

Fordham Law Review

Volume 64 | Issue 4

Article 2

1996

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Bruce A. Green

Fordham University School of Law

Bernardine Dohrn

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Recommended Citation

Bruce A. Green and Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 Fordham L. Rev. 1281 (1996).

Available at: <https://ir.lawnet.fordham.edu/flr/vol64/iss4/2>

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Foreword: Children and the Ethical Practice of Law

Cover Page Footnote

Bruce A. Green, Associate Professor, Fordham University School of Law; Director, Stein Center for Ethics and Public Interest Law. Bernardine Dohrn, Director, Children and Family Justice Center at the Legal Clinic of Northwestern University School of Law; Member, ABA Steering Committee on the Unmet Legal Needs of Children; University of Chicago Law School, J.D.

FOREWORD: CHILDREN AND THE ETHICAL PRACTICE OF LAW

Bruce A. Green*
and Bernardine Dohrn**

INTRODUCTION

IN her recent book *Guide My Feet*, Marion Wright Edelman exhorted, "As we face a new century and a new millennium, the overarching challenge for America is to rebuild a sense of community and hope and civility and caring and safety for all our children."¹ This challenge comes at a time when—in the wealthiest nation in the world—almost 25% of children under age six live below the poverty level,² fifteen children a day are killed by handguns,³ and the number of children in foster care has doubled in the course of a decade.⁴ One consequence of this national crisis has been and will continue to be an increasing number of children appearing in courts and legal proceedings,⁵ while, at the same time, drastic cuts in legal services for the poor⁶ reduce the opportunity for children to receive zealous and competent lawyering.

Against this background, child advocates have engaged in a dialogue, captured in this book, which seeks to make sense of lawyering for children. The accelerating crisis for children both informs and gives added urgency to this effort to define the rights, power, and au-

* Associate Professor, Fordham University School of Law; Director, Stein Center for Ethics and Public Interest Law.

** Director, Children and Family Justice Center at the Legal Clinic of Northwestern University School of Law; Member, ABA Steering Committee on the Unmet Legal Needs of Children; University of Chicago Law School, J.D.

1. Marian Wright Edelman, *Guide My Feet: Prayers and Meditations on Loving and Working for Children* at xxviii (1995).

2. Report of the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, *America's Children At Risk: A National Agenda for Legal Action* at ix (July 1993) [hereinafter Report, *America's Children At Risk*].

3. Children's Defense Fund, *The State of America's Children Yearbook 1995*, at 55 (1995).

4. W.K. Kellogg Foundation, *Families for Kids of Color: A Special Report on Challenges and Opportunities 3* (1995).

5. *Id.* (noting that "state courts are overwhelmed by cases involving . . . children" and that Chicago judges hear about 1,700 juvenile delinquency cases per month).

6. See Stephen Labaton, *Back From the Brink, the Legal Services Corporation Discovers It's in Danger Again*, N.Y. Times, Mar. 31, 1995, at A28 ("With little notice, the Legal Services Corporation has joined other federally supported programs on the list for drastic cuts or possible elimination by the new Republican congressional leadership."); Henry Weinstein, *Legal Aid For the Impoverished Faces Budget Ax; Social Programs: Legacy of Johnson Era Faces 33% Slash in Funding*, L.A. Times, Dec. 29, 1995, at 3 (reporting that "Congress is on the verge of drastically reducing legal aid for the nation's 39 million poor people in the most dramatic change since the program was created . . . in 1965").

thority of children as clients and the terms of accountability of their lawyers.

Lack of adequate legal resources merely compounds the difficulties that children's lawyers face when they try to make sense of their role and responsibilities in even the most common cases. Imagine, for example, the lawyer assigned to serve in a child welfare case on behalf of an eight-year-old child. The child welfare administration has removed the child from his mother's home because she physically abused him on occasion. What is the proper course when the lawyer believes that the child would be better off living with his grandmother, but the child has expressed a definite desire to return home to his mother? The lawyer may respond in a variety of ways, some appropriate, some professionally irresponsible. Consider the following possibilities:

Lawyer A attempts to explain to the child what he must know to make an informed decision. When the child continues to express a desire to return home, the lawyer seeks to secure social services to make the mother's home a safer one for the child. In the end, the lawyer advocates vigorously for what the child desires, albeit with misgivings, hopeful that the judge will make a wise decision, and knowing that the judge will place substantial weight on the lawyer's arguments.

Other lawyers advocate for the goal that they believe to be best for the child, namely, an order placing the child with the grandmother. Lawyer B spends virtually no time with the child to either explore why the child wants to return home or explain why it might be better not to do so, reasoning, "My role is to serve the child's best interests, not to advocate the child's desires." Lawyer C believes, "My role is to advocate the desires of a *competent* child," but after interviewing the child, this lawyer concludes that *if* the child wants to return home to an abusive parent, he is *not* competent to direct the representation.

Lawyer D decides, "This child is competent, and my role is therefore to advocate for his desires, but that task involves *counseling* the child." In doing so, the lawyer, by taking advantage of the child's vulnerability and dependence on the lawyer, persuades the child to agree to be placed with the grandmother.

