

**ETHICS AND THE STANDARDS OF PRACTICE FOR THE  
REPRESENTATION OF CHILDREN IN ABUSE AND  
NEGLECT PROCEEDINGS**

Gail Chang Bohr<sup>†</sup>

I. CHILDREN HAVE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	995
II. THE ROLE OF THE CHILD’S ATTORNEY.....	996
III. CLIENT UNDER A DISABILITY.....	998
IV. CONFIDENTIALITY OF INFORMATION .....	1000
V. ATTORNEY AS ADVISOR .....	1003
VI. TRAINING TO IMPROVE REPRESENTATION OF CHILDREN ....	1004
VII. CONCLUSION .....	1006

This symposium on the centenary of juvenile courts in Minnesota lends itself to a discussion on ethics and the standards of practice for the representation of children. While the landmark case, *In re Gault*<sup>1</sup> gave children in juvenile court the constitutional right to an attorney for juvenile court proceedings where the loss of liberty for the child was a possibility, not every child has been afforded the right to a lawyer. Interestingly, Minnesota has

---

<sup>†</sup> Executive Director, Children’s Law Center of Minnesota; William Mitchell College of Law, J.D., *magna cum laude*; Simmons College School of Social Work, M.Sc. in Social Work; Wellesley College, B.A. Ms. Bohr was an Editor and Executive Editor of the *William Mitchell Law Review*. She clerked for Minnesota Supreme Court Justice A.M. “Sandy” Keith and was an associate at Faegre & Benson. Ms. Bohr served on the Minnesota Supreme Court Foster Care and Adoption Task Force and on the Minnesota Supreme Court Juvenile Protection Rules Committee. In addition to representing children in court, she serves on the Minnesota Legislature CHIPS Work Group, Children’s Justice Initiative, the Ramsey County Combined Jurisdiction Advisory Committee, Juvenile Justice Advisory Committee, the ABA Section of Litigation Children’s Rights Litigation Committee Working Group, the Advisory Council of the Hubert H. Humphrey Institute of Public Affairs, and the Board of the Ombudsperson for Asian Pacific Minnesotan Families. Ms. Bohr is the recipient of the 2004 MSBA Civil Litigation Section Advocate Award and the 1997<sup>1</sup> Minnesota Council of Child Caring Agencies Distinguished Service Award.

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

accorded children the right to a lawyer by statute since 1959<sup>2</sup>—but it is not clear how that right was implemented. One hopes it was not just another aspirational goal for protecting children with no possibility of fulfillment because the funding was not appropriated.

As so often happens when children are concerned, someone needs to advocate on their behalf for their important rights and interests. Although the child's right to a lawyer in child dependency proceedings exists in many states' statutes, the child may be one of several hundred children on the lawyer's caseload, which calls into question the child's right to effective assistance of counsel.<sup>3</sup> At the same time, there is national recognition that having a lawyer capable of carrying out his or her ethical responsibility to the child and providing quality representation can make a difference in the outcome of child dependency proceedings.<sup>4</sup> Because having a lawyer matters, providing lawyers who offer effective assistance of counsel for children in abuse and neglect proceedings is critical on both a statewide and national scale.

In Minnesota, the State Public Defender's Office does the bulk of the representation for parents and children in abuse and neglect proceedings.<sup>5</sup> But with increased filings in juvenile court, the need

---

2. 1959 Minn. Laws ch. 685, § 22, subd. 2 (codified as amended at MINN. STAT. § 260B.163, subd. 4 (2004)). "The minor, parent, guardian or custodian have the right to counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor or his parents or guardian in any other case in which it feels that such an appointment is desirable." *Id.*

3. See *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362-63 (N.D. Ga. 2005) (discussing the heavy caseload of child advocates in relation to class action claims of ineffective assistance of counsel); ABA Ctr. on Children & the Law, *Strategies for Addressing High Attorney Caseloads in Child Welfare Cases*, 8 CHILD CT. WORKS (2005) ("Reasonable caseloads are essential to quality representation of all parties in child welfare proceedings.").

