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Essays

Rights & Duties: An Overview of the Attorney-Child Client Relationship

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I. INTRODUCTION

An attorney's duties to the client result directly from the client's legal rights. To the extent that the law gives a client a recognized legal interest, the attorney has a legal and an ethical duty to protect that interest. Many people misunderstand or fail to recognize children's rights in the legal system. Without a clear understanding of children's rights, attorneys who represent children will misunderstand or fail to recognize the attorney's duties to the child client. As a result, children in the legal system regularly receive inadequate representation.¹

The legal system protrudes upon a child's life following allegations of abuse and neglect. Of the 2.9 million cases of abuse or neglect reported to the United States Department of Health and Human Services (the "Department") in 1992, further investigations substantiated, or "indicated," 1 million of those reports.² The Department estimated that 17%, or 200,000 of those cases, required court action.³ Often, in these cases, children do not receive adequate legal representation, and consequently, remain in dangerous situations.⁴ Failing to protect these children, due to inadequate representation in a system created to protect them, is unconscionable.

Child advocates generally agree that the attorney has a duty to provide complete, competent representation. Yet, not all actors in the

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1. A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 7 (1993) [hereinafter CHILDREN AT RISK].

2. NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1992: REPORTS FROM THE STATES TO THE NATIONAL CTR. ON CHILD ABUSE AND NEGLECT 9-10 (1994) [hereinafter CHILD MALTREATMENT 1992]. The terms "substantiated" and "indicated" refer to reports which are "founded," as opposed to reports which are "unfounded" and dismissed based on insufficient evidence.

3. *Id.*

4. CHILDREN AT RISK, *supra* note 1, at 4.

legal system acknowledge this, and some believe that children are entitled to something less than the full benefit of legal counsel. Proponents of the theory of lesser representation seem to suggest that an attorney representing a child acts more as a liaison between the court and the child, rather than as an advocate. The law, however, does not support this position. Instead, the law supports a modern concept of zealous child advocacy. If children's needs are to be served in the legal system, competent, independent counsel must represent those needs.⁵ This duty of complete, competent representation stems from the recognition of children as "persons," entitled to the rights and privileges that the United States Constitution guarantees.

This Essay, first, traces the historical evolution of the legal rights of children.⁶ Next, it discusses the attorney's legal and ethical duties,⁷ and the special considerations involved in the lawyer's representation of the child client.⁸ Finally, this Essay concludes that attorneys must zealously advocate the interests of child clients, just as they would the interests of adult clients, to best ensure that the attorney satisfies children's special legal needs.⁹

II. HISTORICAL EVOLUTION OF CHILDREN'S LEGAL STATUS

The history of children and the law in America aptly describes the role of children in American society. If the law reflects social consciousness, then the absence of a body of children's law and children's rights reveals that historically Americans, at best, have failed to recognize children's needs, and at worst, have chosen to neglect them.¹⁰ The history of children and the law is primarily a

5. *Id.* at 7 ("Meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings. Competent, professional representation in proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided.").

6. *See infra* part II.

7. *See infra* part III.A-B.

8. *See infra* part III.C.

9. *See infra* part IV.

10. It can be argued that unless children are legally guaranteed the same fundamental human rights and liberties that a society guarantees its adults, the society does not truly care for its children. Yet, as a society, we have historically failed to recognize children as persons under the law. The preface to *Legal Rights of Children*, edited by Howard Davidson and Robert Horowitz, begins as follows:

A nation may be judged by many standards, but one of the most telling is the treatment of its children and the status they hold in society. Grace Abbott, former head of the United States Children's Bureau, once wrote that 'the progress of a state may be measured by the extent to which it safeguards the rights of its children.' Although we profess to love children, is this merely an

history of society and parental rights regarding children and children's property.¹¹ From the first books on law relating to children until the recent past, commentators focused not on children, but on the rights of adults with respect to their children.¹² Lawrence Friedman highlighted this treatment of children and the law in his thorough treatise, *A History of American Law*, first published in 1973.¹³ Indeed, prior to the 1960s, American history did not include children's law as known today.

A. *The Early Development of Children's Rights*

Prior to the nineteenth century, the European-American legal tradition regarded the family as the basic unit of society.¹⁴ Consequently, the law treated children as chattel of the family (or, more commonly, of the father) rather than as persons in their own right.¹⁵ Absolute parental control over children was almost unquestioned,¹⁶ and what little extra-familial aid or protection was available to children was provided by churches out of a sense of moral, not legal,

abstraction, or are we truly, as some have said, a child-centered civilization? Are our children adequately nurtured and sheltered from harm, or do we constantly expose them to maltreatment, exploitation and needless danger? Are children accorded rights and benefits worthy of their citizenship, or do we, to their detriment, too freely exercise parental prerogatives and proclaim the incapacities of youth?

LEGAL RIGHTS OF CHILDREN at vii (Robert M. Horowitz & Howard A. Davidson eds., 1984).

11. Robert M. Horowitz, in LEGAL RIGHTS OF CHILDREN 1, § 1.02 (Robert M. Horowitz & Howard A. Davidson eds., 1984).

12. Sanford J. Fox, *Preface to FOUNDATIONS OF CHILD ADVOCACY* (Donald C. Bross & Lauren F. Michaels eds., 1987). *The Infant's Lawyer or Law, Both Ancient and Modern Relating to Infants*, published in 1697, is thought to be the first English book on law and children. *Id.*

13. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 214 n.30 (2d ed. 1985) (citing SOPHONISBA P. BRECKINRIDGE, *PUBLIC WELFARE ADMINISTRATION IN THE UNITED STATES* 98, 99, 101, 113 (2d ed. 1938)).

14. See Edward J. McLaughlin & Lucia B. Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force and NAC Standards*, 46 *BROOK. L. REV.* 1, 6 (1979).

15. Horowitz, *supra* note 11, § 1.02.

16. One example of state interference occurred in 1642 in Massachusetts. 1 *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 39 (Robert H. Bremner ed., 1970). The Massachusetts Bay Colony passed "a series of acts intended to compel parents to 'train up' their children properly and authorizing magistrates to take children from parents who neglected their duties." *Id.* The colony offered children almost no protection from their parents. Sir Robert Filmer compared a father's control over his family to that of a king ruling his kingdom. *Id.* at 27.

obligation.¹⁷ Indeed, no formal legal system worked to protect pre-nineteenth century children from abuse or neglect.

