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Ethics, Cultures, and Professions in the Representation of Children

Cover Page Footnote

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ETHICS, CULTURES, AND PROFESSIONS IN THE REPRESENTATION OF CHILDREN

Frank P. Cervone and Linda M. Mauro*

PROFESSIONALS charged with child placement, or deciding other important aspects of a child's life, confront a process that is fraught with power and ambiguity. They are often ill-prepared to handle the conflicts that naturally arise when working with professionals in other disciplines, whose training, practices, and social mandates differ from their own. This is frequently true in regard to the relationship between lawyers and social workers.

In a classic work, Ernest Greenwood identifies the characteristics of profession as (1) a body of theory, (2) professional authority, (3) community sanction, (4) a code of ethics, and (5) a professional culture.¹ A profession's culture influences the ways in which one views a problem. It also influences a professional's understanding of roles, responsibilities, and ethical principles, as well as her ability to address differences of race, class, and gender. Those ways of thinking and acting that are shared by members of the same profession develop over time through education, practical experience, membership in professional organizations, and even habit.

The Fordham Conference recommended that lawyers cooperate with other disciplines outside the law, including social workers, when necessary to facilitate the attorney-client relationship with a child.² Lawyers and social workers frequently work together (and occasionally work at odds) in their representation of children within the child welfare system. Despite profoundly shaping efforts of lawyers and social workers, the cultures of the two professions receive little attention. While the differences in status, legal standing, salary, and prestige between the professions are generally accepted, albeit with some criticism, the differences that arise from the professions' theoretical understanding of the phenomena with which they focus, appreciation of the roles different actors play when addressing these phenomena, and preparation in addressing issues of diversity, educational standards, and codes of ethics continue to obstruct this coopera-

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1. Armondo T. Morales & Bradford W. Sheafor, *Social Work: A Profession of Many Faces* 71 (7th ed. 1995) (citing Ernest Greenwood, *Attributes of a Profession*, *Social Work*, July 1957, at 45-55).

2. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1301 (1996) [hereinafter *Recommendations of the Conference*] (parts II.A.4.a.ii, II.A.5.d, IV.B.3.f, and V.A.3). The conferees also recognized that further study is needed on the issues of teamwork, interviewing, and confidentiality. *Id.* part II.C.1.n.

tion. Far more than *opportunity*, we see the *necessity* for the collaboration between lawyers and social workers in the representation of children.³ Unfortunately, we also perceive some profound differences in the ways lawyers and social workers think and communicate.⁴ Thus, we call upon the legal profession to examine how these different professional identities influence the professionals' work, their clients, and their colleagues.

I. PROFESSIONAL PERSPECTIVES AND ROLES

The representation of children requires interdisciplinary approaches, not only between lawyers and social workers but also including doctors, teachers, parents, and other significant figures in the child's life. Within the child welfare system, as well as other systems, different ways of working together emerge. Nevertheless, the enterprise of collaboration between lawyers and social workers has little to guide it. Little in either of their educational backgrounds prepares them for working with anyone but those of the same profession. In fact, most graduate level educational programs are unidisciplinary, in contrast to undergraduate education where students are required to take courses outside of their major field of study. Hence, at a time of professional development, when the openness to new ideas and other ways of thinking might be expected to be high, one is only exposed to those who think one way—that is, to the viewpoints of those whose ranks one is hoping to join. This provides a special challenge for lawyers and social workers who must work together, and, consequently, learn about each other.

Central to social work is an understanding of the person in her environment. Accordingly, "[t]he purpose of social work is to promote or restore a mutually beneficial interaction between individuals and society Social workers focus on persons-and-environment *in interaction*."⁵ Social work theories of and for practice are developed and

3. For other studies of the subject, see Michael Benjamin, *Child Abuse and the Interdisciplinary Team: Panacea or Problem?*, in *Family Law: An Interdisciplinary Perspective* 125 (Howard H. Irving ed., 1981); *Interdisciplinary Perspectives in Child Abuse and Neglect* (Faye F. Untalan & Crystal S. Mills eds., 1992); Marie Weil, *Research on Issues in Collaboration between Social Workers and Lawyers*, 56 *Soc. Serv. Rev.* 393 (1982).

4. One author even suggests that the differences between the professions may be attributed to personality styles and brain function. See Judith Alphonso Lau, *Lawyers vs. Social Workers: Is Cerebral Hemisphericity the Culprit?*, 62 *Child Welfare* 21 (1983).