Two other lawyers accept the child's goal yet conduct the representation in a manner that may undermine its accomplishment. Lawyer E, while arguing for reuniting the child and his mother, asks the court to appoint a guardian *ad litem* to advocate for what is in the child's best interests. Lawyer F, while purporting to advocate for the child's desire, does so with "a wink and nod" to the judge in order to preserve the lawyer's credibility for the benefit of other clients.

Finally, Lawyer G moves to withdraw from the representation altogether.

Given this range of real-life alternatives, lawyers serving children would benefit from guidance about how best to proceed in this and

other common situations that implicate various aspects of lawyers' professional conduct. Where the legal community has reached professional consensus on the proper nature and scope of representation of children, it should make such standards explicit for the benefit of inexperienced lawyers. Further, where child advocates have not yet reached consensus, lawyers should strive to identify areas of disagreement and engage in a dialogue aimed at narrowing it. The writings herein seek to serve both ends.

This book contains the articles, responses, recommendations, and reports generated from the Conference on Ethical Issues in the Legal Representation of Children hosted at Fordham University School of Law from December 1-3, 1995. At the Conference, more than seventy lawyers, judges, legal scholars, and representatives of other professions worked together to develop and adopt Recommendations to improve professional practices of lawyers who serve on behalf of children. The questions addressed at the Conference included: Who should determine when a child is a client with authority to set the goals of the representation? When should the lawyer decide the goals of the representation rather than deferring to the child's decision? How should the lawyer determine whether the child has the capacity to direct the representation? How should the lawyer conduct the representation when the child does not or cannot direct the representation? How should the lawyer interview and counsel the child and address issues of confidentiality and conflicts of interest? And, how should courts and other legal institutions facilitate the provision of effective and appropriate legal services to children? The Recommendations developed in response to these questions are meant to guide the work not only of individual lawyers, but also of the organized bar, the judiciary, lawmakers, and law schools.

The Conference represented a substantial commitment of resources by thirteen organizational cosponsors drawn from the organized bar, the judiciary, government, legal services offices for children, and legal academia.⁷ More significantly, the Conference represented a tremendous commitment of time, energy and, in many cases, personal re-

7. Seven cosponsors were entities of the American Bar Association: ABA Center on Children and the Law; ABA Center for Professional Responsibility; ABA Section of Criminal Justice, Juvenile Justice Committee; ABA Section of Family Law; ABA Section of Individual Rights and Responsibilities; ABA Section of Litigation, Task Force on Children; and ABA Steering Committee on the Unmet Legal Needs of Children. The other six cosponsors were: Administration for Children, Youth and Families, U.S. Department of Health and Human Services; Juvenile Law Center (Philadelphia, PA); National Association of Counsel for Children; National Center for Youth Law (San Francisco, CA); National Council of Juvenile and Family Court Judges; and Stein Center for Ethics and Public Interest Law, Fordham University School of Law.

For their generous financial contributions to the Conference, we express our special gratitude to the Administration for Children, Youth and Families, the ABA Section of Family Law, the ABA Section of Litigation, the ABA Steering Committee on the

sources by the participants. Collectively, they spent thousands of hours organizing the Conference, researching and writing, preparing to attend, participating in discussions, and preparing various summaries and responses. Academics and professionals prepared fourteen articles that were distributed to the other participants in advance of the Conference. Drawing on these articles, on the prior literature, and on their own professional experience, participants met first in small "Working Groups" and then in a plenary session led by Professor Thomas D. Morgan to draft, discuss, and approve recommendations on seven broad subjects. Afterward, participants worked to prepare summaries of the discussions that gave rise to the Recommendations, while others drafted responses designed to critique, expand upon, or complement aspects of the work of the Conference. This book contains all these writings—the Recommendations, Reports of the Working Groups, fourteen articles prepared prior to the Conference and revised thereafter, and ten additional responses to the Conference.

In the two years leading up to this publication, the organizers and cosponsors have frequently been asked whether there is really a need for additional writings addressing the professional practices of lawyers who serve children, and by what process the Conference was responding to this need. This Foreword addresses these questions in turn.

I. THE NEED TO STUDY THE LEGAL REPRESENTATION OF CHILDREN

By their involvement in this Conference, the cosponsors and participants demonstrated their conviction that improving professional representation will matter to the lives of children. What happens in court shapes children's futures. Whether or not children have lawyers and how their lawyers serve them, for better or worse, influences the quality of judicial decisions. The quality of lawyers' work, in turn, is profoundly affected by the laws, judicial decisions, and professional standards that guide and support their professional conduct. Lawyers serving children, however, presently receive inadequate guidance and support.

Each year, courts determine the basic needs and future prospects of millions of children. Lawyers represent hundreds of thousands of these children. Only twenty-nine years ago, the Supreme Court held in *In re Gault*⁸ that children have constitutional rights—including a right to counsel in delinquency cases where their liberty is at stake. This decision constitutes a historical milestone recognizing the legal,

Unmet Legal Needs of Children, the National Council of Juvenile and Family Court Judges, and the Stein Center for Ethics and Public Interest Law.

8. 387 U.S. 1 (1967).

civil, constitutional, and human dignity of children. In the ensuing three decades, the domain of children's law has exploded.

