A-12

Supreme Court Juvenile Justice Study Commission

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The attached memorandum is submitted in behalf of the Supreme Court Juvenile Justice Study Commission. Members of the Commission, appointed by the Supreme Court, are listed along the left hand margin of this letterhead.

Memorandum related to the "Proposed Rules of Procedure for Juvenile Court" submitted by the undersigned appointed by the Chairman of the Supreme Court Juvenile Justice Study Commission and submitted in behalf of the Commission.

As the court is aware, the membership of the Commission consisted of persons representing a wide spectrum of points of view and experience with children. After numerous meetings the members arrived at a consensus on what the underlying philosophy should be in the Rules. That philosophy received the overwhelming vote of approval by the Commission. The Commission rejected the concept that older juveniles though falling within the juvenile court jurisdiction can be treated as mature individuals who can be entrusted with making major decisions affecting their lives which might arise in the course of juvenile court proceedings. Instead the Commission adopted the position, inherent in the juvenile court system which relieves the juvenile of criminal responsibility, that those entrusted to the jurisdiction of the juvenile court are immature individuals lacking sound judgement and need the assistance, guidance and approval of mature adults in the course of the proceedings. Particular juveniles may be mature just as some adults are immature, but a line needs to be drawn not depending on the diverse views of particular judges in particular cases. That line has been drawn in the juvenile court code at under age 18. For this reason the Commission rejected the notion that those 16 and 17 years of age should be entrusted with decisions not permitted to those of lesser age. This would simply be inconsistent with the basic philosophy of the juvenile court system.

This position is consistent with many other areas of law affecting juveniles. To name a few, a minor cannot appear either as plaintiff or defendant

in a civil action, or enter into a marriage, or make a contract, or vote, or hold public office, or buy or consume intoxicating liquors (age recently raised to 19). These limitations apply whether or not the minor is more mature than the average. The Commission also accepted the juvenile court as a valuable institution that takes the juvenile out of the punitive atmosphere of the criminal court room and recognized that juveniles, being young and immature, are more amenable to treatment and rehabilitation. That certain constitutional rights incident to criminal proceedings have also been applied to juvenile court proceedings does not alter the purpose and value of the juvenile court system; a point clearly made in Gault.

The Minnesota juvenile court code has been subject to periodic legislative revision. That rehabilitation is the objective under the present juvenile court code is evident from several provisions. In 1980 the legislature adopted a new statement of purpose of laws relating to children alleged or adjudicated delinquent, one which has been pointed to by some as changing the protective role of the juvenile court, but note the last sentence of this new purpose, Mn. Stat., sec. 260.011 (2) which reads, "This purpose should be pursued through means that are fair and just in recognizing unique characteristics and needs of children and that give children access to opportunities for personal and social growth." Section 260.125, permits transfer for criminal prosecution only if the child is not amenable to treatment or in the interest of public safety. If the child is treatable he must be retained for that purpose unless public safety makes transfer necessary. Sec. 260.211, subd. 1 reflects this same policy in removing disabilities imposed by conviction, and providing that adjudication is not deemed a conviction of crime and that disabilities associated with criminal conviction are removed.

Examination of the provisions of legislation and rules in other mid-west States (about 10) disclosed that the position taken by the Commission is also

their policy consistently adopted in all recent legislation.

This has also been the policy of this state for generations. Minnesota was among the first to set up the Reformatory intended to separate young first offenders from the hardened more adult criminals. It was among the first to establish the juvenile court in this state. It was the second to create the Youth Conservation Commission. Probation and parole were early adopted. Whenever these laws were questioned the Minn. Supreme Court has consistently upheld them.

It is this recognition of the immaturity of the juvenile and the hope for his rehabilitation that permeates the proposed Rules. Rule 1.02, expressed this briefly in stating the purpose of the rules to be, among others, "to promote the rehabilitation of the juvenile and the protection of the public."

A second purpose stated in this Rule is "to assure that the constitutional rights of the juvenile are protected." The Commission considered these constitutional rights of the juvenile to be important rights which should not be lost through the immature judgement of the juvenile. Hence the need for some mature input before these rights are waived. Hence the need for an attorney to advise on these rights and the consequences of waiver, and for the parent to see that an intelligent decision is made. This is the purpose of Rule 6, which is a procedural or evidentiary Rule governing the admissibility of confessions; Rule 4, governing the right to counsel in the proceedings; and Rule 15, governing the waiver of counsel and other constitutional rights.

