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Alberto Bernabe
John Marshall Law School, abernabe@uic.edu

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A GOOD STEP IN THE RIGHT DIRECTION: ILLINOIS ELIMINATES THE CONFLICT BETWEEN ATTORNEYS AND GUARDIANS

*Alberto Bernabe**

INTRODUCTION

Last year, the Illinois Supreme Court decided what could one day become one of the most important cases on juvenile delinquency practice.[1] This is so because it correctly addressed one of the most prevalent problems in most, if not all, juvenile delinquency systems throughout the nation: the conflict between the roles of attorneys and guardians *ad litem*. In the Illinois case, the court invalidated the widespread practice of allowing an attorney to serve in both roles at the same time, whether explicitly or impliedly. The court held that representing a minor as an attorney and as a guardian at the same time, or attempting to serve the best interests of the minor to the detriment of the duties of an attorney, constitutes an inherent conflict of interest and creates too much of a risk of a violation of a minor's Constitutional right to counsel.[2] In doing so, the court clarified the duties of lawyers who represent juveniles.

The court's holding is extremely significant because the type of conflicted, and flawed, representation involved in the case is common in most, if not all, jurisdictions in the United States today. It is a problem that needs to be addressed, and the Illinois Supreme Court's decision is a good first step in the right direction. However, it is important to spread the word about the problem and the relatively simple solution for there to be real progress in solving it. Hoping it will help in that process, this essay will describe the problem and highlight that possible solution.[3]

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* Professor of Law, The John Marshall Law School; B.A., Princeton University; J.D., University of Puerto Rico Law School; LL.M., Temple University School of Law.

1. People v. Austin M., 975 N.E.2d 22 (Ill. 2012).

2. *Austin M.*, 975 N.E.2d at 42.

3. For a longer discussion of the issue in the context of Illinois law and practice before the Illinois Supreme Court's decision in *People v. Austin M.*, see Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833 (2012).

I

Starting at the very end of the 19th century, different states in the United States began to establish a separate system of justice to deal with delinquent minors—meaning minors who engaged in conduct that would be considered a crime if committed by an adult.[4] The move to create a new judicial system designed specifically for this purpose was the result of efforts by a group of reformers who believed that children should not be subjected to the harshness of the criminal justice system. They thought that juvenile proceedings should provide "rehabilitation" rather than punishment.[5]

For this reason, procedures in the newly created juvenile justice systems around the country were designed to be more informal than those of criminal trials. Two of the defining characteristics of this informality were the fact that children were rarely represented by attorneys and that their rights were thought to be better served by allowing adults to decide what was in the minors' best interests.[6] This view is exemplified by an article written in 1909 by a prominent proponent of the original reform movement, which stated the theory behind the new approach to juvenile justice as follows:

> The ordinary trappings of the court-room are out of place in [juvenile delinquency] hearings. . . . Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.[7]

The juvenile justice system, however, has changed dramatically over the years.[8] Juvenile delinquency proceedings have, in fact, become much

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4. Chicago became the site of the first separate juvenile court in the United States in 1899. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1191-92 (1970) (discussing the Illinois Juvenile Court Act of 1899, § 1, Ill. Laws 131-32 (repealed 1965)).

5. Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 85-87 (2006).

6. Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 970-71 (2010).

7. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

8. SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW 458 (4th ed. 2010) ("Public pressure has led state legislatures to embrace a more punitive model that resembles the adult criminal process . . . ."); *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 (1971) ("[T]he fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized."); Katherine R. Kruse, *Standing in Babylon, Looking Toward Zion*, 6 NEV. L.J. 1315, 1318 (2006) ("[R]ight to adversary counsel in delinquency cases was established in a surge of realism about the widespread failure of juvenile courts to live up to their rehabilitative ideals.").

more like criminal proceedings.[9] For this reason, beginning with a series of decisions starting in the 1960s, the United States Supreme Court began to recognize that minors in delinquency proceedings must be assured due process guarantees comparable to those provided to adult criminal defendants.[10]

