



ETHICAL CHALLENGES IN CHILD REPRESENTATION | Unique Challenges, and Practical Solutions

A STARTING POINT: FORDHAM LAW REVIEW SPECIAL ISSUE: MARCH 1996

- Articles in the special issue addressed the accelerating legal and social crisis children faced in our country- doubling of children in foster care, increased filings in delinquency cases, a quarter of children under the age of 6 living in poverty- and while the number of children participating in court proceedings had increased, there were drastic cuts to the legal services providers who represented them.
- The issue included articles describing the ethical contours of interviewing and counseling children, a child's capacity to direct representation, confidentiality, and conflicts of interest. This was especially important to the authors because the Model Rules had very little to say on the specific "immediate, frequent, and palpable" ethical issues presented when representing children.
- For the first time, there was a terrific and detailed resource on ethics for lawyers representing children.

RECOMMENDATIONS OF THE CONFERENCE RELATED TO THE FORDHAM LAW REVIEW ISSUE

- While the authors of the issue did not agree on everything, they made several important recommendations with implications for ethical practice:
 - Children need lawyers
 - Lawyers do their best work for children when they serve as lawyer- not guardian ad litem
 - A lawyer's responsibility to their child client will vary depending on the child's capacity to direct representation
 - Lawyers must take particular care in communicating with the child client
 - The child's lawyer should serve with undivided loyalty
 - Lawyers must be aware of, and sensitive to, the differences of race, ethnicity, class and culture between the lawyer and child
 - Lawyers for children must know more than the law
 - Ethical representation requires the support of an appropriate legal and policy framework for representation
 - There is a lot more work to be done!

IN OTHER NEWS...

The same year as the Fordham Issue, the ABA issued Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Proceedings.

- The Standards expressed a clear preference for appointment of lawyers in the attorney role- not as GALs.
- It recognized the unique conflicts that exist in child welfare cases- like conflicts between representing multiple siblings in a case, or the conflict between the attorney and GAL roles.
- It also, like the Fordham issue, highlighted another approach- advocating for a child's legal interests- when the child is preverbal and unable to direct representation.
- It gave excellent guidance for children's lawyers about what the duties of diligence and competence mean in the context of representing children.
- It also included ideas about how judges could ensure children received quality representation by discussing how lawyers should be appointed and compensated.
- It raised the issue of how high caseloads can impact ethical practice.

WHAT IS SO ETHICALLY CHALLENGING ABOUT REPRESENTING CHILDREN?

- Representing children is "newer" than representing adults.
- States have varying frameworks for representing children- are lawyer's advocating for the child's "stated interests" or the child's "best interests"?
- How should lawyers represent a baby or toddler's interests?
- How can lawyers bridge the gap between their adult views about a case, and the child's perspective?
- To what extent can children direct representation in the same way we think adults can?
- What happens when a child wants an outcome the adult lawyer disagrees with?
- How do these questions vary from one legal context to another? Is there one unified ethical approach to representing children in dependency, delinquency, family law, or education law matters?

ROLE CONFUSION: THE BEST INTERESTS AND STATED INTERESTS DILEMMA IN DIFFERENT LEGAL CONTEXTS

Let's take four examples of the roles lawyers play when they represent children in Iowa:

- **Delinquency:** Iowa Code Section 232.11 - right to appointment of counsel.
- **Child Welfare Law:** Iowa Code Section 232.89 - lawyers are initially appointed in a dual role- both lawyer and guardian ad litem. The Code explains "the same person may serve both as the child's counsel and guardian ad litem. However the court may appoint a separate guardian ad litem if the same person cannot represent the legal interests of the child as legal counsel and also represent the best interests of the child[.]"
- **Guardianship Law:** Under the new 232D (HF 591) lawyers must "advocate for the wishes of the respondent to the extent those wishes are reasonably ascertainable and advocate for the best interests of the minor if the wishes of the minor are not reasonably ascertainable."
- **Custody Cases:** Chapter 62 of the Iowa Court Rules includes Standards of Practice for Lawyers Representing Children in Custody Cases. The Standards state a lawyer should either be the child's attorney or GAL, not both!

DIVING A LITTLE DEEPER...

How do lawyers resolve their role confusion in the child welfare context?

* In re A.T. and T.P., 744 N.W.2d 657 (Iowa Ct. App. 2007): Iowa Court of Appeals reverses a trial court's termination of parental rights because the child should have been appointed separate counsel given her age and maturity. The Court explained: "It would appear that the older, more intelligent, and mature the child is, the more impact the child's wishes should have, and a child of sufficient maturity should be entitled to have the attorney advocate for the result the child desires."

* The Iowa Code also notes that when roles are bifurcated, it is a GAL that should be appointed- the original advocate should remain as lawyer. Iowa Code Section 232.89(4). This is consistent with the attorney's ethical duties to maintain privileged information.

* Query: Are there other reasons a lawyer might ask for bifurcation of the roles that are not "maturity-related?"

