a minor child represented by the guardian *ad litem*; and
- (2) made within the context of such representation.

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

D. When Disclosure Is Allowed.

A guardian *ad litem* may reveal confidential communications to the extent the guardian *ad litem* believes necessary:

- (1) to promote or defend the child's interests;
- (2) to prevent the child or someone else from committing a criminal or fraudulent act;
- (3) to prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the child; however, 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;⁸³
- (4) to rectify the consequences of the child client's criminal or fraudulent act in the commission of which the guardian *ad litem*'s services were used;
- (5) to establish a claim or defense on behalf of a guardian *ad litem* in a controversy between the guardian *ad litem* and the child, or to establish a defense to a criminal charge or civil claim against the guardian *ad litem* based upon conduct in which the child was involved; or
- (6) to comply with the orders of a court or the rules of law.

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

83. See *supra* note 51.

C. *Proposed Statute: Court Designated Investigator*

A. Definitions.

- (1) "Court Designated Investigator" means an individual who has been appointed by a court to gather information relevant to the court's determination of the best interests of minor child.
- (2) "Minor child" means an unemancipated child under the age of eighteen.
- (3) "Parent" means the natural or adoptive parent, the stepparent or foster parent, guardian or other adult having legal or practical responsibility for the minor child.
- (4) "Communication" means any expression by words, oral, written, or sign language or by express acts intended to convey a meaning or message to another.
- (5) "Confidential communication" means a communication made in confidence by a minor child to his or her guardian *ad litem*.

B. Basic Responsibilities.

The principal responsibility of a court designated investigator is to gather information relevant to a court's determination of the best interests of a child who is involved in litigation being decided by the court. The investigator is an agent of the court, not a representative of the child nor any other party involved in the litigation. A court designated investigator should not be viewed or used as an expert witness about issues before the court, unless the investigator can be qualified as an expert under the normal rules governing expert witness qualification.

C. Responsibilities With Respect to the Court.

A court designated investigator is an agent of the court and should follow the instructions of the court.

D. Confidentiality.

Conversations with a court designated investigator are not privileged. Court designated investigators should carefully explain the purpose of their meetings. They should also explain that they will reveal the substance of their conversations to the court and to other participants in the litigation. Any written reports of court designated investigators must be provided to all parties or their legal representatives, and the investigators and their sources may be called as witnesses and cross examined, if their testimony is relevant and otherwise admissible.

VI. APPLICATION OF PROPOSALS

Enactment of these proposed statutes will not resolve all problems involving role definition and confidentiality. They will, however, provide guardians *ad litem* and courts clearer guidance and lead to greater consistency. This is illustrated by examining the same questions that were discussed earlier in this Article to illustrate role defini-

tion and confidentiality problems. The basic facts are that John, thirteen years old, is the subject of a custody dispute, and John has a strong preference to live with his father.

The following additional facts raise the issue of a legal representative's responsibility to advocate John's position if the legal representative disagrees with it:

John has a court appointed guardian *ad litem* who also serves as his attorney. There is evidence that the father is a pedophile and that he once fondled John during an unsupervised overnight visit. After fully investigating the case, the legal representative concludes that giving the father custody would not be in John's best interests. John demands that the legal representative advocate for custody with the father.

What should the lawyer-guardian *ad litem* present to the court?

Under current laws, the answer would vary from state to state and would depend on what role is assigned to the legal representative. If the assigned role of the legal guardian is to be a pure advocate, the legal representative would be expected to advocate John's position. In other roles, the legal representative may be expected to pursue his or her personal opinion of what would be in John's best interests. Under the legislation proposed in this Article, the guardian *ad litem* would not be compelled to advocate John's position. Rather, the guardian should try to do what a parent would do in a similar situation. This would probably be to make his or her recommendation to the court, explain the reasons behind it, and present any relevant evidence. Given John's age, the guardian should also explain John's preference and the reasons for it; and the court should probably give John an opportunity to speak for himself. The preferred situation, of course, is for John to have separate counsel to advocate his position.

