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# ETHICAL ISSUES IN REPRESENTING JUVENILE CLIENTS: A REVIEW OF THE IJA-ABA STANDARDS ON REPRESENTING PRIVATE PARTIES

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The 1967 decision of the United States Supreme Court in *In re Gault*[1] established that a juvenile has the right to counsel in juvenile court proceedings. The *Gault* decision, however, did not end the debate concerning the role and professional obligations of that counsel. Prior to *Gault,* the presence of counsel in juvenile court proceedings was the exception rather than the rule.[2] The assumed rehabilitative, nonpenal intent of the juvenile justice system created an informal procedure and a courtroom environment which discouraged, or at best co-existed uneasily with, the lawyer's traditionally adversarial role.[3] Social workers or juvenile court counselors supplanted or undercut the attorney's function as counselor to his client.[4] Dispositions relied more upon youth workers' predictions of the juvenile's behavior and recommendations for treatment or services than upon the sufficiency of the evidence.[5] In a proceeding where the

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

2. Fewer than 10 percent of respondents in juvenile court received legal representation. President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime 82 (1967).

3. W. Stapleton & L. Teitelbaum, In Defense of Youth 64-65 (1972).

4. Brennan & Khinduka, *Role Expectations of Social Workers and Lawyers in the Juvenile Court,* 17 Crime & Delinquency 191 (1971); Cayton, *Relationship of the Probation Officer and the Defense Attorney after* Gault, 34 Fed. Probation 8, 9 (1970); Edelstein, *The Duties and Functions of the Law Guardian in the Family Court,* 45 N.Y. St. B.J. 183 (1973); McMillian & McMurtry, *The Role of the Defense Lawyer in Juvenile Court: Advocate or Social Worker,* 14 St. Louis U.L.J. 561, 562 (1970).

5. Ferster & Courtless, *Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court,* 7 Law & Soc'y Rev. 195, 206-09 (1972).

interests of the state and the accused juvenile were assumed to be identical, an attorney's skills were arguably unnecessary.[6]

The *Gault* decision rejected the assumption of identical interests, asserting the importance of legal assistance to allow the accused juvenile "to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[7] *Gault* extended certain fundamental protections to juvenile defendants, including the privilege against self-incrimination and the right to confront witnesses. It did not, however, wholly disclaim the view that because juvenile proceedings are benevolent, attorneys should play a diminished, or at any rate non-adversarial, role in the proceedings.[8] Subsequent decisions by the Supreme Court and other courts reinforced the principle that, while juvenile court and adult criminal proceedings must provide defendants with substantially similar fundamental due process protections, those proceedings need not be identical. To some commentators, it seemed logical that the role and professional obligations of attorneys in the two types of proceedings should also differ.[9] To others, the traditional adversarial role met the requirements of both types of proceedings; it insured that the unique features of the juvenile justice system in fact benefited the juvenile client.[10]

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6. H. Lou, Juvenile Courts in the United States 137-38 (1927), *cited in Introduction* to Institute of Judicial Administration-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties 1(Tent. Draft L. Teitelbaum rptr. 1976) [hereinafter cited as Standards]; Teeters & Reineman, The Challenge of Delinquency 321 (1961).

7. 387 U.S. at 36.

8. *Id.* at 23-26. *See* W. Stapleton & L. Teitelbaum, *supra* note 3, at 32-37.

9. Isaacs, *The Role of Counsel in Representing Minors in the New Family Court,* 12 Buffalo L. Rev. 501 (1963); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach,* 61 Geo. L. Rev. 1401, 1410 (1973).

10. The American Bar Association Code of Professional Responsibility requires a lawyer to represent his client zealously within the bounds of the law. ABA Code of Professional Responsibility, Canon 7. Ethical Considerations 7-1 and 7-19 illustrate the reason why such zealous and adversarial representation is seen as benefiting not only the client but the justice system as a whole. *Id.*, Ethical Consideration 7-1, 7-19 [hereinafter Ethical Consideration will be cited EC]. EC 7-1 states, "The duty of a lawyer, both to his client *and to the legal system,* is to represent his client zealously within the bounds of the law." (Emphasis added.) *Id.* at 7-1. According to EC 7-19:

> Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.

*Id.* at 7-19. The United States Supreme Court in *Gault* similarly assumed that strong adversarial advocacy on behalf of juvenile clients could only further the purposes of the juvenile justice system. 387 U.S. 1, 21-22 (1967).

This debate among commentators reflects a legitimate and serious concern among attorneys representing juvenile clients about the nature and extent of their professional obligations. In the absence of concrete guidance, attorneys are handicapped in providing the effective representation essential to the preservation of their clients' rights. Professional ethical canons which propose to address these difficult issues must recognize the realities of juvenile justice practice and provide explicit guidelines on how to handle the unique elements of such practice.

It is not the purpose of this article to review exhaustively the literature and commentary which surround this debate. Rather, the article will provide a brief presentation and analysis of the two alternative roles most frequently proposed for attorneys representing juvenile clients. Particular emphasis will be placed on the practical as well as ethical difficulties such recommended roles may present. Next, the article will highlight and comment upon one recent set of proposed standards as guidelines for attorneys in juvenile justice proceedings, exploring the ways in which the proposals may or may not assist attorneys in effective and ethical representation. A short conclusion will attempt to summarize the key considerations for a conscientious attorney developing an ethical standard to pursue in representing the juvenile client.

## ALTERNATIVE ROLES—THE ATTORNEY AS GUARDIAN OR AMICUS CURIAE

In the post-*Gault* years, youth workers, judges, and attorneys attempted to develop alternative roles for the attorney practicing in juvenile court. While prevented by *Gault* from arguing an absolute identity of interest between juveniles and the court, some of the commentators nevertheless assumed tension existed between "defending" a juvenile client in traditional adversarial fashion and encouraging the client's respect for and understanding of the legal system.[11] An "amicus curiae" role for the attorney, it was proposed, might lessen this tension.[12] Such a role would primarily be geared to assisting the court's decision-making process. The attorney would place before the court any information, either factual or legal, which might further its decision-making process. In some cases this could

11. E. Lemert, Social Action and Legal Change: Revolution Within the Juvenile Court 178 (1970); Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court,* 116 U. Pa. L. Rev. 1156 (1968).

