American Academy of Matrimonial Lawyers

Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary[1]

Prefatory Note

In 1994, the American Academy of Matrimonial Lawyers published standards for the representation of children in custody and visitation cases. We did so because members of the Academy had been witnessing a significant trend toward the use of representatives assigned to children in these cases but also had observed that the expectations of what representatives were to do varied widely and, too commonly, were unclear to all parties and even the court. Believing, above all else, that clarity of role would contribute substantially to the administration of justice, the Academy issued its Standards to help clarify what children's representatives should and should not do when assigned by courts.

Since the Standards' publication, the use of children's representatives has increased nationally. Moreover, two major efforts to develop additional standards for these representatives have been promulgated, first by the American Bar Association (ABA),[2] and, more recently, by the National Conference of Commissioners on Uniform State Laws (NCCUSL).[3]

For several reasons, the Academy decided that it should revisit its 1994 work. Since the Academy's Standards were published, the ABA has revised the Model Rules of Professional Conduct and made significant language changes which bear di-

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[1] Approved by the Board of Governors of the American Academy of Matrimonial Lawyers on March 20, 2009.

[2] AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES (2003), *available at* http://www.abanet.org/family/reports/standards_childcustody.pdf [hereinafter ABA STANDARDS].

[3] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf [hereinafter NCCUSL ACT].

rectly upon the Standards.[4] Moreover, the two national efforts promulgated after the Academy's deserve to be considered in light of the Academy's initial work. For these reasons, the Academy decided in 2006 to revisit the Standards and publish revised Standards.

Founded in 1962, the American Academy of Matrimonial Lawyers is a professional organization comprised of more than 1,600 lawyers throughout the United States. We have considerable experience and expertise in the area of custody litigation. We are pleased that other organizations have also focused on this important field of practice. This national attention reaffirms our decision more than 15 years ago to single out this aspect of practice and promulgate specific standards and guidelines for courts throughout the country. We have modified our original Standards in light of, and in response to, these more recent efforts and actual experience. We hope and expect this dialogue to continue for some time.

Introduction

To an important extent, the growing call for greater use of lawyers for children in custody cases is based on an implicit criticism of how such cases are being processed. We believe making such criticisms explicit is useful before addressing when to encourage using children's lawyers and before defining what their roles should be. Although both the ABA Standards and the NCCUSL Act discuss the various roles children's lawyers might perform, neither addresses the critical initial analysis of determining whether and, if so, how current matrimonial practice fails adequately to resolve familial disputes.

We begin with a brief assessment of current practice in this field. As the leading professional organization with expertise in matrimonial dispute resolution through contested court matters, we are familiar with the myriad of problems associated with these matters. Public investment in courts has diminished over the past generation during a period when the volume of cases has vastly increased. Court personnel are too often underpaid and understaffed, and, frequently, inadequately trained. This has made it increasingly difficult to attract and maintain high quality

[4] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

personnel to work in the court system. In addition, a generation ago, in many jurisdictions, there were ancillary arms of the court process, including departments of probation and forensic units, which could be expected to investigate cases independently and quickly in order to provide courts with neutral and meaningful reports. Too often today these services are unavailable or have become cookie-cutter tools, failing to provide insightful and reliable information.

As a consequence, a vast, privately funded system has replaced this public one in cases where parties have considerable wealth. However, this has created a myriad of problems. First, the costs associated with completing cases involving clients with significant disposable income have raised to an extremely high level. Well beyond the cost of counsel for both parties, the use of a multitude of ancillary professionals, including parenting coordinators, referees, facilitators, forensic experts, private mediators, conciliators, case managers, evaluators, and social workers often results in the expenditure of many tens of thousands of dollars. Second, and perhaps even more disturbingly, there is a substantial disparity in dispensing justice in matrimonial cases between those with and without substantial means. Cases involving wealthy clients take up a disproportionate share of court time. Cases involving all others receive a form of second-class justice. Indeed, an ever growing percentage of cases involve parties who are unable to afford to retain counsel but are ineligible for court-appointed counsel. These *pro se* parties often have their cases assigned to overwhelmed probation services or court-annexed forensic offices. These cases commonly are resolved based on whatever report is furnished by these offices. Many familiar with the work produced by these court-annexed offices lament its quality.

Despite the extraordinary efforts of many judges and other court personnel to provide high quality and individualized attention to each case, the lack of resources overwhelms the system. Overcrowded dockets and the delays resulting from this congestion, poor or tardy forensic reports and collateral investigations, the absence of counsel for many parties, too little time devoted to each case that is heard in court, and a general feeling of dissatisfaction by the parties as to how their cases are handled are prominent examples of pervasive problems many encounter in

virtually every jurisdiction throughout the United States. In short, we certainly would join others who believe that significant change in the administration of justice as it relates to the resolution of custody cases should be high on anyone's agenda.

