Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (With Commentary)

Preamble

These Standards set forth guidelines for the appointment and role of counsel and guardians ad litem representing children[1] in custody and visitation proceedings.[2] The Standards address when lawyers and guardians ad litem should be appointed and their obligations and responsibilities.

These Standards apply to three distinct categories: counsel for children who are empowered to direct the role of counsel (counsel representing "unimpaired" clients); counsel for children lacking the capacity to direct the role of counsel (counsel representing "impaired" clients); and guardians ad litem (regardless of the child's capacity and regardless of whether the guardian is an attorney).

Standards 1.1 to 1.3 address the appointments of counsel and guardians ad litem for children. They address when such appointments should be made, the training persons eligible for appointments should have, and the first steps both courts making the appointments and the persons who are appointed should take. Standards 1.1 to 1.3 apply to all appointments for children, including counsel and guardian ad litem appointments. Stan-

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[1] In these Standards, "counsel" refers to an attorney acting as a lawyer for a child. A guardian ad litem may or may not be an attorney.

[2] There are many other proceedings in which representatives are routinely assigned to represent children, including abuse and neglect proceedings, termination of parental rights proceedings, and juvenile delinquency proceedings. These Standards do not reach any of those types of cases. These Standards only apply to private custody or visitation proceedings, including those between parents and non-parents 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 visitation and custody 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.

dards 2.1 to 2.13 address the behavior of attorneys assigned to represent children as counsel. Standards 2.3 to 2.6 and Standards 2.7 to 2.13 differentiate the role of counsel depending on the age, maturity, and intelligence of the child. Standards 3.1 to 3.8 address the role of guardians ad litem. Those Standards apply to all guardian ad litem appointments, whether or not the guardian is an attorney or a court combines the role of guardian ad litem and counsel, the attorney should represent the client in accordance with Standards 2.1 to 2.13.

These Standards are not intended to contravene state law. Rather, they are designed to fill gaps where they exist. In addition, to the extent the 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.

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

The following standards are applicable to all appointments of representatives for children, including appointments of counsel and guardians ad litem.

1.1 *Courts should not routinely assign counsel or guardians ad litem for children in custody or visitation proceedings. Appointment of counsel or guardians should be preserved for those cases in which both parties request the appointment or the court finds after a hearing that appointment is necessary in light of the particular circumstances of the case.*

Comment

These Standards reject the general call for children to be represented in all matrimonial cases. Representatives for children, whether counsel or guardians ad litem, may be appropriate in particular cases. Other than in those cases, however, children are not necessarily better served by being given a representative, and the other parties to the action may be adversely affected by the appointment. In the absence of a particular reason for as-

signing representation for a child, the representative frequently will merely duplicate the efforts of counsel already appearing in the case.

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 in a contested manner is insufficient reason to require a separate legal representative for children in most cases.

Furthermore, the routine addition of representatives for children may delay the proceedings and tax the resources both of the parties and the courts. Adding a lawyer or guardian ad litem can not only increase the fees; overall costs may become geometrically greater if the child's representative wishes 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 will be available after the divorce (and during its pendency) to spend on the child. If the child's representative is paid by the county, taxpayers will be subsidizing private parties engaged in a private legal dispute; in the absence of allegations that the child has suffered serious risk of harm that rises to the level of abuse or neglect, this would appear to be a misuse of public money. If representatives for children are unpaid, there will be an insufficient number of qualified professionals routinely available to represent children.[3]

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 representatives 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 caselaw merely recognizes the court's discretion to make an appointment when, for example, "the court determines

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[3] *See* AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 3-8 (Report of the American Bar Association Working Group on the Unmet Needs of Children and Their Families 1993).

that representation of the interest would otherwise be inadequate."[4]

Under this Standard, representatives for children should be assigned when both parties want the child to be represented or when the court finds that there should be an appointment. When both parties want the child to be represented, there are few reasons to disallow the appointment. 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.

If either one or both parties do not want the child to be represented, this Standard requires that the court first conduct a hearing and make specific findings that a representative should be assigned before an appointment may be ordered. Such a hearing may be held upon motion of either party, on application of the child or a representative purporting to represent the child, or on the court's own motion. Under this Standard, before permitting a representative to appear on a child's behalf the court should find that separate representation is appropriate.

This Standard does not expressly set forth factors to be considered at the hearing. Some states have established useful criteria providing guidance where courts have the discretion to make an appointment. Arkansas, for example, authorizes an appointment "where the evidence is either nonexistent or inadequate to

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[4] ALA. CODE § 26-2A-52 (1992). Some states mandate the appointment of counsel when certain criteria are met. Florida, Louisiana, Minnesota, Missouri, South Dakota, and Tennessee, for example, require the appointment of a guardian ad litem or an attorney if allegations of abuse or neglect are involved. *See* FLA. STAT. ANN. § 61.401 (West 1992); LA. REV. STAT. ANN. § 345(B) (West Supp. 1995); MINN. STAT. § 518.165 (1990); MO. ANN. STAT. § 452.423(1) (Vernon Supp. 1993); S.D. CODIFIED LAWS ANN. § 25-4-45.4 (1992 & Supp. 1993); TENN. R. JUV. P. 37(c). Oregon requires the appointment of counsel "if requested to do so by one or more of the children." OR. REV. STAT. § 107.425(3) (1993). 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) (1989 & Supp. 1991). Finally, Wisconsin requires counsel for children in all contested custody proceedings. WIS. STAT. § 767.045(1) (1989-1990).

determine the comparative fitness of the parents and to determine where the best interests of the child lie, or in cases where it is apparent that the dispute is centered on the desires of the parents rather than the best interests of the child."[5] Louisiana has developed a set of guidelines that this Commentary recommends that courts consider when deciding whether to appoint a representative. Louisiana law instructs judges to consider the following five issues when exercising discretion to appoint counsel for children:

(1) Whether the proceeding is exceptionally intense or protracted;
(2) Whether the attorney could provide the court with significant information not otherwise available or likely to be presented;
(3) Whether it is possible neither parent is capable of providing an adequate and stable environment for the child;
(4) Whether the interests of the child and those of either parent conflict;
(5) Any other factor relevant in determining best interests.[6]

Finally, in those cases in which appointment of counsel or guardian ad litem for a child is appropriate, such appointment should take place at the earliest possible stage of the proceeding.