The second question considers the guardian *ad litem*'s duty to report information to the court. The new facts are that the legal representative is the only person other than John and his father who knows about the father's pedophilia and his fondling of John. Further, the legal representative has concluded that, despite this problem, the father should be awarded custody.

Is the lawyer/guardian *ad litem* required to inform the court about the sexual contact when making a recommendation about custody?

Under existing laws, the answer would vary from state to state, but the guardian *ad litem* would be expected to report this information if the jurisdiction is one which views the guardian *ad litem* as an independent fact finder for the court. Under the legislation proposed in this Article, the guardian *ad litem* would not have a duty to disclose all facts to the judge. If the guardian *ad litem* believes it would not be in John's best interests to report this information to the court, it would not be reported.

With respect to whether the guardian *ad litem* is expected or required to report the sexual conduct to investigative agencies, current law varies; although states are increasingly requiring guardians *ad litem* to report possible child abuse, fewer require such reporting by lawyers. Under the proposed legislation, this information does not have to be reported if the guardian believes it would not be in John's best interests to report it.⁸⁴

The proposed legislation also makes it clearer that an attorney for a child must follow the guardian *ad litem*'s instructions with respect to the litigation, even when the guardian's directions conflict with the lawyer's and the child's views of the best interests of the child. This recognizes that it is the guardian *ad litem*, not the lawyer, who has been delegated the responsibility for helping children make decisions related to litigation.

The final situation regarding John's case involves the following facts: John has been appointed both a guardian *ad litem* and an attorney and there is general information in the file about the father being a pedophile. The only information about his fondling John, however, is that John told this to his guardian *ad litem* and to his lawyer in two separate conversations.

If, upon making his report to the court, the guardian *ad litem* is asked by the mother's attorney on cross examination if he knows of any sexual contact between the father and John, what is his answer?

Under current laws, John's guardian *ad litem*, but not his attorney, could be compelled to answer such questions, even if the guardian *ad litem* believes it would not be in John's best interests to do so. The proposed legislation establishes a privilege, which allows the guardian *ad litem* to refuse to answer the question if the guardian believes the answer would be detrimental to John's interests. However, the guardian would be free to answer the question if the guardian *ad litem* believes it would be in John's best interests to do so.

Although the attorney-client privilege is destroyed in most jurisdictions by the presence of a guardian *ad litem* during conferences between attorneys and child clients, the proposed legislation protects the confidentiality of attorney-child client communications from this threat.

CONCLUSION

Guardians *ad litem* stand in the shoes of children's parents when parents are unable to assist children involved in litigation. Guardians *ad litem* serve as surrogate parents for the limited purpose of helping children make litigation-related decisions. They should be expected

84. I do not intend to imply that it would be unreasonable for a state to make a different choice and to mandate reporting possible sexual abuse as a matter of public policy.

to perform the same functions in litigation as children's parents would perform if they were not disqualified, and no more. They should not be asked to serve as agents of the court. Moreover, lawyers who serve as guardians *ad litem* should not be asked also to perform as the child's lawyer, especially when there is a possibility that their duties as guardians *ad litem* would conflict with their duties as the child's lawyer.

Although their evaluations of cases may lead them to make decisions that differ from those preferred by their wards, guardians *ad litem* should consider and respect children's rights and wishes, and those of their parents.

Confidential communications between guardians *ad litem* and their wards should be protected, although guardians should have the discretion to disclose their wards' secrets when it would be in the children's best interests to do so. No one should be allowed to force a guardian *ad litem* to reveal a ward's secrets, absent compelling reasons.

Adopting the proposals in this Article would lead to more predictable results in litigation involving children. It would also place more responsibility on the shoulders of guardians *ad litem*. My belief is that most guardians *ad litem* would accept this responsibility and would exercise their discretion in good faith and with sensitivity and thoughtfulness. If I am right, viewing guardians *ad litem* as surrogate parents, and treating them as such, will improve the quality of children's experiences in litigation.