12. Walker, *The Lawyer-Child Relationship: A Statistical Analysis,* 9 Duq. L. Rev. 627, 647 (1971); Comment, *The Attorney-Parent Relationship and the Juvenile Court,* 12 St. Louis U.L.J. 603 (1968).

involve the disclosure of information to the court which an attorney following an adversarial role would regard as confidential. The theory is that the attorney, by providing such information, increases the chances of obtaining an appropriate and beneficial disposition for the juvenile client. Moreover, the "amicus curiae" role recommends that the attorney act as intermediary between the court and the juvenile (and in some cases the parents as well), explaining the purpose and operation of the court process and interpreting the court's positions and judgment.[13]

Proponents of the "amicus curiae" role generally seem to accept (or at least to regard as appropriate encouraging the juvenile client to accept) that the court is concerned with, and acting in, the juvenile's best interests. Thus, the benevolent orientation of the court, rather than the competency of the juvenile to assist an attorney in representing him, is the primary justification for the "amicus curiae" role.[14] Some proponents, in addition, assume that the accused juvenile, if not actually guilty of the charged offenses, probably needs some services or supervision which an adversarial attorney, by obtaining an acquittal, would prevent him from receiving. (This concern assumes that the juvenile or his family will refuse to participate voluntarily in diversion or other social service programs.) For such clients, the "amicus curiae" attorney might point out the need for services, both to the juvenile and to the court, and interpret the court's dispositional order for his client as appropriately requiring the juvenile's participation.[15]

The limited competency of the juvenile to identify and assert his own best interests, on the other hand, is the primary rationale advanced by proponents of the "guardian" role.[16] The attorney following such a role independently identifies and then advocates to the court his judgment of the juvenile's best interests. The "guardian" attorney decides whether to take into account the juvenile's own expressed desires and, if so, how much weight to give them. He may exercise his traditional skills to the extent that so doing will

13. Skoler & Tenney, *Attorney Representation in Juvenile Court,* 4 J. Fam. L. 77 (1964); Stapleton & Teitelbaum, *supra* note 3. Some commentators urging the adversarial role still point out the necessity of these mediating and explanatory functions. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Juvenile Proceedings,* 11 Harv. C.R.-C.L. L. Rev. 565, 590 (1976).

14. *Introduction* to Standards 6-7; Platt, Schecter & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court,* 43 Ind. L.J. 619, 624 (1968).

15. Platt & Friedman, *supra* note 11, at 1184.

16. Walker, *supra* note 12, at 627-28. *See also* Genden, *supra* note 13, at 589, recommending deference to a "fully competent" adolescent and a more independent decision making role for the attorney "[d]epending on the age and maturity of the child."

accomplish the result he has identified as desirable for his client.[17] Thus, he may in some cases assert or waive the client's rights, or raise or decline to raise privileges or objections—not to obtain an acquittal or the least burdensome disposition for his client, but to obtain an adjudication of delinquency or a restrictive disposition if such a result is in the client's best interests. The "guardian" role has been especially recommended for attorneys in cases where the client is very young and does not have an appointed guardian, or where there is a perceived conflict of interest between parent and child which would prevent the attorney from looking to the parent for guidance.[18] The attorney following the "guardian" role has discretion to pursue a strategy or advocate to the court a disposition to which the juvenile client objects.

The "guardian" role which permits an attorney to override the expressed desires of his client is consistent with the general rationale behind the state's authority to intervene in the lives of children who have committed no crime. Juvenile court jurisdiction over so-called status offenders is predicated upon the assumption that children, by virtue of their youth, lack the ability to make competent decisions as to their well-being.[19] Thus, behavior which appears to pose a possible danger to the juvenile's health or welfare or which the local community regards as inappropriate for children may justify intervention by the state. Similar state intervention in the lives of adults, by contrast, can be justified only by a showing of incompetency, for example, through a guardianship proceeding or civil commitment hearing.[20] Juvenile proceedings rest on the dual premises that it is

17. Coxe, *Lawyers in the Juvenile Court,* 13 Crime & Delinquency 488, 490 (1967). *Cf.* Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel,* 39 Fordham L. Rev. 375, 383-85 (1971) (suggesting the adversarial role is appropriate for the adjudication phase and a wider range of roles, including "guardian" type, at disposition).

18. Comment, *supra* note 12, at 620, outlining possible adversity of interest between parents and child. *See also* Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice:* Gault *and Its Implications,* 3 Law & Soc'y rev. 491, 548-49 (1969) on delinquency matters in which parents were complaining witnesses.

19. National Council on Crime and Delinquency, Status Offenders and the Juvenile Justice System: An Anthology (1978); L. Teitelbaum & A. Gough, Beyond Control: Status Offenders in the Juvenile Court (1977).

20. Paralleling the debate concerning the role of counsel in juvenile court proceedings has been a similar discussion among attorneys representing allegedly mentally ill, mentally retarded, or elderly clients. Here again, some commentators have criticized the traditional adversarial role as inappropriate in "civil" settings such as commitment hearings, guardianship or conservatorship proceedings, where the state's purpose is benevolent. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 Tex. L. Rev. 424 (1966); R. Rock, M. Jacobson & R. Janopaul, Hospitalization and Discharge of the Mentally Ill (1968); Galie, *An Essay on the Civil Commitment Lawyer: or How I Learned to Hate the Adversary System,* 6 J. Psych. & L. 71 (1978). As with children, difficulties in communicating with clients have contributed to the issue of incompetency. Limited ability to consult clients on essential matters has

appropriate to treat juveniles differently from adults and that the juveniles' incapacity deprives them of certain powers to act for themselves and also entitles them to special protections.[21] Indeed, courts upholding differences in juvenile court procedures have never held that juveniles are entitled to less protection than adults, but rather have held that, where changes in procedure contribute to the rehabilitative purpose of the juvenile justice system, they are constitutionally acceptable.[22]

It is easy to understand the attraction of both the "amicus curiae" and the "guardian" roles. The first emphasizes the essential professional function of the attorney—to explain and interpret the complexities of the juvenile court system and the applicable law to the client and his parents. The "amicus curiae" attorney can derive satisfaction from the belief that he is doubly assisting the course of justice, by presenting all relevant information to a benevolent court and by increasing his client's respect for the juvenile justice system. The "guardian" role helps the lawyer overcome problems caused by the juvenile client's communication problems or limited understanding. It permits the attorney an approved way out of the frustration (as common in adult as in juvenile justice practice) of deferring to a client's judgment which runs contrary to the attorney's assessment of the best course of action.

The psychological attractions of these alternative roles, however, are irrelevant to their acceptability from an ethical standpoint. An attorney must be able to further the goals delineated in *Gault*—protection of the juveniles' rights and benefits under law and pursuit of any legitimate purpose by lawful means. It is from this perspec-

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produced a confusion of roles or feeling of "rolelessness" among attorneys. *See generally* Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal,* 45 Miss. L.J. 43 (1974); Blinick, *Mental Disability, Legal Ethics and Professional Responsibility,* 33 Alb. L. Rev. 92 (1968); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems,* 62 Calif. L. Rev. 816 (1974).