4. ABA Ctr. on Children & the Law, *supra* note 3, at 1.

5. Children's Law Center of Minnesota (CLC), a section 501(c)(3) non-profit organization, represents, on average, about 450 children per year in Hennepin and Ramsey counties. CLC represents children in Child in Need of Protection or Services (CHIPS) and Termination of Protection Rights (TPR) proceedings in Ramsey County, as well as post-termination proceedings in Hennepin and Ramsey counties. In both counties, CLC is appointed by the juvenile court to provide representation. CLC assigns the case to a staff attorney or a volunteer lawyer. At the end of 2005, CLC had 200 trained volunteer lawyers who currently had one or more cases. In addition, CLC also represents children in the Twin Cities metropolitan area who call CLC and request help because they have been abused or neglected and are in need of services. The Juvenile Law Project of Legal Aid Society of Minneapolis also provides representation to youth in Minneapolis in need of protection or services or seeking independent living.

for lawyers representing parents and children has outpaced the resources of the State Public Defender's Office. The lack of lawyers for parents and children in Child in Need of Protection or Services (CHIPS) and Termination of Parental Rights (TPR) proceedings recently reached crisis proportions and the Legislature was asked to intervene.<sup>6</sup>

The Minnesota Legislature authorized the CHIPS Work Group to convene and make recommendations to the Legislature by January 15, 2006.<sup>7</sup>

The state court administrator shall convene a working group of stakeholders interested in and knowledgeable about issues related to the representation of children and adults in CHIPS proceedings. The state court administrator shall ensure broad representation in the group so that it includes members from diverse groups on the issue. At a minimum, the working group shall study and make recommendations on the appropriate assignment and use of limited public defender resources and ways to minimize CHIPS proceedings through early intervention initiatives such as family group conferencing, mediation, and other innovative strategies. By January 15, 2006, the state court administrator shall report the working group's findings and recommendations to the chairs and ranking minority members of the senate and house committees and divisions having jurisdiction over criminal justice and civil law policy and funding.<sup>8</sup>

Minnesota is not alone in this crisis of how to provide effective representation to children. Attention is being paid to this issue across the country.<sup>9</sup> In August 2005, the American Bar Association's House of Delegates approved a resolution geared toward improving outcomes for children under the jurisdiction of dependency courts.<sup>10</sup> The ABA Recommendation was comprehensive in addressing areas such as "effective, trained, and

---

6. 2005 Minn. Sess. Law Serv. ch. 136, art. 1, § 2, subd. 2 (West).

7. At the time this paper was written, the recommendations were forthcoming. *See id.*

8. *Id.*

9. *See, e.g.*, PEW COMMISSION REPORT ON CHILDREN IN FOSTER CARE (on file with author); AM. BAR ASS'N, RESOLUTION ON IMPROVING THE PLIGHT OF CHILDREN IN FOSTER CARE—NEW APPROACHES TO THE DEPENDENCY COURT PROCESS AND FEDERAL CHILD WELFARE FINANCING (2005), <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/10b.doc>.

10. AM. BAR ASS'N, *supra* note 9.

qualified lawyers”; “reasonable compensation” that is not tied to the volume of cases or clients; and developing protocols for reasonable caseloads and “high quality training.”<sup>11</sup> Additionally, the ABA Recommendation urged the “recruitment and long-term retention of committed, qualified, and trained bench officers who oversee the needs of abused and neglected children in dedicated dependency courts.”<sup>12</sup> On the specific issue of representation for children, the ABA Recommendation stated:

Be it Resolved, that the American Bar Association urges Congress, state and territorial legislatures, and judicial leadership, to enact the following laws and policies, consistent with recommendations of the national bipartisan Pew Commission on Foster Care, for improving outcomes for abused and neglected children under dependency court jurisdiction:

(a) All dependent youth should be with equal footing with other parties in the dependency proceeding and have the right to quality legal representation, not simply an appointed lay guardian ad litem or lay volunteer advocate with no legal training, acting on their behalf in this court process;

(b) Foster youth should be notified of and afforded the opportunity to participate in the proceedings in their own dependency case.<sup>13</sup>

While recognizing that children in abuse and neglect proceedings should be on an equal footing with all the other parties and have the right to *quality* legal representation, it is equally important to recognize that there is an ongoing debate about what the nature of that representation in these proceedings should be. Indeed, there is an ongoing effort to draft uniform laws on the representation of children.<sup>14</sup> The drafts of the proposed Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act demonstrate the ongoing debate about the role of attorneys in representing children. The debate centers around whether lawyers for children should act as lawyers in the traditional attorney-client relationship with the child bound by the

---

11. *Id.* at (c), (d).

