Fordham Law Review

Volume 64 | Issue 4 Article 30

1996

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Judith Larsen

CONFIDENTIALITY: DOES THE BAR HAVE AN OBLIGATION TO HELP CLOSE AN EVIDENTIARY GAP?

*Judith Larsen**

GREAT tension arose among the Conference participants over the issue of confidentiality. Drawn broadly, the question is: When a child is in serious danger, should protection of that child be a requirement that supersedes the bar's traditional ethical obligation to respect attorney-client confidences? Drawn more narrowly, the issue could be phrased: Is the primary task of the "best interests" guardian *ad litem* to watch out for the child's safety or to advocate for the child's wishes?

Part of our confusion about the roles that are filled by attorneys who represent children occurs because neither our laws nor the typical court's resources permit the judge to obtain enough information to protect the child during the many years that some children spend within the jurisdiction of the court. Despite laws that urge neglect-abuse cases to be resolved within eighteen months,[1] a long-term case may, not infrequently, remain in the foster care system until the child reaches majority—eighteen years in some states, twenty-one in others. An attorney's tasks shift as the case ages and resources dwindle.

During the initial stages of a dependency case there is a flurry of activity: discovery, experts, lay witnesses, and tangible evidence. In the absence of a stipulated agreement, the court holds an evidentiary hearing, which adheres to the standards of proof pertaining to adult civil cases. Evidence must be competent, material, and relevant. The court bases decisions about whether the abuse or neglect did occur on a preponderance of evidence standard. This is the one time in the life of a case when there may be enough of the right kind of people to bring adequate information to a judge who usually is charged with making a decision that will be in the child's best interests.

This stage of relative abundance of resources may last through the immediate post-trial period, during which a hearing is scheduled to

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* Judith Larsen has represented families before the Superior Court of the District of Columbia for twelve years. She also is a consultant on family law issues to a number of bar and bench professional groups, which has given her an opportunity to observe court practice in many jurisdictions.

1. *See, e.g.*, The Adoption Assistance and Welfare Act of 1980, 42 U.S.C. §§ 627(a)(2)(B), 675(5)(C) (setting out the requirements that states must comply with to qualify for additional payments of federal funding for foster care, including the "implement[ation] and . . . opera[tion] . . . [of] a case review system;" defining "case review system" as requiring a dispositional hearing within "eighteen months of original placement"). All states have adopted its mandatory provisions in order to obtain the subsidies the law provides.

decide where the child will stay while services aimed at keeping—or bringing—the family together are offered. (Most courts call this a disposition hearing.) The child's case plan, which describes goals and objectives for the family, is presented at the hearing. Not unusually, witnesses may testify about needed services and placement prospects. The social worker's recommendations are supposed to be based on a thorough investigation of the family.

After the trial and the immediate post-trial decisions in a case, the law provides for court or administrative reviews to occur at least every six months or a year, depending on the age of the child and the status of the case.[2] Complicated cases command considerably more court oversight. During this stage, a perceptible drop in the formality of the proceedings occurs, and the resources available to court-appointed counsel to produce evidence on behalf of the poor families that make up the bulk of the dependency caseload also diminish. Because the court permits hearsay, information that would have been presented by experts during the initial evidentiary hearing, now is expected to be presented second-hand by the attorneys and the guardian *ad litem.*

"Your Honor, the therapist says that Melanie is overcoming her fear of her father, and that visits with him probably can commence in a couple of months. In my last conversation with Melanie, however, she told me that she doesn't want to see her father." These are typical statements heard during court reviews of neglect-abuse cases that are winding through the years. Such statements might come from the social worker, but also often come from the child's attorney or guardian *ad litem.* Indeed, if attorneys and guardians *ad litem* are silent on significant issues affecting the child, the court usually will put pressure on them to "do their job," and to report to the court the crucial information that will permit the judge to make decisions that will protect the child. An active child's attorney or guardian *ad litem* can be the person closest to vital information, and thus becomes the point person for much of that judicial pressure. Attorneys may find it hard not to respond to that pressure because their natural instincts may be to protect the child. Love of children often is what draws them to the practice.

Part of the bar's dispute over confidentiality may arise from this untenable situation: *lawyers for children* (whether acting in the role of advocate, or as a "best interests" guardian *ad litem*) *are being asked to close the evidentiary gap so that judges can make informed decisions that will serve the best interests of the child.* For cases that remain under the court's care for years, instead of providing for periodic independent investigations and evidentiary hearings whenever a critical issue emerges, state laws and court practice tend to rely on a small

2. *Id.* § 675(5)(B) (stating that "case review system[s]" require judicial or administrative review of the status of each child in foster care at least once every six months).

group of practitioners to present crucial data in an informal way. That hardy band of familiars may include the social worker, the child's representatives, and counsel for the parents and the state. Indeed, this sets the scene generously. In many jurisdictions even fewer people appear for these court reviews. Often only the social worker and a representative for the child show up. Other counsel and even the parties themselves have fallen away from the habit of coming to the court for hearings. The judge becomes more and more distant from the actual facts in the case, relying increasingly on information that the child's representative brings to court.

Undoubtedly the bar should resist taking on responsibilities that would erode the effectiveness of the attorney or guardian *ad litem* to accomplish the goals of representing a child—once the bar has agreed on what the goals of representation should be. (Among several goals that emerged at the Conference, child empowerment and child safety present two goals that potentially could conflict.) If the legal community determines that confidentiality constitutes a necessary characteristic for the representation of children, as it does for adults (and certainly the Conference revealed sharp disagreement on this point), then the bar should resist judicial and child welfare pressures to give up confidentiality. Simply staging resistance, however, swithout taking in the bigger picture, does not advance the debate. In fact, our current laws and current resources do not permit the job of protecting a child to be accomplished by the court if attorney-client confidentiality strictures mean that the judge may never know—and never have the means to find out—that a particular child is endangered. For lack of the judge knowing what is going on, a child may suffer; a child may die.

Therefore, in addition to insisting on confidentiality as the cornerstone of an effective attorney-client privilege, the bar must argue for changes in federal and state laws that will close the evidentiary gap for the judge. Courts need legal mandates and resources for ongoing investigations that do not involve an attorney in flagging or breaching a confidence. Now that so much power is devolving from the federal government to the states, this may be an ideal time for the bar to weigh in on this issue.