Children are the silent presence in courtrooms adjudicating hundreds of thousands of cases of domestic violence each year,⁹ and are the subjects of increasing judicial attention in family law matters of divorce, custody, visitation, and adoption. Children appear in legal settings involving grave issues of termination of parental rights and adoption, involuntary civil commitment, and health decisions ranging from surgery and abortion to the right to die and organ donation. Children live in prison including on death row. They are expelled from school, and need or are inappropriately forced into special education or home schooling. Children are the *raison d'être* but not participants in child support, parentage, and social security disability proceedings. Children have First Amendment speech, association, and religious rights which spill into litigation, as well as search-and-seizure and privacy concerns. They are parties to deportation proceedings. They are parties to class actions. They are witnesses in judicial proceedings. In short, except in large-scale commercial litigation, children are frequent petitioners or defendants, or the primary non-party subjects in a huge array of legal matters involving lawyers and judges.

The worsening economic condition of American children suggests that increasing numbers of children will be thrown into courts for the determination of their basic needs. The chronic crises of foster care and child protection, the prosecution of children as adults in criminal court, and the reduction of financial support for medicaid, public housing, and public schools will undoubtedly give rise to additional crises, any of which will be addressed within the legal system.

Judicial decisions shape the lives of children of all ages as well as all races, religions, classes, and cultures. But, disproportionately, the courts' decisions address the lives of children of color and the poor. In most cases, judges making these decisions are of a different racial or ethnic group, class, and culture from the children whose lives are at stake. This divide can only compound the challenge confronting judges who seek to make appropriate decisions in difficult and, often, heart-wrenching cases.

Lawyers matter in this process. Our legal system rightly assumes that individuals whose interests are at stake in a judicial proceeding will be better off with legal assistance. No one would imagine that children can adequately fend for themselves in judicial proceedings—certainly not our own children. Few would presume that judges will make decisions that best serve the interest of children without benefiting from the perspective of representatives who speak on the chil-

9. See Report to the President of the ABA, *The Impact of Domestic Violence on Children* (1994).

dren's behalf. That is especially true given the enormity of decisions judges must make. If anyone needs legal assistance, children do.

Yet, the legal needs of children are vastly underserved.¹⁰ Outside the context of delinquency proceedings, where children have a constitutional right to counsel, the availability of assistance is a function of statutory law or judicial discretion. The legal system does not automatically assign children legal representation whenever courts address their rights or interests. In some contexts, such as dependency proceedings, although the stakes are extraordinarily high for children, access to legal assistance varies greatly from state to state. In some states, children are appointed lawyers; in others, they are appointed nonlawyer guardians *ad litem* or attorney/guardians *ad litem*; in others, they receive no independent assistance at all. In other legal contexts, such as custody proceedings in domestic relations cases, the absence of representation for children is the norm, not the exception.

When lawyers do represent children, the lawyers' performance matters critically. Judges look to lawyers to develop options and to help select among them. The judges most likely rely on the child's representative—if the child has one—to explore and present options appropriate for the child. By all accounts, judges place great stock in what a child's representative has to say. Thus, children's lawyers have a great capacity to influence judges—for good *or* bad.

Unfortunately, recent studies show that lawyers often serve children poorly.¹¹ This is scarcely surprising. Typically, the court assigns and the state compensates children's lawyers. Inadequate compensation and overwhelming caseloads often make it impossible to give each child's case the time it deserves.

Moreover, many lawyers are professionally unqualified to serve children. A contemporary legal education may provide no training at all in interviewing and counseling clients, much less in interviewing and counseling child clients in light of developmental differences from adult clients. Law schools rarely educate students to understand the racial, ethnic, class, and cultural backgrounds of those who comprise the child-client population—backgrounds vastly different from those of most lawyers. Law schools do not prepare lawyers to overcome the obstacles these differences present in communicating with children, evaluating children's goals, and understanding children's options. Traditionally, law schools teach about legal institutions, but not about the social institutions relevant to children; they train law students to work

10. See Report, *America's Children At Risk*, *supra* note 4, at 3-4.

11. See, e.g., Report of the ABA Juvenile Justice Center, Juvenile Law Center, and Youth Law Center, *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 6-7 (Dec. 1995) (finding that attorneys do not vigorously represent child clients and stating that "the interests of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless").

with lawyers, but not with social workers, psychologists, and other professionals whose work influences judicial determinations about children. Only a handful of law schools have in recent years developed programs focusing particularly on the legal representation of children.¹² Assigned lawyers who only occasionally represent children may not have the incentive or the opportunity to obtain the post-graduate training or experience necessary to assist children competently. In many cases, lawyers may be so ill-prepared that a child would be better served by a dedicated nonlawyer representative with the time to concentrate on one family.

Given the importance of how lawyers practice, professional norms matter, as do institutional structures that facilitate or frustrate implementation of those norms. Children's lawyers confront ethical questions that are immediate, frequent, and palpable. Such quandaries are not an academic matter. Ethical concerns arise not only when an eight-year-old client wants to return home to a previously abusive parent, but also when an abandoned newborn can be placed for adoption on the condition that she never have knowledge of her siblings or biological family, when a ten-year-old refuses to visit a noncustodial parent, or when a child tells her lawyer about drugs or domestic violence in her foster home on the condition that the lawyer will keep the confidence. Professional standards influence lawyers' responses to these problems because most lawyers want to serve their clients well and ethically. Where professional standards give clear guidance as to appropriate professional practices, lawyers will strive to uphold them even in the face of pressure to do otherwise.

