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## An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases

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# AN ANALYSIS OF THE PROPOSED STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN ABUSE AND NEGLECT CASES

Linda D. Elrod\*

A lawyer appointed to represent a child in an abuse and neglect case may be expected to serve several different functions—as an attorney for a child client, as a guardian *ad litem* who is considered an officer of the court, or as a representative serving in a capacity that is a hybrid of these two roles.<sup>1</sup> Frustration with the lack of a clear definition of the lawyer's role,<sup>2</sup> inadequate training, meager compensation, and large caseloads has led to a demand for guidelines for lawyers who represent children. Within the past few years, several states have adopted court rules, statutes, and bar association guidelines for guardians *ad litem* and lawyers representing children.<sup>3</sup> Un-

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1. The Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. § 5101 (Supp. V 1993), requires appointment of a guardian *ad litem* in every judicial proceeding involving an abused or neglected child. See 45 C.F.R. § 1340.14(g) (1994). Many states require that the person appointed as guardian *ad litem* be a lawyer. See, e.g., D.C. Code Ann. § 16-2304(b)(3) (1994) ("The Superior Court shall . . . appoint a guardian ad litem who is an attorney . . ."); Kan. Stat. Ann. § 38-1505(a) (1993) ("[T]he court shall appoint a person who is an attorney to serve as guardian *ad litem* for a child . . ."); Utah Code Ann. § 78-3a-44.5(2) (1992 & Supp. 1995) (stating that the guardian *ad litem* shall be an attorney). The duties, however, are not so clear. See *In re Marriage of Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988), cert. denied, 490 U.S. 1021 (1989) (holding that an attorney appointed for a child should present all evidence regarding the child's best interests, not just repeat the child's wishes); *In re Marriage of Rolfe*, 699 P.2d 79, 86 (Mont. 1985) (holding that an attorney is obligated to advocate her view of a child's best interests where the attorney's views clash with the child's wishes).

2. See, e.g., Ann M. Haralambie, *The Child's Attorney* 25 (1993) ("The unsettled and conflicting law in this area offers no clear direction to attorneys."); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259, 259 (1995) (noting that children are often denied adequate representation due to the confusion over the lawyer's role); Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam. L.Q. 349, 353 (1993) ("There is a wide divergence of opinion among legal scholars about the extent to which the role of a child's attorney differs from that of an adult's attorney.").

3. E.g., N.H. Rev. Stat. Ann. § 490:26-e (1993); New York State Bar Association Committee on Juvenile Justice and Child Welfare, *Law Guardian Representation Standards* (1988); New York State Bar Association Committee on Juvenile Justice and Child Welfare, *Law Guardian Representation Standards*, Vol. II: *Custody Cases* (1992); Marie Walton & Donna Schmalberger, *Standards of Practice for Guardians ad Litem*, 21 Colo. Law. 1907 (1992).

fortunately, state statutes and rules vary widely regarding the differing roles lawyers play, depending on whether lawyer or lay guardians *ad litem* are used and on the presence or absence of Court Appointed Special Advocates.<sup>4</sup> Most of these new guidelines are inadequate to provide lawyers with the direction necessary to be effective child advocates.

To provide national leadership and to promote uniformity, the Family Law Section of the American Bar Association appointed a committee of child advocates<sup>5</sup> that began drafting more definitive guidelines for lawyers representing child clients who have been abused or neglected. In August, 1995, the Family Law Section endorsed the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases<sup>6</sup> ("*Abuse and Neglect Standards*" or "*Standards*") which were approved by the ABA House of Delegates in February 1996. This Response focuses on the relevance of the *Standards* to the issues raised at the Fordham Law School Conference on Ethical Issues in the Representation of Children, highlighting the areas of agreement and disagreement between the recommendations of the Fordham conferees<sup>7</sup> and the *Standards* on items relating to lawyers representing children in abuse and neglect cases.<sup>8</sup>

### I. A LAWYER IS A LAWYER IS A LAWYER

Lawyers have attended law school, been admitted to at least one state to practice, and are bound by the profession's ethical rules,

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4. See U.S. Dep't of Health & Human Services, Final Report on the Validation & Effectiveness Study of Legal Representation Through Guardian Ad Litem § 2.1.2 (1990) (finding considerable variation in the way states define guardian *ad litem*). There are also differing standards as to when an attorney or guardian *ad litem* should be appointed. See *Wilkinson v. Declue*, 890 S.W.2d 774, 776-77 (Mo. Ct. App. 1995) (holding that a court should have appointed a guardian *ad litem* for the child when the father alleged abuse by the mother); *S.R. v. P.C.*, 634 N.E.2d 786, 790 (Ind. Ct. App. 1994) (holding that a court was not required to appoint guardian *ad litem* in paternity actions).