The nineteenth-century development of children's law corresponds with the industrialization and urbanization of America.¹⁸ Social reformers believed that children needed to be rescued from the effects of the industrial revolution.¹⁹ These reformers advocated and effected the passage of child labor laws.²⁰ "Child Saving" by the state and private groups promoted rehabilitation, rather than punishment, for delinquent children.²¹ While this ameliorated the harsher treatment of children prior to the nineteenth century, the reformers did not base their desire for improvements on a recognition of children's rights or on a limitation on parental control, but rather on the development of the "*parens patriae*" concept of child law.²²

Parens patriae—literally "parent of the country"—refers to the role of the state as sovereign and guardian of persons, such as children, with a legal disability.²³ While the concept acknowledges the state's responsibility for a child, it emphasizes the state's quasi-parental authority to dictate what is appropriate for the child, without regard to any inherent rights a child may have.²⁴

One of the first cases to assert the state's *parens patriae* role was *Ex parte Crouse*,²⁵ in which the Pennsylvania Supreme Court declined to issue a writ of habeas corpus to free a girl from a house of refuge.²⁶ Although the girl was not free to leave the house of refuge, the court denied the writ because the house was not a prison.²⁷ The court further noted that the girl was there for her own good—that is, for her reformation from incorrigibility—and, thus, had no standing to complain.²⁸

Although society attempted to help children in trouble, it did very little to protect them from abuse or neglect from their own families. While states had prosecuted parents for child abuse in a few instances prior to the nineteenth century, these prosecutions were few and far

17. Horowitz, *supra* note 11, § 1.02; see FRIEDMAN, *supra* note 13, at 212.

18. Horowitz, *supra* note 11, § 1.02.

19. *Id.*

20. *Id.*

21. *Id.*

22. See *In re Gault*, 387 U.S. 1, 15-16 (1967); Horowitz, *supra* note 11, § 1.02.

23. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

24. *Gault*, 387 U.S. at 17.

25. 4 Whart. 9 (Pa. 1839).

26. *Id.* at 11-12.

27. *Id.* at 11.

28. *Id.*

between, usually involving cases of extreme or merciless punishment.²⁹ Even then, such prosecutions only punished the parents and did not protect the child.³⁰ When the problem concerned a child's safety from his or her family, nineteenth century law and society provided little or no protection.

The case of Mary Ellen Wilson is the first documented case of child protection.³¹ Mary Ellen was an eight-year-old girl living with adoptive parents in New York City in 1874.³² Even though Mary Ellen's adoptive mother confined her to one room, gave her no clothes, and beat her regularly, law enforcement officers refused to intervene.³³ Ultimately, a social worker contacted Henry Bergh, the founder of the Society for the Protection of Cruelty to Animals, who, with the help of his attorney, Elbridge T. Gerry, successfully petitioned the court to remove Mary Ellen from her abusers.³⁴ Thereafter, Mr. Bergh and Mr. Gerry established the Society for Prevention of Cruelty to Children.³⁵ Although numerous private agencies dedicated to protecting children from harm existed throughout the world by the end of the nineteenth century,³⁶ children still had no established legal right to this protection.

The *parens patriae* rationale formed the basis of the juvenile court systems which sprang up around the country in the beginning of the twentieth century, starting with the Cook County, Illinois Juvenile Court System established in 1899.³⁷ The State of Illinois expected these courts, which supplanted the criminal justice system in cases involving child offenders and parental abuse,³⁸ to act as the child's ultimate parents.³⁹

29. See 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 119-24 (Robert H. Bremner ed., 1971) [hereinafter 2 CHILDREN AND YOUTH IN AMERICA] (describing four cases where courts discussed when parents exceed their parental privilege).

30. See *id.* at 120 (relating that a criminal conviction of the parent was possible, but only if the parent permanently damaged the child).

31. VINCENT DEFRANCIS & CARROLL L. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S 1 (rev. ed. 1974).

32. 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 29, at 185-86.

33. *Id.* at 186.

34. *Id.* at 189-91.

35. *Id.* at 189.

36. *Id.* at 201.

37. *Gault*, 387 U.S. at 14.

38. Horowitz, *supra* note 11, § 1.02.

39. *Gault*, 387 U.S. at 15-16.

The United States Supreme Court recognized and approved this *parens patriae* function of the state in *Prince v. Massachusetts*.⁴⁰ The juvenile courts sought to rehabilitate, rather than punish, child offenders. The Court's rationale, and ultimately the myth, was that the benevolent hand of the juvenile court's "rehabilitation" system spared children the harshness of adult criminal court.⁴¹ In reality, the juvenile court avoided some of the harshness of the criminal system, but sacrificed children's basic constitutional protections in the process.⁴²

To be sure, the *parens patriae* concept represented an advance in society's protection of children. It also marked the beginning of society's recognition that the legal system might need to interfere with the family relationship in some cases to protect the health, safety, and general well-being of children. The state provided this protection, however, based on its interest and its power in protecting children, rather than on a recognition of the child's inherent right to such protection.⁴³

B. Modern Children's Rights

Two developments in the 1960s sparked the evolution of child law as we know it today: society's recognition of the scope and breadth of child abuse, and the Supreme Court's recognition of children's rights under the law. The first development alerted society to children's need for protection.⁴⁴ The second development firmly rooted children's rights to protection afforded by the United States Constitution.⁴⁵

1. Recognition of Child Abuse

The twentieth century marked the recognition of child maltreatment as a significant societal problem. Child psychology and social work practitioners began to recognize children as a distinct class of people.⁴⁶ Moreover, the publication of *The Battered Child Syndrome*⁴⁷ in 1962,

40. 321 U.S. 158, 166-71 (1944) (reasoning that Massachusetts did not violate the Equal Protection Clause nor the First Amendment's guarantee of religious freedom by exercising its *parens patriae* power to prohibit minors from distributing religious materials).

41. *Gault*, 387 U.S. at 15-16.

42. *Id.* at 17-21.

43. *See id.* at 15-17.