The focused question becomes, however, whether appointing children's lawyers will fix these problems. We do not believe that the proper cure for the perceived ills of current practice is the addition of more lawyers for children in these cases. In many instances, we believe there is virtually no connection whatsoever between the problems that we have just catalogued and the recommendation that children be given lawyers.

Indeed, there is a paradox embedded in the call for ever increasing use of children's lawyers given that so many parents are obliged by the realities of economic circumstances to appear unrepresented in these cases. This would mean that, in a very large number of cases, the only person being represented by counsel is the child, a non-party. We would more confidently join a call for the increased use of lawyers in these cases once we have ensured that all parties are entitled to be well-represented, even when they cannot afford to pay private market rates.

Of all the ills that plague current practice, two, in particular, strike us as having any connection to the call for increased use of lawyers for children. The first is the complaint that children's voices are not being heard sufficiently or, a closely related concern, that cases are not being decided often enough in accordance with the stated preferences of children. The second is that children are being harmed by the associated consequences of the litigation and courts need a new device to protect children from these harms.[5] Both of these legitimate concerns could be met by less expensive and more efficient means other than appointing lawyers for children.

A. *Hearing Children's Voices or Deciding Cases in Accordance with Children's Preferences.*

A simpler and far less costly means to ensure that children's voices are heard by judges before cases are decided is to require that judges interview children. Alternatively, courts might re-

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[5] *See* ABA STANDARDS, *supra* note 2, Commentary to Standard VI.A.2; NCCUSL ACT, *supra* note 3, Comment to § 6.

quire that children be interviewed by well-trained and certified court-appointed professionals such as probation officers or forensic experts who would be directed to ascertain the wishes of children. If these routes were taken regularly, judges would be made aware of what children want before deciding the case. We recognize, of course, that, for some, the goal of appointing counsel for children goes well beyond merely clarifying for the court what the child wants. The goal is to engage an advocate who will articulate forcefully the wishes of the child.

Once we reach the question of how cases are decided, however, we need to consider not only whether judges are being made aware of what children want, but also the substantive bases by which these cases are to be decided. It may be accurate that many cases decided by judges do not reflect the stated wishes of children. But that would hardly be surprising because children's preferences are not to be determinative in deciding cases. As is well known, these cases are to be decided based on the judges' objective determination of what is in the child's best interests, something which might well conflict with the stated preferences of children.[6]

Thus, we recognize a relationship between the call for more children's lawyers and a concern that judges do not come to learn regularly enough what children want and do not decide cases often enough in accordance with what children want. In our view, however, neither factor makes a compelling justification for appointing lawyers for children in these cases.

B. *Children Are Being Harmed by the Litigation*

A separate concern regarding children and the administration of contested custody disputes is that children may sometimes become too directly involved in the litigation or otherwise made to experience to their detriment the ongoing conflict between the parents. Admittedly, appointing lawyers for children in order to shield them may help alleviate this problem, but it can also exacerbate it. Regardless, there are less costly and equally effective ways to strive to protect children. For example, judges might is-

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6 *See* D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247, 247 (2005) ("The custody law in every state in the United States also embraces the 'best interests' standard.").

sue orders forbidding any discussion of the litigation with the children, making clear that were either party to breach the injunction he or she might be disfavored in the result.[7]

C. *Remaining Deficits of Current Custody and Visitation Practices*

All of the other complaints about modern custody litigation are, we believe, unrelated to a sensible call for more lawyers for children. These other complaints may include that: (i) courts are not getting all of the material information necessary to make an informed decision; (ii) cases take too long to resolve; (iii) the parties do not feel that the system of justice to which they are exposed serves them or their families well; and (iv) courts make poor decisions which do not serve the best interests of the children.

Organizations concerned about improving the administration of justice in this important area of the law need to pay careful attention to what contributes to these problems and what solutions are most appropriate to redress them. Unfortunately, neither the ABA nor NCCUSL attempted to do so. Instead, they addressed the single issue involving the appointment of children's representatives keeping as background their underlying understanding of the various ways current practice falls short of the ideal. We would join any effort to address ways to improve current practice. However, we do not believe that the addition of children's lawyers to these proceedings accomplishes this.

We approach the question of developing Standards for Representing Children far more neutrally than is evident from the work produced by the ABA and NCCUSL. We are as interested in whether to appoint representatives as we are in how to do so. We reach the specification of the representative's role only after examining these antecedent questions. What follows are the newly revised Standards.

