

DECIDING DESTINIES

The Lawyer and the Young Client's Directives

The U.S. Perspective

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Family Law and the Rights of Children

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“Real moral dilemmas are ambiguous, and many of us hike through them unaware that they exist.” McCoy, “The Parable of the Sadhu,” Harvard Business Review, Sept/Oct 1983

United Nations Convention on the Rights of the Child Article 12:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

- the first international instrument which explicitly states that children have a right to “have a say” in processes affecting their lives. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff Publishers, Dordrecht, 1992, p.

The emergence of the right to be heard

In Re Gault, 387 U.S. 1 (1966): [a] juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. 387 U.S. 36.

In the wake of *Gault*, U.S. lawyers began to argue for the independent representation of children generally. Coyne, “Who Will Speak for the Child,” *Annals of the American Academy of Political and Social Science*, 383 (May 1969), pp. 35 – 47, arguing that a child should have a separate attorney in care and custody proceedings; Hansen, “Guardians ad Litem in Divorce and Custody Cases; Protection of the Child’s Interests,” 4 *Journ. Of Fam. Law* 181 (1964), where the author, a family court judge in Wisconsin, a state which led the U.S. in encouraging independent representation for children, arguing in favor of routine appointment of legal representatives for children;

Note as well the UN Declaration on the Rights of the Child, 1959, and the civil rights revolution which the U.S. was undergoing at the time.

By the mid-1970’s in the U.S. the right to independent representation gained even more impetus with Congressional passage of the Juvenile Justice and Delinquency

Prevention Act, P.L. 93-415 (1974), and the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, (1974). The latter required that every child in a child welfare proceeding in court have a guardian *ad litem* as a condition of funding to the states. Both acts created a system of grants in aid to the states, conditioned upon those states complying with certain terms of the acts.

These developments in the U.S. also provided the impetus for the development of standards of legal representation in the juvenile court.

In 1976, the U.S. National Advisory Committee on Criminal Justice Standards and Goals published far-reaching suggested standards on the operation of the juvenile justice system in the various states and territories. The standards contained a section devoted to “The Child Advocate,” within the defense function of the juvenile court, with suggested guidelines for the performance of counsel. These included recommendations for counsel representing a juvenile accused, and in addition, counsel representing children said to be endangered by reason of abuse or neglect. The guidelines governed counsel representing a child said to be incompetent, or counsel appointed as guardian *ad litem* for such a child. Importantly, the standards cautioned against assuming a child lacked capacity for a normal attorney-client relationship.

In 1982 the U.S. National Advisory Committee on Juvenile Justice and Delinquency Prevention published its own version of comprehensive standards for the juvenile court. It likewise addressed the role of counsel in representing the juvenile accused, as well as children who were abused or neglected. These standards likewise recommended that children for the most part be considered competent to make decisions on their own behalf about litigation involving them. The guidelines for both groups, however, recommended the appointment of a guardian *ad litem* for a child who was thought to be incompetent.

In 1979, together with the Institute for Judicial Administration, the American Bar Association also approved a comprehensive set of standards for the operation of the juvenile justice system in the U.S., to include the juvenile court’s function in abuse and neglect proceedings. Under its standards governing performance of counsel representing private parties, that is, parents or children, the ABA standards addressed the lawyer – client relationship:

3.1(b) Determination of client’s interests.

(i) Generally.

In general, determination of the client’s interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

(ii) Counsel for the juvenile.

[b] Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her own behalf, determination of the client’s

interest in the proceeding should ultimately remain the clients' responsibility, after full consultation with counsel.

IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties, Standards Relating to Counsel for Private Parties.

The commentary to the recommended standard anticipated that a determination that a child was considered to be incapable of considered judgment, would be the exception rather than the rule.

The divergence of the lawyer's role in delinquency and dependency proceedings

As the role of counsel for a child accused of a crime became more defined, the role of counsel as a guardian *ad litem* for an abused or neglected child remained amorphous and ill-determined. This was especially exacerbated by the advent of volunteers relied upon by U.S. family courts to augment, or even supplant, the use of lawyers to represent children in these proceedings.