44. *See* 3 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 865-89 (Robert H. Bremner ed., 1974) [hereinafter 3 CHILDREN AND YOUTH IN AMERICA].

45. *Gault*, 387 U.S. at 12-13.

46. OLIVER C.S. TZENG ET AL., THEORIES OF CHILD ABUSE AND NEGLECT: DIFFERENTIAL PERSPECTIVES, SUMMARIES, AND EVALUATIONS 4 (1991).

47. C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

by C. Henry Kempe and his colleagues, marked the development of child abuse as a distinct academic subject.⁴⁸ *The Battered Child Syndrome*, which describes a pattern of child abuse resulting in certain clinical conditions and establishes a medical and psychiatric model of the cause of child abuse,⁴⁹ perhaps more than any other single contribution, led to society's recognition and awareness of the true and significant scale of child abuse.

In fact, this study and others led many states to pass child protection laws authorizing state intervention into the family on a scale previously unknown.⁵⁰ All states now have laws which prohibit maltreatment of children within their homes.

2. Recognition of Children as Persons

The recognition of children's rights, independent of their parents or the state, finally came in 1967. In the landmark case of *In re Gault*,⁵¹ the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁵² *In re Gault*, like *Crouse*, 120 years earlier, involved a petition by a parent for a writ of habeas corpus for an incarcerated child.⁵³

In *In re Gault* the Arizona juvenile court committed Gerald Gault, a fifteen-year-old delinquent, to the state industrial school.⁵⁴ The court performed a typically informal, but kindly, juvenile proceeding, without affording Gault notice of charges, counsel, protection from self-incrimination, or the opportunity to confront and cross-examine his accuser.⁵⁵ The parents argued that the Arizona juvenile code, which permitted this result, violated the Fourteenth Amendment to the United States Constitution.⁵⁶ The Supreme Court agreed.⁵⁷

48. TZENG ET AL., *supra* note 46, at 4 n.45.

49. Kempe et al., *supra* note 47.

50. 3 CHILDREN AND YOUTH IN AMERICA, *supra* note 44, at 880-89; DEFRANCIS & LUCHT, *supra* note 31, at 6.

51. 387 U.S. 1 (1967). Even before *Gault*, the Supreme Court had expressed its displeasure with the juvenile court and its willingness to extend constitutional protection to children. In *Haley v. Ohio*, 332 U.S. 596 (1948), the Court held that the Fourteenth Amendment's prohibition against coerced confessions applied to a fifteen-year-old. *Id.* at 601. In *Kent v. United States*, 383 U.S. 541 (1966), the Court stated that the basic requirements of due process and fairness must be observed in proceedings to transfer a child to adult court. *Id.* at 553-54, 561-62.

52. *Gault*, 387 U.S. at 13.

53. *Id.* at 3-4.

54. *Id.* at 7-8.

55. *Id.* at 5-10.

56. *Id.* at 10-11. The Fourteenth Amendment provides in part:

No State shall make or enforce any law which shall abridge the privileges or

The *Gault* Court reviewed the shortcomings of the then current juvenile court system.⁵⁸ Under that system, juvenile courts reasoned that children could be denied procedural rights because children had no right to liberty, only custody.⁵⁹ Therefore, the lack of procedural protection did “not deprive the child of any rights, because he has none.”⁶⁰ The juvenile courts justified this result by asserting that the State could best care for the child without the distractions of due process.⁶¹

According to the Court, this “led to a peculiar system for juveniles, unknown to our law in any comparable context.”⁶² The Court cited the historical failings of this system and observed that “[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”⁶³ The result of the *parens patriae* system was not enlightenment, but arbitrariness, and denial of due process.⁶⁴

In contrast to the *parens patriae* approach, the Court in *Gault* insisted that “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”⁶⁵ The *Gault* Court held that juvenile proceedings for an adjudication of delinquency (guilt) must meet Fourteenth Amendment Due Process and fair treatment requirements.⁶⁶ The Court specifically included among those rights the right to notice of charges,⁶⁷ the right to confrontation and

immunities of citizens of the United States; nor shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1 (emphasis added).

57. *Gault*, 387 U.S. at 41-42. The *Gault* Court’s extension of due process protection to children was based on the recognition that children are “persons,” although the Court did not explicitly state this finding. *See id.* at 55-59. Two years after *Gault*, in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), the Court explicitly held that children are “persons” under the Constitution and “are possessed of constitutional rights which the State must respect . . .” *Tinker*, 393 U.S. at 511.

58. *Gault*, 387 U.S. at 17-28.

59. *Id.* at 17.

60. *Id.*

61. *See id.* at 15-17.

62. *Id.* at 17.

63. *Id.* at 18.

64. *Id.* at 18-21.

65. *Id.* at 20.

66. *Id.* at 41-42.

67. *Id.* at 33-34.

cross-examination,⁶⁸ the prohibition against self-incrimination,⁶⁹ and the right to counsel.⁷⁰ At last, the law clearly recognized the protected rights of children.⁷¹

The eventual recognition of children as persons under the Constitution had two important effects on the modern development of child law. First, children accused of violating the law received essentially the same rights as adult criminal defendants.⁷² As persons, therefore, children are imbued with certain fundamental constitutional rights, which all state juvenile codes must recognize and protect. Second, the legal system established child protection as an appropriate goal. The law now recognizes children as independent persons, and not merely as the property of their families.⁷³ This recognition imposes substantial limits on a family's authority over a child.⁷⁴ All states now have laws designed to protect children from abuse and neglect at the hands of their families.⁷⁵ In addition, the Child Abuse Prevention and Treatment Act conditions that states must enact mandatory child abuse reporting laws in order to qualify for federal funding.⁷⁶

With the recognition of children as persons under the law, children also have become a new type of client. Because *Gault* only established a juvenile's right to counsel in delinquency proceedings, and because no such universal declaration of the right to counsel exists in protection proceedings, many state child abuse laws require the appointment of counsel or a guardian ad litem⁷⁷ for children in abuse and neglect proceedings. Additionally, courts increasingly appoint counsel for children in private custody proceedings, and some now argue for children's standing in civil proceedings affecting their interests. Children have not attained the legal status of adults in our society, but children, now, do have certain identifiable legal rights. The following section reviews the modern attorney's basic duties to protect the rights

68. *Id.* at 56-57.