5. Working Statement on the Purpose of Social Work, in Anne Minahin, Introduction to Special Issue: Purpose and Objectives of Social Work Revisited, 26 *Soc. Work* 5, 6 (1981). Basic social work values and ethics include: (1) relationships built on regard for individual worth and dignity, and advanced by mutual participation, acceptance, confidentiality, honesty, and responsible handling of conflict; (2) respect for the individual's right to make independent decisions and to participate actively in the helping process; (3) commitment to assisting client systems to obtain needed re-

selected with a view toward explaining the interface between the person and the environment, as well as examining how to effect change to improve social functioning. Hence, in analyzing the causes of problems and in identifying targets for change, social workers investigate a range of conditions, from social factors such as poverty, discrimination, and educational and employment opportunities, to individual factors of motivation such as capacity, behavior, history, and family relationships. In addition, social workers also examine factors that have both societal and individual components. For example, members of an ethnic group embody both personal and social elements of cultural values and conduct. It is through culture that one creates an identity by bringing together unique characteristics of an individual with ties to a group. Both in the ways they understand situations and in the interventions they select, social workers focus on the interrelationship between the individual and the environment, whether it be the immediate environment of the community or the larger society of which we are all a part. This attention to multiple causality and multiple ways of addressing situations should result in a willingness to live with uncertainty and ambiguity.⁶

By comparison, lawyers typically take the more deductive approach. They refer to only those conditions which affect the case or situation at hand.⁷ The rule of relevancy cuts with a sharp edge. It would be unusual for a lawyer to spend much time or effort accounting for cultural differences when litigating virtually any case where cultural differences were not the dominant factor. Indeed, this narrow focus often results in the pro bono lawyer becoming overwhelmed when confronted with the myriad of needs and crises that poor clients and their families face, far afield from the referred matter.

Particularly in our pluralistic culture, professionals need a construct to account for the diversity of forms and influences.⁸ The knowledge base for work with families must remain broad and diverse, drawing on concepts from psychology, sociology, political science, and other disciplines. Social work uses the school of systems theory to help explain the relationship of the parts to the whole. According to Naomi

sources; (4) efforts to make social institutions more humane and responsive to human needs; and (5) demonstrated respect for and acceptance of the unique characteristics of diverse populations. Comm'n on Accreditation, Council of Social Work Educ., Handbook of Accreditation Standards and Procedures part B6.3, at 100-01 (4th ed. 1994) [hereinafter Accreditation Standards].

6. See Joe M. Schriver, *Human Behavior and the Social Environment: Shifting Paradigms in Essential Knowledge for Social Work Practice* 51 (1995).

7. See Model Rules of Professional Conduct Rule 2.1 (1983) [hereinafter Model Rules]. Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. *Id.* (emphasis added).

8. Naomi I. Brill, *Working With People: The Helping Process* 61 (5th ed. 1995).

Brill, "[a] system is defined simply as a whole made up of interrelated and interdependent parts."⁹ The dynamic element of people—that is, the fundamental reality that people change—creates a major problem in working with them and their groups.¹⁰ As a theoretical orientation, systems theory provides a framework for social workers to assess the multiple factors that are affecting a given situation. It also provides a way to recognize that multiple ways of intervention exist and that a change in one part of the system will affect change in other parts. The approach affords a dynamic point of view that stresses changing relationships rather than the static moment-in-time of classical diagnosis.¹¹ Furthermore, "systems theory . . . tends to remove the onus of responsibility for all change from the individual" by recognizing the importance of external factors "in creating and maintaining problems . . . that are . . . beyond the power of the individual as part of the system to change."¹²

A systems approach highlights individual factors which must be addressed in any particular scenario. For example, systems theory will examine compliance with a family service plan that requires participation in drug treatment, while also considering the program's waiting lists or the lack of programs for parents and children. Cognizant of the systemic problem, a social worker applying systems theory might adjust the client's time limits so as to recognize the existence of the program's waiting list. At the same time, the social worker may call upon the parent's responsibility to enter treatment and become "clean." Furthermore, the social worker might continue to look for other programs, possibly even advocating that this parent receive priority status in such programs. The professional becomes obliged to address the multiplicity of factors, directly by advocating for this parent's admission to the program, and indirectly by modifying the requirements of the family service plan.

The systems approach, as well as viewing the person in her environment, is evident in the social worker's use of multidimensional assessment. A nonlinear diagnostic approach, multidimensional assessment is a dialogic process between client and worker—as well as other significant participants—that identifies the relevant information in, and solutions to, the situation.¹³ It calls for a broad understanding of interventive methods, human behavior, social policy, and research, as well as a specialized understanding of particular problem areas, such as child abuse, drug or alcohol abuse, and mental illness.

9. *Id.* at 61.

10. *Id.* at 62.