Indeed, as a reaction to the then prevailing informality of delinquency proceedings, where assistance of counsel was thought to be an obstacle to the process, the Supreme Court implied that juvenile delinquency proceedings resembled "kangaroo courts" and held that the Constitution guarantees minors the right to counsel.[11] In fact, the Court asserted that "no . . . action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel."[12]

Unfortunately, however, recognizing that children have a constitutional right to counsel has not necessarily resulted in a systematic protection of that right. The extent to which states guarantee the right to counsel in delinquency proceedings varies among jurisdictions.[13] Also, access to adequate representation is affected by other problems common to juvenile justice systems throughout the United States, including the continuing confusion over the role of counsel in delinquency proceedings.[14]

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9. For specific examples that illustrate this trend, see Bernabe, *supra* note 3, at 840-49.

10. *See* Kent v. United States, 383 U.S. 541, 562 (1966); *In re* Gault, 387 U.S. 1, 30-31 (1967); *In re* Winship, 397 U.S. 358, 359 (1970); Breed v. Jones, 421 U.S. 519, 519-20 (1975); Fare v. Michael C., 442 U.S. 707, 708 (1979); ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 1 (2009), *available at* http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf.

11. *Gault*, 387 U.S. at 28-30.

12. *Id.* at 38 n.65.

13. RAMSEY & ABRAMS, *supra* note 8, at 515 (quoting N. Lee Cooper, *Conveyor Belt Justice*, 83 ABA J. 6 (1997)) ("[T]housands of juveniles are urged or cajoled into waiving their rights without adequate representation . . . ."); *see also,* ARIZ. REV. STAT. ANN. § 8-221(A) (2011) (counsel appointed only if offense can result in detention); N.M. STAT. ANN. § 32A-2-14 (West 2011) (requiring the appointment of counsel in a delinquency hearing within five days of the filing of the petition or before the commencement of the detention hearing); DEL. FAM. CT. R. CRIM. P., 44(a) (2012) (stating that a minor can waive right to counsel); N.H. REV. STAT. ANN. § 169-B:12 (LexisNexis 2010) (stating that the court shall appoint counsel at the time of arraignment for a minor, provided that the minor does not have a valid waiver); N.J. STAT. ANN. § 2A:4A-39 (West 2011) (describing that a juvenile shall have the right to counsel); 705 ILL. COMP. STAT. 405/1-5(1) (2006) (stating that a minor has a right to be present, heard, and present evidence, as well as the right to be represented by counsel); OR. REV. STAT. ANN. § 419C.200 (2011) (mandating that the court must appoint counsel to a child in any case in which the court would be required to appoint counsel to an adult charged with the same offense); WASH. REV. CODE ANN. § 13.40.140(2) (West 2004) (stating that children have the right to be represented by counsel at all critical stages of the proceedings).

14. A.B.A. JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 26 (1995), *available at* http://www.njdc.info/pdf/cfjfull.pdf [hereinafter A CALL FOR JUSTICE] ("[D]esire to 'help' children . . . reflects profound confusion about the lawyer's ethical duty to juvenile clients. Although ethical and legal standards call for attorneys to represent children as zealously as they would adults . . . sometimes . . . children's attorneys . . . abandon adversarial efforts in paternalistic deference to the court's efforts to intervene in the child's life."). The problem is prevalent throughout the United States. *See* ELIZABETH