The divergence was even more pronounced as the family courts came to rely on guardians *ad litem* in child custody cases.

In time, U.S. courts came to view the role of the attorney serving as a guardian *ad litem* as a hybrid, merging the duties of a lawyer who was to investigate the youngster's circumstances and advocate, not for the child, but for the child's "best interests." *See, e.g. Leary v. Leary*, 97 Md.App. 26, 627 A.2d 30 (1993), holding that, between the schools of thought on the one hand which consider a child's preference as a factor to be considered, and the other school which endorses full advocacy of the child's preference, there is an intermediate view in which counsel serves in a "continuum of roles rather than the extremes of advocate and fact-finder," citing *Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1141 (1978). *See also, In Re Marriage of Barnthouse*, 765 P.2d 610 (Col.App. 1988), holding that the role of an attorney in custody cases is to recommend those alternatives in the "best interest" of the child, and not simply to "parrot" the child's express wishes.

By the mid-1990's, U.S. lawyers became disenchanted with the lack of clear guidance regarding their duties to their young clients in child welfare and child custody cases. *See, e.g. Lidman and Hollingsworth, The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 Geo. Mason L.Rev. 255 (1998). This was also fueled by emerging disgruntlement among parents and other adult litigants who felt victimized by the lack of definition of these intruders who represented their children. *See, e.g. Jones, Guardians ad Litem: Minnesota's Response to the Growing Dissatisfaction with a "Friend," 17 Hamline J. Pub. L. & Pol'y 427 (1996)*, describing that state's response to the criticisms of guardians *ad litem*, often referred to as a "next friend."

As a result, U.S. lawyers began developing principles and standards of conduct to more clearly define the role of an attorney representing a child in the U.S.

The Ethical Background in the U.S.

Ethical Considerations - ABA Code of Professional Responsibility (1969):

EC 7-11: The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding...

EC 7-12: Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities on his lawyer...If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client...

ABA Rules of Professional Conduct Model Rule 1.14 Client Under a Disability (1982):

(a) When 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.

Comment: [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 regarding their custody.

ABA Ethics 2000 Revisions:

A reassessment of the model rules by the ABA in the year 2000 altered the language to address the representation of a client said to have diminished capacity rather than a client under a disability or impairment, including the disability of age. The revisions also struck the sentence in the commentary expressing that the law recognizes

“intermediate degrees of competence,” with its inference that competence was capable of gradation.

The revisions also allow a lawyer to take protective action with regard to such a client if the lawyer “reasonably believes” that the client is “at risk of physical, financial or other harm.” The protective action might include consultation with others and the appointment of a legal representative for the client, such as a guardian ad litem. ABA Model Rule 1.14(b).

The 1995 Fordham Conference on Ethical Issues in the Representation of Children

This conference, held December 1-3, 1995 at Fordham University in New York, invited a stellar collection of lawyers and academicians from around the U.S. to review and examine the state of the art in representing children in U.S. courts. The conference resulted in a number of recommended guidelines for the appointment and performance of counsel representing children, and as well as recommendations for further study.

The report is found at 64 Fordham L. Rev. 1 (1996), and includes a number of useful and thoughtful journal articles on various aspects of representing children. Among its key recommendations:

The lawyer should assume the obligations of a lawyer, irrespective of the nature of the appointment.

The conference recommended that U.S. laws which allowed the appointment of an attorney in some other capacity, such as a guardian *ad litem*, should be eliminated. It urged attorneys who were appointed in a capacity other than as a lawyer should assume the ethical responsibilities of an attorney, and avoid appointment as both guardian *ad litem* and counsel. Even then, the attorney should elect to serve as counsel.

The lawyer for a child who has the capacity to direct the representation should set the goals of representation for the lawyer as would an adult client.

The conference generally recommended that the lawyer communicate with the young client routinely, see the client in the child’s surroundings, and carefully review with the client the nature of the proceedings and the goals and options available to the young client.