11. *Id.* at 61-62. Consider the value of such an approach when litigating a neglect case with the impact on the child measured over time, or when shaping a service plan which accounts for the strengths and capacities of the entire family system.

12. *Id.* at 63.

13. See Dean H. Hepworth & Jo Ann Larsen, *Direct Social Work Practice: Theory & Skills* 192-93 (4th ed. 1993).

Lawyers and social workers can also improve their practice by reflecting more broadly upon the various roles they play. Social work theorists frame multiple professional roles to conceptualize and carry out their interventions, recommending the selection of roles based on client need.

Some authors identify as many as twenty-five roles while others focus on four or five.¹⁴ For work with children and families, a social worker might consider roles of enabler, teacher, broker, mediator, and advocate. Despite the negative connotation as the one who helps to maintain another's dependency (particularly in the field of addictions), the *enabler* facilitates the client's accomplishment of change by "assisting [the] client[] to find the coping strengths and resources within [herself] to produce changes necessary for accomplishing objectives of the service contract."¹⁵ The *teacher* role may involve role modeling, providing information to cope with problems, and teaching and practicing new skills.¹⁶ The *broker* connects people with resources¹⁷ by matching client needs with those resources.¹⁸ The *mediator* brings the parties together to resolve disputes through identifying a common ground.¹⁹

Enablers, teachers, brokers, and mediators. The representation of children demands these roles, but who will play them?²⁰ In answering this question, lawyers and social workers must analyze each particular situation and adapt their roles accordingly.

Lawyers are most likely to play the role of advocate, but social workers also use the term to describe one of their professional roles. A comparison of these "advocacy" roles reveals how the attorney's and the social worker's understanding of the advocacy role differ.

14. See, e.g., Beulah Roberts Compton & Burt Galaway, *Social Work Processes* 507 (4th ed. 1989) (discussing five interventive roles of the social worker).

15. *Id.* at 509.

16. *Id.* at 509-10.

17. Gale Goldberg Wood & Ruth R. Middleman, *The Structural Approach to Direct Practice in Social Work* 109 (rev. ed. 1989).

18. Compton & Galaway, *supra* note 14, at 507-08.

19. *Id.* at 510-11.

20. Child abuse cases often require all involved professionals to perform liaison and interagency activities as well.

[S]uch work—telephone calls, letter writing, attending meetings—is often described dismissively as administration and viewed as a tiresome distraction from the 'real' work of face-to-face contact with clients or patients Several of the committees of inquiry into cases of child abuse have revealed difficulties of communication within and between professions—notably in record-keeping and message-taking—caused, at least in part, by inadequate levels of clerical and administrative support. But it would seem inevitable that a certain and perhaps increasing amount of time will be spent by professionals in communication with each other if the complex and fragmented welfare services are to function effectively.

Christine Hallett & Olive Stevenson, *Child Abuse: Aspects of Interprofessional Cooperation* 21 (1980).

Legal rights and entitlements provide the foundation of advocacy for both professions, but the professions might differ on the limits or bounds of their efforts. The social worker advocate works "with and/or on behalf of clients to obtain services and resources which would not otherwise be provided."²¹ Like lawyers, social workers serve as advocates for their clients by pressing for more, but most often in the context of what is available or appropriate. Unlike lawyers, however, the social worker may be more comfortable with compromise because of her focus on what is *realistically* available.

Furthermore, different forces drive the attorney's representation as opposed to the social worker's. Because of the ethical rules and culture of the legal profession, the lawyer is hard-pressed to resist a client's stated desires, even if they are not in the child's best interests. In contrast, having assessed the systems and client issues and facing the prospect of losing both the client's commitment and achievement of her desires, a social worker might bridge client self-determination and best interests for a time. At the same time, however, in part from exposure to clinical training, social workers recognize the limits of real change. Considering these constraints, the pragmatic worker might "push" the formal duties and role-definitions to keep the client an active participant and to achieve as much as possible for her. Notwithstanding commitment to a client and the client's wishes, fidelity to the larger picture has a place in the social worker's advocacy calculus. Social workers often feel the obligation to see it all.