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[7] These Standards are not intended to address the psychological impact on children of such issues as involving them in the court process.

Scope and Definitions

A. *Scope*

These Standards set forth guidelines for the appointment and role of counsel[8] representing children in custody and visitation proceedings.[9] The Standards address when lawyers should be appointed and their obligations and responsibilities. The previous Standards developed guidelines both for the appointment of counsel for children and for guardians ad litem. These revised Standards eliminate the category of guardian ad litem.

Standards 1.1 to 1.3 address when appointments of counsel for children should be made, the training persons eligible for appointments should have, and the first steps courts making the appointments and the persons who are appointed should take. Standards 2.1 to 2.4 address the behavior of attorneys assigned to represent children as counsel. Standards 3.1 to 3.2 address the role of all other professionals who may be appointed in a capacity to represent a child, to speak on a child's behalf, or to present facts or opinions to the court.

To the extent that these Standards actually conflict with current law in a particular jurisdiction, it is hoped the law will be reevaluated in light of these Standards. The Standards are most likely to be particularly useful, however, in those jurisdictions that currently provide little guidance either to judges or lawyers as to when and why children should be represented. In these cases, they are designed to fill gaps where they exist.

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8 In these Standards, "counsel" refers to an attorney acting as a lawyer for a child.

9 There are many other proceedings in which representatives are routinely assigned to represent children, including dependency, abuse and neglect proceedings, termination of parental rights proceedings, and juvenile delinquency proceedings. These Standards do not apply to any of those types of cases. These Standards only apply to private custody or visitation (access) proceedings, including parenting plan disputes, in which the state is not a party and the standard by which the case is to be decided is the best interests of the child. Moreover, the Standards only apply to the custody and visitation issues in those cases. Other issues that commonly arise in those cases, such as child support and other financial matters, are beyond the scope of these Standards.

B. *Definitions*

1. "*Counsel for the child*": A licensed member of the relevant state Bar assigned by the Court to represent a minor who is the subject of the proceeding. The principal purpose of assigning such counsel is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation's objectives as established by the client. Counsel for the child is presumptively the client's agent and the client is the principal.

2. "*Court-Appointed Professionals Other than Counsel for the Child*": Any person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.

STANDARDS WITH COMMENTARY

1. *Standards Relating to the Appointment of Counsel for Children in Custody or Visitation Proceedings*

1.1 Courts should not routinely assign counsel for children in custody or visitation proceedings. Appointments should be reserved for those cases in which both parties request the appointment or the court wants the objectives sought by the child to be a prominent basis for the outcome of the case.

Commentary

Except when both parties support such an appointment, representatives for children should be appointed only when courts want an advocate for the child who will strive to achieve the outcome the child wants. In all other cases, children are not necessarily better served by this extra person being added to the case, and the other parties to the action may be adversely affected by the appointment.

To this extent, the AAML is more neutral in its support for using counsel for children than the ABA and NCCUSL. Believing that there are advantages and disadvantages to appointing counsel for children, these Standards do not embrace any presumption in favor of such appointments. Although appointment of counsel for children is discretionary under all three standards,

the ABA and NCCUSL place fewer restrictions on the court's ability to make such appointments.

In contrast to the AAML Standards, the ABA Standards and the NCCUSL Act accord courts wide discretion to appoint counsel for children, referencing a long list of factors which may indicate a particular need for such appointments. Indeed, the ABA Standards devote several paragraphs of commentary to the various benefits of appointing counsel for children, but never discuss any reasons to avoid their routine appointment.[10] Although the NCCUSL Act describes the need for courts to consider the financial burden and other disadvantages of appointing counsel for children, it, too, emphasizes the "significant benefit" of appointing them in certain custody cases and fails to discuss in sufficient detail reasons to avoid such appointments.[11]

Academy Standards alone among the three limit the circumstances under which courts may appoint counsel for children. We believe that matrimonial and related custody proceedings should continue to be viewed as private disputes brought to the court for resolution because the parties are unable to resolve the dispute by other means. The mere fact that parents have decided to resolve their dispute through a litigation forum is insufficient reason to require a separate legal representative for children in most cases.

The routine addition of counsel for children may merely duplicate the efforts of counsel already appearing in the case or needlessly delay the proceeding. Moreover, adding a lawyer taxes the resources of the courts and the parties.[12] Adding a lawyer not only increases fees; overall costs may become exponentially greater if the child's representative chooses to retain paid experts whose contributions may, in turn, encourage the parties to retain additional experts. These greater expenses may ultimately be detrimental to the child's interests, since less money may be available during and after the litigation to spend on the child. If the child's counsel is paid by the court, taxpayers will be

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10 *See* ABA STANDARDS, *supra* note 2, Commentary to Standard VI.A.2.