Even lawyers who represent children regularly and are qualified to do so, however, find clear answers unavailable. Lawyers may face un-

12. The most comprehensive program is the Civitas Childlaw Center and Clinic at Loyola University School of Law (three-year law clinical curriculum designed to educate lawyers to represent children in abuse and neglect proceedings). Innovative programs at our own institutions are the Children and Family Justice Center at Northwestern Legal Clinic, Northwestern University School of Law (multidisciplinary clinical representation of children and families in child welfare, adoption, delinquency, domestic violence, and education-related cases) and the Child Advocacy Project at Fordham University (offering interdisciplinary courses and externships to graduate students in law and social work and emphasizing ethical issues raised when professionals work together in the context of child abuse and neglect proceedings). Other pioneering programs include: the Child Advocacy Clinic at the University of Michigan Law School; the Children's Advocacy Institute at the University of San Diego School of Law; the Tulane Juvenile Law Clinic; the University of Maryland Law School Clinic; the Juvenile Law Clinic at the District of Columbia School of Law; the Juvenile Justice Clinic at Georgetown University School of Law; the Children's Law Project at Sheppard Broad Law Center, Nova Southeastern University; the Mandel Legal Aid Clinic at the University of Chicago Law School; and the Juvenile Law Center and Family Law Center at New York University School of Law. For a complete listing, see ABA Section of Litigation: Task Force on Children, *A Directory of Pro Bono Children's Law Programs* (2d ed. July, 1994) (on file with *Fordham Law Review*).

certainty about the very nature of their role, since, in proceedings involving children, lawyers have been assigned to serve variously (or simultaneously) as the child's lawyer, the child's guardian *ad litem*, or the court's independent fact finder. How does the lawyer explain her role to the child client? How does she develop trust and solicit information? Can she switch back and forth between the attorney role and the guardian *ad litem* role?

Even when the lawyer's role is clearly stated, significant uncertainty about what professional obligations the role implies has led lawyers for children to perceive their responsibilities in vastly different ways.¹³ For example, questions abound regarding the proper duty to preserve the child client's confidences. Should the lawyer be permitted to breach the child's confidences to prevent the child from engaging in conduct likely to cause the child physical harm or death? Should lawyers be mandated by law to report when a child client is being physically abused?

Likewise, it is uncertain how the lawyer is to determine the child client's best interests, when the lawyer has a responsibility to do so. Suppose the lawyer is assigned to represent a seven-month-old baby with multiple unexplained fractures. The mother states that the child was never out of her care and that the baby was injured when hospital personnel administered CPR. What should the lawyer do if two independent experts retained to examine and submit reports, present evidence, and assess the demeanor and conduct of the parents, disagree about how the child had been harmed? Should the lawyer present the one expert who supports the conclusion that the lawyer finds most convincing? Should she choose the alternative that poses the least short-term or long-term risk to the child, and, if so, how should she determine what that alternative is?

It is understandable that prevailing professional norms, as reflected, for example, in the Model Rules of Professional Conduct ("Model Rules"), may not provide any answers, or, if they do, may provide incomplete or inappropriate answers to important questions about how lawyers properly should serve children. By design, the Model Rules state principles broadly applicable to wide-ranging areas of practice, but rarely provide detailed or context-specific guidelines.

13. In 1995, students in a Fordham Law School seminar on ethics and public interest law interviewed lawyers who regularly represent children. The interviews revealed a wide array of approaches to situations like the one described at the outset of this Foreword. For a description of the seminar and its place in the law school's curriculum, see Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum For A New Century*, 58 *Law & Contemp. Probs.* (forthcoming 1996) (describing Fordham Law School's specialized professional responsibility curriculum); James L. Oakes, *Commentary on Judge Edwards' "Growing Disjunction Between Legal Education and the Legal Profession,"* 91 *Mich. L. Rev.* 2163, 2166 (1993) (commenting on Fordham's "varied and rich curriculum" in professional responsibility).

They assume that lawyers will be able to apply the general principles in particular practice settings.

For example, rules of professional conduct instruct lawyers to represent clients competently. But they do not elaborate on what lawyers must learn to qualify them to represent children or what lawyers must do to entitle them to say that they have served a child adequately. Similarly, the rules provide that, when clients' interests may conflict, a lawyer sometimes may not represent multiple clients and sometimes may do so with the clients' informed consent. The rules are often implicated in cases involving children. Children typically live with their families. May a lawyer represent a child and a parent or a group of siblings? Children act with cohorts and so, when arrested, are far more likely than adults to be arrested in groups. May a lawyer represent a group of unrelated children? Government agencies often purport to act in a child's interest. May a lawyer represent a child and a government agency? Existing conflict-of-interest rules do not explicitly answer these questions.