The lawyer's duty of zealous advocacy contains an acquisitive edge—one which, in this litigious American age, lawyers and their clients often seize upon in order to obtain "the most they can get." (Isn't this the aspect of the profession that most alienates non-lawyers?) As an advocate, the lawyer zealously asserts the client's position under the rules of the adversary system,²² and in the lawyer's adversarial model, the burden to discover is on the parties to the action. In cases involving children, however, the court needs and should have all the information that is available and relevant, formulated as objectively as possible. The dilemma is whether to reveal information that is good for the child but bad for the case. This conflict is best seen in domestic relations custody cases, theoretically posited as a quest for the child's best interest, but rooted in parental self-interest. For example, a parent who wants custody of her child but who also has a drinking problem will probably seek to hide her alcoholism

21. Hepworth & Larsen, *supra* note 13, at 27.

22. See Model Rules, *supra* note 7, Rule 3.4 cmt. This comment states: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." *Id.*

in order to better her chances of obtaining custody. In the lawyer's model, family secrets and events of questionable meaning give way only to the press of the adversary. The lawyer's ethical obligation is to answer the adversary's question honestly, not to gratuitously offer information which may be helpful to the other side. How frequently the social worker innocently asks the lawyer, "Don't we have to tell them what we know?" and "Is this case about what the child needs or what each parent wants?"

The rights or entitlement approach to advocacy appraises opportunity. It is in this context that some theorists urge an expanded or reformed bundle of rights for children vis-à-vis their parents, the state, or both. As enthusiasts of children's rights, we join this momentum. Unbridled rights theory, however, is like the unbridled adolescent himself. Even incorporating the compelling arguments that children deserve competent and aggressive advocacy to the full extent of the law, one must question whether the adversarial model works as an approach for the representation of children.

Most family matters, like other types of litigation, use the opportunity to settle as both the tool and goal of the advocacy process. Within the "give and take" involved in negotiating a family problem, however, relationships with other professionals are often strained in the lawyer-social worker mix. The phrase "We will have to take this to court" is seen as a rude threat, rather than as access to an impartial arbiter in an otherwise irreconcilable conflict. Because of the interpersonal costs associated with advocacy, social workers are encouraged to play the role of advocate only after other roles have been tried.²³ Since there is a reciprocal relationship in taking on roles, the assumption of the adversarial role of advocate "invites the target of action to take the role of adversary. If the target of advocacy accepts the role of adversary and plays it well, however, the goal will not be realized. This is the advocacy paradox."²⁴ The fight may be fruitful, necessary, and even professionally rewarding, but it will likely produce its own victims as well.

Cross-training and team communication exercises further clarify some of the role issues in social work and law, while also promoting each profession's understanding and acceptance of the other's area of expertise.²⁵ Moreover, a multidisciplinary team might find new or better ways of resolving, either by engaging the youth or family member or by calling the participants to reframe the case into a child-centered inquiry about meeting the child's needs. Likewise, a mediator might help the parties in conflict to "rediscover their need for each

23. Wood & Middleman, *supra* note 17, at 142.

24. *Id.*

25. Paul Johnson & Katharine Cahn, *Improving Child Welfare Practice Through Improvements in Attorney-Social Worker Relationships*, 74 *Child Welfare* 383, 396 (1995).

other, thereby freeing them to contribute to each other's welfare."²⁶ The tools of the advocate must be reconciled with the lessons which the professions have taught their members about their clients and themselves. Advocates for children must have the liberty and ability to press the margins while maintaining a fundamental respect for the roles and the players.²⁷

II. CULTURES OF RACE AND CLASS

Approximately "one-third of the child-protective cases in the United States involve families from minority cultural heritages. [Therefore,] problems arising from different, if not conflicting, culturally determined child-rearing values are . . . a significant aspect of child-protective work in the United States . . ." ²⁸ In designing an approach to the representation of children in the "system," it is necessary to view race as a dynamic, as well as recognize the existence of institutional racism and its historical importance to the child welfare practice.²⁹

Issues of self, including one's race, cultural heritage, and psychological identity, imbue the practice of most professionals, and training on these issues can play a critical role in shaping the culture of a profession. In contrast, race has, at best, a secondary dimension in legal studies where virtually no attention is given to its influence on the lawyer and her practice. Other than the occasional enlightened discussions in criminal law or procedure class about the incidence of racial bias in police work or sentencing, law school classes seldom speak critically about race. Race is rarely factored into case practice, except when it can be strategically used—for example, in jury selection. Even then, its legitimacy as a factor in the American social dynamic remains questioned. For social workers, by contrast, race is a predominant component of practice. Colloquially, "it's everywhere." Social workers are among the minority of professionals who consistently recognize this dimension of work. In fact, standards of accreditation for social work programs require race and cultural diversity as content areas.³⁰ Furthermore, "[t]he National Association of Social Workers

26. Wood & Middleman, *supra* note 17, at 125.

27. See *Recommendations of the Conference*, *supra* note 2, part IV.C.2.

28. Candace Beavers, *A Cross-Cultural Look at Child Abuse*, 44 *Public Welfare* 18, 18 (1986) (citation omitted).

29. In their classic work documenting the history of treatment of Black children in the child welfare system, Andrew Billingsley and Jeanne Giovannoni advocate for reorganization of the child welfare system. "Fundamental to this reorganization are the yielding of control over direction and the administration of services, at all levels, to the Black community, and the revision and innovation of practices and procedures, with specific and deliberate reference to Black children and their situations." Andrew Billingsley & Jeanne M. Giovannoni, *Children of the Storm: Black Children and American Child Welfare* at x (1972).