11 NCCUSL ACT, *supra* note 3, Comment to § 6.

12 We note here that the ABA has specifically called for counsel for children to be paid "in accordance with prevailing legal standards of reasonableness for lawyers' fees in general." ABA STANDARDS, *supra* note 2, Commentary to Standard VI.C.

subsidizing private parties engaged in a private legal dispute. If counsel for children are unpaid, there would likely be an insufficient number of qualified professionals routinely available to represent children.[13]

A review of the laws in the different jurisdictions in the United States reveals that very few states provide meaningful guidance about any aspect of the use of counsel for children in custody or visitation cases. Relatively few states provide courts with any meaningful guidelines regarding when to make appointments. In the vast majority of jurisdictions, the relevant statute or case law merely recognizes the court's discretion to make an appointment when, for example, "the court determines that representation of the interest otherwise would be inadequate."[14]

Under this Standard, counsel for children should be assigned when both parties want the child to be represented. When both parties desire such an appointment, there are few reasons to disallow it. The impact on the parents' privacy and pocketbook are not the exclusive costs associated with the needless complication of legal dispute resolution (judicial resources, as one prominent example, can be severely taxed when cases are not resolved expeditiously). Nevertheless, when both parties are willing to absorb these costs, the appointments should go forward.

When either party opposes the appointment, this Standard permits courts to appoint counsel for children only for one purpose: to advocate, after proper counseling by the lawyer, for the outcome desired by the child. Given these limitations, courts

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13 *See* AMERICAN BAR ASSOCIATION, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 3-8 (1993) (Report of the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families).

14 ALA. CODE § 26-2A-52 (2007). Some states mandate the appointment of counsel when certain criteria are met. Florida, Louisiana, Minnesota, and Missouri, for example, require the appointment of a guardian ad litem or an attorney if allegations of abuse or neglect are involved. *See* FLA. STAT. § 61.401 (2007); LA. REV. STAT. ANN. § 9:345(B) (2007); MINN. STAT. § 518.165, subdiv. 2 (2007); MO. REV. STAT. § 452.423(2) (2007). Oregon requires the appointment of counsel "if requested to do so by one or more of the children." OR. REV. STAT. § 107.425(6) (2007). Vermont requires the appointment of counsel whenever a child is called as a witness in a custody, visitation, or child support proceeding. VT. STAT. ANN. tit. 15, § 594(b) (2007). Finally, Wisconsin requires counsel for children in all contested custody proceedings. WIS. STAT. § 767.407(1)(a)(2) (2007).

should appoint counsel only when they believe that the child's wishes need to be forcefully advocated. When courts choose to add a professional to the case for any other reason, the appointed professional should not carry the label "counsel," or "attorney."

1.2 To be eligible for appointment as counsel for a child in a custody or visitation proceeding, a person should be specially trained and designated by the local jurisdiction as competent to perform the assignment.

Commentary

To be effective, children's counsel should be specially trained to serve as children's advocates. At a minimum, counsel for children must know how to communicate effectively with children and understand children's mental and emotional states at different ages and stages of their lives.

More than this is necessary to ensure that the individuals appointed to serve as counsel for children will perform their assignment well. No one should be appointed who has not been designated as possessing the requisite training, temperament, knowledge and experience. This Standard anticipates that bar associations or local court personnel in each jurisdiction will develop courses and materials designed to familiarize persons who wish to be eligible for assignment as children's counsel and for continuing education purposes; to create a panel to review applications from individuals interested in being assigned as counsel; to review performance of assigned counsel on an on-going basis; and to maintain a list of persons eligible for such appointments. These courses and materials should have an inter-disciplinary focus on children. They should focus on a psychological understanding of child development, including the capacity of children to understand their environment and to communicate effectively at various stages of their development. (Communication training ought to include development of the skills of reading the verbal and physical messages and cues that children are transmitting.) They should also present methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping the parties to reduce the conflict. This specialized training will prepare counsel to protect children from the harms attendant with litigation and

to facilitate expeditious resolution of the dispute in accordance with the child's interests.

1.3 Whenever a court assigns counsel for a child, the court should specify in writing the scope of the assignment and the tasks expected, preferably in the form of an order. In the event that the court does not specify these tasks at the time of the appointment, counsel's first action should be to seek clarification from the court of the tasks expected of him or her.

Commentary

Ideally, courts or legislatures will adopt these Standards in individual jurisdictions. Faithful adherence to these Standards largely eliminates the need for clarifying the role of counsel for the child since these Standards contemplate only one principal role. As further elaborated in Standard 2.2, counsel's role is, to the fullest extent feasible, a straightforward one of serving as the agent for the child who is the principal.