5. The committee appointed in 1992 in addition to myself included Gail Baker, Georgia Creel, Howard Davidson, Kate Federle, Ann Haralambie, and Jack Sampson. The committee sought input from various other advocacy groups involved in the representation of children, in particular the ABA Committee on the Unmet Needs of Children.

6. *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375 (1995) [hereinafter *Abuse and Neglect Standards*]. The *Abuse and Neglect Standards* apply only to lawyers who represent children in abuse and neglect cases and not in other contests over custody. Although the committee that drafted the *Standards* strongly felt that the *Standards* were broad enough to cover any case in which a lawyer was appointed to represent a child, there were some members of the Family Law Section who questioned the need for a child's attorney, let alone a zealous advocate, in divorce cases.

7. My analysis is based on the Recommendations and Working Group Reports produced at the Conference.

8. The Fordham Conference included discussion of the role of the lawyer representing a child in class action litigation, delinquency cases, custody contests in divorce, as well as in abuse and neglect cases.

either the Code of Professional Responsibility or the Model Rules. Lawyers are trained advocates. Nothing in a lawyer's training qualifies a lawyer to make decisions on behalf of a client, especially a child client. Therefore, the *Abuse and Neglect Standards* take the position that lawyers should be appointed as lawyers and act as lawyers irrespective of the age of the client.<sup>9</sup>

The *Standards* favor the appointment of a lawyer as advocate, rather than as a guardian *ad litem* or in a dual capacity.<sup>10</sup> When a lawyer is appointed as a guardian *ad litem*, the lawyer's role is often unclear<sup>11</sup> and conflicts can arise between the duty to the child client and the duty to the court. Additionally, most lawyers are ill prepared to make "best interest" determinations.<sup>12</sup>

The consensus of the Fordham conferees supports the view that the lawyer should always be a lawyer and should not be forced into a hybrid role,<sup>13</sup> and the Conference recommended that federal and state

9. See *Abuse and Neglect Standards*, *supra* note 6; § A-1 & cmt.

10. *Id.* § A-2 cmt. ("These Standards . . . express a clear preference for the appointment as the 'child's attorney.' "); *id.* § B-2(1) ("If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem.")

11. See, e.g., *In re J.E.B.*, 854 P.2d 1372, 1375 (Colo. Ct. App. 1993) (holding that whether a guardian *ad litem* must testify and undergo cross-examination depends upon the role being played); *John O. v. Jane O.*, 601 A.2d 149, 163 (Md. Ct. Spec. App. 1992) (holding that counsel is obligated to present the minor's position but is not required to advocate in favor of that position); *In re Hollister*, 496 N.W.2d 642, 644 (Wis. Ct. App. 1992) (holding that guardian *ad litem* is an advocate for the best interests of the child and not a witness at the trial); *In re M.F.B.*, 860 P.2d 1140, 1152 (Wyo. 1993) (holding that the duty of guardian *ad litem* is to act with reasonable diligence as advocate for child).

12. The Recommendations of the Conference boldly assert that the "profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) [hereinafter *Recommendation of the Conference*] (part IV.B.1).

13. *Id.* part I.B.2 ("An attorney cannot ethically function as both an attorney and a GAL for an unimpaired child."); see also *Report of the Working Group on the Allocation of Decision Making*, 64 Fordham L. Rev. 1325, 1332 (1996) [hereinafter *Report—Allocation of Decision Making*] ("The Working Group recommended for further discussion and ultimate incorporation into an ethical rule the proposition that an attorney be prohibited from serving as both attorney and GAL for an unimpaired child."); *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 Fordham L. Rev. 1339, 1339 (1996) [hereinafter *Report—Determining Child's Decision-Making Capacity*] ("[A]s with adults, lawyers have an ethical obligation to advocate the position of a child . . ."); *Report of the Working Group on Interviewing and Counseling*, 64 Fordham L. Rev. 1351, 1353 (1996) [hereinafter *Report—Interviewing and Counseling*] ("[C]hildren should be entitled to the same zealous, independent, and competent representation that the legal system affords adults in legal proceedings.").