Two arguments against these rules were considered and rejected by the Commission. It has been argued that Fare v. Michael.... and the corresponding Minnesota Supreme Court cases have fixed the standard of admissibility as the "totality of circumstances" in determining whether there has been a knowing and voluntary waiver of a constitutional right, age being but one of those circumstances. These decisions stand for the principle that anything less than this

would not be sufficiently protective of a suspect's rights to withstand constitutional attack. They do not hold that a state may not provide for greater protection. They would permit, if a state were so inclined, exclusion of all confessions made by a juvenile under any circumstances. The proposed Rules add but a modest additional safe-guard deemed necessary for the protection of the rights of the juvenile.

The second argument considered by the Commission was the reference to Minn. Stat., sec. 260.155, subd. 8, which reads:

> Waiver of any right which a child has under this chapter must be an express waiver intelligently made by the child after the child has been fully and effectively informed of the right being waiver. If the child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter."

Several points may be made. The statute does not deal with constitutional rights, only those "under this chapter". Since the proposed Rules will supercede the corresponding procedural provisions of the chapter, the statute will have but limited application in any event. Finally, the statute does not propose to give a right or capacity to waive. Instead it undertakes to provide certain safeguards on waivers by children. The proposed Rules merely provide additional safeguards.

In light of the foregoing considerations the Commission considered the role expected to be played by the several participants other than the child.

The County Attorney is given recognition in the Rules unprecedented in any previous statutes or rules in this state. The Commission recognized the fact that his participation became a necessary incident when the juvenile was afforded the constitutional right to have his case presented by counsel. Under the Rules the county attorney may be an active participant on behalf of the state from the initiation of the proceeding in delinquency cases to the final disposition. This enables the more effective prosecution of the charge.

The state needs this means of protecting the public and effectuating the purposes of the juvenile court. But it also requires greater protection of the juvenile so that his immaturity and lack of judgement do not result in loss of his rights and in unfair and unjust decisions.

This and the more neutral role of the judge than formerly have made all the more necessary the presence of the parent during the proceedings to advise the juvenile and to prevent rash and superficial decisions by him. The parent as no one else knows the limitations and problems of his child. The Rules however recognize that the charge is against the child during the adjudication hearing and the parent is usually not able to contribute much by way of evidence on that issue. Hence the Rules contemplate his status not as a full party at this stage but as a guardian in the broader sense, going beyond that of a parent in a civil proceeding in representing the child as defendant or plaintiff. His role in the proceedings is to serve the kind of function that he serves on other matters in the life of the parent outside of juvenile court proceedings. For example, if the child, through a sense of self-punishment insists on admitting the charge when the attorney advises against it, the parent should be able to advise the attorney to enter a denial of the charge. On the other hand it would not be permissible for the parent to enter an admission of the charge over the protests of the child. Once the dispositional stage is reached the parent is treated as a full party since at stake is his custody and control of his child. The fact that some parents, momentarily angry at their child, may urge an unwise waiver of his legal rights, does not invalidate the need to protect and preserve the parent-child relationship fundamental to American family life. See Grisso, Juvenile Waiver of Rights: Legal and Social Competence, and Grisso, "Juveniles Capacity to Waive Miranda Rights: Empirical Analysis," 68 California Law Review, 1980.

There are occasions when the parent is not available or is disqualified from assuming the role. A guardian ad litem must then be appointed under the Rules. The guardian ad litem will have the same rights and obligations as the parent which he superceded and are not comparable to those in civil litigation.

Since the obligations of a guardian ad litem is so substantial, the Commission considered that this was not an appropriate function for an attorney who is appearing for the child. Quite aside from the ethical propriety of his taking on this responsibility, there are legal questions such as the possible charge of malpractice, the problems of disclosure of confidential information received by him as guardian ad litem, etc.

The role of parent, guardian ad litem, and counsel are being fully developed in an article being drafted by one of the undersigned. A copy of a tentative draft is attached to this memorandum.

With respect to other procedural rules, three policies of the Commission should be mentioned. One is that time limits should be set at the minimum length so as to assure prompt action on the charge and to avoid any unnecessary detention of the juvenile. The second is to prevent the taking into custody of the juvenile and his detention unless there has been a showing of probable cause. Third is to provide adequate notices to the juvenile and his parents of his rights so that he will have an opportunity to assert them.