12. *Id.* at (f).

13. *Id.* at (a)-(b).

14. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND CUSTODY PROCEEDINGS ACT (Drafting Committee Meeting, Feb. 3-5, 2006) (draft for discussion only).

traditional ethics that govern that relationship or whether they should be “best interests lawyers”<sup>15</sup> who exercise “substituted judgment”<sup>16</sup> and advocate for what the lawyer believes is in the best interest of the child.

The hybrid attorney/guardian ad litem role, which is in use in other states, but not here in Minnesota, is rejected because it blurs professional roles thereby creating an ethical dilemma for the attorney/guardian ad litem.<sup>17</sup> For example, in the attorney role, the child is the client and the attorney owes his duty and allegiance to his client. However, in the guardian ad litem role, the court is really the client because the attorney must inform the court about what the attorney thinks is in the best interest of the child regardless of whether the child agrees with the attorney. Moreover, in such a situation, it is difficult to ascertain what ethical rules govern the attorney/guardian ad litem role. Rejecting the hybrid attorney/guardian ad litem role is an important first step in providing effective assistance of counsel to children.

Even in the case of the “best interests” attorney as contemplated by the proposed uniform laws, the “best interests” attorney and the hybrid attorney/guardian ad litem appear indistinguishable. Under the proposed draft definitions, “best interests attorney” means “an attorney appointed by the court to provide legal representation for a child to protect a child’s best interests without being bound by the child’s directives or objectives.”<sup>18</sup> Who then is the client in that situation? In contrast, the definition of the “child’s attorney” means “an attorney appointed to provide legal representation for a child.”<sup>19</sup>

In Minnesota, lawyers for children function in the traditional attorney-client relationship that includes the advocacy and counseling roles. In fact, by statute, the lawyer for the child cannot also act as the guardian ad litem for the child.<sup>20</sup> Before advocating for the child’s express wishes, the attorney should investigate the options and explain them to the child, including the child protection process.<sup>21</sup> In this role, the attorney is not merely a

---

15. *Id.* § 2(2).

16. *Id.* at Prefatory Note 5-6, § 12(d)(1).

17. *Id.* at Prefatory Note 4.

18. *Id.* § 2(2).

19. *Id.* § 2(3).

20. MINN. STAT. § 260C.163, subd. 3(d) (2004).

21. It is not unusual for critics of children’s lawyers to state that all abused children want to return home and that is the position that the lawyer for the child

“mouthpiece,” nor an automaton, but is actively engaged in and engages the child in the representation. The child’s engagement in the process helps him to feel some control and sense of empowerment. Children’s Law Center of Minnesota (CLC) uses the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases<sup>22</sup> (ABA Standards) in its training for volunteer lawyers and other child advocates and has adopted the ABA Standards to define the roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case.

While the Minnesota Rules of Professional Conduct provide the ethical underpinnings for all lawyers practicing in Minnesota, the ABA Standards provide principles and guidance to lawyers who represent children in abuse and neglect cases. CLC made a conscious decision to adopt the ABA Standards to fulfill and give meaning to the statutory mandate of “effective assistance of counsel.”

The ABA Standards guide CLC’s staff lawyers and volunteer lawyers in representing children.<sup>23</sup> A core element in CLC’s

---

must argue in court even when it is unsafe for the child to return home. First, not all abused and neglected children want to return home. Some want to be away from their abusers, others want to return with conditions, while still others understand that while returning home is a goal, the parents have to complete treatment before that can be accomplished. CLC lawyers for children meet with the child in advance of court hearings, talk with the child’s social worker and guardian ad litem, and have a good understanding of where the case is procedurally. The CLC lawyer explains the process to the child. The child will often instruct the lawyer to inform the court that while returning home is the preferred option, the child is willing to remain where she is pending the parents’ completion of the case plan.

22. ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996) [hereinafter ABA STANDARDS].