30. Accreditation standards governing the purpose, structure, and curriculum content of social work education reflect the commitment of the social work profession to

has defined the elimination of racism as one of two major goals for the profession."³¹

Regardless of the theoretical approach one applies in her social work practice, issues of self-awareness (for example, countertransference in the Freudian scheme) are important. Social workers are taught not to let their personal points of view intrude into their helping relationship with the client. Throughout the two years of full-time masters-level social work training, a student will devote as many as three days per week to practice-oriented placements. This provides an opportunity to apply the theoretical knowledge base to the real world of social work practice. Additionally, social work students use field work to examine their own fit with the values and knowledge of the profession. For example, in the arduous self-examination of "process recording," the student reveals her own impact on, and feelings about, a given event or intervention. Further, the Council of Social Work Education's ("CSWE") Accreditation Standards require that social work programs provide opportunities for students to examine the compatibility between their own values and those of the profession's, as embodied in the Code of Ethics.³²

While social work students learn in their classes about the historical development of child welfare and the differential treatment of minority children, in their field placements they come face-to-face with the children, their families, the systemic issues, and even their own personal issues and values. Hence, they are invited to recognize the role of race and other cultural factors not only on interpersonal relationships, but also on the delivery of services. While they may not be able to change the differential treatment, they are prepared to recognize and address it. Notwithstanding the success of clinical programs in most law schools, however, much of the legal curriculum continues to favor academics divorced from practice. Particularly for service to poor children, clinical practice and a broad reframing of the relevant issues must be demanded in legal training.

the understanding and appreciation of race and cultural diversity. To advance the social work purpose of preparing social workers to understand, respect, and practice with diverse populations, CSWE standards and guidelines require that "curriculum content [must encompass] differences and similarities in the experiences, needs, and beliefs of people. The curriculum must include content about differential assessment and intervention skills that will enable practitioners to serve diverse populations." Accreditation Standards, *supra* note 5, part B6.4. The curriculum must also address patterns, dynamics, and consequences of discrimination, economic deprivation, and oppression upon a diverse population. *See id.*

31. Donald Brieland & John Allen Lemmon, *Social Work and the Law* 398 (2d ed. 1985).

32. Accreditation Standards, *supra* note 5, part B6.3, at 100.

III. ETHICS AND THE DYNAMICS OF COLLABORATION

Collaborating professionals are often confused about the division of tasks among the various members of the team.³³ For instance, lawyers might interpret a social worker performing legal tasks in juvenile court as the unauthorized practice of the law and thus, outside the realm of social work practice.³⁴ Consider, then, how this confusion is related to differences in how each profession addresses its ethical responsibilities. If one person has to choose between two or more roles, or if the role of the two collaborators are in conflict, which takes priority?³⁵ As between the lawyer and the social worker, who decides?

The lawyer's ethical constraints arise from the maxim that no person or interest may come between the attorney and client. Lawyers might refer to their canons of ethics for the obligation to follow the client's instructions or to refrain from sharing certain tasks with collaborators.³⁶ Similarly, lawyers are generally prohibited from disclosing client information to third parties without the client's consent. Compare, however, the social worker's less restrictive ethical responsibility: "The social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional service" and may share such confidence, absent the client's consent, only for "compelling professional reasons."³⁷ An interdisciplinary approach that includes social workers thus risks a loss of client confidentiality because of different rules or standards of the respective professions. More problematic is the resorting to one's professional code as demanding certain actions in order to win the battle over role, when other less confrontational ways of resolving the

33. An Indiana study asked attorneys and social workers to indicate the tasks for which each was responsible. The author found that the differing concepts lawyers and social workers have of their roles in child welfare cases may result in role disagreement, where there is a sense that members of the other occupation are overstepping their professional boundaries and performing tasks that would be more appropriately performed by their own group. Robin Russel, *Role Perceptions of Attorneys and Caseworkers in Child Abuse Cases In Juvenile Court*, 67 *Child Welfare* 205 (1988).

34. *Id.* at 213.