laws and court rules be amended to mandate appointment of an attorney for the child rather than a guardian *ad litem*.<sup>14</sup>

Although there was general agreement that a lawyer should function as a lawyer when representing a child client, there was no consensus as to what to call the lawyer. Conferees employed a proliferation of names for the different roles, such as attorney/champion, traditional attorney/advocate, and best interest guardian *ad litem* ("BIGAL"). The *Abuse and Neglect Standards* refer to the lawyer appointed for the child as the "child's attorney" to differentiate the lawyer from other participants in the legal process.<sup>15</sup>

Although most lawyers think they understand the functions of a lawyer, some do not seem to know what is expected when the client is a child. The *Abuse and Neglect Standards*, therefore, provide a detailed list of the basic obligations<sup>16</sup> and role for the child's attorney.<sup>17</sup> The *Standards* provide that the lawyer should inform others of the representation of the child<sup>18</sup> and maintain confidentiality.<sup>19</sup> The Working Group on Allocation of Decision Making implies that for a

14. The Recommendations of the Conference affirmatively state that "Laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child's guardian *ad litem* should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding." *Recommendations of the Conference*, *supra* note 12, part I.A.1.

15. The committee drafting spent considerable time discussing the label to apply to lawyers representing children. Although the ABA Ethics Committee encourages use of the term "lawyer," "child's attorney" seemed a better choice to refer to a lawyer with a specific job description.

16. The *Abuse and Neglect Standards* provide:

The child's attorney should:

- (1) Obtain copies of all pleadings and relevant notices;
- (2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) Inform other parties and their representatives that he or she is representing the child . . . ;
- (4) Attempt to reduce case delays . . . ;
- (5) Counsel the child . . . ;
- (6) Develop a theory and strategy of the case . . . ; and
- (7) Identify appropriate family and professional resources for the child.

*Abuse and Neglect Standards*, *supra* note 6, § B-1.

17. The *Standards* state that the child's attorney should: "conduct thorough, continuing, and independent investigations and discovery," *id.* § C-2, "file petitions, motions, responses or objections as necessary," *id.* § C-3, "seek appropriate services (by court order if necessary) to access entitlements, [and] to protect the child's interests," *id.* § C-4, "assure that a child with special needs receives appropriate services," *id.* § C-5, and "participate in settlement negotiations." *Id.* § C-6. The *Standards* provide guidance as to the nature of the investigation to be conducted, *id.* § C-2, suggest types of relief that the attorney may request, *id.* § C-3, and list services that may be appropriately requested for children with special needs. *Id.* § C-5. The *Standards* also describe the role of the child's attorney at hearings, *id.* §§ D-1 to D-13, and after hearings. *Id.* §§ E-1 to E-3.

18. *Id.* § B-1(3).

19. *Id.* §§ B-2 cmt., B-4 cmt.

competent child the lawyer's role is the same as for an adult client and apparently agrees with the position taken by the *Standards*.<sup>20</sup>

As to the representation itself, the *Standards* emphasize, and the Recommendations of the Conference agree, that the child's attorney should meet with the child<sup>21</sup> and talk with the child using "developmentally appropriate" language.<sup>22</sup> Additionally, the court should not proceed on any substantive matter unless the child is present.<sup>23</sup> The child's attorney has an obligation to represent the child throughout the process, including on appeal if necessary.<sup>24</sup>

### A. Allocation of Decision Making

The *Abuse and Neglect Standards* indicate that the child's attorney should follow the child's direction throughout the course of litigation.<sup>25</sup> The Working Group on Allocation of Decision Making concluded that when the client is an unimpaired child, the client should direct the goals of the proceeding.<sup>26</sup> For a preverbal or "verbal but impaired" child, this Working Group noted several different views on the appropriate role of the attorney, reflecting the concern that in such situations, there is no client direction to hold the attorney accountable.<sup>27</sup> In contrast, the *Standards* take the position that there is no need for a separate attorney/champion, reasoning that a "child's attorney" will arrive at the goals of litigation by conducting a thorough factual investigation through discovery, contacting experts, and

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20. *Report—Allocation of Decision Making*, *supra* note 13, at 1331 ("The attorney for an unimpaired child has the same duty to counsel the child client as any other unimpaired client."); *see also Recommendations of the Conference*, *supra* note 12, part V.A.1 ("As with adults, lawyers have an ethical obligation to advocate the position of a child unless there is independent evidence that the child is unable to express a reasoned choice.").