23. CLC benefited from the work of many experienced lawyers for children in this regard. Shortly after CLC opened for operations in 1995, the ABA House of Delegates adopted the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases and *Fordham Law Review* published the *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, which contained the articles, responses, recommendations, and reports generated from the Conference on Ethical Issues in the Legal Representation of Children hosted by Fordham University School of Law from December 1-3, 1995. See, e.g., Linda Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 999 (1996). In January 2006, the University of Nevada–Las Vegas, brought together a group of children’s experts and advocates in a conference called, “A Working Conference, Representing Children in Families: Exploring the Relationship Between Children’s Advocacy and Justice Ten Years After Fordham.” See Fordham

training of volunteer lawyers in the representation of children in foster care is its underlying philosophy that getting to know the child and developing a relationship with the child is key to the child trusting and confiding in the lawyer. The continuity of representation helps in the formation of the trusting relationship; it is the norm for CLC's volunteer lawyers to remain as the child's lawyer for the life of the court case, which can take two or more years.

Interestingly, in many recommendations regarding representation of children and parents in abuse and neglect proceedings, there are references to "quality representation" without defining the term.<sup>24</sup> It is as if we will know "quality representation" when we see it, not unlike pornography.

As with other attorneys in Minnesota, children's attorneys are governed by the Minnesota Rules of Professional Conduct in the ethical representation of children. Three rules are indispensable to any discussion on the ethical representation of children by children's attorneys: Rule 1.14—Client with Diminished Capacity; Rule 1.6—Confidentiality of Information; and Rule 2.1—Advisor.<sup>25</sup> This paper discusses these rules in conjunction with the ABA Standards, including the training recommendation for children's lawyers. The author believes that using the ABA Standards as a benchmark for the effective assistance of counsel for children also addresses the issue of "quality representation."

#### I. CHILDREN HAVE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Minnesota gives children the statutory right to effective assistance of counsel in connection with a juvenile court proceeding.<sup>26</sup> But what does it mean to provide effective assistance

---

University Calendar of Events, <http://law.fordham.edu/ihtml/eventitem.ihtml?id=5121&back=home&template=cal> (last visited Jan. 31, 2006). The participants engaged in discussions and developed recommendations designed to advance the understanding of lawyers, courts, ethics rule-makers, non-lawyer professionals, and others about how best to represent children in families and assess the various relationships between children's advocacy and justice. The proceedings will be published in a special edition of the *Nevada Law Journal*. The author participated in this invitation-only Working Conference.

24. Cf. JENNIFER RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 1 (2004).

25. MINN. RULES OF PROF'L CONDUCT RR. 1.6, 1.14, 2.1 (2005), available at <http://www.courts.state.mn.us/lprb/05mrpc.html>.

26. MINN. STAT. § 260C. 163, subd. 3(a) (2004).

of counsel to a child? Effective assistance of counsel requires the lawyer to perform certain minimum legal tasks including: meeting with the child before court hearings; conducting investigations and discovery; interviewing caseworkers and foster parents; reviewing all judicial, medical, social service, educational, and other records pertaining to the child; evaluating the child's need for particular services; monitoring implementation of court orders; actively participating in all hearings; and filing all relevant motions and appeals.<sup>27</sup>

Minnesota lawyers receive some guidance—Minnesota Statutes and Rules are clear that the lawyer for the child shall not also act as the child's guardian ad litem.<sup>28</sup> The lawyer for the child is one who owes the same duty of loyalty to the child as the lawyer for an adult does, and whose ethical responsibilities flow from the attorney-client relationship that the lawyer has with the child.<sup>29</sup> Nationally, training and materials on ethics principles in child welfare cases are recommended as a way to improve representation.<sup>30</sup>

A derogatory term used for the attorney for a child is the "mouthpiece" for the child. The term suggests that the attorney is merely repeating what the child wants without regard to the ethical duties imposed on the lawyer by virtue of the attorney-client relationship. The "mouthpiece" role is in contrast to the "substituted judgment" role, in which the attorney makes the decision for the child without regard for the child's wishes.<sup>31</sup> Neither of these roles accurately describes the role of the lawyer in the ethical representation of children in Minnesota.