Until these Standards are formally adopted, there will continue to be uncertainty concerning the purpose and role of the assignment. To minimize this uncertainty, courts should, at the time they make the appointment, specify in writing the purposes of the assignment, the particular tasks expected to be performed, the time frames, if any, within which to complete the tasks, and the fee arrangement for the child's counsel's services, including the rate, payment schedule, and who is responsible for paying.

Judges who do not want counsel for the child to advocate for the child's preferences may not, consistent with these Standards, modify the role. Instead, these judges should avoid appointing someone designated as counsel for the child and employ other options (e.g., a "guardian ad litem").

Although this Standard does not require that the court schedule a formal appearance with all parties to discuss the purpose of the assignment, such an appearance may serve everyone's interests and actually save time in the long run. If such an appearance has not taken place at the time of the assignment, counsel for the child should consider arranging for a meeting with all counsel and the judge shortly after the assignment to clarify the purpose for the appointment.

2. *Standards Relating to Counsel for Children*

2.1 Court-appointed counsel must decide, on a case-by-case basis, whether their child clients possess the capacity to direct their representation. In the event that the court seeks to appoint counsel for children who lack the capacity to direct their representation, the lawyer should strive to refuse the appointment.

Commentary

When lawyers represent clients with sufficient capacity to direct their representation, once the client has determined his or her goals, counsel's principal function is to try to ensure that the outcome is consistent with what the client wants. This is true regardless of counsel's personal opinions, values, or beliefs about what should be the client's preferred outcome. Correspondingly, counsel's views of what will serve the client's best interests may not interfere with counsel's duty to "abide by a client's decisions."[15] One great virtue of such an understanding of counsel's role is that similarly situated clients will be similarly represented. Our legal system serves clients best, to the greatest extent possible, by defining an objective, uniform role for lawyers.

Rule 1.14 of the American Bar Association's Model Rules of Professional Conduct clarifies that a lawyer's role and responsibilities vary sharply, depending upon whether or not a client has diminished capacity. As the Rule recognizes, children are among the populations of clients who may have diminished capacity which affects the client's ability to participate meaningfully in an attorney-client relationship. Yet, as the Rule and its Commentary also recognize, the age of a child is not the central criterion for assessing diminished capacity.[16] Whether or not children have diminished capacity depends upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors.

It is crucial that the task of assessing capacity be performed by the court-appointed lawyer at the outset of the assignment. The terms of the relationship between an attorney and a client are always a matter for the attorney to determine. Under the

15 ABA MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

16 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14, Comment 1 (2007).

Model Rules of Professional Conduct, attorneys are obliged to make the case-by-case determination regarding a client's capacity to set the goals of the representation.[17] It is inappropriate for judges to perform this task.[18] Judges are always free not to appoint a lawyer for a child. However, once courts assign a lawyer to represent a child with the expectation that the lawyer will perform a traditional attorney role, they must allow the lawyer to assess whether the client possesses the requisite capacity to set the objectives in the case.

Unfortunately, the Model Rules of Professional Conduct provide little guidance to lawyers representing child clients who may have diminished capacity by virtue of their age and/or level of maturity. The Rules recognize that "a client's capacity to make adequately considered decisions" may be "diminished" by reason of "minority, mental impairment or for some other reason."[19] However, the Rules provide: (a) nothing about how lawyers are to determine whether a particular client has diminished capacity; and (b) virtually nothing about what lawyers may or must do when they represent clients who have diminished capacity.[20]

Perhaps the only thing the Rules make clear concerning diminished capacity is that counsel is not free to make across-the-board assumptions that children below a particular age automatically have diminished capacity and instead must make individualized assessments of a child client's capacity. The previously published AAML Standards created a rebuttable presumption that children aged 12 and above possess sufficient capacity to di-

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17 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

18 Both the ABA and NCCUSL are in accord that lawyers, not judges, are to make the determination of the client's capacity. *See*, ABA STANDARDS, *supra* note 2, Standard IV.C.1; NCCUSL ACT, *supra* note 3, Comment to § 12.

19 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2007).

20 "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2007).

rect the representation and that children below age 12 do not.[21] This bright line was established both to reduce the discretion available to lawyers to decide for themselves when and whether to cede any meaningful control of the case to the client and to ensure that older children will be able to direct the lawyer's actions. However, bright lines of this sort have not been favored. Recognizing that children develop differentially, the Model Rules contemplate that lawyers assess each client individually. Although we believe there are difficulties associated with this approach, we now are persuaded that a bright line rule should be rejected.