DO CHILDREN HAVE DIMINISHED CAPACITY?

In re A.T. also noted another important ethical quandary for lawyers- assessing whether their client has diminished capacity.

Iowa Rules of Professional Conduct 32:1.14 states "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with a client."

The Rule goes on to note that one remedy a lawyer can seek when the client's capacity is compromised, and there is a risk of substantial harm unless action is taken, the lawyer may take protective action, including seeking appointment of a GAL.

CAPACITY: A FIGHTING ISSUE AMONG CHILDREN'S LAWYERS

This is an area where it is hard to find general agreement among child advocates-like child capacity generally- lawyer's views on this topic are on a continuum from:

Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyer in Interviewing and Counseling the Child Client*, 64 Fordham L. Rev. 1655 (1996). Federle persuasively argues that the powerlessness and vulnerability of the child demands that a lawyer advocate for what they want- unlimited by a paternalistic assessment of their maturity.

to... the many state codes that simply appoint a GAL for children in child welfare or child custody cases with no reference to attorney representation.

BUT- the trend is toward attorney only representation- and appointing other experts to help determine best interests questions.

COMPETENT REPRESENTATION REQUIRES MORE THAN JUST KNOWING THE LAW

One key recommendation about lawyer competence from the Fordham Conference was that "lawyers must undertake training and develop expertise that is substantially different from that ordinarily necessary to represent adults."

- Interviewing children across the age spectrum;
- Understanding child development and its impact on areas of law like child welfare, delinquency, and education;
- Practicing in a multi-disciplinary way- working with experts in social work, psychology, education and child development;
- Understanding the differences in age, race, class and culture that impact a child's decisionmaking- as well as the lawyer client experience itself.

Query: Are lawyers for children the only lawyers who have to gain expertise in other areas to do competent work?

REPRESENTING BABIES AND TODDLERS

Representation of very young children- typically in child welfare cases- is the best example of the way attorneys for children are asked to go outside typical lawyer-client relationships.

- Children from birth to 5 represent more than 40% of the children who enter the foster care system.
- These children are at a critical state in child development- and "effective advocacy can set or maintain the [child] on a healthy developmental track" and move the case toward reunification or another permanency plan. See Candice Maze, *Advocating for Very Young Children*, ABA (October 2010).
- In order to protect the client's rights to safety, services, and connection to a caring parent or other caregiver, the attorney has to understand what children need in their early years.

Examples: visitation; early childhood mental health services; early access and preschool
Query: should lawyers be appointed as GAL or as the child's attorney?

REMAINING OBJECTIVE... CHECKING OUR OWN BIASES

A big critique of lawyers for very young children- we substitute our own judgment for that of our clients, and this leads to our own biases about families- and race, class, gender and culture- to infect our recommendations.

The antidote: A child-centered approach that assesses the needs of *this child*. What would I want for my child, but rather: "what is best for this baby in light of her special needs and unique family context?"

ABA Standard B-5 states:

The determination of the child's legal interests should be based on objective criteria as set forth in the laws that are related to the purpose of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing and permanent environment, and the use of the least restrictive or detrimental alternatives available.

WHAT FAMOUS ADOLESCENT CRITIQUED LAWYERS IN THE FOLLOWING WAY?

"Lawyers are alright, I guess — but it doesn't appeal to me", I said. "I mean they're alright if they go around saving innocent guys' lives all the time, and like that, but you don't do that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink Martinis and look like a hot-shot. And besides, even if you did go around saving guys' lives and all, how would you know if you did it because you really wanted to save guys' lives, or you did it because what you really wanted to do was be a terrific lawyer, with everybody slapping you on the back and congratulating you in court when the [expletive deleted] trial was over, the reporters and everybody, the way it is in the dirty movies? How would you know you weren't being a phony? The trouble is you wouldn't"

BRIDGING THE GAP: OVERCOMING THE CAUFIELD PRESUMPTION

- "One of the most obvious facts about grownups to a child is that they have forgotten what it is like to be a child". Randal Jarell
- Especially in the child welfare and delinquency systems, children often view adults as people who will likely not listen to them, probably wouldn't understand anyway, and may even hurt them.
- When you combine the gap between adults and kids with the challenges presented by race and class differences, you have a perfect storm.
- So, what bridges the gap?
 - It takes more than building rapport- you have to earn trust in spite of your status as an adult.
 - You may need to take more time to do this than with a typical adult client
 - Do what you say you are going to do
 - Demonstrate you are on their side- show them you'll go to bat for them.

QUESTIONS MY STUDENTS SOMETIMES ASK ME

My 10 year old client opposes termination of parental rights, but I think it is in his best interests. What should I do?

I am at a visit with my client and his mother just showed up for a visit. Can I speak with her too?

My delinquency client just told me he is going to run away from the shelter tonight. Can I tell anyone?

CONTACT INFORMATION

Brent Pattison
Clinical Professor of Law
Drake University Law School
515.271.1810
brent.pattison@drake.edu