One difficulty in applying the general principles is that representing children differs from representing other clients. For example, the rules instruct lawyers to consult with their clients, to keep their clients informed, and to preserve their clients' confidences. But they do not explain how to perform this counseling function for children who have not sought or selected the lawyer but have had the lawyer thrust upon them; who do not understand the lawyer's function and for whom the legal process is unfamiliar; who, based on sad experience, have learned to distrust adults; and for whom access to the lawyer, by telephone or in person, is restricted. The rules do not explain how to respond to a child client's age, dependency, lack of verbal ability, or severe medical needs. In short, the rules do not begin to address how children's lawyers should overcome the numerous, seemingly insurmountable, barriers to the creation of anything resembling the traditional attorney-client relationship.

An added difficulty is that, in representing children, the ordinary expectations of the attorney-client relationship may not even apply. Thus, Rule 1.14 of the Model Rules describes minority as a potential disability, acknowledging that a child's minority may affect the lawyer-client relationship. It implies that a lawyer's ordinary relationship with a client—including for example, the duty to serve the client loyally and to preserve the client's confidences, the duty to serve the client zealously and competently, and the duty to defer to the client's decisions about the goals of the representation—may sometimes differ when the client is a child. Yet, neither the rule nor the accompanying commentary provide meaningful guidance about how and when the child's minority will affect the lawyer's ordinary professional obligations. If the child's "capacity" is the factor determining whether the client sets the goals of the representation, then how does the lawyer

determine the child's "capacity"? If the child cannot set the goals of the representation—as is clearly the case when the client is an infant—what responsibilities does the lawyer assume on behalf of that child client?

Making decisions on behalf of a nonverbal child presents an even more daunting lawyering challenge than doing so on behalf of an incapacitated adult client. For example, the lawyer confronts more difficult issues in representing a six-month-old neglected infant whose mother is drug-addicted and obviously loves her infant than in determining how to manage the assets of an incapacitated older client who had a lifetime of experience with money matters and family relationships. With a young child, no lifetime footprints guide the lawyer about the person's intent or wishes or nature. Consequently, the discretion accorded the lawyer or guardian *ad litem* for a preverbal child is unparalleled in scope. The opportunity, indeed inevitability, of bias and personal value-determined judgments in such a situation, including the class, race, ethnic, and religious assumptions that underlie notions of child rearing and family life, is vast and undisclosed.

The attorney-client relationship is a principal-agent relationship. It is difficult, however, to think of children as "principals" in any meaningful sense, given their relative, if not utter, powerlessness to control or fire the lawyers who act in their name. In relationships with child clients, only professional norms guide lawyers' conduct. Thus, while in other attorney-client relationships clear standards may be desirable but unnecessary, here they are essential. This Conference sought to identify the gaps in professional standards for lawyers representing children, recommend statutory reforms and practice guidelines, and help launch broad reforms in children's lawyering.

II. THE FORDHAM CONFERENCE

A. *Organization of the Conference*

The Conference on Ethical Issues in the Legal Representation of Children was the culmination of more than a year's planning. Work began in 1994, when the ABA Section of Litigation Task Force on Children and the ABA Section of Family Law agreed to join Fordham's Stein Center for Ethics and Public Interest Law in organizing a conference modelled on one hosted by Fordham in 1993.¹⁴ Repre-

14. The Conference on Ethical Issues in Representing Older Clients, conducted at Fordham in December 1993, led to the development of Recommendations and other writings contained in a special issue of the *Fordham Law Review*. The organization of the earlier Conference, the considerations leading up to it, and the writings it produced, are described in Bruce A. Green & Nancy Coleman, *Foreword*, 62 *Fordham L. Rev.* 961 (1994). Since 1994, the work of that Conference has had considerable impact within the legal profession. It has been the subject of conferences and educational programs conducted throughout the country for the benefit of elder law practitioners, legal services lawyers, and trusts and estates lawyers, among others.

sentatives of these three groups,¹⁵ assisted by representatives of the ten other organizations that subsequently joined as cosponsors,¹⁶ worked together to establish a framework for developing recommendations and solicit other writings that would provide practical guidance to children's lawyers and to judges, lawmakers, and legal educators who influence how these lawyers practice. We planned to draw upon and contribute to academic study, but to focus on the practical dilemmas of lawyering for children.

Our idea was to bring together thoughtful professionals with varied experiences relevant to the legal representation of children. The participants at the Conference would engage in discussions and strive to develop recommendations designed to advance the legal profession's understanding of how to best serve child clients in the face of difficult questions of professional ethics. The primary purpose was not to educate the invited participants, but to draw on their expertise and intellectual energy to develop writings that would benefit the legal profession and, more importantly, the children it serves. This would include, secondarily, educating and challenging the participants.

We set an initial goal of examining issues of professional practice across the full spectrum of legal settings. We recognized that lawyers provide assistance to children in a variety of contexts, that the child's role in the different categories of cases may vary, and that the kinds of representation a child will need in these different contexts may vary accordingly, as may the lawyer's role and ethical responsibilities. Whether an issue arises at all, precisely how it is presented, and ultimately how it should be resolved, may depend on the context. Nevertheless, we expected that norms developed in some contexts would have implications for how lawyers practice in other contexts, that variations in practices in different settings might prove to be unjustifiable upon close examination, and, ultimately, that it should be possible to

Additionally, Recommendations concerning Model Rule 1.14, dealing with the representation of incapacitated clients, have inspired proposed additions to the Commentary to that rule and other proposals for clarifying the application of the rule that are now under consideration within the ABA.