1.2 *To be eligible for appointment as counsel or guardian ad litem for a child in a custody or visitation proceeding, a person should be trained in representation of children.*

Comment

To be effective, children's representatives, whether they are lawyers appointed as counsel or guardians ad litem or non-lawyers appointed as guardians ad litem, should be specifically trained as children's advocates. At a minimum, representatives must know how to communicate effectively with children. Non-lawyers appointed as guardians should receive training in the laws and procedures in custody and visitation proceedings.

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 assign-

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5 Kimmons v. Kimmons, 613 S.W.2d 110, 113 (1981)
6 LA. REV. STAT. ANN. § 345 (West Supp. 1995).

ment as children's representatives. These courses and materials should include methods in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial breakup on children, and techniques for helping the parties to de-escalate conflict. It would be appropriate if these materials incuded an inter-disciplinary focus on children. This specialized training will prepare representatives, as these Standards require, to protect children from the harms attendant with litigation and to facilitate expeditious resolution of the dispute in accordance with the child's best interests.

1.3 *Whenever a court assigns counsel or a guardian ad litem for a child, the court should specify in writing the tasks expected of the representative. In the event the court does not specify the tasks expected of the representative, the representative's first action should be to seek clarification of the tasks expected of him or her.*

Comment

State law rarely specifies what type of representative for a child is to appointed. Although most states permit an appointment of either an attorney or a guardian ad litem or both, a few states require that the appointment be a guardian ad litem,[7] an attorney,[8] a guardian ad litem who must be an attorney,[9] or "a

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[7] *See, e.g.*, Arkansas (Kimmons v. Kimmons, 613 S.W.2d 110, 113 (1981)); Florida (FLA. STAT. ANN. § 61.401 (West 1992)); Maine (Gerber v. Peters, 584 A.2d 605, 607 (Me. 1990); Cyr v. Cyr, 432 A.2d 793 (Me. 1981)); Massachusetts (MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1993)); New Hampshire (N.H. REV. STAT. ANN. § 458:17-a(I) (1992)); South Carolina (S.C. R. CIV. P. 17(c)).

[8] *See, e.g.*, Colorado (COLO. REV. STAT. ANN. § 14-10-116 (West Supp. 1995)); Delaware (DEL. CODE ANN. tit. 13, § 721(c) (1974)); Iowa (IOWA CODE ANN. § 598.12(1) (West Supp. 1995)); Louisiana (LA. REV. STAT. ANN. § 345 (West Supp. 1995)); Maryland (MD. CODE ANN., FAMILY LAW § 1-202 (1992)); Montana (MONT. CODE ANN. § 40-4-205 (1991)); Oregon (ORE. REV. STAT. § 107.425(3) (1991 & Supp. 1992)); Pennsylvania (PA. R. CIV. P. 1915.11(a)); South Dakota (S.D. CODIFIED LAWS ANN. § 25-4-45.4 (1989 & Supp. 1993)); Vermont (VT. STAT. ANN. tit. 15, § 594(a)-(b) (1989 & Supp. 1991)); Washington (WASH. REV. CODE ANN. § 26.09.110 (West 1986 & Supp. 1993)).

[9] *See, e.g.*, New Mexico (N.M. STAT. ANN. § 40-4-8(A) (Michie 1989 & Supp. 1992)); Virginia (VA. CODE ANN. § 16.1-266(D) (Michie 1988 & Supp. 1993)); Wisconsin (WIS. STAT. § 767.045(1), (3) (1989-1990)).

friend of the court."[10] It is even rarer when jurisdictions specify what duties the representative should undertake. Only about a dozen jurisdictions even attempt to provide meaningful guidance.[11]

It is essential, however, that the representative's role be clear to everyone before he or she undertakes any significant tasks. These Standards set forth rules of conduct for counsel and guardians ad litem representing children, enumerating both actions that representatives are expected to undertake and those they are prohibited from undertaking. Ideally, the bar will adopt these Standards in individual jurisdictions. Until they are formally adopted, there will continue to be uncertainty concerning the purpose and role of the assignment. To minimize this uncertainty, this Comment recommends that, at the time they make the appointment, courts specify in writing: (a) the purposes of the assignment; (b) the role of the child's representative; (c) the particular tasks expected to be performed by the representative; (d) the time frames, if any, within which to complete the tasks; (e) the fee arrangement for the representative's services, including the rate, payment schedule, and who is responsible for paying; and (f) whether the appointment is only for trial-level matters or includes responsibilities through any appeal that may be prosecuted.

Although this Standard does not require that the court schedule a formal appearance with all parties to discuss the role of the representative, such an appearance may serve everyone's interests and actually save time in the long run. In any event, if the court fails to specify the representative's role, the newly ap-

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10 *See, e.g.*, Kentucky (KY. REV. STAT. ANN. § 403.090(1) (Michie/Bobbs-Merrill 1984 & Supp. 1992)); Michigan (MICH. STAT. ANN. § 25.121) (Callaghan 1991)).

11 These states include Colorado (*In re* Marriage of Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988), *cert. denied*, 490 U.S. 1021 (1989)); Florida (FLA. STAT. ANN. § 61.403 (West 1992)); Louisiana (LA. REV. STAT. ANN. § 345 (WEST SUPP. 1995)); MAINE (Gerber v. Peters, 584 A.2d 605, 606 (ME. 1990)); Massachusetts (MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1993)); Missouri (MO. ANN. STAT. § 452.423(2) (Vernon Supp. 1993)); New Hampshire (N.H. REV. STAT. ANN. § 458:17-a(I) (1992)); New Mexico (Collins v. Tabet, 806 P.2d 40 (N.M. 1991)); New Jersey (N.J. CT. R. 5:8A & 5:8B)); South Carolina (Shainwald v. Shainwald, 395 S.E.2d 441 (S.C. Ct. App. 1990)); Virginia (VA. R. ANN. 8:6); and Wisconsin (WIS. STAT. ANN. § 767.045(4) (West Supp. 1992)).

pointed representative should take the necessary steps to ensure clarification. Ideally, the representative should arrange for a meeting with all counsel and the judge shortly after the assignment to request specific guidance as to his or her role, the tasks to be performed, and the reasons for this assignment.

When judges are explicit about the purpose of the assignment, the representative should feel free to react. If a lawyer appointed as counsel to represent a child is given instructions by the court that conflict with the ethical obligations of counsel's role, counsel should inform the court as promptly as possible that counsel's higher duty is to the professional rules. Once counsel has determined that the child is impaired or unimpaired for purposes of the representation pursuant to Standard 2.2, *infra*, it is appropriate for counsel to inform both court and the parties of that determination.