69. *Id.* at 55.

70. *Id.* at 41.

71. *Id.* at 30-31.

72. *See id.* at 30-31.

73. *See, e.g.,* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976) (holding that minors have constitutional rights); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

74. *See generally* 3 CHILDREN AND YOUTH IN AMERICA, *supra* note 44, at 849-89 (discussing child protective services and when interference in the family is founded).

75. 3 CHILDREN AND YOUTH IN AMERICA, *supra* note 44, at 884-85 (citing DEFRANCIS & LUCHT, *supra* note 31, at 6-11).

76. 42 U.S.C. §§ 5101-5107 (1988).

77. *See infra* notes 82-85 and accompanying text for a definition and discussion of the role of a guardian ad litem.

of their child clients.

III. THE ATTORNEY'S DUTIES

Attorneys often fail to recognize the development of children's legal rights. This failure creates inadequate or incomplete representation of children by attorneys in our legal system. Once attorneys recognize the substantial body of children's law, however, they should recognize that the traditional requirements of adult representation apply to children. Indeed, the American Bar Association Model Rules of Professional Conduct expressly provide that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁷⁸ Thus, lawyers owe the same basic duty to child clients as they do to adult clients.

A. *Proceedings in Which Attorneys Represent Children*

Attorneys represent children in many various legal proceedings, each type having its own particular implication for the attorney-client relationship. Perhaps the most common representation of children occurs in abuse, neglect and dependency cases, as well as in delinquency⁷⁹ and status offense⁸⁰ cases. Additionally, it is becoming increasingly common for a child to be represented in custody disputes.⁸¹ Other fora for child representation include civil litigation for damages, adoption, guardianship, health care, welfare benefits, and school law.

Often, courts appoint attorneys to represent children in the role of guardian ad litem.⁸² A guardian ad litem is "a special guardian

78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983).

79. Delinquency cases in the juvenile system are the equivalent of criminal cases.

80. Status offenses are non-criminal offenses which are nonetheless unlawful for minors. Curfew violations are an example of status offenses.

81. ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES* § 4.24 (2d ed. 1993).

82. Horowitz, *supra* note 11, § 7.17 (detailing how the traditional attorney's role is modified when functioning as a guardian ad litem). Ann Haralambie summarized the guardian ad litem's role as follows:

The distinguishing feature of the attorney appointed as guardian *ad litem* . . . is that he or she makes decisions in the case based on that attorney's view of what is in the best interests of the child client. The attorney need not be bound procedurally or substantively by the child's expressed desires. In this

appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs."⁸³ Unlike traditional attorneys, guardians ad litem make their decisions in the case based on *their* view of the child client's best interests, and are not bound procedurally or substantively by the child's expressed desires.⁸⁴ Nevertheless, a guardian ad litem should consider the child's wishes and should communicate those wishes to the court even when those wishes conflict with what the attorney believes to be in the best interest of the child.⁸⁵

Each of these areas of child law are specialized and complex, and a child's lawyer should no more be presumed an expert in each area than an adult's lawyer should be presumed an expert in any area of law which involves adults. In addition, an attorney representing a child must understand the substance and procedure of the area of law involved and the resulting effect on the obligation to the child client. The following sections concern the duties of the child's attorney which apply to all forms of child representation.

B. *Ethical Duties of the Child's Attorney*

The highest court of every state regulates the ethical duties of attorneys. Each state has adopted a code of ethics or professional responsibility which governs an attorney's conduct. All states pattern their ethical rules on either the American Bar Association's Model Code of Professional Responsibility or the Model Code of Professional Conduct.⁸⁶ Although the Model Rules of Professional Conduct specifically require attorneys to follow the ethical rules as far as

regard, the attorney acts almost as much as a social worker as an attorney. However, the guardian *ad litem* should consider the child's wishes and should inform the court of those wishes even when they conflict with the guardian *ad litem's* position.

ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY* 6 (1993) (footnotes omitted).

This author, however, does not believe, except to the extent specifically contradicted by the role, that an attorney functioning as guardian ad litem is in any way relieved of the general advocacy duties of the attorney. An attorney guardian ad litem is still an attorney bound by the law and the attorney's codes of conduct. The essential duty of zealous, competent advocacy—whether advocating wishes, interests, or both—remains paramount.

83. BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

84. HARALAMBIE, *supra* note 82, at 6.

85. *Id.*

86. The American Bar Association's ("ABA's") Model Code of Professional Responsibility was adopted in 1969. In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct. The majority of states base their ethics rules on the more current Model Rules.

reasonably possible, many lawyers representing children do not recognize or follow these duties when working with a child client.⁸⁷ The following are ten selected fundamental ethical advocacy rules for the child's attorney.⁸⁸

1. The child's attorney has a duty, as far as reasonably possible, to maintain a normal attorney-client relationship. This duty includes the obligation to zealously represent the child's interests within the bounds of the law.⁸⁹

2. The child's attorney has a duty to provide competent representation.⁹⁰

3. The scope of representation by the child's attorney includes the duty, within reason, to abide by the client's decisions concerning the objectives of representation.⁹¹

87. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983).

88. Each of these duties are adopted from the Model Rules of Professional Conduct.

89. See MODEL RULES OF PROFESSIONAL CONDUCT Pmb., Rule 1.14(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1969). *But see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11, EC 7-12 (1969) (stating that the responsibilities of a lawyer may vary according to the minority or the incompetence of the client).

90. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1), (2) (1969). For further discussion of the duty of competent representation, see *infra* part III.C.1.

ABA Model Rule 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). The Comment to this rule addresses its components—legal knowledge and skill, thoroughness, and preparation. The factors for determining knowledge and skill include "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter . . ." *Id.* Rule 1.1 cmt. 1 (1983). The factors for determining thoroughness and preparation include "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id.* cmt. 5.

The Model Code counterpart is DR 6-101(A)(1) which provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1969). The Model Code requires "preparation adequate in the circumstances." *Id.* DR 6-101(A)(2) (1969).

91. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), EC 7-7, EC 7-8 (1969).