With respect to the Juvenile Protection Rules, Rules 37 to 65, the same policies and procedures were followed to the extent applicable, recognizing that in the cases to which the Rules apply involve charges against the parent or other custodian and not against the juvenile involved.

In conclusion, may I point out that the Commission's approach, reflected in the proposed rules, was pragmatic. We have not ignored the need for procedures which enable judicial process to go forward with all the facility consistent with the basic purpose of the juvenile court. Although critics may charge that we have erred too far in one direction or the other -- that we have

complicated procedures unduly to protect the juvenile's rights or that we have unnecessarily compromised those rights to facilitate handling of the individual case, it has been our purpose to strike a reasonable balance of interests here and we believe that the proposed rules achieve that end.

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The position is sometimes taken that if the juvenile is sufficiently mature to make his own decisions, the intervention of a parent or guardian ad litem should not be required and that the attorney should look to the juvenile for guidance as he would with adult clients. This would leave to each attorney representing a juvenile client in a delinquency proceeding the determination of whether his client had the necessary degree of maturity. This presents some problems. Maturity is an elusive concept and depends on such factors as the juvenile's intellectual capacity, his prior experiences in and out of court, his emotional make-up, and the complexity of the issues presented. Conclusions reached would be as varied as the lawyers making them. The role of the parent or guardian ad litem would evidently be confined to advising the juvenile who would be free to ignore the advice however unwise this were considered by the parent or guardian ad litem and the attorney. Would the juvenile be bound by the attorney's determination that the juvenile had the necessary maturity so that an adverse adjudication stemming from the juvenile's decision could not be attacked on the ground that he was in fact too immature to have been entrusted with the decision? Would the attorney be liable to the juvenile for having permitted him to make the decision and for having acted on it in representing the juvenile? Issues such as these have not been addressed by those who would permit the "mature" juvenile to make his own decisions. To permit the under age, but presumably "mature" juvenile to make his own decisions in delinquency proceedings on what is in his best interests is inconsistent with the policy adopted in most other areas of the law. A minor is considered too immature to be entrusted with decisions substantially affecting his welfare. Generally, he cannot enter into a binding contract or contract a marriage, buy or sell property, appear in a civil action without adult representation, disregard limitations on hours and conditions of employment enacted for his

protection, choose not to attend school, have access to obscene materials otherwise available to adults, ... or buy a glass of beer. The probable maturity of the juvenile in the individual case does not affect these limitations. The juvenile court system is but an extension of this basic policy. It is also likely in delinquency cases to present more serious issues and consequences for the juvenile than most of the instances mentioned. It relieves the juvenile of criminal responsibility and to be consistent it should also not permit him to make decisions on issues that call for the mature judgement of an adult.

> Disqualifications based on age cannot, of course, disregard constitutional protections that apply regardless of age. Thus, Planned Parenthood of Cent. Mo. v. Danforth, 428 U. S. 52. 72. 96 S. Ct. 2831 (1976), held that a pregnant juvenile may not be required, if sufficiently mature, to obtain the consent of her parents to an abortion. This may suggest that the authority of a parent in a delinquency proceeding is not unlimited, e. g., he probably cannot be permitted to enter an admission of the delinquency charge over the protests of the juvenile.
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> Fare v. Michael C., 442 U. S. 707, 99 S. Ct. 2560 (1979) held that a juvenile in police custody and properly warned of his constitutional rights may wiave his rights and make a confession of a crime that the State may use against him even though made without the presence of an adult, if the confession was knowingly and voluntarily made, age being but a factor in the totality of the circumstances. However, the decision cannot be construed to forbid a state from making under age of the juvenile, and his presumed immaturity, the controlling factors in excluding his confession from use against him.

The more recent trend in both judicial decisions and legislation is to require the presence of a parent or other supportive adult.

Imposing on the attorney the duty to decide what is in the best interests of his juvenile client presents him with some serious legal as well as ethical problems. If his decision is a hasty and superficial one, he may face the prospect of a malpractice suit at a later date. To avoid that risk he would ordinarily have to gather information going beyond those relevent to the misconduct charged. If he conducts the investigation himself, and meets the

standards of adequacy required to avoid a charge of malpractice he faces the prospect that he would be obligated to testify as to what he found and become disqualified from continuing in the case as the child's attorney.