2. *Standards Relating to Counsel for Children*

a. *Determination of "impaired" or "unimpaired" children*

The following standards are applicable to all appointments of counsel for children. These standards control the behavior of lawyers acting in the capacity of counsel for children. When lawyers are acting in such a capacity, of course, they are fully bound by the controlling rules of professional conduct in their jurisdiction.

2.1 *In order to define the appropriate nature of his or her role and responsibilities as counsel for a child, counsel should determine whether the child client is "impaired" or "unimpaired."*

Comment

Rule 1.14 of the American Bar Association's Model Rules of Professional Conduct makes clear that a lawyer's role and responsibilities vary sharply, depending upon whether the client is "impaired" or "unimpaired."[12] As the Rule recognizes, children are among the populations of clients who may suffer from an

[12] Although Model Rules are not binding on counsel unless adopted in a particular jurisdiction, they refect the most current thinking of the American Bar Association and usefully serve as guidelines for these Standards.

"impairment" that 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 "impairment." Children can be "impaired" or "unimpaired," depending upon their age, degree of maturity, intelligence, level of comprehension, ability to communicate, and other similar factors. Thus, in every case in which an attorney is appointed to represent a child client, the attorney must make a threshold judgment about whether the client is "impaired" or "unimpaired." That determination will guide the attorney's responsibilities throughout the course of the representation. Standards 2.3 to 2.6, *infra*, set forth guidelines for representation of "unimpaired" children; Standards 2.7 to 2.13, *infra*, apply to the representation of "impaired" children.

2.2 *There is a rebuttable presumption that children age twelve and above are unimpaired. There is a rebuttable presumption that children below the age of twelve are impaired. Under this Standard, the child's counsel, rather than the judge, is to make the judgment whether the child is impaired.*

Comment

The Model Rules of Professional Conduct provide little guidance to lawyers representing child clients who may be "impaired" by virtue of their age and/or level of maturity. The Model Rules recognize that "a client's ability to make adequately considered decisions" may be "impaired" by reason of "minority, mental disability, or for some other reason."[13] However, the Rules say (a) nothing about how lawyers are to determine whether a particular client is impaired or unimpaired and (b) virtually nothing about what lawyers may or must do when they represent impaired clients.[14] Rule 1.14(b) merely states: "A law-

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13 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1994).

14 The Model Code of Professional Responsibility is similarly unenlightening. Ethical Consideration 7-11 states: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . ." Ethical Consideration 7-12 states:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must

yer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[15] As already stated in the Comment to Standard 2.1, perhaps the only thing the Model Rules make clear concerning impairment is that lawyers are not free to make across-the-board assumptions that children below a particular age are automatically impaired and instead must make individualized assessments of a child client's capacity.

This Standard sets forth the rebuttable presumptions counsel should use when determining a child client is unimpaired or impaired. This Commentary articulates the factors counsel should consider when determining whether to treat these presumptions as rebutted in any given case. The Standard is designed to: (a) 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 (b) ensure that the significant percentage of children who are unimpaired are accorded their rightful prerogatives.

Under the Model Rules, a client is impaired only when he or she "cannot adequately act in the client's own interest."[16] For purposes of this Standard, the essential qualities distinguishing an unimpaired client from an impaired one is the capacity to comprehend the issues involved in the litigation, to speak thoughtfully about the case and the client's interest at stake, and

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look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disablility 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. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

15 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (1994).

16 *Id.*

to appreciate the consequences of the available alternatives. Clients who have these qualities should ordinarily be deemed "unimpaired" within the meaning of the Model Rules of Professional Conduct and these Standards.

It is worth pointing out that the Standard is directed solely to the nature of the relationship between counsel and client when the court has seen fit to appoint counsel for a child. The Standard does not require appointment of an attorney to every child who is a party in litigation. Indeed, as explained in Standard 1.1, these Standards assume that children will not be represented by counsel except when there is a specific reason or need for representation.

Moreover, the Standard's use of age twelve as a dividing line for assessing capacity of children is not intended to apply, either directly or by analogy, to the question of whether (and, if so, when) a judge should accord deference to the stated preferences of a child. This Standard is concerned solely with the type of relationship an attorney should have with his or her child client.

(a) *The Use of Age Twelve as a Dividing Line for the Rebuttable Presumption*

The standard deliberately uses an objective chronological criterion to distinguish between children. Under this Standard, lawyers representing children aged twelve or older are to presume their clients to be capable of directing the lawyer's actions. The age of twelve was carefully selected. Although any chronological age is necessarily arbitrary, a number of factors suggest that age twelve is an appropriate dividing point with regard to children's capacity to understand the circumstances of their case and to articulate a considered position about their future. First, the literature on cognitive development suggests that children reach the highest stage of cognitive development between the ages of eleven and fourteen,[17] and many children have already reached the highest stage of cognitive development by the time they are twelve. As a leading author, writing on the subject of

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17 *See* Lois A. Weithorn & Susan A. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589-91 (1982); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING (1958).

when children should have the power to consent to health-related treatment, has written:

> Many authors have reexamined the presumption that minors are incompetent to make decisions regarding their own health or research participation. The conclusions drawn by these authors are strikingly similar. On the basis of cognitive-developmental theory and research, all authors suggest that children age 14 and older possess the requisite cognitive and intellectual capacities to render them comparable to adults, as a group, relative to competency. And, most of these authors recognize that many children attain this highest level of cognitive functioning by age 12."[18]

This research was conducted to support the conclusion that almost all children above the age of twelve are competent to make informed medical decisions about their own treatment. Surely if children over the age of twelve are able to make such decisions, they are mature and intelligent enough to perform the lesser task of instructing their lawyer as to their wishes in a custody or visitation proceeding.

Second, children as young as twelve years of age already enjoy many rights recognized under the law. These rights include the First Amendment right to free speech[19] and the Fourteenth Amendment privacy and autonomy rights to choose to terminate an abortion over the objection of their parents.[20]

Indeed, as the empirical data suggests, many judges already treat children age twelve as a dividing line with regard to the degree to which judges are interested in the views of the child. In the only known survey of its kind, juvenile court and circuit court judges in Virginia who together decide all custody cases in that state were surveyed to determine whether and to what extent they are interested in the views of the children who are the sub-

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18 Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, *in* CHILDREN'S COMPETENCE TO CONSENT 235 (Gary B. Melton et al. 1983). *See also*, Gary B. Melton, *Children's Competence to Consent*, *in* CHILDRENS COMPETENCE TO CONSENT 1, 14 (Gary B. Melton et al. eds., 1983).