It is essential that lawyers be given meaningful guidance when making the crucial determination regarding a client's capacity to direct counsel or otherwise a central purpose of these Standards would be defeated—the avoidance of dramatically disparate behavior by professionals in similarly situated cases. For purposes of determining diminished capacity, counsel's inquiry should focus on the process by which a client reaches a position, not on the position itself. The lawyer must treat the client as having sufficient capacity so long as the child is able: (a) to understand the nature and circumstances of the case; (b) to appreciate the consequences of each alternative course of action; (c) to engage in a coherent conversation with the lawyer about the merits of the litigation; and (d) to express a preference that similarly situated persons might choose or that is derived from rational or logical reasoning.[22] Clients regardless of their age or stated position on the merits of the case who have these qualities should ordinarily be deemed to have the capacity to direct their

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21 AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (1995), Standard 2.2.

22 "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client." ABA MODEL RULES OF PROF'L CONDUCT R. 1.14, Comment 6 (2007). *See also* Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, *in* CHILDREN'S COMPETENCE TO CONSENT 248 (Gary B. Melton, Gerald P. Koocher & Michael J. Saks eds., 1983).

representation within the meaning of the Model Rules of Professional Conduct and these Standards.

It is important to note that the test does not permit an attorney to declare that the client has diminished capacity because the lawyer believes the client has selected an option which is not in the client's best interests. Under these principles, a lawyer may not "reasonably believe" a client has diminished capacity[23] simply because the client seeks a different outcome than the lawyer would choose if the lawyer were free to make that determination for the client.

2.2 Unless controlling law expressly provides otherwise, counsel's role in representing a child client is the same as when representing an adult client. Clients who have sufficient capacity, regardless of age, have the right to establish the goals of representation and counsel is obliged to seek to attain those goals. In no case shall counsel for the child advocate for any objectives other than those established by the client.

Commentary

The ethical rules of professional conduct emphasize the client-centered focus of lawyers. The Model Rules of Professional Conduct require that lawyers representing clients with capacity "abide by a client's decisions concerning the objectives of representation."[24] This requirement "is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[25] Lawyers representing children must accord them the same ultimate authority to determine the objectives of the litigation, unless the child's ability to make decisions is diminished.

When clients have diminished capacity to the degree that they are unable to direct the representation, the crucial question becomes whether their lawyers should be expected or permitted to advocate for a particular outcome. In certain kinds of proceedings, such as juvenile delinquency proceedings, it may be necessary for counsel for the child to advocate for a particular

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23 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2007).

24 ABA MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007).

25 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14, Comment 1 (2007).

outcome even when the client is unable to direct the representation. Contested custody and visitation cases, however, are not among them. Since it is unnecessary for counsel for children to advocate for an outcome in every custody or visitation case, under these Standards when clients are unable to direct the representation, counsel for children may not advocate for any outcome.

Model Rule 1.14(b) permits a lawyer who reasonably believes that the client lacks capacity to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian" when the client "is at risk of substantial physical, financial or other harm unless action is taken."[26] They do not, however, permit a lawyer to choose a position to advocate for a client with diminished capacity, even when the client is at risk of substantial harm.[27] Previous versions of the Model Rules permitted a lawyer, under certain circumstances, to protect the client by acting as a "*de facto* guardian" who would be free to advocate a position contrary to what the client wanted.[28] However, the ABA deleted this comment in 2002. Notwithstanding this significant change in the Model Rules, the ABA Standards and the NCCUSL Act employ a "best interests attorney" who is authorized to investigate and advocate the child's best interests based on the lawyer's individual view of what is best for the child and is not bound by the child's objectives.[29]

We reject as fundamentally flawed a rule that gives children's counsel the authority to advocate, in their clients' name, the result they themselves prefer. The Model Rules insist that lawyers only undertake assignments that they are competent to handle.[30] Since lawyers are untrained to determine what is best for children, lawyers who are assigned to represent children with

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26 ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2007).

27 *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

28 *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.14(b), Comment (2001).

29 ABA STANDARDS, *supra* note 2, Standard II.B.2; NCCUSL ACT, *supra* note 3, § 2.3.

30 ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

diminished capacity should refuse the assignment as beyond their competence if the court directs them to make a recommendation on the outcome of the case.

The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate for his or her own preferred outcome in the name of the child's best interests. The danger is that this additional adult will make a difference in the outcome of the proceeding without any assurance that the outcome is "better" (that is, without an assurance that the outcome best serves the child's interests).

When counsel is free to determine the best outcome for the client and then to develop a litigation strategy to obtain that outcome, discrepant results will be sought by the child's counsel depending on the values and beliefs of the attorney fulfilling that role. In other words, under such an arrangement similarly situated children would be subject to dramatically divergent representation depending on the views of the particular lawyer assigned the task. This arbitrariness is the antithesis of the rule of law. It is difficult to justify a system that treats similarly situated persons so differently.

