The Child Client in Domestic Violence Proceedings

The Ethical Dilemma of Child Advocacy In Guardian Ad Litem Appointments

By Joshua B. Crabtree & Rebecca Ballard DiLoreto

For any practitioner who regularly represents children, the question of where to begin often starts with the question, "whom do I represent?" or "to whom do I owe a duty?" Recent revisions to the Kentucky Supreme Court Rules of Professional Conduct highlight the importance of working through these preliminary questions to ensure solid footing as counsel advances in a case. In representing children, these foundational questions are ignored at one's peril. Such questions are especially important in cases involving domestic violence. It was only recently reported that Kentucky topped the nation for 2007, with the highest rate of deaths from child abuse and neglect, with 41 deaths, or a rate of 4.09 per 100,000 children in the state.[1] The issue of quality legal representation for children is obviously of vital importance.

Unfortunately, the Kentucky Courts and legislature, as well as secondary authorities such at the American Bar Association Family Law Committee, American Bar Association Pro Bono Child Custody Representation Project, the National Council of Juvenile and Family Court Judges and the National Conference of Commissioners on Uniform State Laws, provide practitioners little to no clarification regarding these questions of "where to begin" and "to whom do I owe a duty" or "whom do I really represent," and how the inquiry itself pertains to representing children.

This article seeks to examine an attorney's ethical duties when representing children as Guardians Ad Litem in Kentucky courts in light of the question "where to begin." Is the attorney's role to represent the child's wishes or is the role to represent the child's best interest? While the stark contrast between the two approaches is most evident in the context of a domestic violence proceeding, the general principles will apply to the issue when it is presented in other circumstances as well.

Kentucky has begun to give attention to expectations and standards of practice for attorneys appointed to act as Guardians Ad Litem (GAL). Guidance is available to the practitioner from SCR 3.130 (1.3) Diligence; (1.4) Communication; (1.6) Confidentiality of Information; and (1.14) Client Under a Disability. Some states offer specific statutory and rule-making guidance for attorneys.[2] For example, in New Mexico, children under age 14 are appointed a GAL in neglect and abuse cases, and an attorney to represent the child's wishes if the child is 14 or older.[3] In addition, the New Mexico Supreme Court has adopted performance standards for these attorneys that set forth with particularity to whom the attorney owes what duty.[4]

Given the more limited guidance offered by the Juvenile Code and court rules in Kentucky, how does an attorney representing a child reconcile differences that may arise between identified best interests and the determined position of the child client? In representing and advocating for a child, is it the attorney's role to be sure the court is aware of and understands the child's wishes? Is it also the attorney's job to look out for the child's best interests in two primary capacities: (1) from negative consequences related to the process of litigation (e.g., when appropriate, advocating to protect a child from testimony in open court or to prevent parents involved in custody battles from using tactics that place their child at risk); and (2) regarding the ultimate result of the litigation (e.g., advocating for the custody/visitation arrangement the attorney believes is in the best interests of the child, or advocating for the most appropriate placement when a child must be removed from the home due to abuse or unmanageable behavior)? Are the duties to investigate and prepare a case comparable to the representation of an adult?

How do the ethical rules respond to the dilemma of attorneys who are faced with the question, "but aren't you supposed to advocate for the child's best interests?" Generally, this question arises when an attorney is advocating for a child's particular wish. At times, this can be a difficult position for attorneys for a number of reasons. In some cases, the child has conveyed to the attorney her preference, but has not given the attorney authorization to reveal this information to anyone else. Should the attorney's relationship with the child he or she represents be like any other attorney-client relationship? Is a child who has expressed a preference, but does not want her parents to know the preference, entitled to the same confidentiality as any other client? Furthermore, how does an attorney zealously represent the client when he or she has to reconcile a child's verbalized wishes with what the attorney believes to be in his or her best interest when these two positions are simply incompatible? How can any of these questions be answered if an attorney does not consider from the time of appointment the ethical ramifications of representing a child with the tensions that can exist between the child's wishes and the best interest standard?