> A. B. A. Code of Professional Responsibility, DR 5-102. Testimony as to the best interests of the child would be relevent in a delinquency case primarily at its dispositional phase.
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> In Lumbra v. Lumbra, 136 Vt. 529, 394 A. 2d 1139, 1978, it was held reversible error for the trial court in a divorce case to receive the recommendations as to custody made by the attorney appointed by the court to represent the parties' children.
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> "If the recommendation was accepted as testimony bearing on the best interests of the children, then it is objectionable on numerous grounds. A lawyer is prevented by ethical considerations from testifying in his client's cause. A. B. A. Code of Professional Responsibility, EC 5-10. To the extent the recommendation is based on the lawyer's out-of-court investigation, it constitutes hearsay. To the extent that the recommendation was testimonial in nature, the trial court's refusal to allow cross-examination violated the due process guarantees of the Fourteenth Amendment to the United States Constitution. If, on the other hand, the children's lawyer was making a recommendation on the basis of expertise, it was incumbent upon him to establish his expert status."
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> Unlike the Vermont court, those advocating the views under discussion assume attorneys are competent to decide the best interests of the juvenile client.

An investigation to determine what is in the best interests of the child, whether conducted by the attorney or by others for him necessarily entails obtaining information from the juvenile and his parents. Unless advised to the contrary, with resulting frustration of the enquiry, they will provide information in the expectation that it is given in confidence and will not be used by the attorney against them. If the attorney then decides, using the information so obtained, that what they want is not in the best interest of the child and proceeds with the case contrary to their express wishes, violation of his ethical duty not to betray their confidence would seem apparent.

Dr 4-101 (B) provides, "a lawyer shall not knowingly . . . (2) Use a confidence [refers to the attorney-client privilege] or secret of his client to the disadvantage of his client." Dr 4-101 (A) defines a secret as other information [not covered by the attorney-client privilege] gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Under these provisions, information obtained by the attorney from either the parent or child would be covered as a "secret" whether or not covered as a "confidence". Communications from the child would clearly fall within the "confidence" or privilege. So also would information obtained from the parent which the child had given for transmission to the attorney.

> De Los Santos v. Superior Court, etc., ____ Cal ____, 619 P. 2d 233, , a personal injury case in which the court stated, "In her capacity as guardian ad litem Mrs. Santos is the holder of the privilege, and she was authorized to assert on Jesse's behalf. (Evid. Code, sec. 953, subd. (b) . . . Since Jesse's statements to his mother were made in response to questions she asked at the request of his attorney . . . to assist the attorney in preparation for trial, the statements were clearly given in the course of the lawyer-client relationship."

Whether the privilege applies to information obtained by the attorney from the parent who did not secure it from the child may be in more doubt.

> Cases dealing with this question have not been found.

It turns in some measure upon the view taken of the status of the parent in the proceedings. It appears to be twofold. Communications under either status, it is believed, should be considered within the Disciplinary Rule. First, at the adjudicatory stage, he is acting for the child in resisting the delinquency charge. As such, he may provide the attorney with information such as the child's inculpatory and exculpatory statements, the general conduct of the child before and after the

alleged misconduct, the whereabouts of the child during the alleged delinquent act, etc. The communication is in as much need of the protection of the attorney-client privilege as if it had been made by the juvenile himself.

Second, at the dispositional stage, the parent will seek to retain the custody of his child. In supplying the attorney with information for this purpose, the parent is acting in his own right and is viewing the juvenile's attorney as his own as well. Hence, the privilege should be held to apply.

That in practice neither the attorney nor the parent view the relationship as dissected in this manner only adds to the need for the full application of the privilege.

> DR 4-101 forbids the use of information obtained by the attorney if it would be to the "disadvantage" of the client or be "embarrassing" or likely "detrimental" to him. These are ambiguous terms not defined. Considered in the context of the Code as a whole, the Rule can hardly mean that the opinion of the attorney is permitted to prevail over the opinions of the parent and child on what is "disadvantageous".