## II. THE ROLE OF THE CHILD'S ATTORNEY

The ABA Standards comprehensively define the role of the child's attorney. The child's attorney is "a lawyer who provides legal services for a child and who owes the same duties of

---

27. See, e.g., *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005). See generally RENNE, *supra* note 24.

28. MINN. STAT. § 260C.163, subd. 3(d).

29. ABA STANDARDS, *supra* note 22, at A-1.

30. ABA Ctr. on Children & the Law, *supra* note 3, at 1 ("Training and materials on ethics principles in child welfare cases, as well as occasional bar enforcement in extreme cases, can also improve representation."). Ethics and standards of practice are a major component of the training that CLC of Minnesota provides for volunteer lawyers.

31. The substituted judgment role is one usually ascribed to the guardian ad litem role.

undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.”<sup>32</sup> The Commentary explains: “These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position.”<sup>33</sup> The child’s attorney owes the traditional lawyer duties to the child client and maintains this traditional relationship.<sup>34</sup> The Standards note that, as with any client, the child’s attorney may counsel against the pursuit of a particular position sought by the child.<sup>35</sup> The child’s attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients.<sup>36</sup> Therefore, the child’s attorney should ensure that the decision the child ultimately makes reflects his or her actual position.<sup>37</sup>

The attorney must communicate with the child client in a “developmentally appropriate” manner.<sup>38</sup> “‘Developmentally appropriate’ means that the child’s attorney should ensure the child’s ability to provide client-based directions by structuring all communications to account for the individual child’s age, level of education, cultural context, and degree of language acquisition.”<sup>39</sup>

In addition, “[t]he lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action.”<sup>40</sup> The attorney “may work with social workers or other professionals to assess a child’s developmental abilities and to facilitate communication.”<sup>41</sup>

In order to advocate for the child, the child’s attorney should

- (1) obtain copies of all pleadings and relevant notices;
- (2) participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences,

---

32. ABA STANDARDS, *supra* note 22, at A-1.

33. *Id.* at A-1 cmt.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at A-3.

39. *Id.*

40. *Id.* at A-3 cmt.

41. *Id.*

changes of placement, and other changes of circumstances affecting the child and the child's family;

- (4) attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- (6) develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- (7) identify appropriate family and professional resources for the child.<sup>42</sup>

The Commentary further notes that "[t]he lawyer's presence at and active participation in all hearings is absolutely critical."<sup>43</sup>

When the attorney for the child carries out her duties according to these Standards, the attorney is providing effective assistance of counsel.

### III. CLIENT UNDER A DISABILITY

In any discussion of the representation of children, one must address the issue of the client under disability. This is because the Minnesota Rules of Professional Conduct consider a client's minority to be a disability, which is in contrast to the ABA Standards.

Rule 1.14 of the Minnesota Rules of Professional Conduct states:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the

---

42. *Id.* at B-1.

43. *Id.* at B-1 cmt.

client cannot adequately act in the client's own interest.<sup>44</sup>

The comments to the Rules of Professional Conduct are instructive about the lawyer's duty when minority is the disability. The Rules state:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects. . . . Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.<sup>45</sup>

Unlike the Rules of Professional Conduct, ABA Standard B-3 does not assume that minority in and of itself is a disability.<sup>46</sup> Rather, the child's attorney is required to determine whether the child "is under a disability" pursuant to the Rules of Professional Conduct with respect to each issue in which the child is called upon to direct the representation.<sup>47</sup> The commentary notes:

These Standards do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others.<sup>48</sup>

Thus, under both the Rules of Professional Conduct and the

---

44. MINN. RULES OF PROF'L CONDUCT R. 1.14 (2005).

45. *Id.* R. 1.14 cmt.

46. ABA STANDARDS, *supra* note 22, at B-3.

47. *Id.*

48. *Id.* at B-3 cmt.

ABA Standards of Practice, the child's attorney must determine the child's ability to make adequately considered decisions in the context of the decision to be made.