21. *Recommendations of the Conference*, *supra* note 12, part II.A.1 ("Every child should be seen by the lawyer, except in the rare circumstance where it is a physical impossibility."); *Abuse and Neglect Standards*, *supra* note 6, § C-1 ("Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child . . .").

22. *Abuse and Neglect Standards*, *supra* note 6, § A-3 & cmt. ("'Developmentally appropriate' means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition."); *see also id.* § B-4 ("The child's attorney should elicit the child's preferences in a developmentally appropriate manner . . .").

23. *See id.* § D-5 ("In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.").

24. *Id.* §§ D-13, F-1 to F-4.

25. *Id.* § B-4 ("The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.").

26. *Report—Allocation of Decision Making*, *supra* note 13, at 1331 ("[T]he attorney [should] counsel the child . . . but allow the client to make the ultimate decision.").

27. *Id.* at 1332-36.

examining and cross-examining the parties while representing the child's legal interests.<sup>28</sup>

The Recommendations of the Conference addressed the lawyer's functions when the child client is unable to direct litigation for whatever reason. The Recommendations' beginning point, that the lawyer must determine the legal interests of the child, follows the Abuse and Neglect Standard position<sup>29</sup> which is referenced in the Recommendations of the Conference.<sup>30</sup> The Recommendations' extremely thorough explanation of how a lawyer discovers and represents a child's legal interests,<sup>31</sup> will be invaluable to lawyers wanting more of a "how to" approach than the *Standards* provide.

### B. *The Capacity Issue*

The issue of capacity is central to, and creates most of the theoretical problems in, defining the child lawyer's role. The fundamental question, then, is when is a child able to make decisions and to direct the course of litigation? While some commentators contend that having a definitive age<sup>32</sup> would make the determination easier, the *Abuse and Neglect Standards* expressly reject the concept that children of certain ages are impaired, disabled, incompetent, or lack capacity.<sup>33</sup> The *Standards* define disability as contextual, incremental, and intermittent, rather than global, and take the position that the child may have capacity for some decisions and not for others.<sup>34</sup>

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28. *Abuse and Neglect Standards*, *supra* note 6, § B-5 ("The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings."); *see also id.* § B-5 cmt. ("A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing.").

29. *Id.* § B-4(2) ("To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.").

30. *Recommendations of the Conference*, *supra* note 12, part IV.B.3.g.i.

31. *Id.* part IV.B.3.

32. *See, e.g.*, American Acad. of Matrimonial Lawyers, *Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings 2* (1994) (indicating that a child under 12 does not need a lawyer).

33. *Abuse and Neglect Standards*, *supra* note 6, § B-3 cmt. ("These Standards do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation.").

34. The *Standards* provide:

[T]hese Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

*Id.* § B-3 cmt.

The Working Group on Determining the Child's Capacity to Make Decisions grappled with the capacity issue and came to the same conclusion as stated in the *Standards* that chronological age is not determinative of capacity and that a child should be presumed to have capacity.<sup>35</sup> The Working Group on the Allocation of Decision Making also began with the presumption of the child's competency.<sup>36</sup>

Both the *Abuse and Neglect Standards*<sup>37</sup> and the Fordham conferees place the burden on the lawyer to determine capacity. The *Standards* require the lawyer to talk with the child in a "developmentally appropriate"<sup>38</sup> manner and suggest reading material about competencies of both adults and children.<sup>39</sup> The Working Group on Determining the Child's Capacity to Make Decisions put together a very helpful, detailed listing of factors for the lawyer to consider in assessing capacity.<sup>40</sup>

One principle achieving strong consensus was that just because a lawyer disagrees with the child's position does not mean that the child is impaired.<sup>41</sup> If the child is or becomes impaired, the child's attorney should ask for the appointment of a guardian *ad litem* to represent the child's best interest. The threshold for finding impairment, however, should be very high.<sup>42</sup> If the child does not have the capacity to direct litigation for whatever reason, the lawyer must advocate the child's legal interests.<sup>43</sup> Both the *Standards* and the Recommendations of the Conference provide similar examples of the considerations in ascertaining the child's legal interests.<sup>44</sup>

### C. Confidentiality

Probably the area of greatest divergence between the *Standards* and at least one of the Fordham groups arises over the subject of confiden-

35. *Report—Determining Child's Decision-Making Capacity*, *supra* note 13, at 1340; *Abuse and Neglect Standards*, *supra* note 6, § B-3 cmt.