Model Rule 1.2(a) provides that "[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." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). The Model Code counterpart is DR 7-101(A)(1), which provides that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law . . ." MODEL CODE OF

4. The child's attorney has a duty of diligent and prompt representation, and a duty to expedite litigation.⁹² This is particularly critical where placement of a young child is at issue.

5. The child's attorney has a duty of effective and thorough communication with the client. This includes the duty to meet with the client.⁹³

6. The child's attorney shall not communicate about the subject of representation with a represented party without counsel's consent. Likewise, opposing counsel shall not communicate with a represented child without the child's attorney's consent.⁹⁴

PROFESSIONAL RESPONSIBILITY DR 7-101 (A)(1) (1969). For further discussion of this duty see *infra* part III.C.4.

The comment to Rule 1.2 makes it clear that the client has the ultimate authority to determine the course of representation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1983). This duty is, admittedly, complicated when representing children. See *infra* part III.C.4.

92. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.3, 3.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3), EC 6-4 (1969).

Model Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983). The Model Code comparison is DR 6-101(A)(3), which prohibits lawyers from neglecting matters entrusted to them. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1969). Model Code EC 6-4 provides that a lawyer should give appropriate attention to his work. *Id.* EC 6-4 (1969).

Additionally, Model Rule 3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983). The Model Code comparison provides that a lawyer shall not "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1969). This rule is particularly apt for the child's attorney, given the impact of proceedings on child development. This is even more significant where placement of a child is an issue.

93. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a), (b) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, 9-2 (1969).

Model Rule 1.4(a) provides that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (1983). Model Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* 1.4(b). The comment to this rule stresses the need for thorough communication but also states, "fully informing the client according to this standard may be impracticable, for example, where the client is a child . . ." *Id.* 1.4 cmt. 3 (1983). Clearly, the age of the child is critical. Although it will be impossible to inform an infant, and impractical to fully advise a very young child, communication with a teenager should not be neglected because of minority. For further discussion of the duty of communication, see *infra* part III.C.2.

94. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1969).

Model Rule 4.2 and Model Code DR 7-104(A)(1) prohibit an attorney from communicating with a represented party without the consent of the attorney for the

7. Attorneys knowing that a child's attorney has committed a violation of the Rules of Professional Conduct may have a duty to inform appropriate authorities.⁹⁵

8. The child's attorney may not accept third-party compensation unless assured that the payment will not effect the representation.⁹⁶

9. The child's attorney is prohibited from representation which would constitute a conflict of interest. The child's attorney should be sensitive to the age and maturity of the client if waiver of a conflict is an issue.⁹⁷

10. The child's attorney is bound by attorney-client confidentiality and privilege.⁹⁸

C. *Special Considerations for the Child's Attorney*

Ideally, a child's attorney should follow each of the ethical duties in precisely the same manner as the attorney would for an adult client. Practically speaking, however, a child client requires that an attorney take special considerations into account. These considerations include: (1) an understanding child and adolescent development from a psychological and legal perspective; (2) communication, consultation,

represented party. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1969). Attorneys may not, therefore, communicate with a represented child without the lawyer's consent, and the child's attorney may not communicate with other parties (the child's parents, for example) without their attorney's consent.

95. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1969).

Self-regulation of the legal profession requires that attorneys report ethical violations to the appropriate state disciplinary board. Model Rule 8.3 requires an attorney knowing that another attorney or a judge has violated the rules of professional conduct to report the violation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983). The comment to the rule states that this is particularly true where it is unlikely that the client will discover the violation. *Id.* Rule 8.3 cmt. 1. Children are, perhaps, the least likely clients to understand their lawyer has violated a rule.

96. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(A), (B) (1969).

The Model Rules require client consent, freedom from interference of professional judgment, and protection of information. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983). The issue of the payment of attorney's fees for child representation is a long standing problem in children's law and is discussed in greater detail *infra* part III.C.3.

97. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), (C), DR 5-107(B) (1969). For a further discussion of the problem of consultation with a child see *infra* part III.C.1.

98. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 3.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, 5-102 (1969). The problems of confidentiality and privilege are discussed in more detail *infra* part III.C.2.

and confidentiality issues; (3) issues relating to the child-parent relationship; and (4) issues regarding the determination of the objectives of the representation.

1. Understanding Child and Adolescent Development from a Psychological and Legal Perspective

Attorney competence is required in all types of representation, and competent representation requires an understanding of the area of law involved.⁹⁹ As with most types of representation, child law requires some specialized knowledge. Children do not function like adults, and their understanding of the legal system changes throughout their developmental life.¹⁰⁰ The first duty of the child's lawyer, therefore, should be to learn about children.

A sound working knowledge of child and adolescent development, from a psychological and legal perspective, is essential to representing children for the following reasons. First, such knowledge allows attorneys to develop reasonable expectations for their clients.¹⁰¹ Second, such knowledge gives attorneys insight into the child's difficulty in comprehending questions, recalling information, distinguishing facts from fantasy, and expressing themselves. Third, such knowledge assists in determining whether the child is able to testify, and the weight the attorney should give to the testimony. Finally, such knowledge is necessary to enable the child's attorney to function in the legal system, from basic fact finding to communication, testimony, and the resolution of special problems.¹⁰²

In order to be an effective child advocate, an attorney must understand a child's limitations without minimizing the child's abilities. To do so requires an understanding of the basic emotional, motor, and cognitive development patterns of children.¹⁰³ Without this understanding, an attorney cannot adequately communicate with the client, and consequently cannot understand and protect the child's interests. Attorneys have an ethical duty to learn these basics prior to working with child clients.

99. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983); see also *supra* note 90 (discussing ABA Model Rule 1.1 and the duty of competent representation).

100. 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.9 (2d ed. 1992).

101. Overestimating or underestimating your child client's abilities can damage the effectiveness of representation.

102. 1 MYERS, *supra* note 100, §§ 1.2, 2.1, 5.2.

103. For a list of sources which discuss these topics see *infra* app. A. For a list of agencies concerned with children's legal issues, see *infra* app. B.

Likewise, the attorney representing a child in abuse and neglect proceedings must attain knowledge specifically in this field.¹⁰⁴ To some extent, of course, the attorneys may rely on experts to supplement their understanding, but to be effective, child abuse attorneys must actively store knowledge about abuse and neglect.