To be sure, assessing the child's capacity to make decisions is not the same as assessing the child's competence. The difference between capacity and competence has been described as follows:

Capacity refers to a client's ability to understand information relevant to the case and the ability to appreciate the consequences of decisions. Does the client really know what the case is about, what is happening, and what consequences might result from certain actions or inactions? Capacity refers to ability and *comes in various degrees . . . .*

Competence is a legal standard, and denotes a specific level of skill, knowledge, or ability. The most critical distinction between the two concepts is that competence is a characteristic that someone either possesses or doesn't. It is an all or nothing principle. Usually competence is associated with a legal standard, used to answer a legal question. For example, in asking whether an individual is "competent to stand trial," the court considers evidence and issues a ruling that the individual either is or is not competent.<sup>49</sup>

To assess the child's capacity for making decisions about a specific issue, it is important for the lawyer to spend time with the child and develop a relationship with the child.

#### IV. CONFIDENTIALITY OF INFORMATION

The confidentiality of the information that the client shares with the attorney is the hallmark of the attorney-client relationship and is what differentiates the attorney for the child from the guardian ad litem for the child. This rule allows the client to confide in the lawyer in order to further the representation. Rule 1.6 of the Minnesota Rules of Professional Conduct states that a lawyer shall not knowingly reveal a confidence or secret of a client.<sup>50</sup> There are a limited number of exceptions: with the consent of the client and only after consultation; when permitted under the Rules of Professional Conduct or required by law or court order; when the client intends to commit a crime, the

---

49. RENNE, *supra* note 24, at 39.

50. MINN. RULES OF PROF'L CONDUCT R. 1.6(a)(1) (2005).

attorney may reveal the information necessary to prevent a crime; when necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used; where there is a dispute about a fee; and to defend against accusations, as well as to inform the Office of Lawyers Professional Responsibility.<sup>51</sup>

The Rule further notes that "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."<sup>52</sup>

The ABA Standards of Practice deal with client confidence under Rule B-4 Client Preferences. The commentary to Rule B-4 (3) notes:

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home . . . . The child may choose to deal with a known situation rather than risk the unknown world of a foster home or other out-of-home placement.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.<sup>53</sup>

The issue of child safety weighs heavily on attorneys who represent children when the child reveals abuse or neglect that is occurring that the child does not want revealed. Consider the following:

Jason, 14, a state ward for whom parental rights had

---

51. *Id.* R. 1.6(b)(1)-(6).

52. *Id.* R. 1.6(d).

53. ABA STANDARDS, *supra* note 22, at B-4 (3) cmt. 3.

been terminated, was living in foster care. The foster mother worked until about 7 p.m. every day. Jason was not given a key because she did not want him to be in the house when she was not there. This often meant that Jason had to find a place after school where he would be warm in the winter-time; he also went without dinner. Nevertheless, Jason did not want anyone to know, because this placement was better, in his eyes, than all the other placements he had been in and he was afraid the next placement would be worse. His attorney spent many months counseling him and he finally gave permission for her to tell his county social worker. Interestingly, the worker's contact with Jason had always been in the presence of the foster mother so Jason never had the opportunity to let the social worker know.

The overall experience at Children's Law Center of Minnesota is that the client does give permission to CLC's lawyer and social worker to talk with the county social worker. We believe that is because the client has developed a trusting relationship with the lawyer.

It is also important to keep in mind that the nature of child-protection cases requires a level of cooperation among all the parties in order to have a successful outcome, i.e., families are together and children are kept safe. At the same time, there is an adversarial aspect as each party advocates for their position and the perception is that negative information about parents or the child will lead to removal. Maintaining confidence is therefore extremely important in order to encourage open communication between the child and her lawyer.

In addition to confidentiality, the attorney-client privilege applies to the representation of children. Very early in CLC's history, a prosecutor subpoenaed the CLC attorney and CLC social worker to testify in the criminal trial of a child sexual abuse case where the child had recanted. The prosecutor had learned from the county attorney in the child protection case that the child had affirmed to her lawyer, even after the recantation, that sexual abuse had indeed occurred. This information had been part of settlement discussions concerning where the child would be placed pending the criminal and CHIPS trial. CLC successfully moved to quash the subpoena on the basis that information obtained in settlement discussions could not be used because it would

discourage children from confiding in their attorneys and discourage settlement discussions in child protection cases.<sup>54</sup>

Confidentiality of information is key to any attorney-client relationship and more so when the client is a child. The child who is the subject of the child protection proceeding has had her trust broken. Knowing that there is someone she can confide in helps to begin to rebuild that trust in adult figures and encourages the flow of information.