Once children are found to have sufficient capacity to direct their representation, they are to be treated substantially like all other clients regardless of their age. The attorney-client relationship is, of course, richly textured. A central component of lawyering involves assisting clients to reach the position that makes the most sense for them. Lawyers are expected to counsel clients, to provide them with feedback, and to help them sort out the advantages and disadvantages of the choices before them. This important counseling role is especially vital when lawyers represent minors. However, the basic principle remains that the final choice of what position to take in the litigation is the client's.

Difficult ethical issues remain when counsel believes the child's preference is the result of parental manipulation or when counsel has evidence that awarding custody in accordance with the child's preference will put the child at risk of severe harm. At a minimum, counsel's role as counselor and advisor should include confronting the client with these concerns and having a full and frank conversation about the implications of the child's

stated preferences at a level appropriate for the client's understanding. However, counsel is not allowed to second-guess the client or to work against the goals that the client seeks. If counsel is unsuccessful in persuading the client to seek a different outcome, counsel is obliged to zealously seek to secure the result sought by the client even when counsel disagrees with the wisdom of the client's preferences. The only measure of escape provided by the ethical rules is when the "client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"[31] in which case the lawyer can seek to withdraw from the representation.

Not only is the role of counsel under this Standard indistinguishable from the role when representing an adult, but all features of the attorney-client relationship, including maintaining client confidences, duties of professional excellence and undivided loyalty, are virtually identical.[32] The only difference these Standards recognize between representing children and all other clients is set forth in Standard 2.4.

2.3 Counsel for a child should be treated by all parties and the court as a counsel of record.

Commentary

This Standard simply clarifies that counsel for a child should be treated in the same manner as all other counsel of record in a lawsuit, except to the extent limited by court order. The emphasis of this Standard is on process. When notices are sent to counsel, pleadings filed, or conferences or hearings conducted, for example, the child's counsel should be included. Similarly, attorneys for other parties may not communicate with the child, seek services for the child, or have the child evaluated without the permission of the child's counsel.

However, this Standard is not meant to expand the purpose of the initial assignment. When, as may be expected in the vast majority of cases, the court has limited counsel's involvement to issues of custody or visitation – excluding counsel from taking

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31 ABA MODEL RULES OF PROF'L CONDUCT R. 1.16 (2007).

32 Representation of multiple clients in the same proceeding presents special concerns regarding conflicts of interest. Counsel should remain sensitive to the possibility that siblings may require separate counsel.

part in other matters such as property division or financial issues – it is appropriate to treat the child's lawyer as counsel of record only with regard to issues of custody or visitation.

2.4 All counsel for children should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement when appropriate in order to reduce trauma that can be caused by the litigation.

Commentary

This Standard makes clear that counsel are expected to take extra care when representing children because litigation involving dissolution of the family can be particularly acrimonious. All persons involved can suffer greatly as a result of this hostility and conflict. Children are especially vulnerable to the harms commonly associated with custody and visitation litigation.

The Bounds of Advocacy endorsed by the American Academy of Matrimonial Lawyers already go further than the Model Rules of Professional Conduct by stating that counsel "should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution."[33] That Standard, like this one, recognizes that in custody cases traditional notions of winning and losing are usually less appropriate than in other areas of the law. Taking the interests of all family members into account is justified in these cases, especially because the parties unavoidably will continue to have a relationship well beyond the litigation and the quality of that relationship could have dire implications to the children if high conflict behavior is not ameliorated.

Although Standard 2.2 requires counsel to cede ultimate authority to the child to direct counsel's conduct, it is appropriate for counsel to advance the interests of the child by protecting him or her from unnecessary conflict. Counsel should be ever mindful that the prosecution of the litigation often can be harmful to children of any age.

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33 AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY, Standard 1.5 (2000), *available at* http://www.aaml.org/files/public/Bounds_of_Advocacy.htm.

This Standard requires counsel to take appropriate steps to reduce all conflict in the litigation. Counsel should try, consistent with the client's instructions on the goals: (a) to resolve the dispute in the least contentious matter; (b) to resolve the dispute in the most expeditious manner; (c) to expose the child to as little of the controversy as possible; and (d) to resolve agreed upon issues and limit issues which need to be litigated. To accomplish this, counsel should attempt to negotiate disputes that have the potential to escalate into harmful conflict. Counsel should also urge the parties and their lawyers to keep the interests of the child paramount, reminding them at various stages of the proceedings how particular actions may affect the child and recommending alternative actions that would better serve the child's interests.