35. Role conflicts were revealed in majorities of both groups wanting responsibility for the same tasks, including: (1) requesting authorization from the court to file a petition alleging that a child is a "Child in Need of Services"; (2) deciding what allegations to make in such a petition; (3) explaining reasons for court hearings to parents; (4) deciding whether a child should testify at court hearings; (5) entering agreements with parents or their representative regarding the disposition of a case; (6) recommending a particular disposition to the court; and (7) interpreting and explaining the court order to the child's parents. *Id.* at 209-10.

36. See, e.g., Model Rules, *supra* note 7, Rule 1.2(a). Rule 1.2(a) states: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *Id.*

37. Nat'l Ass'n of Social Workers, Code of Ethics part II.H (1993), *reprinted in* Encyclopedia of Social Work 2625-29 (Linda Beebe et al. eds., 19th ed. 1995).

conflict might be as or more ethically sound. While the Fordham Conference recommended that the more restrictive lawyer standard govern client confidences involving children, more attention must be paid to the collegiality of the reconciliation that maintains elements of ethical propriety and parity in the professional relationship.

The ethic of self-determination remains the touchstone of most forms of lawyer-client relationships; for lawyers, the client's wishes govern virtually all choices and decisions, even that of the lawyer's role. This principle was a fundamental tenet of the Fordham Conference and is part of the proposed American Bar Association's *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (hereafter "Abuse and Neglect Standards"): "The . . . child's attorney . . . owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."³⁸ Lawyers are typically uncomfortable interposing their judgment to select the goal or outcome of a case. In short, the child's attorney must advocate the child's choice of direction.

Self-determination, however, does not always work for children. Most child welfare professionals who have represented teenagers know the sinking feeling from, and the consequent anxiety of, permitting children to engage in dysfunctional behaviors. Ethicist Frederic Reamer recognizes the inability to resolve "absolutist" versus "relativist" positions when faced with this ethical dilemma. He asserts that attempts to develop hierarchies of values lack clear rules about how to order these values. Hence, he offers guidelines for practice. First, "[r]ules against basic harms to the necessary preconditions of human action (such as life itself, health, food, shelter, mental equilibrium) take precedence over rules against harms such as lying or revealing confidential information or threats to additive goods such as recreation, education, and wealth."³⁹ Second, "[a]n individual's right to basic well-being (including goods that are essential for human action) takes precedence over another individual's right to self-determination."⁴⁰ One might not interfere in someone's right to refuse treatment, but would if not doing so would threaten to hurt someone else. Third, "[a]n individual's right to self-determination takes precedence over her own right to basic well-being."⁴¹ Query whether the child's choice about where to live should be honored if the child's choice is to stay in a situation in which she continues to be abused? Further, what if the child chooses to remain in a situation where there is psychological abuse that is less than apparent and possibly long-term?

38. Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375, § A-1 (1995) [hereinafter *ABA Proposed Standards*].

39. Frederic G. Reamer, *Social Work Values and Ethics* 60 (1995).

40. *Id.*

41. *Id.* at 61.

The Conference recommended that the unimpaired child set the goals of the representation as would an adult client.⁴² Under this rule, once competent and verbally capable of communicating, the child should be entitled or empowered to make her own decisions, regardless of age, developmental abilities, or impact of the choice.⁴³ Certainly for young children and even for older children, however, it remains the intuition and experience of many that this freedom to direct their course of their case does not work. For example, some decisions may be too large a burden for a child to make (such as a choice between two parents, or between a stable foster family and a mother who has just now become "clean" of drugs). Assuming that we cannot divorce the advocacy role from the fact-finder role of the judge, how far do we let children go in assessing the long-term consequences of their actions? The limits of a child's cognitive abilities and emotional control suggest that ethics alone are not sufficient to resolve this conflict.⁴⁴

On the other hand, taking over the child's decision-making authority works a disservice in both the short- and long-term. The Fordham conferees reached consensus that both the substituted judgment and the best interest approaches had their own significant problems; we concur. With a longer view, we suggest that some events which prompt a child's age-appropriate decision-making, in turn, will provide the child with the cognitive tools to make independent adult decisions. That is, the child will learn in the choosing process per se. In addition, as most parents will attest, children often do what they want anyway. In social work, forcing a child into foster care or other service mode which she does not want often means she simply will not go or will not make use of the service, even to the point of sabotaging efforts to help and perhaps getting into worse trouble than at the outset. Thus, the question presented is whether professionals should allow children to make decisions that ultimately will harm them. Ethical rules of client direction paint the broad stroke and raise a

42. *Recommendations of the Conference, supra* note 2, § I.