#### V. ATTORNEY AS ADVISOR

The role of the attorney as advisor or counselor is extremely important in the effective representation of children. Rule 2.1 of the Minnesota Rules of Professional Conduct states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.<sup>55</sup>

Advising the child is an important part of the attorney-client relationship. Children in abuse and neglect proceedings have not often had the opportunity to have candid conversations with adults with whom they have a trusting relationship. The Comments note:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation . . . a lawyer may initiate advice to a client when doing so appears to be in the client's interest.<sup>56</sup>

While the child's attorney must be careful not to use her position to overpower the will of the client, it is rare for the child to not want to know what the attorney thinks. Indeed, the child often will actively seek advice, even if the child does not follow it.

---

54. Bill Mullin, one of CLC's first volunteer lawyers, represented CLC in the motion to quash the subpoena. Ramsey County Judge Teresa Warner held for CLC. The prosecutor secured a conviction in the sexual abuse case through independently obtained evidence that had been available all along.

55. MINN. RULES OF PROF'L CONDUCT R. 2.1 (2005).

56. *Id.* R. 2.1 cmt.

Furthermore, when children go on the run, they often call their attorney, who advises them to turn themselves in to the child protection authorities. In some situations, that is the very reason why the children called—they want to know how to turn themselves in to the child protection authorities. Confidentiality is therefore central to the attorney-client relationship, particularly when the client is a child.

#### VI. TRAINING TO IMPROVE REPRESENTATION OF CHILDREN

Rule 1.1 of the Minnesota Rules of Professional Conduct states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>57</sup>

Further, the Comment to Rule 1.1 states:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and expertise in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.<sup>58</sup>

....

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.<sup>59</sup>

---

57. *Id.* R. 1.1.

58. *Id.* R. 1.1 cmt.

59. *Id.*

The Comments further note that a lawyer should engage in continuing study and education to maintain the requisite knowledge and skill.<sup>60</sup>

Likewise, the ABA Standards recommend and encourage training of lawyers who represent children in abuse and neglect proceedings. At a minimum, training should include:

- (1) information about relevant federal and state laws and agency regulations;
- (2) information about relevant court decisions and rules;
- (3) an overview of the court process and key personnel in child-related litigation;
- (4) a description of applicable guidelines and standards for representation;
- (5) a focus on child development, needs, and abilities;
- (6) information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
- (7) information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;
- (8) information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families . . .;
- (9) provision of written material (e.g. representation manuals, checklists, sample forms), including listings of useful material available from other sources.<sup>61</sup>

In a similar vein, CLC's training for volunteer lawyers includes a specific section on how to relate to the child client, who the players are in the system, how to conduct education advocacy, and how to provide ethical representation for children.<sup>62</sup> It also includes a panel of volunteer lawyers who talk about issues they have advocated for their clients, as well as a panel of youth in foster care who explain their experience in foster care and what they want from their lawyers.

---

60. *Id.*

61. ABA STANDARDS, *supra* note 22, at I-2.

62. See CHILDREN'S LAW CTR. OF MINN., REPRESENTING YOUTH IN FOSTER CARE MANUAL (2005) (on file with author).

Because children in child protection proceedings have so many needs, it is important for the attorney to have an understanding of the whole child. This may mean knowing when the child's special education needs are not being met, that the child continues to flounder in school, or the child even begins truanting. In fact, often the child's teacher welcomes a telephone call or a meeting because the teacher does not understand the child's frustration in school. Lawyers trained to represent the whole child are effective advocates for children.

## VII. CONCLUSION

This paper outlines some of the ethical issues that lawyers who represent children in abuse and neglect proceedings must address. The Minnesota Rules of Professional Conduct provide basic rules of ethical conduct for lawyers. The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases provide guiding principles for competent representation. As such, the ABA Standards are the yardstick by which we measure the effectiveness of counsel and give definition to "quality representation."

Because children come with unique developmental, social, and legal needs, having standards like the ABA Standards ensures that lawyers provide quality representation and advance justice for children.