It specifically recommended that lawyers representing a child determine whether the young client was capable of reasoned decision-making, with a presumption in favor of finding the child to have that capacity, unless there was independent evidence to the contrary. It urged lawyers to fully investigate the client’s circumstances, and to seek guidance from other persons or professionals involved in the child’s life. Determinations of capacity should take into account:

- the child’s development;

- the child's expression of a relevant position;
- the child's individual ability to make decisions free of coercion or influence, and with consistency;
- the child's ability to understand consequences.

It also cautioned lawyers representing children to be on guard for cultural or ethnic bias, remembering that choices which might appear irrational on the surface might be rooted in the child's background, and that lawyers should be respectful of that background.

If the child is preverbal or otherwise lacks capacity, the lawyer should make decisions for the child only by exercising extreme caution, and by employing a structured decision-making protocol.

The conference observed that lawyers representing children, and particularly very young children, currently exercised far too much discretion in making decisions on behalf of the client, and that decision-making on behalf of such a child should take into account the context of the child's life and in be conducted in a principled way. The protocol is summarized as follows:

- While a child may have a universe of needs, the lawyer should narrow the child's interests at stake to those which are the legal interests before the court or forum.
- The lawyer should focus on the young client in the context of the child's life, eliciting as much detail as possible to include whatever verbal or implied communication the client may be capable of.
- The lawyer should take into account the child's behavior, development and living circumstances presently – a "snapshot" of the child's life, to be updated with the client.
- The lawyer should evaluate the options realistically available to the child, including those which might require the extension or modification of existing law.
- Those options should take into account the views of other disciplines.
- The lawyer may wish to rely on other experts for consultation in identifying what legal interests to pursue, keeping in mind those experts may not share the duty of the lawyer to the client.
- If there is no definitely preferable option to suit the young client's legal interest, the lawyer should nonetheless urge upon the tribunal any

preferences the child can express, and marshal the evidence in favor of the options which may still serve the child's legal interest.

Confidentiality

Confidentiality of communication is essential to the lawyer client relationship and the conference offered recommendations on that subject as well. It recommended that a lawyer representing a child comply with the rules of professional responsibility, maintaining the principle of confidentiality and that counsel explain the notion of the principle, and its exceptions in a detailed, understandable way.

The conference did, however, recommend for further study whether the ABA Model Rules of Professional Conduct should be amended to allow the lawyer to disclose confidences to prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the young client, and whether lawyers should be classified as mandatory reporters of suspected child abuse or maltreatment.

Guardians ad Litem

Recognizing that lawyers in the U.S. might nonetheless be called upon to serve as guardians *ad litem* for children, the conference recommended that any such appointment clearly identify the role which the lawyer is required to serve, with its attendant responsibilities.

Any lawyer serving in a capacity requiring that the lawyer advance the child's "best interests" should engage the child with candor, explaining the role of the lawyer as the child's legal representative, with its attendant limitations. As a part of the duty of communication with the child, the lawyer as guardian *ad litem* should also exercise care with regard to allowing others to participate in interviews with the child, whether to rely on other experts, and whether to refer the child to an independent evaluation.

The lawyer as guardian *ad litem* should alert the child to the fact that the lawyer may advocate what the attorney considers best for the child, and not the child's desired outcomes. The lawyer should also caution the young client about the limits of confidentiality in such a context.

The conference did, however, recommend that a lawyer as guardian *ad litem* exercise at least some discretion about disclosure of the child's communications and strive to protect the client's confidences. The conference likewise recommended that rules of evidence in U.S. courts create a privilege for a guardian *ad litem* in legal proceedings utilizing a guardian *ad litem* to represent a child.

ABA Standards of Practice for Lawyers Who Represent Children In Abuse and Neglect Cases

Almost simultaneously with the publication of the Fordham colloquium, the American Bar Association took up the role of the attorney in child protection cases. The standards approved by the ABA were not so much the result of the Fordham recommendations as they were coincidental with the trends which emerged at the Fordham conference, shaped by many who were conference participants.