36. *See Report—Allocation of Decision Making*, *supra* note 13, at 1329.

37. *Abuse and Neglect Standards*, *supra* note 6, § B-3 ("The child's attorney should determine whether the child is 'under a disability' . . . with respect to each issue . . .").

38. *Id.* § A-3.

39. *Id.* § A-3 cmt.

40. *See Report—Determining Child's Decision-Making Capacity*, *supra* note 13. For example, the Working Group divided the process of determining a child's capacity into two phases. The fact-finding phase requires an understanding of the child's developmental stage, medical status, and personal history. *Id.* at 1341-43. The determination phase looks to the child's ability to communicate with the attorney and articulate reasons, the possibility of influence or coercion, and the child's ability to understand consequences of decisions made. *Id.* at 1343-45.

41. *Report—Allocation of Decision Making*, *supra* note 13, at 1330; *Report—Determining Child's Decision-Making Capacity*, *supra* note 13, at 1343.

42. *Report—Allocation of Decision Making*, *supra* note 13, at 1330.

43. *See Report of the Working Group on Determining the Best Interest of the Child*, 64 *Fordham L. Rev.* 1347, 1349 (1996).

44. *Recommendations of the Conference*, *supra* note 12, part IV.B.3; *Abuse and Neglect Standards*, *supra* note 6, § B-5 & cmt.

tiality. The *Standards* require absolute fidelity to the client's confidences.<sup>45</sup> Undercutting this position is the fact that some states require lawyers to report suspected child abuse.<sup>46</sup> Although the *Standards* recognize this possibility, the *Standards* require the lawyer to maintain confidentiality to the extent permitted in the jurisdiction.<sup>47</sup> The *Standards* do allow an attorney to withdraw if he or she feels unable to represent the child's position, or to request appointment of a guardian *ad litem* without revealing the reason for the request.<sup>48</sup>

The Working Group on the Allocation of Decision Making and the Working Group on Interviewing and Counseling seemed to support the absolute fidelity to the client unless there is a life threatening situation.<sup>49</sup> The Working Group on Confidentiality, however, recommended amending Model Rule 1.6 to allow a lawyer for a child to breach confidentiality to protect the minor from imminent death or substantial bodily harm.<sup>50</sup> Their hypothetical illustrating why a lawyer should breach confidentiality—a child client calls to say (s)he is going to stand on a street corner where there have been gang shootings and does not want anyone else to know<sup>51</sup>—seems particularly troublesome and unrealistic. A more typical problem faced regularly by attorneys for children might be when a runaway, living on the streets or in other dangerous circumstances, contacts the lawyer and arranges a meeting but does not want others to know where he or she is. Thus, the area of confidentiality seems to be one of the major areas of contention between the *Standards* and some of the Fordham conferees.

45. *Abuse and Neglect Standards*, *supra* note 6, § A-1 ("The . . . 'child's attorney' . . . owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."); *id.* § B-2 cmt. ("The lawyer-client role involves a confidential relationship with privileged communications . . . Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role.").

46. See Utah Code Ann. § 62A-4a-403 (Supp. 1995).

47. The *Standards* state:

Confidentiality is abrogated . . . by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege . . . . The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

*Abuse and Neglect Standards*, *supra* note 6, § B-4(3) cmt.

48. *Id.* § B-4(3).

49. *Report—Allocation of Decision Making*, *supra* note 13, at 1336; *Report—Interviewing and Counseling*, *supra* note 13, at 1356.

50. *Report of the Working Group on Confidentiality*, 64 Fordham L. Rev. 1367, 1371 (1996) [hereinafter *Report—Confidentiality*]. This group made distinctions between the judicially designated investigator who is an information gatherer for the court with no expectation of confidentiality and the "best interest guardian *ad litem*." *Id.* at 1372-75. The Standards Committee would take the position that a lawyer acting as BIGAL is still bound by the Model Rules and would not allow this distinction. *Abuse and Neglect Standards*, *supra* note 6, § B-2(2) cmt.