43. Lawyers can face a similar issue in working with incapacitated clients. The authority for commitment derives from the doctrines of *parens patriae* and from the police power of the state. Simply, the state has the responsibility to care for persons who cannot care for themselves. The state also has the responsibility to protect the public. See Andrea Saltzman & Kathleen Proch, *Law in Social Work Practice* 180 (1990). In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court held that parents may commit their children for psychiatric care with only minimal procedural protection. See *id.* at 602-04.

44. The ABA Abuse and Neglect Standards take the approach that disabilities are contextual, incremental, and possibly intermittent. ABA Proposed Standards, *supra* note 38, § B-3 cmt. By contrast, the recently issued standards for domestic relations cases sets a rebuttable presumption that children below the age of 12 are impaired. *Am. Acad. of Matrimonial Law., Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings Standard 2.2* (1995).

struggle of conscience. Somehow, someone must play the role of the adult in the process.

IV. COMING TOGETHER

The state of practice for children today reflects a range of approaches and an even wider range of quality in service. The representation of children is, or should be, an enterprise of collaboration. Both the Fordham Conference and the proposed Abuse and Neglect Standards invite the child attorney's cooperation with other disciplines and professionals.⁴⁵ We would go further and suggest that such cooperation must achieve a shared priority with zealous and competent advocacy, to the end that this collaborative approach becomes the state of the art for child welfare practice, especially in the representation of children.

The Fordham Conference offered many suggestions that would improve collaboration between professionals and thus, result in a higher quality of legal representation of children. The issue of culture was a salient topic in many of the groups. As we add to the discussion the concept of the culture of professions, one can see the importance for all professionals to be culturally knowledgeable, sensitive, and self-aware. Professionals also need to make use of experts from the racial, ethnic, and socio-economic cultures of the client.

Likewise, as one examines collaboration in light of the complexity of the decisions that must be made with and for children, it is clear that such power should not rest in one pair of hands. Also, the elaboration of the differences between zealous advocacy and best interests must continue, and the roles and ethics of other professions in the work of child advocacy merit additional study.

It should also be noted that the experiential component of legal education is important. The complexity of decision-making and its profound effects on the lives of children and families require levels of understanding that cannot be gleaned from books alone.

In addition, the assessment of capacity for children takes time, changes over time, and relies on the expertise of others. Moreover, capacity is not definitive. Hence, collaboration even in the gathering of information is crucial.

Furthermore, legal interests of children are intertwined with their social and psychological interests. How to resolve which interest is most important at a particular point in time is unclear. What is clear is that child advocacy takes place in the context of relationships—that is, between the client and the professionals and between the professionals themselves. Professionals need to respect each other and work together to arrive at meaningful decisions.

45. *Recommendations of the Conference, supra* note 2, parts II.A.4.a.ii, II.A.5.d, IV.B.3.f, V.A.3; *ABA Proposed Standards, supra* note 38, § C-2.

Collaboration has other benefits. First, an interdisciplinary approach would seem essential to compensate for the limits of language skills in working with children.⁴⁶ Second, with the diverse range of needs implicated by work with troubled children and often dysfunctional families, the practitioner must know how to recognize needs and how to identify resources that can serve them. A collaborative effort can help achieve these goals. Third, if court or administrative intervention is to succeed, professionals will need to effect some change in the family system's function. Thus, the lawyer-as-counselor function of representation, particularly in the enabler component which precedes the point of lawyer recommendation or client choice, takes time, skill, and a multiplicity of perspectives. Again, collaboration with other professionals will enable lawyers to better perform their function.

Courts typically recognize these dimensions as no more than a luxury for the child's attorney. For example, child advocate social workers are seldom funded in court-appointment models of representation. Instead, goal-setting and resource identification are relegated to the children and youth social worker, a party-in-interest whose goals may conflict with those of the child.⁴⁷ The role of expert testimony comes closest to the involvement of other disciplines in expanding the vision of the case, but experts are sources of evidence, not *participants* in the representation itself. Some offices utilize social workers in an effort to allocate resources—for example, to conduct home visits and to perform other fieldwork. These investigative functions are consistent with other areas of legal practice, but they still leave the case wanting for a legal professional who knows the child, the family, and the environment. The better approach is to have both professionals involved in both the fieldwork and the courtroom.⁴⁸ The practice of representation must include home visits, hard, patient work with the child, and collaboration with other professionals. To collaborate, professionals must find the common ground through interaction with each other and with the case.

Laying the groundwork for a meaningful attorney-client relationship with a child or youth takes a special effort. This ethic of relationship must acquire its own priority in the representation of children.⁴⁹ Most lawyers have to work at establishing the client's trust, a gradual

46. *ABA Proposed Standards*, *supra* note 38, § A-3 cmt.