19 *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

20 *See, e.g.*, Ohio v. Akron Reproductive Health Ctr., 497 U.S. 502 (1990); Bellotti v. Baird, 443 U.S. 622 (1979). *See also* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

ject of the custody dispute.[21] Virtually all judges reported that the preference of children aged fourteen and older was extemely important (89 percent of the judges surveyed described the preference of children fourteen years or older as dispositive or extremely important).[22] Moreover, virtually all of the judges rated the preferences of children aged ten and thirteen as extremely important (54 percent).[23] In sharp contrast, 92 percent of the judges rated the preferences of children between the ages of six to nine as only somewhat important or as not important.[24] Most judges considered the views of children below the age of six to be irrelevant.[25]

This study might suggest that the presumption of unimpairment be made at age ten. Unfortunately, because the study used a broad category (ages ten to thirteen) for children immediately below fourteen years of age, the study does not indicate how many judges would give even greater weight to children aged twelve and thirteen, as opposed to those aged ten and elevem. At the very least, however, this study clearly shows that judges give significant weight to the expressed views of a twelve-year-old.

(b) *Exercising Discretion As to Each Client*

It is, of course, neither possible nor desirable to eliminate all discretion for lawyers. This portion of the Commentary discusses how a lawyer ought to determine whether a child is of sufficient preference. It is essential that lawyers be given meaningful guidance when making this crucial determination or else 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 impairment, counsel's inquiry should focus on the process by which a client reaches a position, not on the position itself. A lawyer who has reason to believe a child over the age of twelve is impaired should evaluate the

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21 Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988).

22 *Id.* at 1050.

23 *Id.*

24 *Id.*

25 *Id.* at 1046.

child's ability to engage in a coherent conversation and to comprehend the nature of the proceedings. In addition, counsel should look to the client's "basic understanding of the facts and possibilities described."[26] So long as a twelve-year-old or older 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,[27] the lawyer must treat the client as unimpaired.

It is important to note the test does not allow an attorney who believes his or her client has selected an option that is not in the client's best interests to declare the client impaired. Rather, if the client's choice has some rational and reasonable basis to it, whether or not counsel believes it to be in the client's best interests, it is the responsibility of the attorney to follow the client's instructions. Under the Model Rules of Professional Responsibility clients are free to decide for themselves what outcome they prefer, and, except in the rare circumstances when clients are actually impaired, lawyers must respect the wishes and instructions given to them by their clients. Under these principles, a lawyer may not "reasonably believe" a client is impaired 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.

(c) *Lawyers, Not Court, Are to Determine Impairment*

The last sentence in the Standard is not meant to change current law. The terms of the relationship between an attorney and a client are always a matter for the attorney to determine.

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26 Weithorn, *supra* note 17, at 248.

27 The Comments to the Juvenile Justice Standards recommend that counsel should consider clients to be incapable of considered judgment in their own behalf "[w]hen clients are incapable of understanding the proceeding in which they find themselves and therefore cannot rationally determine their interests in the matter." JUVENILE JUSTICE STANDARDS, Counsel for Private Parties, Standard 3.1(b) cmt. (Institute of Judicial Administration/American Bar Association 1982).

Under both the Model Rules of Professional Conduct[28] and the Code of Professional Responsibility,[29] attorneys are obliged to make the case-by-case determination regarding a client's capacity to set the goals of the representation. This is an impossible task for judges to perform since it requires spending many hours with a client. Moreover, counsel's determination is not properly subject to review by a court because any judicial inquiry would necessarily intrude into the confidential communication between counsel and the client.

b. *Representing "Unimpaired" Children*

2.3 *Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client.*

Comment

As stated in the Comment to Standard 2.1, the crucial distinction between categories of clients is impairment versus unimpairment, not age by itself. Once children are found to be unimpaired, they are to be treated substantially like all other unimpaired clients regardless of their age. This means, among other things, that all communications between attorney and client are privileged and subject to the profession's ordinary rules of confidentiality. The only difference these Standards recognize between representing unimpaired children and all other unimpaired clients is set forth in Standard 2.6.

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 and that representing both an unimpaired and an impaired child in the same proceeding may result in a conflict of interest.[30]

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28 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1994).

29 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1982).

30 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994).

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 representation. Counsel is obliged to seek to attain the objectives of representation set by the client.*

Comment

The ethical rules of professional conduct emphasize the client-centered focus of lawyers. The American Bar Association's Model Code of Professional Responsibility provides that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[31] Similarly, the Model Rules of Professional Conduct require that lawyers representing unimpaired clients "abide by a client's decisions concerning the objectives of representation."[32] This requirement "is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[33] 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 impaired.

The attorney-client relationship is, of course, richly textured.[34] 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 young people. However, the basic principle remains that the final choice of what position to take in the litigation is the client's.[35]

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31 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1982).

32 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994).

33 *Id.* Rule 1.14 cmt.

34 *Id.* Rule 2.1 (1994).

35 *See also* BOUNDS OF ADVOCACY Standard 2.17 (American Academy of Matrimonial Lawyers 1991), *reprinted in* 9 J. AM. ACAD. MATRIM. LAW. 1, 24 (1992): "AN ATTORNEY SHOULD NOT ALLOW PERSONAL, MORAL OR RELIGIOUS BELIEFS TO DIMINISH LOYALTY TO THE CLIENT OR USURP THE CLIENT'S RIGHT TO MAKE DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION."

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. But counsel should not be free to second-guess the client or to work against the legitimate ends the client seeks. If counsel is unsuccessful in persuading the unimpaired client to seek a different outcome, counsel is obliged to zealously seek to effect the result sought by the client even when counsel disagrees with the wisdom of the client's preferences.[36] The only measure of escape provided by the ethical rules is when the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[37] Counsel may then ask the court to permit withdrawal, provided that "withdrawal can be accomplished without material adverse effect on the interests of the client."[38]

2.5 *Counsel for an unimpaired child should be treated by all parties and the court as a counsel of record unless the court expressly specifies otherwise.*

Comment

This Standard simply clarifies that counsel for an unimpaired child should be treated 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, for example, the child's counsel should be included. When pleadings are filed, all counsel of record should routinely receive them. Similarly, attorneys for other parties may not communicate with the child or have the child evaluated without the permission of the child's counsel.