15. We are grateful to Professor Katherine Hunt Federle who, on behalf of the ABA Section of Family Law, worked closely with the two of us as a principal organizer of the Conference.

16. The cosponsors were represented by: Howard Davidson (ABA Center on Children and the Law); Susan Mischmerheizen and Joanne Pitulla (ABA Center for Professional Responsibility); Robert G. Schwartz (ABA Section of Criminal Justice and Juvenile Law Center) Professor Katherine Hunt Federle and Ira Lurvey (ABA Section of Family Law); Professor Sanford Fox (ABA Section of Individual Rights and Responsibilities); Bernardine Dohrn (ABA Section of Litigation, Task Force on Children); Professor Catherine J. Ross (ABA Steering Committee on the Unmet Legal Needs of Children); Cecilia Sudia (Administration for Children, Youth and Families, Department of Health and Human Services); Marvin Ventrell (National Association of Counsel for Children); Professor Martha Matthews (National Center for Youth Law); Krista Johns (National Council of Juvenile and Family Court Judges); and Professor Bruce A. Green (Stein Center for Ethics and Public Interest Law).

develop guidelines that would be useful in most, if not all, settings in which lawyers represent children.

An additional goal was to assure that the participants' discussions be fully informed by work that had previously been undertaken. We recognized that much work had already been done to fill the gaps in the professional codes. Books and articles on lawyering for children have been produced by academics and professionals, including some of those who would eventually participate in the Conference,¹⁷ and practice guidelines have been developed by various professional organizations, including some of the cosponsors.¹⁸ Fourteen additional articles, made available in advance of the Conference, would further contribute to the participants' thinking. Drawing on this body of work, participants would have the opportunity to broaden and to advance previous discussions, to develop additional learning, and thereby enhance the understanding about how best to represent children.

The organizers began by outlining what appeared to be the most significant unresolved ethical issues encountered by lawyers representing children in different legal settings. This outline was distributed to various law professors and practitioners who had previously written or worked in the fields of legal ethics or children's representation, in order to solicit authors to address some of these issues. Responding to the call were the fourteen authors whose articles are published in this book as part of the Proceedings of the Conference.

The organizers next developed a list of invitees, in addition to those who had agreed to author articles. We sought a broadly representative group. Participants ultimately included lawyers, law professors, judges who work in areas affecting children, and academics and professionals from other disciplines, such as social work and psychology, who have extensive experience relating to children. The lawyers at the Conference included many with years of experience representing children. They served children in different practice settings, in different geographical locales, and on both an assigned and privately retained basis. Other lawyers at the Conference brought legal

17. Among the prior writings by participants are: Janet R. Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation*, in *Ethical Problems Facing the Criminal Defense Lawyer* (Rodney J. Uphoff ed., 1995); Ann M. Haralambie, *The Child's Attorney* (1993); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DePaul L. Rev. 983 (1993); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Representation of Children*, 59 N.Y.U. L. Rev. 76 (1984); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. Fam. L. 1 (1977-78); Robert E. Sheperd, Jr., *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. Rich. L. Rev. 156 (1974).

18. See, e.g., Proposed ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375 (1995).

experiences, backgrounds, and expertise in other relevant areas, including legal ethics generally.

For the first two days of the Conference, participants worked intensively in seven assigned "Working Groups" to propose recommendations relating to different, but often interrelated, issues bearing on the legal representation of children. Those seven areas were: (1) allocation of decision-making authority; (2) determining the child's capacity to make decisions in the representation; (3) the lawyer's role as decision maker when the child cannot direct the representation; (4) interviewing and counseling; (5) confidentiality; (6) conflicts of interest; and (7) the judicial role and responsibility with respect to the child's representation.

Each Working Group included a discussion leader and eight to ten additional participants, including one responsible for recording the substance of the discussion. The participants were urged to proceed systematically—first raising questions and identifying issues relating to the broad subject matter of the Working Group, then identifying the options available for resolving these issues, next considering the relative merits of these options, and, finally, attempting to reach a consensus with respect to a body of recommendations. Essential to the success of the Working Groups was that everyone participate fully in discussions, drawing on his or her background and experience, that participants open themselves to each others' insights and experience, and that participants work together in a disinterested manner to achieve common ground, keeping in mind that the process would focus on how best to serve real children with real needs. By all accounts, each Working Group proceeded successfully in this manner, ultimately producing an array of proposed recommendations. The Reports of the Working Groups contained in this book summarize the discussions leading to the initial proposals.