The competition of these two models has been called the dilemma of child advocacy.[5] Both models have been rightly criticized. Cases involving domestic violence are perfect examples of when an answer to the question of "where do I begin?" becomes paramount. The "child's wishes" approach is criticized where a child of diminished capacity and immature judgment sets detrimental goals for the outcome of a case. For example, a young abused child often wants to return to the custody of the parent, even when that parent is the one who caused the child's injuries. How can a Guardian Ad Litem advocate putting his or her client in continued danger? Alternatively, the "best interests" approach is criticized because it

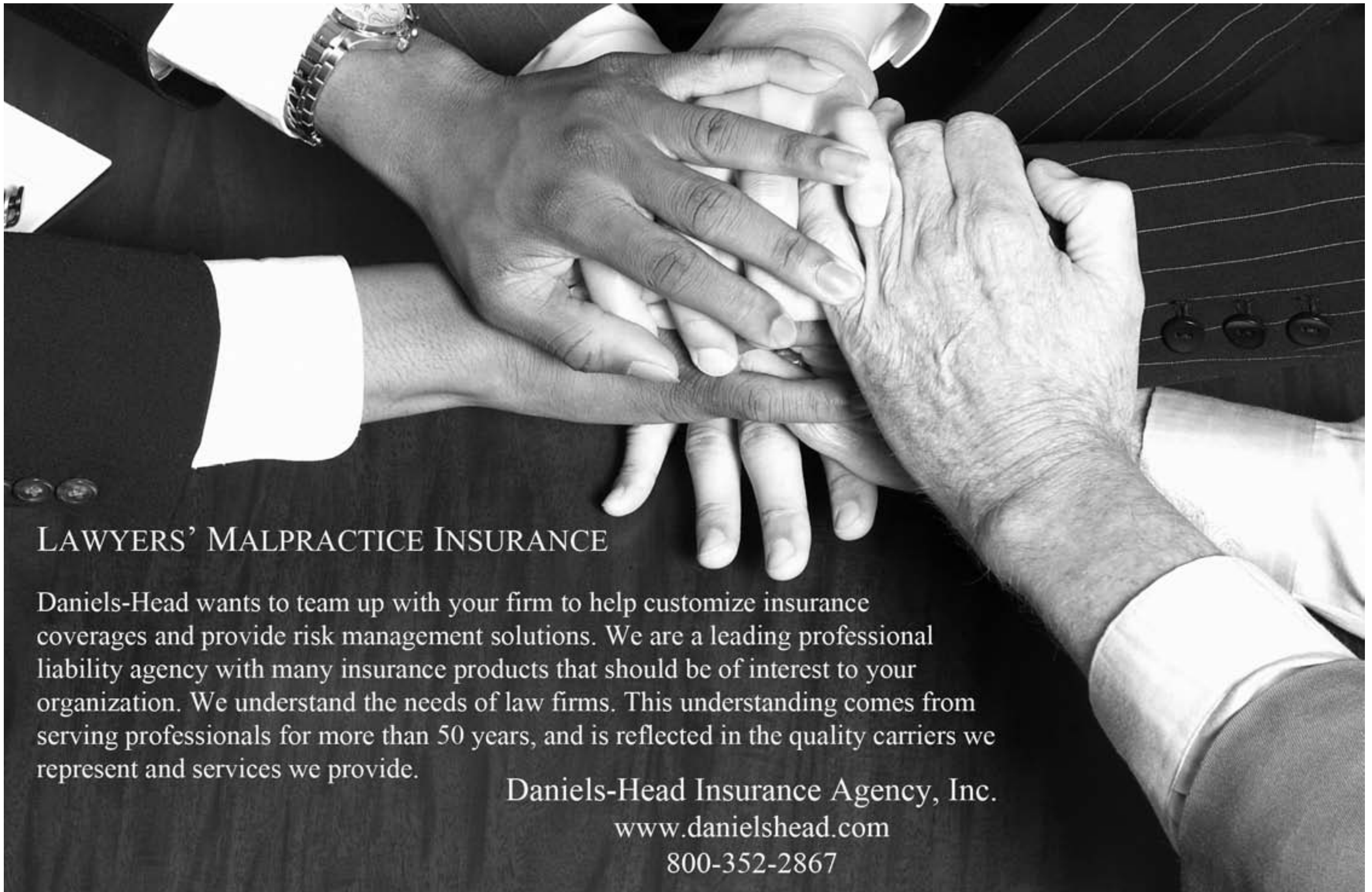
allows attorneys to inappropriately substitute the view of the lawyer for that of the child while at the same time usurping the role of the court to make such determinations.[6] The "best interests" approach has also resulted in what is being termed "relaxed advocacy," where attorneys feel free to ignore their traditional duties (such as meeting their client or filing motions) because they are appointed as a Guardian Ad Litem.[7]