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36 *See, e.g.*, Robert M. Horowitz & Howard A. Davidson, *Tough Decisions for the Tender Years*, FAM. ADVOC., Winter 1988, at 8, 11. *See also* JUVENILE JUSTICE STANDARDS, *supra* note 27, at Standard 3.1(b)(1).

37 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1994).

38 *Id.* Rule 1.16(b).

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 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.

2.6 *When representing an unimpaired child, counsel 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 in order to reduce trauma that can be caused by the litigation.*

Comment

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 Standards for Matrimonial Lawyers endorsed by the American Academy of Matrimonial Lawyers already go further than the Model Rules of Professional Conduct by requiring counsel to "encourage the settlement of marital disputes through negotiation, mediation, or arbitration."[39] That Standard, like this one, recognizes that in matrimonial cases traditional notions of winning and losing are less appropriate than in other areas of the law. Taking the interests of all family members into account is justified in these cases.

Although these Standards require counsel to cede ultimate authority to the unimpaired 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. For example, counsel should try to minimize the number of interviews to which a child may be exposed as a result of investigations or expert evaluations.

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39 BOUNDS OF ADVOCACY, *supra* note 35 Standard 2.15.

This Standard requires counsel to take appropriate steps to de-escalate all conflict in the litigation.[40] Counsel should try, consistent with the client's instructions on the goals: (a) to resolve the dispute in the least contentious manner; (b) to resolve the dispute in the most expeditious manner; and (c) to expose the child to as little of the controversy as possible. 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 interest 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.

c. *Representing "Impaired" Children*

2.7 *When a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation.*

Comment

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 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). This Standard rejects as fundamentally flawed a rule that gives attorneys the authority to advocate the result they themselves prefer, in the client's name.[41]

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[40] These Standards impose this obligation on representatives of all children, whether they are counsel for impaired clients or guardians ad litem. *See* Standards 2.10 and 3.5, *infra.*

[41] As the comment to Standard 2.3 states, Model Rules of Professional Conduct Rule 1.14(b) appears to allow a lawyer who reasonably believes that the client is impaired to "seek the appointment of a guardian or take other protective action with respect to a client." The comments to that Rule add, "[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian." In ordinary guardian-ward relationships, guardians are free to advocate a position contrary to what the ward wants.

When lawyers represent unimpaired clients, the individual lawyer's personal views are virtually irrelevant. Because lawyers must "abide by the client's decisions"[42] when representing ordinary clients, all are obliged to perform the same role. Once the unimpaired client has determined his or her goals, counsel's conduct depends in no way on his or her personal values. Similarly situated clients will be similarly represented. Although cases may be decided differently because of the quality of counsel's skill, such differencs are unavoidable. Our legal system can do no more — but should do no less — than define an objective, uniform role for professionals.

When clients are impaired, it is equally important to develop standards that seek to achieve such uniformity. Accordingly, these Standards define a uniform role of counsel for lawyers representing impaired children that does not depend on the opinions or values of the lawyer. When counsel is free to determine what is 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.

Even if ethical rules arguably allow lawyers acting as "de facto guardians" to advocate a position based on the lawyer's personal opinion of what is best for the child, they do not require lawyers to do so; this Standard prohibits such action. The Model Rules insist the lawyers only undertake assignments that they are competent to handle. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994). Since lawyers are untrained to determine what is best for children, it is consistent with those rules for an attorney acting as a "de facto guardian" to eschew taking any position on the ultimate outcome of the case. Therefore, under this Standard, lawyers who are assigned to represent impaired children should refuse the assignment as beyond their competence if the court directs them to make a recommendation on the outcome of the case.

42 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1994).

2.8 *To the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship. This should include, whenever possible, advising the client of counsel's role and informing the client of all significant developments in the case. When communicating with the child client, counsel should use terms and concepts comprehensible to a child of the client's age and intellect.*

Comment

Perhaps the most important function counsel can perform when representing an impaired child is to develop a strong relationship with the child. Under this Standard, lawyers are expected to keep in regular contact with their clients and are encouraged to maintain an ongoing dialogue with them. This is consistent with the Model Rules of Professional Conduct. Rule 1.14(a) states that even when clients are impaired, lawyers are obliged to try, "as far as reasonably possible, [to] maintain a normal client-lawyer relationship."[43] Even when the client is impaired, it is important for the child to know that there is an attorney in the proceeding who will keep the child informed of all relevant information during the course of the case.[44]

2.9 *Counsel for an impaired child should be treated by all parties and the court as a counsel of record unless the court expressly specifies otherwise.*

Comment

This Standard, like Standard 2.5, reminds all parties that, once assigned to represent a child, counsel is another counsel of record in the case and should be treated accordingly. This means, among other things, and subject to court order in a particular case, that the child's counsel should: (a) be served with copies of all papers; (b) be given notice of all court appearances or conferences; and (c) appear at every conference and every court appearance unless excused by the court. In addition, counsel for

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43 *Id.* Rule 1.14(a).

44 This is because, as the comment to MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 states, "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."

an impaired child, as all other counsel of record, may file any motions or other pleadings seeking relief on the child's behalf.

However, the admonition in the Commentary to Standard 2.5 should be kept in mind. This standard is not meant to expand the purpose of the initial assignment. When the court has limited counsel's involvement to issues of custody or visitation — excluding counsel from taking 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 those issues for which counsel has been assigned.

2.10 *When representing an impaired child, counsel 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 in order to reduce trauma that can be caused by the litigation.*

Comment

As set forth in the Commentary to Standard 2.6, children are particularly vulnerable to the harms commonly associated with custody and visitation litigation. The Commentary to Standard 2.6 is generally applicable to this Standard. However, nothing in this Standard is intended to put counsel for the impaired child in the awkward position of being asked to propose a particular outcome that appears to be based on the preference of the child's counsel. If either of the parties were to ask counsel to state such a position, consistent with Standard 2.7 counsel must decline to do so.[45]

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[45] Experienced counsel who have represented very young children in custody proceedings consider the roles of investigator and protector to be of enormous benefit to children. Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study*, 68 NEB. L. REV. 330 (1989).