2. Communication, Consultation, and Attorney-Client Confidentiality Issues

The Model Rules of Professional Conduct require attorneys to communicate with their clients¹⁰⁵ and to consult with their clients in a number of situations.¹⁰⁶ "Consultation" means the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."¹⁰⁷ More importantly, attorneys must preserve the confidentiality of conversations that they have with their clients.¹⁰⁸ Each of these duties presents special considerations when the client is a child.

For an attorney to help a child client, a solid relationship based on real communication must exist. The first step in establishing communication is meeting with the client. Attorneys would not consider representing an adult client whom they have not met, yet lawyers frequently appear on behalf of children whom they have never even seen. Some states require the child's attorney to meet with the child,¹⁰⁹ and it is probably a violation of the attorney-client communication requirements of Model Rule 1.4¹¹⁰ and of Model Code EC 7-8 and EC 9-2¹¹¹ not to do so. But even if it is technically permissible to represent clients without first meeting them, an attorney cannot provide competent representation without client contact.

While meeting with an older child who is capable of clearly articulating his or her position is obviously beneficial, the need and

104. A list of recommended child development and child abuse readings for the attorney is contained *infra* app. A.

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983). Rule 1.4 provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

106. *See, e.g., id.* Rules 1.2, 1.6, 1.7, 1.8, 1.9.

107. *Id.* Terminology.

108. *Id.* Rule 1.6.

109. HAW. REV. STAT. § 587-34(c) (1993); NEB. REV. STAT. § 43-272.01(2)(d)(i) (1993).

110. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) (stating that a lawyer shall keep a client reasonably informed about the status of a matter).

111. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, 9-2 (1969).

benefit of meeting with younger children is no less critical. The Model Rules' Comment to Rule 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur.¹¹² Visiting the preverbal client is also important. Because infants can communicate their wants and needs by their behavior, viewing the child's environment is an important part of the attorney's investigatory duties.¹¹³ Attorneys may also be surprised by the degree to which they more zealously advocate for a child once they have visited.

Although under any circumstance interviewing children can be difficult, such a meeting may be particularly difficult between an attorney and an abused or neglected child. In these situations, it is imperative for the child to trust the attorney and to feel the attorney's empathy. In other situations, it is equally important to hold a child accountable for his or her actions. Attorneys may have difficulty achieving this balance.¹¹⁴

Similar problems arise in situations where attorneys must consult with their child clients. For example, Model Rule 1.7 permits an attorney to represent clients with adverse interests only if each client consents after consultation.¹¹⁵ Consultation requires that the client be able to appreciate the significance of the matter in question.¹¹⁶ However, a young child (or even an older child) may simply be

112. The Comment to Model Rule 1.14 provides as follows:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 1 (1983).

113. The *Handbook of Infant Mental Health* (Charles H. Zeanah, Jr. ed., 1993), is a resource providing insight into what infants tell us by their behavior.

114. For a thorough discussion of meeting with and interviewing children, see HARALAMBIE, *supra* note 82, at 66-78 and Karen J. Saywitz, *Bullying Children Won't Work*, 10 FAM. ADVOC. 16 (1988).

115. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (requiring further that the attorney reasonably believe that the representation will not adversely affect the relationship with the other client).

116. *Id.* Terminology (1983).

incapable of appreciating the significance of the matter in question. The child's lawyer should understand when the child is able to consent and should not take any action based on ineffective consultation.

Another area especially important to the representation of children is the area of attorney-client confidentiality.¹¹⁷ The confidentiality requirement "facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance."¹¹⁸ Difficulties arise because attorneys representing children must elicit these facts from children who are often distrustful of adults. Thus, to properly represent children, attorneys must explain that information the child tells them is so secret that it cannot be revealed to anyone.¹¹⁹

A dilemma occurs, however, when the child reveals information that the lawyer believes must be disclosed to further the best interests of the child, but the child refuses to consent to disclosure. A particularly common situation occurs when the child discloses parental abuse. Although Model Rule 1.6 permits disclosure without consent when necessary to prevent the client from committing a criminal act likely to cause death or substantial bodily harm,¹²⁰ there is no "abuse" exception to the confidentiality requirement. One commentator has suggested that because Model Rule 1.6(b) permits disclosure to prevent clients from seriously harming others, it seems reasonable to

117. A related matter involves when it is proper for a court to compel an attorney to reveal information. The general rule is that if an attorney is acting solely as an attorney, the privilege is protected. Where an attorney is a guardian ad litem, the law is not so clear. The Colorado Court of Appeals has developed a test based on the manner in which the guardian ad litem conducts the representation:

Inssofar as the guardian ad litem chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence, the guardian functions as a witness in the proceedings and, thus, should be subject to examination and cross-examination as to the bases of his or her opinion and recommendation.

If, on the other hand, the guardian ad litem's recommendations are based upon the evidence received by the court from other sources, then they are analogous to arguments made by counsel as to how the evidence should be viewed by the trier of fact. Opinions and recommendations so based and presented are not those of a witness, but are merely arguments of counsel and examination and cross-examination concerning these should not be permitted. *People ex rel. J.E.B.*, 854 P.2d 1372, 1375 (Colo. Ct. App. 1993) (citation omitted).

118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1983).

119. The promise of secrecy must be unconditional. To qualify the explanation by stating that this is true, unless of course "I believe it would be best for you if I were to tell others," confirms the child's suspicions that this adult is no different from all the others and virtually assures that the lawyer will not get full disclosure.

120. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

permit disclosure where others may seriously harm children.¹²¹ Nevertheless, the general rule remains that the lawyer may not reveal information obtained from the child about child abuse without the child's consent.¹²²

The ultimate answer may also depend on the attorney's role. As a general rule, the attorney-client privilege applies to an attorney acting as an advocate.¹²³ When the attorney acts as a guardian ad litem, however, some courts have held the privilege applicable,¹²⁴ while other courts have disagreed.¹²⁵

In any event, attorneys must consider the age of the child client when dealing with all issues of communication and consultation. No matter what the child's age, the attorney has a duty to meet with the child and consult the child whenever possible. As yet, the issue of confidentiality remains unresolved.