A number of commentators have argued forcefully in favor of a traditional adversarial role. *See generally* James, *Handling the Civil Commitment Case,* 2 Mental Disability L. Rep. 430 (1978); Plotkin, *Legal Malpractice: Representing "Mentally Different" Clients,* 36 N.L.A.D.A. Briefcase 46 (1979); S. Schwartz & D. Stern, A Trial Manual for Civil Commitment ch. 6 (1976), *reprinted in* 1 Mental Disability L. Rep. 380 (1977); Note, *The Role of Counsel in the Civil Commitment Process,* 84 Yale L.J. 1540 (1975) (even where severely handicapped clients are involved); S. Herr, The New Clients: Legal Services for Mentally Retarded Persons 136-42 (1979); Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals,* 31 Stan. L. Rev. 625 (1979).

21. *Compare In re* Gault, 387 U.S. 1, 50 (1967) *with In re* Winship, 397 U.S. 358, 367 (1970). *See* Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 Stan. L. Rev. 1187, 1191 & n.25 (1970).

22. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Kent v. United States, 282 U.S. 541 (1966).

tive, then, that the "amicus curiae" and "guardian" roles will be assessed.

## ETHICAL AND PRACTICAL PROBLEMS PRESENTED BY THE ALTERNATIVE ROLES

Underlying both the "guardian" and "amicus curiae" roles is the unspoken assumption that a juvenile who has come to the attention of the court is almost always someone for whom state intervention is appropriate. Even if the actual charges cannot be proven or are in some respects inaccurate, the juvenile client still is in need of social services; the juvenile will get into trouble again if not stopped or, ideally, rehabilitated.[23] This conviction is shared by youth workers, police, and court personnel, all of whom have been criticized for shaping the charges to fit, not the facts of the juvenile's situation, but the action they wish the state to take (e.g., foster care placement, secure confinement, psychiatric treatment).[24]

If the attorney assumes that his juvenile client will almost always be "better off" under the jurisdiction of the court than by winning an acquittal, his discomfort with the traditional adversarial model becomes acute. Attorneys defending adult clients assume that, whatever the beneficial aspects of criminal sanctions upon society, these sanctions are unlikely to be experienced other than negatively by the client. The primarily penal emphasis of the adult criminal justice system logically requires strong procedural protections against unjust application of such sanctions.[25] Even where the attorney has reason to believe the client committed the acts alleged, his adversarial role permits him to require the state to prove its case, while he offers mitigating factors and suggested dispositions which clearly are intended to serve the client's interest, and only secondarily, or not at all, the state's. The *judge* has the responsibility to balance the defense attorney's suggestions against the interests of the state and to decide whether a less restrictive disposition may in fact preserve the state's interest in preventing a repetition of the offense.

The "guardian" role in juvenile court in a sense requires the attorney to perform those judicial functions before developing a strategy

23. Platt & Friedman, *supra* note 11, at 1184; Kay & Segal, *supra* note 9, at 1411; Ferster, Courtless & Snethen, *supra* note 17, at 400.

24. *See* Ferster & Courtless, *supra* note 5, at 207 (court recommendations based on availability of resources rather than appropriateness of treatment); Platt & Friedman, *supra* note 11, at 1175 (attorneys view social workers and court personnel as naive, powerful, and arbitrary, interested in supporting their own functions within the juvenile justice system).

25. The United States Supreme Court has held that a client is entitled to defense by an advocate on appeal—a right not satisfied by an amicus curiae. Anders v. California, 386 U.S. 738 (1967); Ellis v. United States, 356 U.S. 674 (1958).

or making any recommendation to the judge. Indeed, one of the difficulties with such a role is that it may require the attorney to perform differently at the adjudicatory hearing than at the dispositional stages. At least theoretically a "guardian" attorney could decide that his client was not in need of any services proposed by the court and logically attempt both an acquittal through vigorous adversarial representation and, failing acquittal, advocacy against any but the least restrictive placement. Assuming, however, that there is a need for services or treatment, the "guardian" attorney may be required not to seek acquittal at the adjudicatory stage so that disposition may be possible. Where diversionary programs are available and the client is willing to use them, this may be less of a problem. But what if the attorney practices in a jurisdiction where there are limited placements available in the program he prefers for his client, and the client's eligibility would be increased if he were adjudicated delinquent or otherwise referred under a court order? If then at disposition the "guardian" attorney's strong advocacy for a less restrictive placement is ineffective, there can be no "taking back" of the neutral posture assumed at the adjudicatory hearing. This is crucial because the disposition hearing is far more important than the actual adjudication in many juvenile justice proceedings. Studies show that an initial secure placement or referral to a highly restrictive program affects future placements of a child and creates stigma, whether the original placement was made because of a status offense or a minor delinquent act.[26] Because the original charge, if serious, may imply a stringent disposition, if the attorney refrains from strong advocacy at adjudication in the hope of eventually getting a less restrictive placement, such a strategy might backfire at the time of disposition.

The "amicus curiae" role presents similar ethical difficulties. It assumes that the primary way in which an attorney can attain a desirable outcome for the client is by furthering an effective and complete flow of communication between client and court. Yet this does not take into account any variation in the impact certain information may have upon the judge, the social worker, or probation officer recommending disposition. It also assumes that the main purpose of the juvenile justice proceeding is disposition, because withholding information to defeat charges against the client is inconsistent with the "amicus curiae" function. Similarly, the role of the "amicus curiae" attorney at disposition and after is to explain to the

26. Community Research Forum, University of Illinois at Urbana-Champaign, Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria (1979); R. Sarri, Under Lock and Key (1974); Pappenfort & Young, Use of Secure Detention for Juveniles and Alternatives to Its Use (1977).

client and his family disposition options and the necessity of complying with the court order. These actions duplicate the functions of the probation officer or social worker. The attorney, however, may also advocate a particular disposition, but if he does so as an expression of the client's wishes, he has departed from the role of an "amicus curiae." If he simply expresses his own opinion, he is acting as a "guardian." This switch from the earlier "amicus" role at the adjudicatory stage is confusing for client, attorney, and court, and might be ineffective in obtaining the desired outcome if the strongest effort of an adversarial attorney would have been at the adjudicatory hearing, directed toward obtaining acquittal (or, at a minimum, preventing the introduction of damaging or inflammatory evidence).