The role of an attorney for a child in a delinquency proceeding needs to be distinguished from an attorney's role in other types of litigation in which he is appointed to protect the interests of a child. Juvenile court Codes usually provide that, in a proceeding in which the custodial parent is charged with neglect or abuse of his child, a guardian ad litem shall be appointed for the child. More recently, statutes and some judicial decisions have permitted the appointment for the child of an "attorney" or "guardian ad litem" in divorce litigation, habeas corpus proceedings, and other cases where the custody or the welfare of the child is in issue. The underlying reason for these provisions is the inadequacy or biased character of the information likely to be supplied to the court by the contending parties. A neutral person is needed to provide this information with the interest of the child in mind so that the court will be better equipped to deal with the custody issue.

Attorneys are frequently appointed to these positions even when it is discretionary with the court to appoint others. The reason probably is that familiarity with the law and legal procedures in which the issue of custody is centered will facilitate the performance of the duties associated with the appointment. But this aside the nature of the functions to be fulfilled by the appointee while usually left unspecified appear to be such that others than attorneys can meet the requirements equally well or even more effectively. A social worker, psychologist, or other such professional may be more qualified than an attorney to execute the responsibilities of the position. The appointee is not placed in an adversary position. His function appears primarily investigative in character as an assistant to the court and owes this principally to the court. It may be he is in some measure a fiduciary to the child. That the appointee need not be an attorney is implied whenever his legal designation is that of guardian ad litem. The appointment of an attorney does not change the character of the position nor the nature of the responsibilities.

> That the appointed attorneys frequently think of themselves as advocates for the child see Lawyering for the Child, 87 Yale L. Jr., 1126, 1978.

The Wisconsin court has considered the child a full party to the proceeding and the trial court is authorized to appoint an attorney guardian ad litem to represent the child with all the rights and duties of an attorney for any litigant.

> de Montigny v. Montigny, 75 Wis. 2d 131, 233 N. W. 2d 463 (1975): ". . . a guardian ad litem appointed to represent children is more than a nominal representative appointed to counsel and consult with the trial judge. Rather, he has all the duties, powers, and responsibilities of counsel who represents a party to litigation."
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> In Matter of Kegel, 85 Wis. 2d 574 (1978), the guardian ad litem in a termination of parental rights proceeding recommended that the rights not be terminated. Under the circumstances of the case it was held

> not reversible error not to follow the recommendation, but the court observed that the recommendations of a guardian ad litem should not be lightly disregarded.

In most states however, the position is created by statutes which leave the powers and duties of the appointee quite undefined. Sometimes he is labeled an "attorney" for the child, other times as a "guardian ad litem". Whether labeled one or the other, attorneys are frequently appointed probably because familiarity with the legal procedures facilitates the performance of his duties. But the duties would appear to be such that it is not necessary that he be an attorney, particularly when the designation is that of "guardian ad litem".

> Fraser, Independent Representation for the Abused and Neglected Child: The Guardian ad Litem, 13 Cal. West. L. Rev. 16 (1976) Johnson, et al, Implementing the Guardian ad Litem Mandate: Toward the development of a Feasible Model, 31 Juv. & Fam. Ct. Jr., No. 4, p. 3 (1980)

The use of these undefined labels has led to confusion over what the role of the appointee is or should be.

> Compare for example, Unif. Marriage & Divorce Act, sec. 310, which authorizes appointment of "an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation." A Commissioner's Note states, "The attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests." There is no explanation of what responsibilities are withheld by not being a guardian ad litem.
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> Ill. Marriage & Divorce Act, sec. 506, added the words: "The court may also appoint such attorney to serve as the child's guardian-ad-litem." For a discussion of the difficulties encountered in the interpretation and application of the Ill. Act, prior to the addition, see .....

When an attorney is appointed, should he act as an advocate for the child and present the views of the child, if he has one, rather than his own if in disagreement with the child? Would his responsibilities be different if a layman is appointed? Rather than undertaking to define his role in terms of the labels placed on the position, it would seem more desirable to treat the position in terms of its function, namely, to provide the court with information and

and assistance in ascertaining what is in the best interest of the child.

However, this is not the occasion for elaboration on these issues. The point to be made here is that when an attorney is appointed in these cases his role is not analogous to that of an attorney for the child in a delinquency case whether retained, appointed or as public defender.

The foregoing analysis suggests the scope and limits of the ethical duties of an attorney representing a juvenile in a delinquency proceeding. Several situations need to be distinguished. If the juvenile denies committing the delinquent act charged and the attorney has no reason to question what he says, the duty of the attorney is clear. Having accepted the case, he must oppose the charge to the best of his ability using all legitimate defenses and objections available. This appears to be the kind of case assumed by courts in upholding the right of the juvenile to be represented by counsel.