3. Issues Relating to the Child-Parent Relationship

In many child law cases, especially those involving abuse and neglect, the child's legal interests directly conflict with those of one or both parents. Even where the child and the parent are not adversaries, the fact that the child is a person, legally independent from the parent, may have implications on the lawyer's duty to the child client. Lawyers must always keep in mind that they represent the child, not the parent.

Children's attorneys, more so than most other attorneys, will often need to communicate with someone other than their client, (i.e., the parents of the children) in the course of their representation. However, the Model Rules may circumscribe the attorney's ability to do so. Model Rule 4.2 prohibits lawyers from communicating with a party represented by counsel without that counsel's consent.¹²⁶ Similarly, Model Rule 4.3 limits an attorney's contact with unrepresented persons.¹²⁷ Although the parents' lawyer will frequently con-

121. HARALAMBIE, *supra* note 82, at 36.

122. Mandatory child abuse reporting laws do not provide assistance because most states' reporting laws do not abrogate the attorney-client privilege. *Id.*

123. *See, e.g., In re Maraziti*, 559 A.2d 447, 451 (N.J. 1989).

124. *See, e.g., id.* at 451 (stating that the attorney-client privilege applies to attorney guardian ad litem).

125. *See Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988) (holding that when the court appoints an attorney as a guardian ad litem, charged with representing the child's best interests, the attorney-client privilege does not apply).

126. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

127. *Id.* Rule 4.3. Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by

sent to the child's attorney having liberal contact with the parents, the child's attorney cannot presume this consent.

Another frequently recurring issue in the child law area involves payment for the attorney's services. Model Rule 1.8(f) prohibits lawyers from accepting compensation for their services from someone other than the client, unless: (1) the client consents after consultation; (2) the payment arrangement does not interfere with the lawyer's professional judgment; and (3) the lawyer continues to protect confidential information from disclosure.¹²⁸ Because children generally do not have the resources to pay their attorneys' fees, Model Rule 1.8(f) is almost always implicated in child law cases. Where the State or some other governmental body pays the attorney's fee no ethical problem exists. Yet, where payment comes from the child's parents, or from some third party, the child's lawyer must clarify the lawyer's duties and responsibilities to everyone involved. One commentator wisely suggests, incorporating the criteria of Model Rule 1.8(f) into the retainer agreement.¹²⁹

4. Objectives of Representation Issues

Another issue that arises with some frequency in representing children is the question of who determines the objectives of the representation. In the traditional attorney-client relationship, Model Rule 1.2 places this determination solely in the hands of the client, with a caveat that the attorney may not assist the client in conduct which the attorney knows to be criminal or fraudulent.¹³⁰ Children's attorneys face a significant dilemma, however, when their view of the child's best interests conflicts with the child's expressed wishes concerning the objectives of representation.¹³¹ In this situation, attorneys face the issue of whether they must represent the child's expressed wishes or the child's best interests. The answer can be complex, and it varies depending upon a number of factors, including: the jurisdiction; the type of proceeding; the particular appointment; and the maturity of the client.

counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id.

128. *Id.* Rule 1.8(f).

129. See HARALAMBIE, *supra* note 82, at 55.

130. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a), (d) (1983).

131. See *In re J.P.B.*, 419 N.W.2d 387, 391 (Iowa 1988).

One solution to this dilemma is for lawyers to use their role as advisors¹³² to persuade their clients to reconcile their express wishes with their best interests. Even attorneys representing adults must occasionally attempt to persuade their clients not to pursue an unwise or utterly foolish course of action. Part of an attorney's duty in representing adults, as well as children, is to reason with the client, to explain why the client made a bad decision, and to present and explain better alternatives.

The law presumes that adults will act in their own best interests once their attorney explains the possible ramifications of their actions. The same reasoning applies to children. If the attorney has established a relationship of trust, and works firmly and compassionately with the child, the attorney can avoid many, if not most, of these conflicts. If the attorney's view of the child's best interests conflicts with the child's wishes, the lawyer should both consider whether the child's wishes are reasonable and whether the attorney truly knows what is best. Simply disagreeing with a client's directive should not, by itself, cause a dilemma. Attorneys may need to compromise their positions as well and must always remain mindful of their role in the system—a role which requires them to advocate a position, and not to determine the outcome. Next, attorneys should invoke their skills as counselors and communicators to help their clients determine the best possible course of action. In the end, there may no longer be a problem. Effective performance by children's attorneys may help avoid many conflicts between the child client's expressed wishes and best interests.

Admittedly, there will be times when reason and hard work fail and the client insists upon a directive which the attorney believes is clearly contrary to the child's best interests. In such cases, lawyers should perform the role for which they were retained or appointed. As a general rule, attorneys represent the expressed wishes of the client

132. The Preamble to the Model Rules of Professional Conduct recognizes that an attorney performs various functions in representing clients:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesman for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

MODEL RULES OF PROFESSIONAL CONDUCT PmbI. (1983). Children's attorneys should be especially conscious of their role as advisors to their clients.

under a traditional model of representation, and attorney guardians ad litem represent the best interests of the child.¹³³ In practice, however, the result is not always apparent. First, courts often fail to clarify whether the attorney is to act as a traditional attorney or as a guardian ad litem. Second, even when acting in a traditional role, in extreme circumstances an attorney may be unable, or unwilling, to comply with the expressed wishes of the child.

In order for children's attorneys to properly resolve this dilemma, they must have a clear understanding of their function. Few states, however, provide such clarification to children's attorneys.¹³⁴ If the jurisdiction and the appointment do not clearly define the attorney's role in a particular case, the attorney should ask the appointing court to precisely define the parameters of that role. Specifically, attorneys should ask the court to clarify whether they represent the best interests of the child or the express wishes of the child, and may also seek guidance on conflict issues.¹³⁵

Finally, if the child asks or directs the attorney to do something regarding an objective of the representation which is clearly contrary to the child's best interests, and all attempts to alleviate the problem have failed, the issue remains of what can be done. For instance, suppose this issue arises when a twelve-year-old female incest victim insists on returning to her father, the perpetrator. The attorney guardian ad litem should clearly advocate for the child's best interests, but should advise the court as to the client's wishes as well. The more difficult situation occurs when the attorney is functioning as a traditional attorney. While the Model Rules require the attorney to advocate the client's express wishes, there may be an exception under such circumstances.