An argument sometimes introduced by proponents of both the "guardian" and the "amicus curiae" roles is that a non-adversarial attorney function helps minimize the trauma of the juvenile justice proceedings for the client.[27] A similar argument was used in support of the informal proceedings challenged in *Gault* and considered again in judicial decisions upholding some distinctions between juvenile court and adult procedures.[28] There is no question that involvement of a juvenile in the court system is a stressful and oftentimes frightening situation for both the juvenile and the parents. The ethical issue for an attorney, however, is whether waiving or softening the procedural protections and formality of an adult hearing, although making the client more comfortable, will ultimately place him at a disadvantage.

The informal courtroom atmosphere often has been linked to loose enforcement of the rules of evidence, opening the door to opinion, hearsay, and conjecture. Encouraging complete family and client candor with court personnel, probation officers, or court-appointed psychologists may produce problems when these people introduce evidence or testify to opinions based upon the candid communications. Overall, the biggest risk of informality in courtroom atmosphere and procedure is that it will support an unspoken assumption that the hearing is chiefly or solely to determine what to do about (or for) the juvenile. If such an assumption is not challenged by the attorney, there is a danger that the essential prelim-

27. Genden, *supra* note 13, at 592; Sarri, *supra* note 26, at 22; Children's Defense Fund of the Washington Research Project, Children in Adult Jails 29 (1976), discuss generally the issue of trauma. *But see* J. Ensminger & T. Liguori, *The Therapeutic Potential of the Civil Commitment Hearing: An Unexplored Potential,* 6 J. Psych. & L. 4 (1978), arguing for the therapeutic benefits of legal proceedings for mentally disabled clients.

28. *In re* Gault, 387 U.S. at 26; State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918). *See also* S. Wheeler & L. Cottrell, Juvenile Delinquency: Its Prevention and Control (1966).

inary issues of jurisdiction, burden of proof, and sufficiency of evidence will only perfunctorily be addressed. Thus the juvenile's attorney, by permitting informality, will have tacitly conceded the state's *right* to intervene.

Adopting a "guardian" role can involve an attorney in usurping judicial functions. It, as well as the "amicus curiae" function, may also negate the function of the legislature. The premise underlying the right to counsel in *Gault* is that the juvenile client, like an adult client, is entitled to the protection of all the rights he has under law. He is also entitled to pursue any lawful purpose by lawful means.[29] Primary among these legal protections is the right to force the state to prove its case against him. An attorney who counsels the client to waive this right, not because this is the most effective tactical move but because as "amicus curiae" he wants the court to have all possible information about the juvenile's guilt, is in effect telling the legislature and the juvenile courts that the procedures they have provided are unnecessary. Where a legislature has defined, for example, criteria justifying secure detention and the attorney as "amicus curiae" does not strongly argue to the court that his client fails to meet those criteria, the attorney in effect is disregarding the legislature's judgment as to what types of juveniles the state has a legitimate interest in confining. The juvenile client has a right to have the state prove that he falls in that category, and the attorney's action negates that right. Moreover, the legislature has determined that the state has no interest in confining a child not in that category. Similarly, for the attorney to permit his client who does not meet the statutory criteria to be confined because, as "guardian," he thinks it would benefit the juvenile is an act inconsistent with the judgment of the legislature. In sum, an attorney who adopts either alternative role replaces the judgment of legislators and judges with his own to the detriment of a juvenile justice system which requires the playing out of a complex procedural process to operate correctly.

Quite apart from the practical difficulties of implementing a non-adversarial role, there remains a serious philosophical objection. The legal profession as a whole has defined the appropriate functions and obligations of an attorney, not merely as an exercise in self-definition, but as a way of informing the public about our services. In plain language, as a profession we represent that an attorney does certain things for a client that one layperson cannot do for another. We support attorney-client confidentiality to reassure the client about the special nature of that relationship. We develop

29. ABA Code of Professional Responsibility, Canon 7, Disciplinary Rule 7-101(A) [hereinafter Disciplinary Rule will be cited DR]; *id.*, EC 7-1; *see* note 35 *infra*.

ethical standards which provide guidance for our clients as well as for ourselves as to what is expected from us in the way of professional skills, loyalty, and integrity. When we agree to be someone's attorney, we are agreeing to perform the function and role which were thus defined. If what we are actually planning to be is somebody's "guardian," or "amicus curiae," or some combination, based on our own emotional reactions to the client or our own psychological convenience, we have defrauded the client. In most cases the client (and this is especially true in juvenile cases) will have no standard against which to measure our efforts in his behalf, so he may never know whether we have actually represented him (as a lawyer would an adult), or whether we have acted as his guardian or as the friend of the court. Certainly the juvenile court personnel are not likely to object to our deviation from the traditional adversarial role; on the contrary, they are the very individuals whose orientation makes them uncomfortable with attorneys who are strong advocates. The lack of an effective monitoring presence to assess whether the attorney is functioning as an adversarial advocate or in some other role inconsistent with the profession's representation, makes the attorney's understanding of his proper role all the more crucial.

Appearing as counsel while really acting as a "guardian" or "amicus curiae" presents a final ethical problem. The juvenile client may not be the only one who is falsely reassured by the presence of counsel. The records of juvenile proceedings on appeal reveal that the presence of counsel creates a presumption of compliance with due process requirements.[30] A judge hearing a case where a juvenile clearly is without the assistance of counsel may feel bound by the judicial canons of ethics to assist the juvenile, or at a minimum, to weigh lightly evidence introduced against the juvenile which an effective attorney would have challenged.[31] This is not an argument

30. The plea of ineffective assistance of counsel is of course available on appeal, but likely to be difficult to assert successfully. Bazelon, *Defective Assistance of Counsel*, 42 Cin. L. Rev. 1 (1973). However, a class action decision in Memmel v. Mundy, 75 Wis. 2d 276, _____, 249 N.W.2d 573, 577 (1977) found that the legal representation of defendants in civil commitment cases, provided by a closed panel of six court appointed attorneys over a period of more than one year, systematically violated the defendants' rights to due process of law and the effective assistance of counsel. The Wisconsin Supreme Court in that case stated that it is a constitutional requirement that legal representation be provided. A Wisconsin statute further required that those attorneys act in an adversarial role. *See also* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 278 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated,* 421 U.S. 957 (1975), *judgment reentered,* 413 F. Supp. 1318 (1976); Quesnell v. State, 83 Wash. 2d 224, 238, 517 P.2d 568, 577 (1974).

31. This is, of course, highly idealistic, but the author has encountered at least one judge who stated that he is more apt to regard himself as the juvenile's advocate if there is no attorney and thus to disregard inadmissible evidence or consider more placement options than if there is ineffective counsel present.

in favor of providing no counsel; the experience of juvenile courts prior to *Gault* clearly indicates that this practice contributed to a widespread violation of the juvenile defendant's constitutional rights.[32] It is an argument for insisting that an attorney do more than just be present during the procedure; he should insure that due process requirements are actually met.