2.11 *As a general rule, counsel for an impaired child should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where counsel reasonably believes that the court would not approve the settlement if it were aware of certain facts, counsel should bring those facts to the court's attention.*

Comment

As Standard 2.10 indicates, ordinarily counsel serves the child's interests by encouraging settlement. However, when counsel believes a proposed settlement may endanger the child, counsel's duty to protect the child may require interposing an objection to the proposed settlement at least to the extent of bringing the matter to the court's attention. This duty applies unless counsel is prohibited from disclosing information by reason of the attorney-client privilege. This standard requires that counsel reasonably believe the court would not approve the settlement if it possessed the facts known to counsel. In those exceptional cases, counsel should alert the court before allowing the settlement to be completed. The manner of alerting the court may vary. However, *ex parte* communication is inappropriate. Ordinarily, counsel should file a formal pleading with notice to all parties.

2.12 *During the pretrial stage of a case, counsel for an impaired child should use all appropriate procedures to develop facts which the decisionmaker should consider in deciding the case and which otherwise would not be brought to the decisionmaker's attention.*

Comment

Counsel for impaired children can play a very productive role in custody proceedings by becoming an aggressive fact-finder seeking to uncover information that the decisionmaker should consider relevant. This Standard addresses counsel's role in the pretrial stage. Standard 2.13 focuses on counsel's role at an evidentiary hearing. These two Standards are closely connected and are both founded on a certain model of the role of a lawyer for an impaired client. This objectively defined role is similar to that of *amicus curiae*: counsel should become familiar

with the factors that properly may be taken into account in determining the child's best interests, then satisfy himself or herself that the court has the necessary facts to decide the case.

The precise steps counsel should take to accomplish this will vary depending on the procedures in the jurisdiction. In many jurisdictions, for example, an independent investigation will be conducted by an agency connected with the court. In other jurisdictions, no investigation of any kind will be ordered. Counsel should set into motion the process by which relevant facts will be uncovered. If an independent investigation has been conducted, it may be sufficient for counsel to speak with the principal investigator and read the final report. If counsel is satisfied that a thorough investigation has been conducted, there may be no further investigative work necessary.

Among the procedures to develop facts that counsel should consider are all types of discovery, including interrogatories, depositions, interviews of witnesses, requests for production of documents, and so forth. Ordinarily, counsel should plan to interview each of the adults seeking custody or visitation (after receiving permission from their counsel) and to ascertain whether there are other witnesses who counsel should interview, such as caregivers, healthcare providers, and teachers. In addition, in preparing for trial, counsel should consider interviewing all witnesses who may be called, including experts who have filed a report with the court or who have been retained or assigned to investigate the case.

Some might object that reducing counsel's role to a fact-gatherer who may present facts to the court that would otherwise not be disclosed deprives the child of his or her own lawyer within the ordinary use of the term.[46] Although this is correct, it is not possible to provide an impaired child with an advocate in the traditional sense of the word. It is for this reason, among others, that these Standards prohibit counsel representing impaired children from undertaking a traditional advocate's role. Having eschewed such a role, this Standard strives to define an objective alternative role.

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46 Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349, 355-56 (1993).

2.13 *At a trial or hearing to determine custody or visitation, the primary function of counsel for an impaired child is to make the decisionmaker aware of all facts which the decisionmaker should consider.*

Comment

This Standard addresses the role of counsel for an impaired child at an evidentiary hearing. It is closely connected with Standard 2.12 which addresses the role of counsel in the pretrial state of a custody or visitation case. This Standard applies to all situations where evidence is presented to a fact-finder to persuade the fact-finder to decide a controversy between the parties. This Standard sets out a non-partisan role of counsel for an impaired child.

a. *Counsel should use all appropriate procedures, including cross-examination and presentation of witnesses, to adduce facts which the decision-maker should consider and which otherwise would not be adduced.*

Comment

Counsel should not routinely cross-examine witnesses called by other parties nor should counsel routinely present witnesses. Rather, counsel should consider asking questions of a witness called by another party only if counsel believes there are relevant facts that have not already been elicited. Counsel can thereby serve as an important check against the danger that relevant information will be hidden from the court's attention. However, counsel is not a partisan seeking to elicit facts in order to persuade the court to reach a particular outcome. The purpose of counsel's cross-examination or presenting evidence is simply to place the court in the best possible position to decide the case on the basis of the child's best interests.

b. *Unless the child requests otherwise, counsel should take appropriate steps to make the court aware of the child's preferences.*

Comment

When an impaired child has expressed a preference on the outcome of the proceeding, counsel should discuss with the client whether or not he or she would want the preference revealed to the court. Even though these Standards generally do not require that counsel be bound by a position of an impaired child, the one exception to this rule is when the impaired child requests that counsel not reveal the child's preferences. When such a request is made, counsel should honor it. In all other cases, however, counsel should ensure that the court is made aware of the child's wishes. In virtually all jurisdictions, courts may or must take into account the preferences of children as one factor among many in determining the outcome.[47] Judges have discretion to decide

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[47] *See* Alabama (Calhoun v. Calhoun, 179 So. 2d 737 (Ala. 1965)); Alaska (ALASKA STAT. § 25.24.150(c) (1992)); Arizona (ARIZ. REV. STAT. ANN. § 25-332(A) (Supp. 1995)); California (CAL. CIV. CODE § 4600(a) (Deering Supp. 1993) (operative until 1-1-94)); Colorado (COLO. REV. STAT. ANN. § 14-10-124 (West 1987)); Connecticut (CONN. GEN. STAT. ANN. § 46b-56(b) (West 1986 & Supp. 1993)); Delaware (DEL. CODE ANN. tit. 13, § 722(a) (1993 & Supp. 1994)); District of Columbia (D.C. CODE ANN. § 16-911(a) (Supp. 1995)); Georgia (Whaley v. Disbrow, 166 S.E.2d 343 (Ga. 1969) (for children under fourteen years of age)); Hawaii (HAW. REV. STAT. § 571-46 (Supp. 1992)); Idaho (IDAHO CODE § 32-717 (1993)); Illinois (ILL. ANN. STAT. ch. 750, para. 602 (Smith-Hurd 1991)); Indiana (IND. CODE ANN. § 31-1-11.5-21(a) (West 1992)); Iowa (IOWA CODE ANN. § 598.41 (West Supp. 1995)); Kansas (KAN. STAT. ANN. § 60-1610(3) (1994)); Kentucky (Burton v. Burton, 211 S.W. 869 (Ky. Ct. App. 1919) (age of discretion); Shepherd v. Shepherd, 295 S.W.2d 557 (Ky. Ct. App. 1956); Haymes v. Haymes, 269 S.W.2d 237 (Ky. Ct. App. 1954); Bowman v. Bowman, 233 S.W.2d 1020 (Ky. Ct. App. 1950)); Louisiana (LA. CIV. CODE ANN. art. 134 (West Supp. 1995)); Maine (ME. REV. STAT. ANN. tit. 19, § 752(5) (West Supp. 1995)); Massachusetts (Bak v. Bak, 511 N.E.2d 625, *review denied*, 513 N.E.2d 1288 (Mass. 1987)); Michigan (MICH. STAT. ANN. § 722.23 (Callaghan Supp. 1995)); Minnesota (MINN. STAT. ANN. § 257.025 (West 1992)); Mississippi (MISS. CODE ANN. § 93-11-65 (Supp. 1994)); Missouri (MO. ANN. STAT. § 452.375(2) (V. Supp. 1996)); Montana (MONT. CODE ANN. § 40-4-212(1) (1995)); Nebraska (NEB. REV. STAT. § 42-364(1) (Supp. 1994)); Nevada (NEV. REV. STAT. § 125.480(4) (1991)); New Hampshire (N.H. REV. STAT. ANN. § 458:17(VI) (Supp. 1995)); New Jersey (N.J. STAT. ANN. § 9:2-4 (West 1993)); New Mexico (N.M. STAT. ANN. § 40-4-9(A) (Michie 1994)); New