Diligence

An attorney representing a child client is not absolved from the fundamental duties of thorough communication with the client and careful preparation and investigation. Acknowledging the challenges that may exist when determining the goals of representation with a client of *diminished capacity*, certain duties are nonetheless fundamental.[8] Counsel for children must be competent, independent, and zealous attorneys who understand their roles and duties. Additionally, children need attorneys who advocate their positions to the court and represent them as litigants through the entire litigation process. Further, children need confidential and meaningful communication with an attorney who will give them a fair opportunity to be effective in the court system.[9] Beyond these systemic needs, an attorney owes a child client the duty to participate in depositions, negotiations, discovery, pretrial conferences and hearings. Attorneys also have the duty to meet with a child client, to file pleadings on the child's behalf, and to thoroughly investigate in order to support the child client's position.[10] Nothing in SCR 3.130 (1.3) or its accompanying commentary pertaining to diligence supports a position to the contrary. It may be tempting for a GAL to count on the prosecutor, social workers, the judge and counsel for the parents to investigate the case fully and report significant information to all parties. However, the failure to investigate and prepare will result in effective abandonment of the role of counsel for the child.

Communication

National authorities and the Rules of Professional Conduct generally accept that a child's attorney is responsible for keeping the child informed about the child's case. Thus, the child's attorney must be available to explain the process to the child and tell the child how to get in touch with her attorney when she has questions.[11] Also, in cases where the child is a witness or the subject of a dependency, neglect or abuse investigation, it is important for the child's attorney to help the child understand that she is not responsible for the judge's decision, and that the judge, not the child, determines the outcome of the case. However, the most daunting challenge that attorneys will confront in representing children is to know how to talk to the child client; that is, how to elicit the client's position on relevant issues and how to advise, inform and guide the child through the process, all in the language of a child. In addition to his or her legal knowledge and skills, an attorney must already possess, or gain,



an understanding and appreciation of the impact of child development generally, and of the particular client's current developmental stage, and the impact of that particular reality on the lawyer's ability to communicate effectively with the child client. Lawyers are not typically trained in child development or in how to communicate effectively with a child, and sometimes find it difficult to translate legal concepts into language a young child can understand. This is what an attorney must do, however, in order to fulfill his or her legal and ethical duties to the child client.

Commentary to SCR 3.130(1.4) stresses that reasonable communication between the lawyer and client is necessary for effective representation.[12] There is simply no way around it: to represent a child competently, a lawyer must develop knowledge and skills beyond the boundaries of traditional legal training in order to effectively relate to children. The critical distinction for lawyers more accustomed to representing adults is that they must educate themselves in communicating effectively with children of different ages. These attorneys may also need to step outside their usual modes, styles and places of communicating with clients to find more appropriate and effective ways of interacting with a child client. For example, an attorney representing adults may be accustomed to contacting clients via telephone or e-mail, or meeting at the client's office, but these options may not be feasible when working with a child client. Additionally, in order to competently represent a child client and to meet the ethical duties of reasonable communication, an attorney must gain an understanding of child development, particularly as it relates to how children perceive, understand, and recall events, and the clues they take from those around them about acceptable and unacceptable behavior.[13] Ultimately, an attorney representing children must adapt his or her practice of law to most effectively meet the needs of the child client.