## THE IJA-ABA STANDARDS—ANALYSIS AND CRITICISM

One volume in the series of standards and commentary developed by the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards[33] specifically addresses the question of the appropriate role for attorneys representing juveniles. In *Counsel for Private Parties*[34] Professor Teitelbaum sets out and discusses standards for representing minors not only in juvenile justice proceedings, including status offense hearings, but in abuse and neglect proceedings as well. The Standards attempt, usually successfully, to resolve the debate over the appropriate use of a traditional adversarial role in the juvenile justice system. While coming down strongly in favor of the adversarial role, the Standards nevertheless acknowledge the special needs of juvenile clients by viewing the attorney as counselor as well as advocate.

The general thrust of the Standards is that the attorney representing a juvenile is bound by the same ethical obligations as any other attorney, including the obligation to represent zealously his client within the bounds of the law. This obligation, the commentary notes, is predicated upon the client's right to have his legally available rights and benefits protected and to seek any lawful objective through legally permissible means.[35]

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32. *In re* Gault, 387 U.S. at 34-42.

33. In the spring of 1977 the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards released twenty-three volumes of proposed standards and commentary. The volumes were the product of the Juvenile Justice Standards Project undertaken by IJA in 1971 and co-sponsored by ABA since 1973. The Project addressed a widely acknowledged need for extensive analysis of the United States juvenile justice system coupled with comprehensive recommendations to guide professionals, and state and social service agencies involved in that system. The proposed standards and commentary were intended to identify and codify developing concepts and policy directions in the area of juvenile justice and to promote uniformity and fundamental fairness among the justice systems of the different states.

34. Standards; *see* note 6 *supra*.

35. The Standards cite the ABA Code of Professional Responsibility, Canon 7, DR 7-101(A), which provides that counsel's duty is to seek the "lawful objectives of his client through all reasonably available means permitted by law," and cite EC 7-1 which says:

> The duty of the lawyer, *both to his client and to the legal system,* is to represent

Throughout the Standards, three key concepts are introduced and developed: the juvenile's need for the assistance of an attorney at key stages throughout the juvenile justice process; the obligation of the attorney to consult the juvenile, as he would an adult client, on essential matters and to honor the client's decision; and the duty to protect the right of the juvenile client of limited or uncertain competency as vigorously as he would protect the rights of any other client. A primary example of how those concepts are applied to the controversy over the attorney's role is the commentary's statement on identification of the juvenile's interest. The Standards reject any assumption of identity of interest between the state and the accused juvenile. They leave it within the powers of the client, after consultation with the attorney, to decide whether, in his particular case, such identity exists.[36] Generally, the ability of the client to participate meaningfully in this identification of his interests is implied throughout the Standards. Where a client's capacity may be affected by extreme youth, mental disability, or other cause, the Standards provide additional guidance.[37] However, the prevailing view throughout the Standards appears to be that such difficulties only underline the attorney's duty to seek effective communication and consultation with the juvenile and do not justify adoption of a "guardian" or "amicus curiae" role.[38]

*Attorney's Relationship with Court Personnel*

The attorney's function as the protector of his juvenile client's rights in any interactions with court personnel is discussed in one of the earliest Standards. The lawyer is required to cooperate with social work and probation departments and agencies and to instruct the client to do so.[39] This Standard reflects an understanding of the practical benefit to attorney and client of being on good terms with the individuals recommending dispositions to the court. It also addresses the concern of some commentators that the attorney's attitude toward court personnel influences the juvenile client's attitude.

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> his client zealously within the bounds of the law . . . . The professional responsibility of the lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

Standards at 3-4.

36. *Introduction* to Standards at 5-7; Standards, Std 3.1(b)(i).
37. *See* text accompanying notes 59 through 63 *infra*.
38. *Introduction* to Standards at 3, 8; Standards, Std 4.2 note, at 99-101.
39. Standards, Std 1.4.

However, there is an important condition: cooperation is required unless it is inconsistent with protecting the client's legitimate interests in the proceeding or other rights under law.[40]

This Standard sets the tone for all subsequent recommendations for attorney interaction with the court system on behalf of his client. To the extent that it is consistent with the attorney's primary task of protecting the client's rights, the attorney may and even should utilize those features of the juvenile justice system which reflect its arguably nonpenal, benevolent orientation. Thus conferences with court social workers and probation officers, exploration of diversion programs, referral for social, psychological, psychiatric, or other services, may all be appropriately pursued where attorney and client agree they may benefit the client.[41] Yet the attorney's continuing duties both to consult his client on significant decisions and to keep his client informed of the progress of the case should avoid the evidentiary and tactical problems discussed above.[42] They may also have the desirable effect of increasing the client's understanding of the working of the juvenile justice system and in particular the role of the attorney.[43]

*Right to Assistance of Attorney*

The Standards acknowledge the importance of providing the juvenile access to legal assistance from the time he enters the juvenile justice system. They require that counsel be provided for a juvenile subject to delinquency or in need of supervision charges, not only during the adjudicatory hearing, as is the practice in many states,[44] but:

40. *Id.*

41. Standards, Stds 1.4, 4.3, 5.2, 6.2.

42. Standards, Stds 3.1(b), 3.5, 5.1.

43. Standards, Std 3.5 note, at 96.

44. A distinction must be made between statutes which *permit* representation of the juvenile by counsel at any stage of the juvenile justice system and those which provide for counsel by court appointment. Attorneys retained by parents or by the client privately may begin their representation of the client at the initial stage of intake. Clients unable to afford an attorney may receive court appointed counsel only for the purposes of representation at a detention review hearing or formal adjudication. Because effective advocacy early in the process may make the difference between dismissal of charges on participation in a diversion program or adjudication and placement after prolonged secure detention, the importance of providing legal representation to the juvenile as early as possible should be clear. While not explicitly requiring court appointment of counsel at intake, the Standards codify case law requiring such counsel at detention, transfer, and parole revocation hearings. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (detention—adults); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parole revocation of adults); Kent v. United States, 383 U.S. 541 (1966) (transfer); Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1975) (detention—juveniles); Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973) (intake procedural protections—juveniles); Shone v. Maine, 406 F.2d 844 (1st Cir. 1969)

> in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment. The nature of the forums and the formal classification of the proceedings is irrelevant for this purpose.[45]

The situations outlined as requiring access to the assistance of an attorney encompass the gamut of juvenile justice system proceedings, from the initial intake stage to post-judicial administrative reviews. The crucial criterion for deciding whether an attorney's presence is required is not whether the meeting or proceeding takes place in court, but whether it will have a significant effect upon the juvenile's custody, status, or course of treatment.[46] This is precisely the criterion which should be used. Many decisions which result in serious deprivation or abridgement of a juvenile's liberty or other fundamental rights are made outside the adjudicatory hearing. An informal conference of social workers, where the juvenile client is not present but is discussed as one of several cases on the court docket, may be the critical meeting which determines the placement recommendation made to the court. The recommendation may be based upon information obtained by a social worker which is not in the juvenile's record, and is not admissible in the court proceedings proper. An effective attorney would make a point of first, knowing of the existence of the meeting, and second, representing the client there. The broad-based language of this Standard alerts the attorney to his obligation to know of any situation which affects his client's interests and not to concentrate only on those in-court proceedings where a lawyer seems most obviously needed.