how much weight to give the children's preferences, based on such factors as age, maturity, and the appearance of undue parental influence. However, under current substantive law, impaired children have the same right as all other children to make their views known to the judge.

c. *At the conclusion of a trial or hearing, counsel for an impaired child shall not make a closing argument or submit a memorandum to the court.*

Comment

Standard 2.7 prohibits counsel for an impaired child from advocating or recommending a particular result. Under these Standards, counsel's role at trial is to monitor the information being made available to the court so that counsel is satisfied that the court has heard all relevant information that counsel reasonably believes the court should know. Once that role has been fulfilled, counsel for an impaired child should not be further involved in the trial phase of the proceeding and shall not comment on the evidence.

3. *Standards Relating to Guardians ad Litem*

The following Standards apply when the guardian ad litem is the only representative for the child. These Standards are inapplicable when the guardian ad litem is separately represented by counsel. In the event a guardian is so represented, the guardian is the client and counsel is obliged by ordinary rules of profes-

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York (Jones v. Payne, 493 N.Y.S.2d 650 (N.Y. App. Div. 1985)); Lyons v. Lyons, 490 N.Y.S.2d 871 (N.Y. App. Div. 1985)); North Carolina (Hinkle v. Hinkle, 146 S.E.2d 73 (N.C. 1966); Campbell v. Campbell, 304 S.E.2d 262, *review denied*, 307 S.E.2d 362 (N.C. 1983); *In re* Custody of Peal, 290 S.E.2d 664 (N.C. 1982)); North Dakota (Novak v. Novak, 441 N.W.2d 656 (N.D. 1989)); Ohio (OHIO REV. CODE ANN. § 3109.04(B)(1) (Baldwin Supp. 1992)); Oklahoma (OKLA. STAT. tit. 10, § 21.1(C) (Supp. 1996)); Pennsylvania (Altus-Baumhor v. Baumhor, 595 A.2d 1147 (Pa. Super. Ct. 1991)); Rhode Island (Kenney v. Hickey, 486 A.2d 1079 (R.I. 1985)); South Carolina (Smith v. Smith, 198 S.E.2d 271 (S.C. 1973)); South Dakota (Jasper v. Jasper, 351 N.W.2d 114 (S.D. 1984)); Tennessee (Harris v. Harris, 832 S.W.2d 352 (Tenn. Ct. App. 1992), *appeal denied* (May 4, 1992)); Texas (Bennett v. Northcutt, 544 S.W.2d 703 (Tx. Ct. App. 1976)); Wyoming (Douglas v. Sheffner, 331 P.2d 840 (Wyo. 1958); Curless v. Curless, 708 P.2d 426 (Wyo. 1985)).

sional conduct to represent an unimpaired client (the guardian). These Standards are applicable to all guardian ad litem appointments when the guardian is not separately represented, whether or not the guardian is an attorney.[48] However, when attorneys assigned as a guardian ad litem intend to represent a child as counsel, Standards 2.1 through 2.13 are controlling under these standards.

3.1 *A guardian ad litem who is also an attorney should not combine the roles of counsel and guardian except in accordance with the provisions of Standards 2.1 through 2.13.*

Comment

This Standard rejects the hybrid arrangement by which attorneys who are appointed as guardians ad litem in effect retain themselves as counsel for the guardian and, in their role as "counsel," take their instructions from the "guardian." Such an arrangement is inconsistent with these Standards. It is inconsistent because the assigned adult, wearing the title "guardian," would be permitted to make decisions on behalf of the child (in violation of Standard 3.2) and would then be able to engage counsel who would effect the goals sought by the guardian.

Under this Standard, when an attorney assigned as a guardian for a child acts as counsel, the provisions in Standard 2 are controlling. When acting as a guardian, whether or not a member of the bar, the provisions in Standard 3 are controlling.

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48 When attorneys are assigned as guardians ad litem, they are not performing a role as an attorney. As a result, they are not bound by the ethical rules constraining the performance of attorneys as attorneys. In addition, when attorneys are performing guardian ad litem functions, they may not be covered by their ordinary malpractice insurance policy. As these Standards further develop, in many jurisdictions, guardians may be called as witnesses in the proceeding.

3.2 *The guardian ad litem shall not make a recommendation on the outcome of the proceeding or on contested issues during the litigation.*

Comment

Commonly, guardians ad litem are appointed for the purpose of making a recommendation concerning the best interests of the child. This Standard rejects the two implicit assumptions underlying that traditional purpose. First, that there are adults with special abilities to determine a child's best interests and that when such adults are assigned to find them they will succeed. Second, 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 effect a result consistent with the adult's perception of them.

Guardians ad litem can be useful in these proceedings but they should not be encouraged to permit their own ideas about child rearing or children's best interests to make a difference in how the case is decided. To avoid this, guardians should shift their focus from what is the best *outcome* for the child to what is the best *process* by which the case should be decided.

Standard 2.7 prohibits lawyers in the role of counsel from advocating a position based on the lawyer's personal beliefs as to the child's best interests. This prohibition is not based on any professional rules of attorney behavior; to the contrary, as the Commentary to Standard 2.7 discusses, those rules actually appear to permit counsel, acting as "de facto" guardian, to advocate such positions. Rather, the prohibition is based on the same principles that lead to this Standard.