> E.g., In re Gault, 387 U. S. 1, 34, 87 S. Ct. 1428, 1967: "The juvenile needs assistance of counsel to cope with problems of law (footnote omitted) to make skilled inquiry into the facts, to assist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." But note the court's footnote, at p. 38: "Recognition of the right to counsel involves no necessary interference with the special purpose juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation." How this role was to be performed was not considered. It could encompass the attorney expressing to the parent and child his opinion as to the best interests of the child, and even urging its acceptance, urging upon the court, with the consent of the parent and child, certain dispositions deemed conducive to rehabilitation and participation in a rehabilitative program once it is ordered by the court. Such measures by the attorney would not be inconsistent with his role as outlined in the text.

If the attorney disbelieves the juvenile's account but remains in the case, it should still be his duty, if the parent and child so request, to resist the charge using such defenses and objectives as are available. He should not be

able to override their wishes and substitute his judgement for that of the juvenile court and deny the juvenile his day in court. If the attorney's conscience prevents his effectively representing the juvenile, he should withdraw, subject to the usual conditions of withdrawal.

In the course of the representation, the attorney may be informed of misconduct by the juvenile, unrelated to the delinquency act charged in the petition. This may reenforce the attorney's belief that the juvenile is in need of treatment and that this can be best obtained by admitting the charge. But, again, under the analysis offered in this article, this should be a decision for the parent and child to make. If, notwithstanding his advice to the contrary, they request that the charge be contested, it should be the attorney's duty to accede to their request. The child is entitled to be judged by the court on the charge made and on that alone. If representing the child to that end, the information received by the attorney of other unrelated misconduct becomes irrelevent.

The same ethical principles would appear to apply at the dispositional stage of the proceedings. Notwithstanding an adjudication of delinquency, the attorney may still properly believe his client to be innocent of the charge. If so, he should seek the most lenient disposition he can obtain from the court. If the attorney thinks the child committed the act charged and that the adjudication of delinquency was correct, he should still seek the most lenient treatment if this is what his clients request him to do, even though he believes more severe measures would better meet the needs of the child.

> For contrary views, see Kay & Segal, The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach, 61 Geo. L. Jr. 1401, 1415 (1973); Treadwell, The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker, or Otherwise, 16 Juv. Ct. Judges Jr. 109 (1965): Fester, Courtless & Snethen, The Juvenile Justice System: In Search of the Role of Counsel, 39 Ford. L. Rev. 375, 410 (1971).

If the views previously expressed are accepted, it is not the attorney's obligation to decide what is best for the child. He has been employed and paid to express and seek the disposition wanted by his clients. That obligation becomes even more clear if the attorney believes that the rehabilitative facilities available to the court or the probable disposition by the court would not benefit and might even be harmful to the child, whether or not the delinquent act charged was committed. That he may be mistaken should not affect the ethical propriety of his decision and of his effort to obtain the most lenient disposition.

In accord: Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L. Jr. 527, 539 (1968).

A more debatable ethical issue is presented when the child admits the charge but the attorney is aware that those prosecuting the charge lack the evidence to establish it, or that the charge can be defeated by securing the exclusion of an illegally obtained confession, illegally seized evidence, or other inadmissible evidence tending to prove the charge. The attorney believes the child would benefit from the court's likely disposition, but the parent and child insist that the attorney defeat the charge. As noted earlier, some would maintain that the attorney's duty is to withhold these objections in order to secure the benefits of the court's disposition. In the writer's view, there are two serious objections to this position. In the first place, it strikes him as inherently unethical for a lawyer to accept a case, with or without a fee, and purport to represent his client and then to proceed contrary to the client's express wishes. He may refuse to accept the case or, without prejudicing the case, ask his client to seek another attorney if the client rejects his point of view.

An option not available to public defenders or appointed attorneys.

But if he accepts and remains in the case, as stated earlier, he becomes his client's representative and spokesman, not his adversary. It should become his duty to present whatever rights and defenses his client has.