Confidentiality of Information

Application of SCR 3.130(1.6) to attorneys representing children can be bewildering. Attorneys may frequently ask whether and to what degree they must keep certain communications confidential. A dilemma arises when the confidentiality normally required under SCR 3.130(1.6) might prevent the attorney with the child client from carrying out the responsibilities of his or her appointment.[14] This can present difficult decisions for a child's attorney as there is no "correct" way to resolve this ethical conundrum.[15] One option that has been discussed is that "the use of the term 'interests'…as in the phrase 'best interests of the child,' suggests that the lawyer may, if necessary, act against the expressed wishes of the client."[16] This method has found support in situations where courts have required that lawyers for children disclose to the court information that would indicate the child is at risk of substantial harm.[17]

Regardless of how the disclosure came about, "[d]isclosures of this kind pose a particular tension with a child client's ability to direct the representation."[18] When an attorney representing a child must disclose confidential communications, the attorney should be particularly cautious. If an attorney representing a child plans to reveal client communications that the child does not want revealed, the attorney should advise the child, before soliciting information, that the information will not be

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confidential. The child can then make an informed decision about what to disclose.[19] For an attorney, "[b]eing clear with the child about [his or her] role, and to what degree information will or will not remain confidential helps maintain the child's sense of trust and confidence that the system will protect her."[20] Therefore a child's attorney must exercise his or her discretion to determine whether to disclose the confidential information to the court. In doing so, the attorney of the child client must be aware that his or her knowledge of the child's situation may be limited, and also recognize potential consequences of disclosing the information if they are to meet the duties of SCR 3.130(1.6).[21]

Client Under a Disability

Although the new Rule 3.130(1.14) and its commentary provide more guidance than the practitioner representing children has ever had before, it is important to note that the Rule was neither drafted nor modified with child representation specifically in mind. The Rules of the Supreme Court define the lawyer's basic duties for zealous, competent and independent advocacy.[22] No court has allowed an exception to the duty to adhere to the Rules for lawyers representing child clients. Instead, the Supreme Court expressly established that the default position when representing children is to maintain as normal an attorney-client relationship as possible.[23] The new SCR 3.130 (1.14) , referring to a client with *diminished capacity*, provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

However, the new SCR 3.130(1.14)(b) does give the attorney representing children broader guidance on what "other protective action" might be appropriate, including consultation with other entities and persons.[24] Additionally, the new SCR 3.130(1.14)(b) provides more guidance regarding the client actions that elicit an attorney's protective response, including situations in which the client "is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest." While the Supreme Court's modification could reflect a loosening of the confidentiality rules under certain limited circumstances, the modification neither gives the attorney representing the child *carte blanche* to impose his/her judgment upon the child client nor the ability to freely disclose confidential communication. The Commentary to Rule 3.130(1.14)[5](b) explains that the new rule:

> "permits the lawyer to take protective measures deemed necessary. Such measure could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances,…consulting with support groups,…or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals if intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

The Comments seem to suggest that pursuing protective actions or disclosing confidential information for or about a child client should be a last resort in limited circumstances, while at all times the attorney must take into account the instructions and wishes of the child client.

Conclusion

The legal representation of children is a complicated matter in any context. Assuming the role of Guardian Ad Litem in our system can be particularly challenging and perplexing. What is clear is that the job is not one assumed in a lackadaisical manner. If a practitioner knows he or she cannot meet the duties required, the ethical choice is to abstain from taking the case. The recent changes to the rules and the modified commentary are helpful to the attorney with child clients, but do not fully clarify the role of such an attorney. Although these changes provide new guidance and insight, the simple fact remains that the rules were not written to govern the representation of children. As long as there are two competing models for the role of the zealous child advocate, the current rules will need further exploration to understand how to apply them to a child client. Diligence, communication, confidentiality, and dis-

ability in an attorney's representation of a child client are paramount issues that the Court has begun to address. Hopefully, the discussion of how these rules and the recent additions should be applied in the context of the representation of children who are often the victims of family violence will continue with informed debate on the role of both the attorney and the Rules. The path to consensus may be long and have the occasional pothole, but if we continue to address the appropriate questions we will arrive at a higher level of practice on behalf of Kentucky's children.

ENDNOTES

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