133. See UNIF. MARRIAGE & DIVORCE ACT § 310, 9A U.L.A. 443 (1973) (stating that an attorney representing a child is to advocate the interests of that child with respect to support, custody, and visitation); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (stating that lawyers shall abide by their clients' decisions with regard to the objectives of representation); HARALAMBIE, *supra* note 82, at 6 (explaining that an independent child advocate may be brought to the court to represent the best interests of the child); C. Barr & J. Jerabek, *The Role and Responsibility of the Guardian Ad Litem as an Advocate for Children*, CURRENT ISSUES IN PEDIATRIC LAW, (Nat'l Assoc. of Council for Children eds., 1993).

134. See, e.g., CAL. WELF. & INST. CODE § 317 (West 1984 & Supp. 1995); HAW. REV. STAT. § 587-34 (1993); ME. REV. STAT. ANN. tit. 22, § 4005 (West 1992); NEB. REV. STAT. §§ 43-272 to -272.01 (1993); N.C. GEN. STAT. § 7A-586 (1994); 23 PA. CONS. STAT. ANN. § 6382 (1991); S.C. CODE ANN. §§ 20-7-122, -124, -125 (Law. Co-op. Supp. 1993); WIS. STAT. ANN. § 48.235 (West 1987 & Supp. 1994).

135. For a good sample of a Motion for Clarification of Role, see HARALAMBIE, *supra* note 82, at 4 fig. 1-1.

A number of jurisdictions have issued opinions on this conflict, suggesting options for the attorney facing the dilemma.¹³⁶ Where the child client instructs a traditional attorney to advocate for a particular result, and the attorney believes that such a result is contrary to the clients' best interests, the Massachusetts Committee on Professional Ethics (the "Committee") has suggested that the attorney has three options.¹³⁷ If the attorney believes that the child is competent to make the placement decision, even though the attorney disagrees with it, the attorney should present the client's position.¹³⁸ If the attorney believes the child is competent, but that the position is so inappropriate that the attorney cannot argue for it, the attorney can seek to withdraw.¹³⁹ If the attorney concludes that the client is incompetent to make the decision, the attorney should obtain all possible aid from the client, consider all of the circumstances, and act with care to safeguard and to advance the child's interests.¹⁴⁰ The Committee also suggested that the attorney may seek the appointment of a guardian ad litem, but must not advocate for such an appointment over the client's objection merely because of a difference in views.¹⁴¹

The dilemma created when a child client's wishes conflict with the attorney's perception of the child's best interests is probably the most difficult component of representing children. In many ways, it is this difficulty which requires the child's attorney to clearly understand his or her role in the representation. When retained to represent the child, the modern children's attorney has an obligation to zealously advocate the child client's position. Otherwise, the child is deprived of full representation. Ironically, in extreme situations, this advocacy can result in harm to a child.

No easy solution exists. Clearly, however, the best solution is for the child client to realize that his or her directive is inappropriate after consulting with the attorney. In the end, however unimaginable, an

136. *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985) (discussing the conflict between the role of guardian ad litem and attorney for a lawyer representing an incompetent adult); ARIZONA STATE BAR COMMITTEE Op. No. 86-13 (1986).

137. MASSACHUSETTS BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, Op. No. 93-6 (Cum. Update No. 2, June 18, 1993).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*; see ARIZONA STATE BAR COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, Op. No. 86-13 (1986) (providing that where there is a conflict between wishes and interests, the lawyer should follow the wishes and move for appointment of a new guardian ad litem).

attorney may be required by law to take action which is likely to harm the child client.

IV. CONCLUSION

We have created procedures within our legal system designed to ensure children certain fundamental rights and to protect them from harm. The same legal system of advocacy which adjudicates the rights of adults—a system based on the belief that justice will result from able counsel zealously advocating the competing interests of their clients—applies to children equally as well. Decisions rendered in this system are only as good as the information upon which they are based, and under-represented parties, whose cases are not adequately pled, cannot expect to obtain justice. Children will not receive adequate representation without competent, independent legal counsel, zealously advocating their interests. Children have a right to be healthy and safe. More than any other class of client, however, children often lack the capacity to ensure that the legal system protects these rights. The protection of these rights is the duty of the child's attorney.

APPENDIX A

RECOMMENDED CHILD DEVELOPMENT AND CHILD
ABUSE READINGS FOR ATTORNEYS

- Donald C. Bross & L. Leslie Michaels, National Ass'n of Counsel for Children, *Foundations of Child Advocacy* (1987).
- Samuel M. Davis, *Rights of Juveniles* (2d ed. 1980).
- David Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986).
- Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973).
- Ann M. Haralambie, *The Child's Attorney* (1993).
- Ray E. Helfer & C. Henry Kempe, *The Battered Child* (4th ed. 1987).
- C. Henry Kempe & Ray E. Helfer, *Helping the Battered Child and His Family* (1972).
- *Legal Rights of Children* (Robert M. Horowitz & Howard A. Davidson eds., 1984).
- John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (2d ed. 1992).
- National Council of Juvenile & Family Court Judges, *Child Development, A Judges Reference Guide* (1993).
- Mark T. Soler, *Representing the Child Client* (1987).
- Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad litem*, 13 Cal. W. L. Rev. 16 (1976).

- Tara L. Muhlhauser, *From "Best" To "Better:" The Interests of Children and the Role of the Guardian Ad litem*, 66 N.D. L. Rev. 633 (1990).
- National Association of Counsel for Children, *The Guardian* (published quarterly).

APPENDIX B

NATIONAL CHILDREN'S LAW ORGANIZATIONS

- National Association of Counsel for Children
1205 Oneida Street
Denver, CO 80220
(303) 322-2260

- ABA Center on Children and the Law
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-2250

- National Council of Juvenile and Family Court Judges
1205 Oneida Street
Denver, CO 80220
(303) 322-2260

- Youth Law Center
114 Sansome Street, Suite 900
San Francisco, CA 94104
(415) 543-3379

- National Center for Youth Law
114 Sansome Street, Suite 900
San Francisco, CA 94104
(415) 543-3307