47. For example, it is commonplace for county agencies to seek discharge of a teenager's case rather than provide services. The ABA Abuse and Neglect Standards require the child's attorney to identify resources in the family and the community. *Id.* § B-1(7).

48. As for teamwork, lawyers "valued team decisions but seemed to expect social workers to build the teams and arrange the pretrial conferences." Johnson & Cahn, *supra* note 25, at 392.

49. Establishing and maintaining a relationship with a child is the foundation of representation. *ABA Proposed Standards*, *supra* note 38, § C-1.

and time-consuming task. With the child client having been provided, rather than having selected, the attorney, the ordinary foundation of a client's decision-to-proceed is missing at the outset. Likewise, progress is seldom neat or orderly, and outcomes are not predictable. Furthermore, the tort maxim "We take the plaintiff as we find him" has a special character for the child client. For example, a youth is not likely to change from recalcitrant teen to compliant and engaged young adult *because* she is sent a school enrollment form! The child's representative first needs to communicate effectively the benefits of the action to the child. More troublesome, the youth must somehow master the troubles and whims of youthfulness, from peer influences to the personal crisis of being let down or abandoned by a parent. Attorneys who are not trained or predisposed, who have neither the time nor the support for such details, cannot possibly serve such clients well.⁵⁰

The Fordham Conference took place at a time when this country is both turning away from responsibility for its children and becoming more punitive toward them and their families. In today's culture, the forms of violence have broadened and become public; indeed, for perhaps the first time in history, Americans are widely afraid in and for their families, schools, and communities. The reality of the youth's choices today is tragic. Why should a child opt for education when her classmates are dying? All the while, resources are dwindling. Few adult Americans (and fewer attorneys) have lived in such a dangerous and challenging world. These realities have implications for communication, fieldwork, service planning, advocacy, and the opportunities which children may or may not have available.

As children ponder their own daunting questions, lawyers and social workers must continue to examine how best to represent children in these troubling times. Should they remove the child from this violence, if given the opportunity to raise the child in a "safer" place? The discussions cannot ignore the context in which children live, yet that context should not necessarily determine what professionals advocate. The discussions and recommendations which emerged at Fordham indicate an extraordinary level of commitment to high-quality representation of children and a keen recognition of the complexity of the task. Requiring certification for all professionals who work

50. The quality of representation will surely be tied to the amount of money spent. Funding for court-appointed counsel for children and families in abuse and neglect cases remains abysmal, and few attorneys make this an issue. For example, a pending proposal of the Philadelphia bar calls for fees of less than \$375 per year for the court-appointed private attorney representation of a family of children—less than \$32 of service per month! In many jurisdictions, court-appointed counsel are compensated at rates as low as \$25 per hour. *Cf. Recommendations of the Conference, supra* note 2, parts VIII.B.2 to .3 (calling for reasonable compensation for court-appointed lawyers, as well as reimbursement for services necessary for the effective representation of the child).

with children, limiting caseloads, and continuing to address the ethical challenges of representing children should continue. In addition to the Conference's specific recommendations which will result in improved legal services for children, child advocates also should use their power to advocate for the other services necessary to achieve a quality of life for these most vulnerable members of society.

Finally, the work of lawyers and social workers must find room for the youth's "objective" needs and "subjective" desires. Representation usually involves helping the client through the decision or crisis. In laying a groundwork of relationship, professionals must establish trust; keeping confidences makes a difference, but much more is needed for the task. A time-intensive process with methods neither neat nor established, the engagement must occur prior to the point of lawyer recommendation or client choice.

Stepping back from the frame of client direction, the goals of the case will depend in large part on the role one elects to play. Neglect cases pose the most difficulty, where as professionals, lawyers and social workers are called to evaluate the quality of a person's or family's life. Whose standards do the professionals apply in assessing a family situation? What will a child know about her neglect, living within the frame of reference? The objectives or targets of one's advocacy efforts might include basic needs, quality of housing, issues of health and safety, educational opportunities, or the abilities of a parent. Where do professionals draw the line? In their zeal for self-determination, professionals should not abdicate standards for children.

For the preverbal and impaired child, the Conference recommended the concept of legal interests—that is, those interests which a proceeding has authority to address—to limit the discretion of overzealous, child-saving advocates.⁵¹ We must promote, however, the role of creativity as well. The Conference's standard failed to capture that dimension of child welfare lawyering that should still look somewhat like parenting. Who will plan for the children and dream for them? Certainly for the verbal child, and even for teens, client self-determination is only part of the picture. As parents, do we simply sit back and let our own children determine their lives and their futures? Our young clients deserve no less.

51. *Id.* part IV.B.3.a.