This prohibition avoids a common pitfall in these proceedings when guardians are permitted to take sides: cases often result in a form of double teaming with the guardian and attorney for one of the parties joining in concert to thwart the interests of the other party. It also avoids the serious danger of abdication of judicial responsibility. By prohibiting the guardian 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.

These Standards reject empowering adults — whether they are labeled counselor, guardians ad litem, or anything else — to

decide what outcome is best for the children they are representing based on their own values, beliefs and ideas. If anyone is ever allowed to state such an opinion, it should only be an expert witness subject to full cross-examination.

An outright prohibition against guardians 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 guardians would advocate the same outcome. In these cases the risk of arbitrary behavior is at its lowest when guardians are appointed. Since the principal concern in these Standards is the avoidance of arbitrary behavior, it would appear that permitting guardians to advocate the result they want in easy cases is consistent with this principle.

However, two problems remain. First, it is not possible to develop standards for determining which are the easy cases. Allowing guardians to decide what result they want for the child whenever the guardian believes the case to be easy is an open invitation to guardians to constrain their own freedom only when they choose to do so. Without meaningful boundaries, it would not be long before guardians were making these decisions even in the harder cases. Second, when cases are obviously easy, a question naturally arises: why is it so important that there be a guardian to seek the obviously correct result? In easy cases, the need for guardians is at its lowest since the court almost always will find the "correct" result on its own. Indeed, presumably guardians will rarely be appointed in such cases.

In the second category, by definition, deciding what is best for the child is difficult. Paradoxically, although it would appear that children particularly deserve advocates in difficult cases precisely to ensure that the "right" outcome is reached, these are the cases in which the risk of a guardian's arbitrary behavior is greatest; in these cases, different guardians are most likely to recommend different outcomes. Moreover, the danger is compounded. Not only is it likely that different guardians will advocate different results in close cases, but it is to be expected that in close cases judges will be grateful to have the opinion of the child's guardian to help decide the case. It is therefore quite possible that the deciding factor in the court's decision will be the guard-

ian's advocacy. This is inconsistent with the rule of law. For these reasons, these Standards prohibit representatives from providing their opinion or from seeking to obtain a particular outcome.

3.3 *Whenever possible, the guardian ad litem should advise the child of the guardian's role and inform the child of all significant developments in the case. When communicating with the child, the guardian should use terms and concepts comprehensible to a child of client's age and intellect.*

Comment

This Standard parallels the expectations of counsel representing an impaired child. The Commentary to Standard 2.8 is applicable to this Standard except for the discussion of the ethical roles concerning the conduct of counsel. Among the important differences between attorney-client and guardian-child conversations is that the latter are not protected by the attorney-client privilege.

3.4 *The guardian ad litem should be notified to appear at all court appearances and conferences with the judge and should appear unless excused by the court.*

Comment

Once a guardian ad litem is appointed, the guardian should be notified of all court appearances and, unless excused by the court, the guardian should be expected to appear at them. This Standard does not expand the purpose of the guardian appointment and would not require notice to the guardian or guardian's involvement in financial matters that are not a part of the custody or visitation issues for which the guardian was appointed.

The Standard is not meant to take up the guardian's, the parties', or the court's time unnecessarily. It is only meant to remind all involved that once a court takes the extraordinary step of appointing a guardian for a child, the guardian should routinely be included in all notification of court proceedings, and a specific decision regarding the necessity of the guardian's involvement should be made. Before the parties or the guardian

may assume the guardian's presence is unnecessary, this Standard requires the court to excuse the guardian.

3.5 *The guardian ad litem 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 in order to reduce trauma that can be caused by the litigation.*

Comment

This Standard parallels the obligations of counsel representing an unimpaired or an impaired child. The Commentary to Standard 2.10 is fully applicable to this Standard.

3.6 *As a general rule, the guardian ad litem should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where the guardian reasonably believes that the court would not approve the settlement if it were aware of certain facts, the guardian should bring those facts to the court's attention.*

Comment

The Commentary to Standard 2.12 is applicable to this Standard.

3.7 *During the pretrial stage of a case, the guardian ad litem should use all appropriate procedures to develop facts which the decisionmaker should consider in deciding the case and which otherwise would not be brought to the decisionmaker's attention.*

Comment

This Standard, like Standard 2.12, instructs the child's representative to be an investigator who attempts to place the judge in the best position to decide the case on the basis of the child's best interests. Although the guardian will not possess most of the tools available to counsel to develop the facts, the guardian should ascertain whether relevant facts about the case will be brought to the court's attention. When the guardian concludes that additional relevant facts exist, the guardian should strive to

supplement the information that the other parties or the court have developed.

3.8 *At a trial or hearing, the primary function of the guardian ad litem is to make the decisionmaker aware of all facts which the decisionmaker should consider.*

Comment

These Standards are written so that the guardian's role can be performed by attorneys, non-attorneys, and Court Assigned Special Advocates (CASA). Indeed, courts should consider using professionals from disciplines other than law as guardians.[49] Since guardians will not necessarily be members of the bar and thus will not be qualified to examine witnesses during trial, Standard 2.13(a) was not carried forward to the guardian's role. Under this Standard, guardians may participate in a proceeding to the extent currently allowed by law in the particular jurisdiction.

a. *If the guardian offers evidence or submits a report, the guardian should be duly sworn as a witness and be subject to cross-examination.*

Comment

Consistent with current practice in many jurisdictions, it is permissible under this Standard for the guardian to offer evidence to the court based on the guardian's own investigation into the case. However, when the guardian's submission is based on his or her independent fact-gathering, the guardian should be treated as all other persons in possession of relevant information and required to testify under oath so that the limitations of the investigation, if any, can be brought to the court's attention. As discussed in the Commentary to Standard 2.13(b), even a young

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49 "While many lawyers may, with training and experience, become intelligent consumers of psychological information and devices, they usually will not be expert in diagnosis and evaluation. Accordingly, it would not seem irresponsible to suggest that a professional trained in psychology, psychiatry, social psychology or social welfare be assigned the initial responsibility for protecting children under these circumstances." JUVENILE JUSTICE STANDARDS, *supra* note 27, at Standard 2.3(b).

child has the right to have his or her views made known to the court. The guardian should ensure that the court is aware of the child's preferences, at least where the child has requested that the guardian so inform the court.

b. *At the conclusion of a trial or hearing, the guardian shall not make closing argument or submit a memorandum to the court.*

Comment

The Commentary to Standard 2.13(c) is applicable to this standard.