The standards purport to build upon the ABA Juvenile Justice Standards Relating to Counsel for Private Parties, while providing more sufficient guidance for attorneys representing children in child abuse and neglect cases. The standards also stress that attorneys appointed in such proceedings, including those appointed in the dual role of attorney and guardian *ad litem*, should perform the functions of a child's "attorney," with a primary duty to protect the legal rights of the child client.

The standards eschew the notion that children of certain ages may be "impaired," "disabled," "incompetent," or otherwise lack capacity to determine their position in litigation. Instead, the standards urge that the child's capacity must be evaluated in context, and that the child may have capacity which is intermittent, or have capacity with regard to certain decisions and lack it in others. *Commentary*, B-3. Client Under Disability.

The ABA standard regarding deference to the child client's preferences are as follows:

B-4. Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

- (1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request the appointment of a guardian ad litem.
- (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.
- (3) If the child's attorney determines that the child's express preference would be seriously injurious to the child (as opposed to being merely contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's express preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of

the request for appointment of a guardian ad litem would compromise the child's position.

The standard is accompanied by an extensive commentary, and emphasizes the following.

First, the lawyer, as with any client, has a responsibility for counseling the client, and this extends to providing the young client with adequate information and explanation about the proceedings, the potential consequences, and the alternatives realistically available. The lawyer has on the one hand a duty to ensure the child client has the information necessary to make an informed decision, including advice and guidance, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the young client to accept a particular position or result, the lawyer may not advocate a position contrary to the child's express position unless there are specific exceptions justified by the standards or the rules of professional ethics. As for those situations in which the young client may insist on a course of action which may be injurious to the child, such as returning to a home which may be unsafe or dangerous, the commentary urges that in most cases the ethical dilemma may likely be resolved through the lawyer's function as counselor, particularly where the lawyer has established rapport, by persuading the child to abandon the course of action or by identifying an alternate course.

The standards presuppose that a lawyer serving as attorney for the child in a child protection proceeding will be bound by the rules of confidentiality and attorney-client privilege.

National Association of Counsel for Children Recommendations For Representation of Children in Abuse and Neglect Cases

The National Association of Counsel for Children is a U.S. organization which has grown in stature and membership since its inception in 1977. Initially an outgrowth of interest in child abuse and neglect supported by the Kempe Center, its focus is now more broadly extended to juvenile justice as well as other legal proceedings affecting children and young people in the U.S.

In April, 2001 the Association endorsed its own set of principles for attorneys appointed to represent young clients in abuse and neglect proceedings. [Role and Duty]

Recognizing that U.S. courts still rely on lawyers to serve as guardians ad litem or in other hybrid roles in such cases, the NACC standards categorize various methods of the legal representation of children in these cases in two more or less distinct models: the traditional client-directed model, in which the lawyer relies on the young client's expressed wishes; and the advocate-directed model, in which the lawyer determines and advances the child's best interests. The NACC standards then analyze both models of representation by categorizing what it terms the three forms of representation of children in the U.S. under each model, and discussing the strengths and weaknesses of each.

Under what it terms the advocate-directed model, the NACC identifies three versions:

The Attorney Guardian ad Litem Hybrid Model: this approach relies on an attorney appointed as guardian ad litem for the child, in which the lawyer may elicit the young client's views as to the outcome of the matter, but is charged with formulating the child's "best interest" and advancing that before the court. The NACC estimated that about 60% of U.S. states rely on this model.

The Lay Guardian ad Litem Model: this version relies upon lay volunteers appointed to represent the child, identify the "best interest" of the child at stake in the proceedings and submit recommendations said to advance that interest to the court. The prototypical version is represented by the use of "court appointed special advocates" or CASA's, which has a national organization in the U.S. The NACC standards discourage this as an exclusive model, urging instead that these lay volunteers be assisted in every case by legal counsel. The NACC identified three states using this model.