51. *Report—Confidentiality*, *supra* note 50, at 1367.

D. *Conflicts of Interest*

The Working Group on Conflicts of Interest posed the question of whom the lawyer represents and gave examples of situations where a conflict of interest may arise. The *Standards* are narrower and start with the assumption that the lawyer is appointed as the "child's attorney."<sup>52</sup> Therefore, the *Standards* reason that the child's attorney represents the child with the same undivided loyalty, confidentiality, and competence as an adult client.<sup>53</sup>

The most typical conflict is between the child's wishes and the lawyer's perception of what is in the child's best interest. The Working Group came to the same conclusion as the *Standards*. Under this view, where a conflict exists between the attorney's and child's views, the attorney may not simultaneously advocate for what the child wants and for objectives that the lawyer believes to be in the child's best interests, because to do so would deny the child an effective advocate.<sup>54</sup> The *Standards* provide that if a lawyer is appointed as guardian *ad litem* or in a dual capacity and a conflict arises, then the lawyer must act as the child's attorney.<sup>55</sup> The Recommendations and most of the Working Groups determined that a lawyer, rather than a guardian *ad litem*, should be appointed for an unimpaired child.<sup>56</sup> The *Standards* also recognize that a lawyer may have to decline representation of multiple clients,<sup>57</sup> and that if a conflict arises when representing multiple clients, the child's attorney must withdraw if the attorney has obtained confidential information.<sup>58</sup>

Model Rule 1.8(f) precludes a lawyer from accepting compensation from someone other than the client unless there is no interference with the lawyer's independent professional judgment.<sup>59</sup> Without giving specific examples, however, the Working Group on Conflicts of Interest indicated that parent payors can direct the course of repre-

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52. *Abuse and Neglect Standards*, *supra* note 6, § A-2 cmt.

53. *Id.* § A-1 & cmt. ("These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client . . .").

54. *Report of the Working Group on Conflicts of Interest*, 64 *Fordham L. Rev.* 1379, 1387 (1996) [hereinafter *Report—Conflicts of Interest*]; *Abuse and Neglect Standards*, *supra* note 6, § B-4(3) cmt.

55. *Abuse and Neglect Standards*, *supra* note 6, § B-2(1); *see, e.g., In re Baby Girl Baxter*, 479 N.E.2d 257 (Ohio 1985) (holding that where a lawyer/guardian *ad litem* has a role conflict, the lawyer should withdraw as guardian *ad litem*). Part of the reason for this is premised on the fact that the lawyer will have received privileged information. *Abuse and Neglect Standards*, *supra* note 6, § B-2(2) cmt.

56. *See supra* notes 13-14 and accompanying text.

57. *Abuse and Neglect Standards*, *supra* note 6, § B-2(2).

58. *Id.*; *see also In re H. Children*, 608 N.Y.S.2d 784, 785 (Fam. Ct. 1994) (holding that a law guardian is required to withdraw from representing either child after allegations of sexual abuse of the daughter).

59. Model Rules of Professional Conduct Rule 1.8(f)(2) (1983).

sentation and receive information relative to representation in situations where parents are otherwise entitled to make decisions on behalf of their child.<sup>60</sup> The *Standards* strongly assert that a third party (even if a parent) paying for retained counsel for a child does not have the right to direct representation or to receive privileged information.<sup>61</sup>

### E. *Miscellaneous*

Two Working Groups recommended changes to the Model Rules. The Working Group on Interviewing and Counseling recommended deleting the word "minority" from Rule 1.14.<sup>62</sup> The Working Group on Confidentiality recommended amending Rule 1.6 on confidentiality.<sup>63</sup> The committee that drafted the *Standards* initially explored whether to recommend amending the Model Rules and chose not to do so for two reasons. First, given that the child client is to be treated as an adult client to the extent possible, a full range of protections, including confidentiality and privilege, should apply. Second, the Model Rules appear to be broad enough to cover all likely situations.