3. *Standards Relating to the Appointment of Professionals Other Than Counsel for the Child*

3.1 Unless appointed as counsel for the child, no one should function as an attorney for the child. No court-appointed person should acquire party status.

Commentary

We long debated whether to limit these Standards to Standards 1 and 2. In an important sense, what we have said thus far is all we have to say on the subject of appointing representatives for children. In contrast with both the ABA and NCCUSL, we reject the use of court-appointed professionals other than in the traditional role as counsel who are given the label children's lawyer or representative.

For this reason, the choice whether to add more Standards was a difficult one. Most importantly, we do not wish to join the chorus of either the ABA or NCCUSL, and encourage the use of such court-appointed professionals labeled as children's representatives. On the other hand, we recognize that courts are likely to consider appointing someone other than counsel for the child. We wish to clarify what the appropriate role of such a court-appointed professional should be.

Courts may choose to appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisor." Courts may

choose to appoint someone in an expert capacity to provide the court with an opinion about some contested matter. When they do so, these professionals should be called "experts." Courts may choose to appoint someone to protect children from the harms associated with the contested litigation. When they do so, these professionals should be called "protectors." There may be other reasons courts may choose to add a professional to the case.

Language matters, however. We believe that assigning any of these tasks to someone who is called *counsel* is unnecessary, needlessly confusing, and misleading. Whatever these professionals are called, and whether or not they happen to be members of the bar, these professionals should never be mistaken for being counsel for the child or serving in any kind of attorney role. Nor should such a professional ever acquire party status.

3.2 No one appointed pursuant to this Standard shall make a recommendation on the outcome of the proceeding or on a factual claim about a contested fact or issue except under oath subject to cross examination by all parties.

Commentary

Courts frequently appoint a third party, such as a court-appointed advisor or an expert (sometimes called "court appointed special advocates," "guardians ad litem," "best interests attorneys," "court appointed advisors," or "investigators") for the purpose of making a recommendation concerning the best interests of the child. We believe this practice is fraught with danger and should be avoided. *Experts* should be permitted to testify to facts and opinions pertinent to the case, but should not be authorized to make recommendations regarding how cases are to be decided by the court. All others (that is, persons who do not qualify as "expert" within the meaning of the controlling rules of evidence) should never be permitted to offer opinion testimony or any other form of opinion.

We do not think that children are better off when an adult – other than the judge – whom they do not know is assigned the task of determining their best interests and seeking to secure a result consistent with the adult's perception of them. Prohibiting

all court-assigned professionals from making recommendations regarding the child's best interests avoids the serious danger of abdication of judicial responsibility. By prohibiting everyone from advocating an outcome, the democratic process by which duly elected or appointed judges become the true arbiters of controversies brought to courts is reaffirmed. Moreover, in making a decision, a judge is subject to relevant evidentiary rules and to appellate process.

An outright prohibition against advisors recommending an outcome can best be explained by placing all cases into two categories: easy and hard cases. In the first category, it is clear what outcome is best for children. In easy cases, it may be assumed that virtually all court-appointed professionals would recommend the same outcome. In these cases, the risk of arbitrary behavior is at its lowest when these professionals are appointed. Since a principal concern in these Standards is the avoidance of arbitrary behavior, it would appear that permitting court-appointed professionals from recommending the result they perceive would further the child's best interests in easy cases is consistent with this principle. The need for court-appointed professionals in easy cases to opine on the child's best interests, however, is at its lowest since the court almost always will find the "correct" result on its own.

Hard cases, by contrast, are difficult precisely because deciding what is best for the child is difficult. In such cases, permitting court-appointed professionals to give their opinion of what outcome best serves the child invites arbitrariness. These cases are precisely the ones in which it is most likely that different court-appointed professionals will recommend different outcomes. Not only is it likely that different court-appointed professionals will recommend different results in close cases, but the danger is compounded because it is to be expected that judges will be grateful to have the professional's opinion to help decide the case. For these reasons, we prefer that court-appointed professionals be prohibited from making recommendations regarding the outcome of contested cases.

Nonetheless, we have concluded that adding this Standard is important because of the widespread practice of allowing (and expecting) court-appointed professionals to make recommendations. This Standard requires that whenever a court-appointed

professional makes a factual claim about a contested issue, the professional should do so under oath and be subjected to cross examination.[34] Basic principles of due process require that no contested claims about a matter before a court be considered by the judge without providing all parties the opportunity to test the accuracy of the claim. In the event the court accepts a written report, the report must be made under oath and may not be considered by the court without affording all parties the opportunity to cross-examine its maker, unless otherwise agreed by the parties.

34 *See* NCCUSL ACT, *supra* note 3, Comment to § 16.