The "Two Distinct Lawyer Roles" Model: this model, used by Michigan, relies on a lawyer appointed as guardian ad litem to represent the child, unless the child is thought to be sufficiently mature to deserve an attorney in the traditional sense. The lawyer appointed as guardian ad litem under the Michigan statute nonetheless enjoys the attorney client privilege, and prescribes aggressive duties for the lawyer-guardian ad litem. The lawyer appointed as guardian ad litem is under an obligation to inform the court of the child's position in the matter irrespective of whether the lawyer-guardian ad litem agrees with it as being in the child's "best interest."

Under what it characterizes as client-directed representation, the NACC standards likewise identify three models:

Traditional Attorney: this model relies upon an attorney representing a child as any other client, including the professional obligation to take direction from the young client, advocate the clients' position to the court, irrespective of the attorney's own view of the client's ultimate interests, and respect the confidences and secrets of the child client. As the NACC notes, the lawyer in this role nonetheless retains a function as counselor, advising the young client as to the options available, and may only advocate based on the evidence and the applicable law. The NACC identified two states which rely on a form of this model, albeit with the assistance of a guardian ad litem in some instances.

The Child's Attorney (ABA Standards Model): this model relies upon the lawyer in a more specialized role peculiar to the needs of the child as client with the same duties of undivided loyalty, competence and confidentiality due an adult. The NACC summarizes the ABA approach to identifying the client's preferences and directives, as described above, including its protocol for the very young client. The NACC identified no state using this model as of its report in 2001.

The Child's Attorney (ABA/NACC Model): this version relies on the ABA model in large part, except as it regards the direction of the young client, which the NACC believes accords too much autonomy to the child client. Instead, the NACC urges that in some instances, the attorney should rely upon a determination of the interests of the child client utilizing objective criteria. No jurisdiction was found to rely upon this version either, as of the date of the report.

The NACC standards stress certain principles of representation irrespective of the model used in any jurisdiction, in all child abuse and neglect cases.

These principles include the opportunity of the young client to present the child's positions to the court, through counsel (Standard III A 3); the right to confidential communications with counsel (Standard III A 4); and meaningful communication with the attorney (Standard III B 2).

Significantly, the NACC standards also urge attorneys representing children in these proceedings to be aware of certain values important to the child in such litigation. Under what it includes under "Advocacy Issues" at Standard III C, the NACC identifies four essential needs of children in such cases.

- Children need permanence, placing a duty on the lawyer to advocate for timely and permanent resolution of the proceedings.
- Children have immediate and basic needs to be met, including food, shelter, clothing, medical care, education and safety (to include a safe temporary placement if necessary).
- Children need family relationships, imposing a duty on counsel to advocate for continuation of family relationships and family preservation services where appropriate.
- Children need to be protected from unnecessary harm which may result from the legal process.

Children and divorce

Lawyers in the US have also attempted to formulate guidelines for those who represent children in divorce and custody cases. Perhaps the earliest formal attempt was that by the American Academy of Matrimonial Lawyers. That group is dominated by attorneys who typically represent the adults in the domestic relations courts, and the formulation was doubtless fueled by the increasing reliance on independent representatives for children in the divorce process, something that many matrimonial lawyers resent or oppose. That professional bias influences the guidelines, which were adopted by the group in November 1994. Another influence was that of the draftsman, Professor Martin Guggenheim, who has argued that children in the U.S. do not

necessarily need independent legal representatives to have their interests adequately protected by the courts. *See, Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76 (1984).

To begin with, the America Academy standards advise against the routine appointment of an independent legal representative for a child in custody or visitation proceedings, urging that selection of such a representative instead occur either when the parties request one, or the assignment of a legal representative by the court after a hearing to determine whether one is necessary.

The standards address the role of counsel appointed as attorney for a child, and seem to prefer the appointment be considered as the appointment of an attorney, rather than a guardian ad litem, a role the standards also address.