Second, the position under consideration fails to give recognition to the important social policies behind these grounds of exclusion. The burden of proving the charge beyond a reasonable doubt, now a constitutional requirement, reflects the broad policy that a state's power to deprive one of his or her freedom because of delinquent or criminal conduct should not be exercised short of the clearest convincing proof. Similar policy considerations underlie the right of confrontation and the exclusion of hearsay evidence. Illegally obtained confessions and illegally seized evidence are excluded to deter law enforcement officers from engaging in these illegal practices. Confidential communications to attorneys, physicians and others are inadmissible to assure the realization of the socially important purposes served by these relationships. Exclusion of this type of evidence may result in a juvenile not getting the rehabilitative services he needs and the public in the short view may not be as adequately protected. That is a necessary price paid for securing the values underlying these evidentiary principles.

It has been assumed thus far that the parent supports the juvenile in the proceedings and consults with and advises the attorney on those issues normally left to the decision of an adult client, the child being too immature and lacking in good judgement to make these decisions on his own. In some instances, the parent is not available or is disqualified from action in this capacity. In that event, it becomes necessary to designate some other adult to perform the parent's responsibilities. To meet this need, juvenile court codes commonly provide for the appointment of a guardian ad litem.

Ill Stat. § 704-5; Ind. Stat., Tit. 31, Art. 5,

§ 31-6-3-4; Vernon's Tex. Civ. Stat., § 51.11; Code of Vir., § 16.1-266; Wis. Stat., § 48.235; Minn. Stat., § 260.155, Subd. 4.

His powers and duties are seldom defined and are currently quite ambiguous but in providing for his appointment in the absence of the parent, it seems evident that his powers and duties go beyond those of a guardian ad litem in civil litigation and include those of the parent he replaces.

> A frequent provision is that he is to represent and protect the interests of the child. Ind. Stat., Tit. 31, Art 5, § 31-6-3-4; Vernon's Tex. Stat., § 51.11; Minn. Stat., § 260.155, Subd. 4

> In other types of litigation, the powers of a guardian ad litem are commonly limited. He may not make admissions for the minor and must assert all available defenses and is accountable to the court which appointed him. See Reinman v. Larkin 222 Mo. 156, 168, 121 S.W. 307 (1909); Eidam v. Finnegan, 48 Minn. 53, 50 N.W. 933 (1892); Note 45 Iowa L. Rev. 360, 386 (1960); 43 C. J. S., Infants, § 234, 236; 42 Am. Jur. 2d, Infants, § 184.

He would thus have the responsibility of making those decisions for the child which the child himself would make were he an adult. His liability as guardian ad litem is probably greater than those of a parent. He would not have the relative immunity from liability which a parent may have.

These statutes frequently provide that the attorney for the child may also be appointed the juvenile's guardian ad litem.

> Ill. Stat. § 704-5; Ind. Stat., Tit. 31, Art. 5 §31-6-3-4; Vernon's Tex. Civ. Stat., § 51.11; Minn. Stat., § 260.155, Subd. 4.

Some judicial decisions have looked upon such appointments with favor,

> Black v. Wiedeman, Ky. App., 254 S. W. 2d 344, 346 (1953).

but others have been critical of the practice.

> Failure to appoint a guardian ad litem pursuant to statute was held reversible error in In re Faubus, Tex. Civ., 498 S. W. 2d 21 (1973), "even though no request

for such appointment was made and the child's counsel and parents were present in court," citing numerous Texas decisions. In Starks v. State, Tex. Civ. 499 S.W. 2d 559 (1970), the court stated, "It is no answer to say that Hernandez had an attorney from the Houston Foundation. The powers and functions of an attorney are different from those of a guardian."

Appointment of defense counsel as guardian ad litem in a criminal case was condemned in In re Dobson, 125 Vt. 165, 212 A. 2d 620 (1965), stating, ".... a lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandary of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests." In re Westover, 125 Vt. 354, 215 A. 2d 498 (1965), held the joint appointment did not render a conviction void in the absence of a showing of prejudice. The ethical implications of the appointment were not considered but the court did refer to separate appointment as "the better practice." See also the similar decision in Gibson v. State, 47 Wis. 810, 177 N.W. 2d 912 (1970).

The objections to the attorney for the child being given the responsibility for deciding what is best for the child would appear equally applicable when the attorney is appointed guardian ad litem to perform this function. The appointment does not change the incompatibility of the functions sought to be combined or add to the attorney's ability to decide what is best for the child. Compromise of his ethical duties as attorney may well result from the obligations imposed upon him as guardian ad litem.