### *Attorney's Duty to Explore Alternatives*

No duty of the attorney is more critical to effective advocacy than the investigation of alternatives, whether at the intake stage or in preparation for the disposition hearing. The lack of available place-

(institutional transfer); Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E.2d 908 (1971) (parole revocation—juveniles). *See also* Ralston, *Intake: Informal Disposition or Adversary Proceeding,* 17 Crime & Delinquency 160 (1971); Rosenheim & Skoler, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings,* 11 Crime & Delinquency 167 (1965).

45. Standards, Std 2.3(a)(ii). The issue of providing counsel for juveniles unable to afford private counsel is addressed in Standards 2.1 and 2.2, which regulate the organization of assigned counsel systems and outline the special qualifications and skills recommended for juvenile justice attorneys. Standards, Stds 2.1, 2.2.

46. Standards, Stds 2.3, 2.4.

ments in existing alternatives to detention and the limited range of program models for juveniles have been well documented.[47] The relationship of those deficiencies to inappropriate and overly restrictive placements of juveniles in the juvenile justice system has likewise been well established.[48] In the absence of a feasible alternative suggested by counsel for the juvenile, many judges will feel inclined or forced to accept the recommendation of the probation department for secure pretrial detention or for post-adjudication placement in an overly restrictive but immediately available program.

Because the issue of placement seems to involve social work or medical and social science expertise, there is a tendency for attorneys to rely upon the findings of the court personnel as to available and appropriate program options and to confine their own investigative efforts to the facts alleged in the charges against their client. The Standards require the attorney, at the outset of representation, to investigate social or legal dispositional alternatives and remind him that prompt action, in this as in other regards, is necessary in order to protect the juvenile's rights.[49] When preparing for the hearing on disposition, the attorney has a duty to familiarize himself with the available alternatives and community resources from which a disposition plan may be developed.[50] He should obtain access to any sources of information which the court will consider at disposition, including social, psychological, or psychiatric reports, and proceed to study and independently investigate them.[51] Regardless of the

47. Major sources supporting these findings include: Hearings on the Detention and Jailing of Juveniles Before the Subcomm. to Investigate Delinquency of the Senate Comm. on the Judiciary, S. Res. 56, 93d Cong., 1st Sess. § 12 (1973); Vintner, Time Out: A National Study of Juvenile Correctional Programs (1976); Children in Adult Jails, *supra* note 27; National Advisory Commission on Criminal Justice Standards and Goals, NAC Task Force Report on Juvenile Justice and Delinquency Prevention (1976).

48. *See* Y. Bakal, Closing Correctional Institutions (1973); Cost and Service Impacts of Deinstitutionalization of Status Offenders in Ten States: Responses to Angry Youth (1977); The Impact of Alternatives to Incarceration in Alaska (1977); L. Ohlin, A. Miller & R. Coates, Juvenile Correctional Reform in Massachusetts (1977); R. Vintner, G. Downs & J. Hall, Juvenile Corrections in the States: Residential Programs and Deinstitutionalization (1975).

49. Standards, Std 4.1.

50. Standards, Stds 4.3, 9.2. These requirements reinforce ABA Code of Professional Responsibility, Canon 7, EC 7-8:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative . . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

51. Standards, Std 9.2(b). *See also* Standards, Std 8.2 (transfer proceedings).

availability of such reports, the attorney must independently investigate any of the client's circumstances which will be relevant to disposition. Where this type of report or information is not available to the court, the attorney should obtain whatever professional or expert consultation is necessary to the formulation of a dispositional plan.[52]

It cannot be overemphasized how often such investigation of resources and obtaining of information concerning the client's needs will be the primary services the attorney can perform. The sole criticism of the Standards on this point is that the detailed delineation of all the attorney's options and duties should not have been reserved for the section on disposition. The attorney should not wait until disposition is imminent before undertaking the investigation of alternatives. From the outset of representation, at the intake and pretrial detention phases as well as at disposition, he should discuss with the client and, where appropriate, with parents the available treatment and services options. The ability to appear in court with a placement or treatment plan supported by both parents and client is an important tactical weapon. Moreover, early and in-depth discussion with client and parents encourages them to develop and assert their own suggestions concerning an appropriate response to the circumstances which brought the juvenile into the justice system. Knowing that they need not rely upon the court's personnel for judgments as to what is best for the juvenile allows client and parents to support the attorney in insisting on the juvenile's right to dismissal of the charges or participation in a diversion program where the state's case is weak. Even if the case proceeds to adjudication and court-ordered disposition, full participation by the juvenile client and parents in formulating the disposition plan may motivate the juvenile to comply with the court order.[53]

At the intake phase, or at any time during the juvenile justice process, the attorney may, in discussing available resources and services, learn that the client, and possibly the parents, are interested in

52. Standards, Std 9.2(c). *See also* Standards, Std 9.3 (court-ordered examinations).

53. Standards, Std 7.5 note, at 144-45. This Standard emphasizes the importance of a professional demeanor in relationships with parents and court personnel as well as the juvenile client, suggesting that such behavior will increase client confidence in the justice process. Standard 9.5, referring to counseling after disposition, requires the attorney to "urge upon the client the need for accepting and cooperating with the dispositional order," even where the order is to be appealed. As part of that counseling role, it might be helpful for the attorney to remind the client of his own obligation, under Standard 7.4, to comply with all rules, orders, and decisions of the court. A distrustful juvenile client who believes that the attorney is simply one of many adults with authority to make decisions concerning the juvenile's placement or care may develop increased confidence upon learning the extent to which counsel is bound by, and attempts skillfully to utilize, the procedures and powers of the court.