## II. THE JUDICIAL ROLE

No matter what standards or guidelines are adopted for lawyers, many child advocates believe that there can be no improvement in practice unless "judicial administrators and trial judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers . . ."<sup>64</sup> Among child advocates on the committee and at the Fordham Conference, there was consensus that judges and courts do not do all they should to encourage vigorous advocacy for children. Perhaps this feeling is what led to the Working Group on the Judicial Role's recommendations, adopted as part of the Conference Recommendations, closely paralleling and endorsing the *Abuse and Neglect Standards*.<sup>65</sup> The Working Group vigorously asserted that judges have a responsibility to children that is not satisfied by appointing counsel for the child.<sup>66</sup> The Recommendations would re-

60. *Report—Conflicts of Interest*, *supra* note 54, at 1387.

61. *Abuse and Neglect Standards*, *supra* note 6, § H-5 ("The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.")

62. *Report—Interviewing and Counseling*, *supra* note 13, at 1352.

63. *Report—Confidentiality*, *supra* note 50, at 1371.

64. *Abuse and Neglect Standards*, *supra* note 6, part II Preface.

65. *Recommendations of the Conference*, *supra* note 12, part VIII; *Report of the Working Group on the Judicial Role*, 64 *Fordham L. Rev.* 1389 (1996) [hereinafter *Report—Judicial Role*]; *Abuse and Neglect Standards*, *supra* note 6, part II. Then again, it could be that Howard Davidson of the ABA Center on Children and the Law was a member of both the Working Group on the Judicial Role and the committee that drafted the *Abuse and Neglect Standards*.

66. *Recommendations of the Conference*, *supra* note 12, part VIII.C.6; *Report—Judicial Role*, *supra* note 65, at 1393.

quire judges to use effective case management techniques to attain speedy resolution of cases, to advocate creation of child advocacy and lawyer training programs, and to engage in continuing education about effective appointment and use of lawyers for children.<sup>67</sup> The *Standards* would additionally require courts to establish uniform representation rules<sup>68</sup> and coordinate activities of other court personnel and agencies with the child's attorney.<sup>69</sup>

### A. Appointment and Selection

The *Standards* mandate appointment of a child's attorney in all abuse and neglect proceedings.<sup>70</sup> The Conference proposed mandatory appointment of counsel when judicial process is initiated in a variety of cases, including abuse and neglect cases.<sup>71</sup> The judge should appoint an attorney based on objective criteria, such as required training and familiarity with relevant standards of practice like the *Abuse and Neglect Standards*, to promote high quality legal representation.<sup>72</sup>

Appointment of a lawyer for the child, however, is not enough to fulfill the judge's role. The judge should monitor the lawyer's actions to ensure competent and effective representation of the child, and the court should be involved in ongoing evaluations focussing on case outcomes.<sup>73</sup>

Both the Conference and the *Standards* suggest that the court give the lawyer appointed to represent a child independence<sup>74</sup> and timely

67. *Recommendations of the Conference, supra* note 12, part VIII.C.6.a-g.

68. *Abuse and Neglect Standards, supra* note 6, § G-2.

69. *Id.* § G-3 ("Courts that operate or utilize Court Appointed Special Advocate (CASA) and other nonlawyer guardians ad litem, and courts that administer nonjudicial foster care review bodies, should assure that . . . the individuals performing those roles are trained to understand the role of the child's attorney.").

70. The *Standards* provide:

- The child's attorney should be appointed immediately after the earliest of
- (1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment;
  - (2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or
  - (3) Allegations of child maltreatment . . . made by a party in the context of [other] proceedings . . . .

*Id.* § H-1(1)-(3).

71. *Recommendations of the Conference, supra* note 12, part VIII.A.1, C.1; *Report—Judicial Role, supra* note 65, at 1393 n.21.

72. *Recommendations of the Conference, supra* note 12, part VIII.B.6, 7.

73. *Recommendations of the Conference, supra* note 12, part VIII.B.8, C.6.e.