In accord: Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L. Jr. 527, 536 (1968). See also In re Dobson.

He may hesitate to consider a course of action, legally feasible and desirable, which he, as guardian ad litem, would be under obligation to carry out. His responsibilities as guardian ad litem, ambiguous as they are, if not performed, or performed inadequately, may entail liability which would not be entailed if his duties were confined to those of an attorney.

See In re Estate of Roe, 316 N.Y.S. 2d 785 (1970), a probate case, in which the court stated, "While the

> guardian ad litem in some respects, represents his ward as an attorney represents an adult client, his concurrent obligation to the court and all parties imposes a higher degree of objectivity."
>
> For discussion of the extensive duties that might be ascribed to a guardian ad litem, see Fraser, Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem, 13 Cal. West. L. Rev. 16 (1976).

These personal risks would color his professional judgement as an attorney and lead to compromising his ethical duties to his client.

> A. B. A. Code of Professional Responsibility, EC 5-2: "After accepting employment, a lawyer carefully should refrain from ... assuming a position that would tend to make his judgement less protective of the interests of his client."

His appointment would also complicate the question of the confidential information received by him from his clients. If the information relates to what should be done with respect to the best interests of the child, does the attorney receive the information as guardian ad litem? If so, it is probably not protected from compulsory disclosure. The Ethical obligation not to voluntarily disclose the information may also be open to question.

By Statutes Requiring Presence of Counsel or Parent at Interrogation

Conn. Stat., Family Law, § 46b - 137

Colo. Childrens Code, § 19 - 2 - 102

Iowa Stat., § 232.11

Okla. Stat., Tit. 10, § 1109

Tex. Family Law Code, Tit. 3, § 41.09

By Court Rule

Mich. Juvenile Court Rules - Rule 6 (attached)

By Judicial Decision

Commonwealth vs Roane, 329 A 2d 286 (Pa. Supreme Court)

Commonwealth vs. Smith, 372 A 2d 797 (Pa. Supreme Court)

Lewis v. State, 288 N E 2d 138 (Ind.)

In re Interest of D. S., 263 N W 2d, 114; (N.D.), interpreting Uniform Juvenile Court Act.

In re Dino, 359 So 2d 586 (Louisiana)

(d) Formal Calendar: Petition to Be Filed. If it appears formal jurisdiction is required, a petition shall be authorized.

[Amended July 22, 1979; Nov. 16, 1979.]

JC Rule 5. Guardians Ad Litem

A guardian ad litem or counsel shall be appointed in the event no parent, guardian or custodian, appears on behalf of the child, or where, in the opinion of the court, the welfare of the child so requires. Such guardian ad litem shall be authorized to consult with the child concerning retaining counsel as provided by Rule 6.

JC Rule 6. Right to Counsel: Duty to Advise; Waiver; Court-Appointed Counsel; Assessment of Costs

.1 Right to Counsel: Duty to Advise.

(a) The court shall advise the child and his parents, guardian, or custodian at the first hearing before the court that they may be represented by counsel and that counsel may be appointed under subrule 6.3.

(b) A custodial confession made by a child to a peace officer or prosecutor is not admissible in a subsequent juvenile court proceeding against the juvenile unless the juvenile was represented by counsel or waived counsel in accordance with subrule 6.2.

.2 Waiver. A child may voluntarily and understandingly waive the right to counsel. If the parent, guardian, or custodian is the complainant or petitioner, the guardian ad litem must concur in the waiver; if not, a parent, guardian, custodian, or guardian ad litem must concur.

.3 Court-Appointed Counsel (Formal Calendar). When proceeding on the formal calendar the court shall appoint counsel to represent the child, his parents, guardian, or custodian as follows:

(a) When the Court Shall Appoint Counsel.

(1) Offense by Child. Unless waived as provided by Rule 6.2, counsel shall be appointed for the child when the child and those responsible for his support are financially unable to employ counsel, or though able, refuse to employ counsel.

(2) Offense Against Child.

(a) For the Child: Counsel shall be appointed for the child on the court's own motion, or upon request of the child or the parent, guardian, custodian, or guardian ad litem appearing in his behalf when it shall appear to the court the child's interests may be adverse to those of a parent, guardian or custodian, or are not otherwise adequately represented.