The standards urge that children be classified either as “impaired” or “unimpaired” in the litigation. A child is considered “impaired” if the youngster is under the age of 12, a so-called bright line. (This is consistent with Professor Guggenheim’s philosophical approach adverted to above.) The age of 12 is merely presumptive; a child may be considered unimpaired if younger, and it is for the lawyer to determine the child’s status as “impaired,” not for the court. Conceivably, a child older than 12 might be considered “impaired” if the child’s counsel so determines, in the lawyer’s discretion.

The standards recommend that counsel for an unimpaired child treat the young client as any other, maintaining a normal client relationship.

Standard 2.4: Unimpaired clients, regardless of age, have the right to set the goals of representation. Counsel for an unimpaired client should discuss the case with the child and counsel him or her with regard to the objectives of the litigation. Counsel is obliged to seek to attain the objectives of representation set by the client.

With regard to “impaired” children, that is, one by virtue of impairment who is unable to set the goals of representation, the lawyer is not to advocate a result or recommendation on behalf of such a child. *Standard 2.7.* Instead, the lawyer is to make the court aware of all facts the court should consider in making a decision about custody or visitation, and the lawyer is to refrain from arguing a position to the court. *Standard 2.13.* Counsel is, however, to make the court aware of the child’s preferences, even though considered impaired, unless the child requests otherwise. *Standard 2.13(b).*

Counsel is to maintain a normal attorney-client relationship with the child, irrespective of the child’s status as impaired, “to the greatest extent feasible,” to include making the child aware of the role of counsel and significant developments in the case, in ways which are comprehensible to the child. *Standard 2.8.*

Significantly, the Academy standards also attempt to define and limit the role of a guardian ad litem appointed to represent a child in a custody or visitation case. The

standards anticipate that a non-lawyer may be appointed to represent a child in such a case. If the person appointed is a lawyer, the lawyer is to adhere to the duties outlined in the foregoing guidelines, as if appointed as counsel rather than as a guardian ad litem. In this way, the standards reject the hybrid role of guardian ad litem and legal counsel for the child. *Commentary, Standard 3.1.*

The standards would circumscribe the role of a non-lawyer appointed as guardian ad litem, primarily by prohibiting a guardian ad litem to offer recommendations to the court as to the outcome. In this way, the Academy attempts to avoid the quandary presented by notions of substituted judgment – the assumption that an adult, irrespective of professional status or otherwise, may make decisions as a surrogate for the child.

Under the Academy’s view, a guardian ad litem is to communicate with the child by explaining the role of the legal representative and by informing the child of any significant developments. While the guardian ad litem is also charged with the obligation to bring all relevant facts to the court’s attention, there is apparently no duty to make the court aware of the child’s preferences. *Standard 3.8.*

The Academy standards make no mention of a duty of confidentiality or privilege. Presumably, the standards retain the privilege for the young client and the lawyer, whether the child is said to be impaired or unimpaired. The standard regarding the lawyer appointed as guardian ad litem is unclear; in a footnote, the commentary suggests that lawyers appointed in this capacity are not bound by the ordinary constraints of the rules of ethics.

ABA Standards of Practice for Lawyers Representing Children In Custody Cases

In August, 2003 the American Bar Association approved its version of standards for attorneys representing children in custody and visitation disputes.

The ABA standards eschew any reference to a guardian ad litem, and completely jettison both the term and the orthodox role of a guardian ad litem as one empowered with unfettered discretion to exercise substituted judgment.

Instead, the standards create two classifications of lawyers for children in domestic relations cases: the “child’s attorney,” and the “best interests attorney.”

“Child’s Attorney”: A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

“Best Interests Attorney”: A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

Standard II.B

The Child’s Attorney

A lawyer serving as the child’s attorney is to take on the traditional role of counsel, treating the child as any other client. The attorney is to abide by the child client’s decisions regarding the objectives of the representation and pursue those objectives expressed by the child unless the child requests otherwise. *Standard 4.C.*

The standard anticipates that a child may be competent to formulate objectives on some issues and not others. In that regard, the attorney is to make a determination, however, as to whether the child may have diminished capacity, consistent with the revised Model Rules of Professional Conduct, to make decisions about any particular issue before the court involving the child.