On the third day of the Conference, participants came together in a plenary session chaired by Professor Morgan to consider, discuss, and vote on the substance of the proposed recommendations.¹⁹ Participants adopted many of the Working Group's proposals, adopted amended versions of some, were unable to address many due to time, and rejected others. In some cases, when a significant number of participants had uncertainties that could not be resolved in the limited time available, the Conference declined to adopt the proposal but

19. We were fortunate to have Professor Thomas D. Morgan's services. Now teaching at George Washington University Law Center, Professor Morgan served previously as a law school dean and as president of the Association of American Law Schools (among his many credits), and is thus a veteran discussion leader. He was familiar with the format of this Conference, having participated in the 1993 Conference on Ethical Issues in Representing Older Clients. He is also a nationally renowned expert on legal ethics, having authored a leading casebook on the subject that is now in its fifth edition and presently serves as Associate Reporter of the American Law Institute's Restatement of the Law Governing Lawyers.

agreed to identify it as one meriting further study. Following the Conference, proposals that had been adopted by the plenary session were compiled, organized and edited, then circulated among the organizers, discussion leaders, and designated members of the Working Groups to ensure that the final product fairly captured the spirit of the Conference as well as the substance of what it had decided. The Recommendations contained in this book represent the culmination of this effort.

Finally, at the close of the Conference, participants were invited to prepare articles in response to the proceedings in order to underscore, expand upon or criticize particular recommendations, or to address issues meriting further study. Ten additional authors accepted the invitation. Their contributions are included in this book as Responses to the Conference.

B. *Recommendations of the Conference*

The Conference adopted Recommendations concerning the panoply of issues addressed by the individual Working Groups. Some endorsed changes in the law, including structural reform; others provided practical guidance to lawyers serving within the framework of existing laws and institutions; others identified subjects on which lawyers for children should be trained and educated; others suggested issues on which further study should be undertaken.

The Recommendations deserve to be read closely by lawyers, judges, policy makers, and others who are concerned about children and the law. One cannot summarize the Recommendations without doing them an injustice. Nonetheless, at least ten broad themes deserve to be highlighted.

First, children need lawyers. The Conference recommended the appointment of lawyers to children not only in delinquency proceedings, where children have a constitutional right to counsel, but also in all dependency (abuse and neglect) proceedings, termination of parental rights proceedings, foster care proceedings, juvenile court proceedings involving status offenses, and mental health commitment cases, as well as in other individual cases where appropriate. It urged the adoption of laws to ensure the appointment of lawyers in such cases and, in the absence of such laws, recommended that judges exercise their authority to make such appointments.

Second, lawyers serve children best when they serve in the role as attorney, not as guardian ad litem. Laws currently authorizing the appointment of lawyers to serve as children's guardians *ad litem* (or in a dual capacity as lawyer and guardian *ad litem*) should therefore be amended to authorize the appointment of lawyers to represent children as their clients. Given the choice, a lawyer should elect to represent the child as a lawyer, not to undertake the role of guardian *ad litem*. And, when the lawyer is assigned the role of guardian *ad litem*,

the lawyer should, to the extent legally permissible, serve in the same manner as would the child's lawyer.

Third, the lawyer's responsibilities with respect to the child whom he represents will vary depending on whether the child has capacity to direct the representation. If the child is preverbal or otherwise cannot direct the representation, the lawyer must decide what position or range of positions to present to the court on the child's behalf. If the child can direct the representation, however, the lawyer has the same ethical obligations as the lawyer would have when representing an adult. Among other things, the lawyer must let the child determine the goals of the representation, must preserve the child's confidences, and must keep the child informed about the conduct of the representation.

Fourth, the child's lawyer must take particular care to communicate with the child. The lawyer must explain, in a manner that the child understands, the lawyer's role and responsibilities, the extent to which the child's confidences will be preserved, and who will make decisions regarding the conduct of the representation. The explanation must be candid. Although a lawyer might be able to employ deceit to obtain important information that would not otherwise be forthcoming, being honest is vital. Establishing a relationship of trust and confidence, obtaining necessary information from the client, conveying information needed by the client to enable him to make informed decisions about the representation, and ascertaining the client's desires, present a difficult challenge when the client is a child. These tasks may require lawyers to spend a significant amount of time with child clients. To guide lawyers, the Conference provided extensive Recommendations about how to interview and counsel children.

Fifth, the child's lawyer must serve with undivided loyalty. Lawyers therefore should not jointly represent more than one child, or a child and another client, in contexts where a reasonable likelihood exists that the clients' interests will conflict. For example, a lawyer should not jointly represent multiple respondents in a delinquency case, should not jointly represent a child and a government agency in any case, and should not jointly represent a child and the child's parent in various categories of cases, including delinquency, termination of parental rights, or child custody proceedings.

Sixth, in deciding how to represent a child, a lawyer should exercise judgment within analytic frameworks that are appropriate and principled. The Conference developed such frameworks for decision making in several areas, including, most importantly, the determination of whether the child has capacity to direct the representation and the determination of what position or range of positions to present to the court when the child cannot direct the representation.

Seventh, in interviewing and counseling a child and in making decisions relating to the representation, the lawyer must be sensitive to dif-

ferences of race, ethnicity, class, and culture between the lawyer and the child. For example, the lawyer must be sensitive to the danger that these differences may inappropriately influence the lawyer's own perception of the child's ability to direct the representation. Decisions that seem unsettling to the lawyer may be rooted in the child's racial, ethnic, cultural, or class background, which should be respected.