utilizing them. It is entirely appropriate for the attorney to facilitate this process, even (or especially) independent of or subsequent to the court proceedings, and the Standards recommend that he do so.[54] From the perspective of an adversarial attorney, it is not inconsistent to defend a juvenile client against a charge which might result in a finding of delinquency or court-ordered treatment while arranging for the juvenile's voluntary participation in the same or some other type of therapy or service program. The difference between the two results is the difference between an abridgment by the state of the juvenile's liberty, with its accompanying stigma, and the juvenile's exercise of that liberty in recognizing and acting upon his need for services. By the same token, an adversarial attorney who believes his client to be in need of treatment or services is in no way prevented by the Standards from advising him to seek them and offering his assistance in that process. The distinction between such action and pursuing the "guardian" role lies in the "guardian" attorney's option of recommending that the court order such treatment or services where the client remains unconvinced. The Standards explicitly provide that the attorney ordinarily should not make or agree to a specific dispositional alternative without the client's consent.[55]

*Decision to Request Independent Expert Evaluation*

The decision to independently seek social, psychological, or psychiatric reports on the juvenile client remains with the attorney, but the Standards generally imply that such reports are desirable.[56] In many cases the adversarial attorney may indeed wish to obtain such information where court personnel have not, or to request an independent professional interview of the client so that an independent report can be compared to existing probation records. However, the opinion or report of an independent expert is chiefly useful only where it raises a doubt concerning the accuracy of the prosecution or probation officer's diagnosis and recommendation or strongly supports the defense's recommendation for a less restrictive dispositional plan. The adversarial attorney should be skeptical of the chances of obtaining such support from an expert who routinely is assigned by the court to perform "independent" reviews.[57] Ob-

54. Standards, Stds 4.3(b), 10.1(a)(ii).

55. Standards, Std 9.3 (a).

56. Standards, Stds 9.2(b)(i), 10.1(a)(ii).

57. Of course, there will be exceptions, but in many jurisdictions the professionals available by court appointment to perform diagnostic or social services reviews in juvenile justice cases will have a conservative orientation, in favor of secure confinement or institutional placement where this is recommended by probation or the prosecution. In some cases these are the same

viously, it is much more damaging to have two reports recommending secure custody for a client than one, especially when the second has been requested by the juvenile's attorney.

To avoid this result, the attorney should be advised to seek services from professionals who are truly independent of the court and to arrange for payment of their fees by the court where the client is indigent.[58] Just as would be done in a personal injuries case, the attorney must obtain names of qualified experts and find one who, after being apprised of the facts, will be able to strongly support the disposition proposed or relief requested by counsel. The Standards' recommendation that professional services be obtained for a juvenile client where appropriate is praiseworthy. The potential pitfall is that this recommendation will be followed only to the extent of automatic referral for an initial or additional review by a court-appointed "regular" expert. Such a referral will reassure the attorney that he has done the right thing but will also seriously undermine any subsequent advocacy for a dispositional alternative not recommended by the expert.

*Decision to Request a Guardian Ad Litem*

Analogous to the dilemma of whether to seek a professional opinion is the issue of whether to request a guardian ad litem. At first glance, the appointment of a guardian seems the obvious way to avoid the conflict between the adversarial attorney's role and the factors which give rise to the suggested alternative roles for attorneys.[59] Yet, in a situation where the alleged inability of the child

professionals called upon for opinions as to competency to stand trial or criminal responsibility in adult cases; they may have no special expertise or insight into juvenile mental health problems or familiarity with treatment modalities. By dint of long-standing relationships with the courts, however, such professionals may have considerable credibility, and a recommendation from them may be difficult to counteract.

58. The difficulty of this will, of course, vary from jurisdiction to jurisdiction. In situations where the local juvenile court judges are particularly inclined to assign a few "regular" professionals and to rely upon their judgment, it will be necessary to convince the court of the special professional qualifications of the proposed expert and of the juvenile client's unusual situation. This can be done readily as part of the process of finding an appropriate expert where an indigent client is involved. As a rule, the reimbursement provided by the court will be inadequate compensation for the professional's services at the going rate. The attorney may have to entice an expert into testifying by stressing the unusual fact situation of his client or the gross inappropriateness of the disposition proposed. Thus an expert on developmental disability may be persuaded to testify in a case where the juvenile's diagnosis as mentally retarded is central to the disposition; a professional studying behavior of adolescent minority women may be interested in a status offense case involving cultural conflicts. The reasons why an expert agrees to participate in a case (special interest and familiarity with new developments in treatment modalities) may be used to persuade the court of the appropriateness of ordering compensation.

59. *See* text accompanying notes 11-22 *supra*.

to make reasoned judgments in his own best interest is the essence of the charge against him, the attorney's action in requesting a guardian may be tantamount to a concession on the merits. In addition, some courts routinely appoint the same individuals as guardians ad litem, a practice which may result in the adversarial attorney's looking for direction to a guardian who is inclined to support the recommendations of the court social worker or probation officer. These considerations should not, of course, prevent the conscientious attorney from requesting a guardian where this course is the only one which will enable the client's rights to be adequately defined and advocated.

The Standards recommend that even when a guardian is appointed, the attorney should consult the juvenile client as well as the guardian concerning essential matters.[60] Where the client and guardian ad litem substantially disagree about the juvenile's best interest, the Standards permit the attorney to so inform the court.[61] Nevertheless, few courts are likely to act contrary to the judgment of the guardian ad litem, especially where the attorney's reason for advocating a different action is because an incompetent client so desires.

Often the difficulty the attorney experiences in consulting the juvenile about those decisions which the Standards require attorney and client to make together is the basis for an attorney's belief that a guardian should be appointed. It is important to realize that a juvenile's difficulty in communicating with an attorney is not necessarily an indication of limited or inadequate ability to make reasoned judgments. The unfamiliarity of legal terminology and the stress of involvement in the juvenile justice system, coupled with the disparity in power between adult and child, are among the factors which could contribute to such difficulty. An additional factor named by the Standards is extreme youth;[62] others may include mental disability, symptoms of drug addiction or alcoholism, cultural differences be-

60. Standards, Std 3.1(b)(ii)(c)(1).

61. Standards, Std 3.1(b) note, at 81-82. For a discussion of the ethical considerations involved in representing adult clients with guardians ad litem, see Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals,* 31 Stan. L. Rev. 625 (1979).

62. Standards, Std 3.1(c). The ABA Code of Professional Responsibility, Canon 7, EC 7-11 and 7-12 discuss the lawyer's responsibility in cases where the client's physical or mental condition affects his ability to make judgments in his own behalf.

> The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearance before administrative and legislative bodies.