If the child does not express any directives about the issues before the court, the attorney is to make a good faith effort to explore the child’s wishes and advocate those to the court if possible. If the child is simply incapable of expressing objectives of representation, such as a child who is preverbal, the attorney in this role is to determine the child’s legal interests and press those before the court, or instead ask that a “best interest” attorney be appointed for the child. *Standard 4.C.2.*

As the commentary explains, a child’s legal interest is any interest traditionally recognized in law, such as the entitlement to education, medical care or support, or maintenance of family relationships. This also includes the child’s right to due process of law. In no event is the lawyer to act contrary to any expressed desire or directive of the child.

The standards also provide that where the child’s expressed directives might put the young client at substantial risk of physical, financial or other harm, and are not merely contrary to the lawyer’s own opinion of the child’s interests, the attorney may seek the appointment of a “best interests” attorney and continue to advocate the child’s expressed desires nevertheless. *Standard 4.C.3.* The standard cautions, however, that the lawyer is not to disclose the reason for the request for the appointment of a best interests attorney unless otherwise permitted by the lawyer’s rules of ethics.

The commentary points out that this standard is aimed at addressing the quandary presented by a child whose expressed desires may conflict with an apparent danger presented by the choice. The classic example, as alluded to in the commentary, is the abused child who expresses a desire to return to a home which may be unsafe. The commentary does urge that the lawyer attempt to resolve such a conflict through the

counseling function of the attorney – client relationship. Otherwise, the lawyer has the discretion to seek protective action for the young client consistent with the Model Rules of Professional Conduct.

With regard to the attorney – client privilege, the standard requires an attorney in this role maintain the traditional rule of confidentiality required by the lawyer’s ethical duties.

The Best Interests Attorney

An attorney serving in this role for a child is constrained to advocate the young client’s interests before the court based on objective criteria established by the law relevant to the issues before the court. *Standard V.f.1.* As the commentary explains:

Determining a child’s best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child’s interests will generally be stated in a state’s statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child’s desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

The commentary goes on to observe that such a lawyer is serving in a non-traditional role, determining a position to be advocated independent of the client. Serving in this role, the commentary urges that counsel make such determinations on the basis of objective criteria and the young client’s recognized needs, with the advice of experts and others who might have knowledge about the child’s circumstances.

The standard for an attorney serving in this role does require that counsel bring to the attention of the court any expressed desires or preferences of the child with regard to custody or visitation, unless the child requests otherwise. *Standard V.f.3*

With regard to confidentiality, a lawyer appointed to advance the child’s best interests is nonetheless bound by the lawyer’s ethical rules of confidentiality, except that the lawyer may utilize the young client’s confidences to advance the child’s interest, without disclosing them. *Standard V.B.* This may not actually represent a departure from the modern ABA rule; as the commentary points out, ABA Model Rule 1.6(a) governing privileged communication allows the lawyer to disclose communications which are “impliedly authorized” by the representation.

The standards impose certain duties on attorneys representing children irrespective of their roles. The lawyer is to be independent and to be allowed to exercise independent professional judgment. *Standard III.C.* The lawyer is not to testify, author a

report or make a recommendation, as distinct from advocacy before the court. *Standard III.B.*

Whether the lawyer is serving as the child's attorney, or as a "best interests" attorney, the lawyer is to meet with the child, explain the attorney's obligations to the child and the court process, and elicit and assess the child's views, communicating with the child in an understandable way. *Standard III.E*

Conclusion

The central themes which have emerged in the U.S. over the preceding forty years of development are these. First, lawyers in the U.S. representing children wish primarily to be treated as lawyers, without being burdened with responsibilities they perceive as beyond their expertise. Second, and that said, lawyers in the U.S. remain uncomfortable as well with the responsibility for making surrogate decisions for young clients, and especially the very young client, who cannot participate in a traditional client relationship, and who may be put at risk by decisions made by the lawyer. Third, lawyers in the U.S. wish to retain the attorney – client privilege with their young clients, with limited exception for disclosure.