Eighth, children's lawyers have a lot to learn. To represent children competently, lawyers must undertake training and develop expertise that is substantially different from that ordinarily necessary for representing adults. Among other things, lawyers must know how to interview and counsel children; must understand child development; must become educated about the role of culture, race, ethnicity, and class in the choices that a child client might make; and must be conversant with the work of social workers and psychologists and know how to work as a team with these and other nonlawyer professionals. The Conference proposed the establishment of a process for certifying lawyers as "child advocates," which would entail both training in these subjects and mentoring by more experienced lawyers. It also recommended that family court judges receive comparable training and that law schools broaden their curricula to include clinical offerings and other courses of study relating to the representation of children.

Ninth, the ethical and competent representation of children requires the support of an appropriate framework of laws, legal structures, and judicial decision making. Accordingly, the Conference recommended structural and legal reform to ensure, among other things, that children's lawyers be appointed by independent agencies based on objective criteria conducive to high-quality representation and that such lawyers receive reasonable compensation, have access to necessary services and information, and carry manageable caseloads. It recognized that judges' responsibility to children is not satisfied solely by the assignment of an attorney. Additional judicial responsibilities include advocating for the creation of children's law programs in law schools, legal services offices, and public defender agencies; establishing responsibilities and monitoring lawyers to ensure that they represent children competently and effectively; and, generally, taking the lead to improve the administration of justice for children and families.

Finally, there is much more work to be done. The Conference identified more than two dozen areas in which further study should be undertaken to enable lawyers to serve children effectively and appropriately. Many involved questions that can be answered only after empirical research. Others involved questions that the participants would have attempted to resolve had time permitted. For example, several proposals were made concerning the representation of children in class actions—the subject of Martha Matthews' article and Christopher Dunn's response—but there was not enough time in the plenary session to discuss them. Similarly, a proposal was made con-

cerning the Model Rule relating to fee payments by third parties—a problem addressed in Nancy Moore’s article—but there was inadequate time to address some participants’ concerns about the proposal.

Although the time allotted to discuss the Recommendations at the plenary session was limited, participants engaged in spirited discussion. For example, questions of confidentiality sparked considerable disagreement at the plenary session—as the Responses to the Conference prepared by Judith Larsen, Randi Mandelbaum, and Kevin M. Ryan may suggest. In particular, the proposed exception to Model Rule 1.6 for cases in which children place themselves in serious physical danger enjoyed the support of a plurality, but not majority of participants. Some criticized the proposal as unduly paternalistic—ultimately, making life easier for lawyers, but not better for children—and a significant minority opposed the proposal. Ultimately, the Conference agreed to recommend this as an additional question meriting further consideration.

Conference participants expressed overwhelming support for many, if not most, of the final Recommendations, but this did not place the Recommendations beyond criticism. For example, several participants expressed concerns about the basic proposition that lawyers should serve unimpaired children as they would serve adults. They were reluctant to say that children should have full authority to direct attorneys without intervention of a parent or other adult who has the child’s best interest at heart. One participant underscored that children under eighteen are not fully empowered. Another suggested that more attention should be given to the important role not only of parents, but also of nonlawyer guardians *ad litem* and Court Appointed Special Advocates.

The set of proposals addressing the determination of whether a child has capacity to direct the representation engendered particular discussion during the plenary session. The initial proposals underwent various revisions before a final set was approved. The participants debated whether the framework should include presumptions that children of various ages are or are not capable of directing the representation. They also questioned whether the framework should include an explicit presumption that *all* verbal children have the capacity to direct the representation. Participants made arguments on both sides of these questions. They discussed a third question regarding the extent to which the lawyer’s determination of the child’s capacity should turn on the nature and wisdom of the decision that the child wishes to make. Conference participants reached agreement that a lawyer should not conclude that a child lacks decision-making capacity solely because the lawyer disagrees with the child’s decision, but that the nature and finality of the decision present relevant considerations.

No doubt, given additional time, these Recommendations could have been improved and expanded. They are not meant to be the last word, but rather, to give guidance to lawyers, to advance debate within the legal profession, to encourage further study, and to spur bar associations, judges, and legal institutions to improve children's access to ethical, qualified counsel.

CONCLUSION

Born two years ago, the project to promote a national, interdisciplinary dialogue on ethical issues in the legal representation of children is, we are confident, still far from full-grown. So far, the project has produced a national conference at which seventy participants developed recommendations for legal reform, guidelines for improving professional practice, and an agenda for education and future study. It has also produced the twenty-four articles that are presented in this book, together with the Recommendations and summaries of the discussions conducted at the Conference.

Although much has been accomplished, we know there is much to be done. We trust that the cosponsoring organizations, other local, state, and national bodies, and individual lawyers will benefit from the collected work product of the Conference, will publicize it, and will use it to foster further discussions and to develop additional materials relating to ethical issues in the legal representation of children. With the publication of this issue of the *Fordham Law Review*, we seek to expand the dialogue and to place its further development in your hands.

**PROCEEDINGS OF THE
CONFERENCE ON ETHICAL ISSUES IN
THE LEGAL REPRESENTATION OF CHILDREN**

**Fordham University School of Law
December 1-3, 1995**

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