ABA Code of Professional Responsibility, Canon 7, EC 7-11.

tween attorney and client, and passivity or suspicion produced by previous experiences with the juvenile justice system. Many of these factors may be overcome by sensitivity to the juvenile client's perspective and by frequent and consistent efforts to explain the attorney's role, to perform actions clearly beneficial to the client, and to preserve confidentiality.[63] Depending upon the degree of difficulty, however, it may be necessary to seek assistance from someone with whom the juvenile has already established communication and trust. Friends, neighbors, relatives (including other juveniles), as well as teachers, youth workers, and other commonly consulted authority figures may perform essential functions as mediators or "cultural translators" in at least some initial conversations between

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> 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 look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously the 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.

*Id.*, EC 7-12.

Clearly the Code of Professional Responsibility provides the attorney with some discretion as to the situations in which he is compelled to make decisions for his client. The strong language throughout these two Ethical Considerations argues against taking any such action where it is possible to obtain aid from the client, even if only in general by identifying those interests which the attorney is bound to protect and promote.

63. The Standards regarding confidentiality mandate the preservation of confidentiality between attorney and client in juvenile cases as in adult cases; there are, however, a few exceptions. Standard 3.3(d) permits disclosure of confidences or secrets with the informed consent of the juvenile client, or without consent where such disclosure will not disadvantage the juvenile, will further the interests of the juvenile and the juvenile is incapable of considered judgment. The attorney must reveal an intention by the client to commit a crime or an act which would be criminal if done by an adult where the act would seriously endanger his health or safety or that of others. This Standard follows the Code of Professional Responsibility DR 4-101(C) regarding circumstances in which confidentiality must be breached. The additional Standards on confidentiality regulate the communications between parents and attorney, recognizing that effective representation may involve frank and highly personal communications concerning family circumstances, but that the attorney's primary responsibility is to the juvenile client. Standard 3.3(c)(i) urges the attorney not to encourage parents' secret communications where disclosure may become necessary for effective representation of the juvenile. The attorney may preserve a parent's confidential communication where so doing does not interfere with the discharge of his duty to the juvenile client. The communication may be disclosed, however, with the parent's informed consent or where the disclosure is necessary to the attorney's representation of the client. Standards, Std 3.3(c)(ii).

attorney and client. Obviously such an arrangement raises some confidentiality issues, but the attorney, or ideally the third party, could be encouraged to obtain the juvenile's permission, and the attorney and client must discuss the purpose of third party presence. Consulting other individuals may provide the additional benefit of finding a desirable candidate for guardian ad litem, should one be necessary.

*Attorney's Duty in Absence of Guardian Ad Litem*

Active representation of a juvenile client which involves recruiting independent experts and concerned third parties is consistent with the Standards' underlying principle that a client's youth should not change the attorney's obligation to provide effective advocacy. Surprisingly, however, where there is no guardian ad litem or other independent advisor and the client is very young, the Standards permit the attorney to maintain a neutral posture.

> Where a guardian ad litem has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's) and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.[64]

The rationale behind such permission is apparently that the attorney's extensive investigation may reveal that a neutral posture is appropriate. Unfortunately, the Standards do not provide criteria by which the attorney is to reach this decision. If the attorney is convinced that presenting and examining the material evidence is sufficient to accomplish the result which someone in the juvenile's position would desire, a neutral posture may be appropriate. But if he is uncertain what someone in that position would want, maintaining a neutral posture presents the ethical problem discussed above.[65] The language of this Standard is especially unhelpful because it offers the attorney the additional option of arguing in favor of the least restric-

64. Standards, Std 3.1(b)(ii)(c)(3).
65. *See* text accompanying notes 29-32 *supra*.

tive intervention justified by the juvenile's circumstances without providing any criteria to indicate when such a position should be adopted.

The principle that, when the state denies or abridges an individual's fundamental rights, even for a legitimate purpose, it must do so only by the least drastic means, has long been applied to juvenile justice and custody proceedings.[66] Giving the attorney discretion whether or not to force the state to so justify its proposed action runs contrary to the Standards' overall position that a juvenile client, no less than an adult, has a right to legal assistance to protect his lawful rights and benefits. If he exercises the client's right to the least restrictive intervention, the attorney need not speculate as to what an individual in the juvenile's position would want. As a matter of constitutional law and judicial principle, it may be assumed the client would want no more state intervention than necessary to accomplish its legitimate purpose. A better Standard for attorneys representing young clients without the assistance of a guardian ad litem would be to require affirmative, adversarial advocacy in favor of the least restrictive intervention.

## CONCLUSION

Representing a juvenile client undoubtedly causes the attorney to confront a variety of practical as well as ethical issues. Communicating with a client of apparently limited capacity to formulate or to express judgments can be extraordinarily frustrating. Resisting the pressures of court personnel to adopt a non-adversarial stance is especially difficult when the attorney knows that, in a capacity as guardian, he would override the decisions his client has made. Yet

66. The underlying constitutional principle of "least drastic means" was first set out by the United States Supreme Court in Shelton v. Tucker, 364 U.S. 479 (1960). Applied to the rights of residents at a state institution for the mentally ill in Wyatt v. Stickney, 344 F. Supp. 387, 396 (M.D. Ala. 1972), the concept was relied upon by the Court in finding a right of the residents "to the least restrictive conditions necessary to achieve the purposes of habilitation." The constitutional principle has been applied to hold that juvenile delinquents have a right to treatment in the least restrictive setting appropriate to the purposes of confinement. Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *reinstated*, 430 U.S. 322 (1977); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972), *supplemented*, 359 F. Supp. 478 (S.D.N.Y. 1973). *See also* Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976); Pena v. New York State Div. for Youth, 419 F. Supp. 203 (S.D.N.Y. 1976), supporting the right to treatment for juveniles which has been linked with the right to the least restrictive alternative in mental health cases. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977); Dixon v. Weinberger, 405 F. Supp. 974, 979 (D.D.C. 1975). For clinical theory supporting the least intrusive intervention in the lives of children, see J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

neither the difficulties of the attorney's task nor the attractions of any alternative role justify professional behavior which is inconsistent with the purpose for which a right to counsel was guaranteed to juvenile clients by the United States Supreme Court. The differences between juvenile and adult clients and their justice systems raise the issue not of whether the attorney must provide them with the same level of loyalty, advocacy, and professional skill, but only of how.

In answering that question, each attorney must ultimately be responsible for a review of his professional performance according to the purposes approved in *Gault*. Is an action of the attorney consistent with protecting the rights and benefits to which the client is entitled under law, including the right to a full panoply of due process protections? Regardless of the attorney's approval, does a decision of the client represent a legitimate purpose or objective which the attorney can legally pursue in his behalf? If the answer is affirmative, the attorney's duty to take the action or to pursue the objective is clear. By detailing the essential steps and options available to him at every stage of juvenile representation, the IJA-ABA Standards provide valuable assistance to the attorney in carrying out that duty.