74. *Abuse and Neglect Standards, supra* note 6, § G-1; see *Recommendations of the Conference, supra* note 12, part VIII.B.1. Independence encompasses independence from the judiciary, from the state, from parents or other third party payors, and from the attorney's own biases. *Abuse and Neglect Standards, supra* note 6, § G-1 cmt.

access to all relevant information and reports,<sup>75</sup> and suggest that the lawyer should be appointed for as long as the court has jurisdiction.<sup>76</sup>

### B. *Education and Training*

The *Abuse and Neglect Standards* emphasize the importance of both judicial and lawyer training. Judges should be actively involved in the preparation of programs to educate members of the bar and should engage in continuing education to enable them effectively to appoint and utilize counsel for children.<sup>77</sup> The *Standards* set out in detail the types of information that should be included in such training.<sup>78</sup>

The Fordham conferees agreed that training was essential; four of the Groups mentioned the need for adequate training. The Working Group on Determining the Child's Capacity to Make Decisions noted the need for lawyers to be trained to determine if a child has capacity to direct litigation.<sup>79</sup> The Working Group on Determining the Best Interest of the Child proposed, and the Conference recommended, requiring specialized training for lawyers in interviewing and counseling skills, knowledge of the current scholarship in interdisciplinary substantive fields, and knowledge of child welfare options.<sup>80</sup> The Work-

75. *Recommendations of the Conference*, *supra* note 12, part VIII.B.3; *Abuse and Neglect Standards*, *supra* note 6, § G-3 ("The court should require that reports from agencies be prepared and presented to the parties in a timely fashion.").

76. *Recommendations of the Conference*, *supra* note 12, part VIII.B.4; *Preface to Abuse and Neglect Standards*, *supra* note 6 ("All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues."); *Id.* § D-13 ("The child's attorney should seek to ensure continued representation of the child . . . so long as the court maintains its jurisdiction.").

77. *Abuse and Neglect Standards*, *supra* note 6, § I-1 ("Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.").

78. The *Standards* state:

At a minimum, the requisite training should include:

- (1) Information about relevant federal and state laws and agency regulations;
- (2) Information about relevant court decisions and court rules;
- (3) Overview of the court process and key personnel in child-related litigation;
- (4) Description of applicable guidelines and standards for representation;
- (5) Focus on child development, needs, and abilities;
- (6) Information on the multidisciplinary input required in child-related cases . . . ;
- (7) Information concerning family dynamics and dysfunction . . . ;
- (8) Information on accessible child welfare, family preservation, medical, educational, and mental health resources . . . ; and
- (9) Provision of written material (e.g., representation manuals, checklists, sample forms), including listings of useful material available from other sources.

*Abuse and Neglect Standards*, *supra* note 6, § I-2.

79. *Report—Determining Child's Decision-Making Capacity*, *supra* note 13, at 1341.

80. See *Recommendations of the Conference*, *supra* note 12, part IV.C.

ing Group on Interviewing and Counseling's list of essentials of training includes cultural competence.<sup>81</sup> The Working Group on the Judicial Role, however, went beyond the others in requiring judges to advocate the creation of specialized child advocacy programs with the court system, law school clinics, and legal services agencies.<sup>82</sup>

### C. Compensation

The *Abuse and Neglect Standards* place the burden on the court to assure that lawyers receive adequate and timely compensation by requiring the entry of a written order addressing compensation and costs at the time of appointment.<sup>83</sup> The rate of payment is to be "commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities."<sup>84</sup> The Recommendations of the Conference support the *Standards* position and adopts almost verbatim language.<sup>85</sup>

## III. CONCLUSION

The Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases provide a comprehensive guide to lawyers appointed to represent children. Although the Conference Recommendations and Working Group Reports addressed only seven aspects of representation, the reports indicate that most of the conferees are in substantial agreement with the position taken by the *Standards* on most issues. The work of the Fordham conferees adds valuable information in several areas that was beyond the scope of the *Standards*, such as interviewing and counseling techniques and methods to ascertain legal interests, that can be incorporated into training programs for lawyers.

The *Abuse and Neglect Standards* should meet the basic needs on all essential points and offer the first comprehensive, and somewhat revolutionary, approach to changing the way judges and lawyers look at issues of child representation. Accordingly, the *Standards* should be well suited to serve as a model for states drafting guidelines for lawyers representing children.

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81. *Recommendations of the Conference, supra* note 12, part II.B; *Report—Interviewing and Counseling, supra* note 13, at 1364-65.

82. *See Recommendations of the Conference, supra* note 12, part VIII.C.6.c.

83. *Abuse and Neglect Standards, supra* note 6, §§ H-2, J-1.

84. *Id.* § J-1.

85. *Recommendations of the Conference, supra* note 12, part VIII.B.2.