M. CALVIN, A.B.A. JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 3 (2003), *available at* http://www.njdc.info/pdf/wareport.pdf ("There is confusion and disagreement about the role of juvenile defenders [in Washington] and, as a result, important opportunities to effectively counsel and represent the interests of the child are lost."); TEX. APPLESEED FAIR DEF. PROJECT ON INDIGENT DEF. PRACTICES IN TEX., SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 24 (2000), *available at* http://www.njdc.info/pdf/TexasAssess.pdf (quoting a defense counsel as saying: "[My first task is] to get these kids help. If they don't agree with me, I don't care. I know what is in their best interest better than their parents do."); A.B.A. JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (Elizabeth Cumming et al. eds., 2003), *available at* http://www.njdc.info/pdf/mdreport.pdf ("Many public defenders did not appear to understand the critical role of defense counsel in providing zealous advocacy through an express interest model of representation."); ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, NAT'L JUVENILE DEFENDER CTR. & CENT. JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (2006), *available at* http://www.njdc.info/pdf/Indiana%20Assessment.pdf (finding that one of the systemic barriers to effective representation in delinquency proceedings in the state is the misperception about the role of counsel as a guardian rather than as an advocate); A.B.A. JUVENILE JUSTICE CTR. & SO. JUVENILE DEFENDER CTR., NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 39 (Lynn Grindall et al. eds., 2003), *available at* http://www.njdc.info/pdf/ncreport.pdf ("As a result of this confusion about counsel's role, many juveniles [do] not appear to be clear about who was representing them . . . ."); PATRICIA PURITZ ET AL., NAT'L JUVENILE DEFENDER CTR., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 42 (2007), *available at* http://www.njdc.info/pdf/mississippi_ assessment.pdf ("Many juvenile defenders believe . . . that their role is to protect the 'best interests' of the child, not to assume an adversarial role in which they protect the legal interests of their clients."); A.B.A. JUVENILE JUSTICE CTR. ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33 (Patricia Puritz et al. eds., 2002), *available at* http://www.njdc.info/pdf/Kentucky_Assessment.pdf (noting significant discrepancies regarding representation in delinquency proceedings, particularly the fact that "in some counties assigned counsel were actually . . . 'guardian[s] *ad litem*' . . . assigned from the court's roster of attorneys used in dependency, neglect and abuse cases"); A.B.A. JUVENILE JUSTICE CTR. & NEW ENGLAND JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (2003), *available at* http://www.njdc.info/pdf/mereport.pdf (identifying as a concern "the systemic pressure for juvenile defenders to act in the 'best interest of the child,' sometimes in opposition to their role as zealous advocates," that various judges interviewed affirmed "that juvenile defenders' first duty is to consider the best interests of the child" rather than acting as zealous advocates, and that "zealous advocacy on legal grounds is not favored"); A.B.A. JUVENILE JUSTICE CTR. ET AL., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (Brock Albin et al. eds., 2003), *available at* http://www.njdc.info/ pdf/mtreport.pdf (identifying confusion among participants in the juvenile court system over whether the role of public defenders is to protect the "best interests" of the child and reported that judges seem to want "public defenders to be advocates for the system . . . rather that advocates for their . . . clients"); JESSIE BECK, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA 54 (2009), *available at* http://www.njdc.info/pdf/ nebraska_assessment.pdf ("[D]efense attorneys across the state showed that they erroneously thought that their role was to act in the client's best interest."); A.B.A. JUVENILE JUSTICE CTR. & CENT. JUVENILE DEFENDER CTR., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 26 (Kim Brooks et al. eds., 2003), *available at* http://www.njdc.info/pdf/Ohio_Assessment.pdf ("[O]ne of the most disturbing trends noted by investigators and in survey data was the lack of clarity regarding the attorney's role in juvenile delinquency proceedings."); MARY ANN SCALI, JI SEON SONG & PATRICIA PURITZ, NAT'L JUVENILE DEFENDER CTR., SOUTH CAROLINA JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 21–22,

This confusion is a serious problem because it is based on a flawed approach that, while supposedly designed to protect the rights of juveniles, actually results in a violation of the rights of the minors with tremendously negative consequences for the system, the profession, and, of course, the minors themselves.

II

Even though most organizations that set advocacy standards for juvenile defenders have emphasized that the duty of the lawyer for a juvenile is to advocate for the legal rights of the minor and not to support some other person's determination of the juvenile's best interests,[15] there is significant evidence that confusion exists among attorneys and judges who participate in juvenile delinquency proceedings as to the proper role of attorneys who represent minors.[16] In some states, courts allow,[17] expect, or even encourage attorneys to act as attorneys and as guardians *ad litem*

51 (2010), *available at* http://www.njdc.info/pdf/south_carolina_assessment.pdf (noting that juvenile defenders and other court personnel across the state are unclear or have not accepted the proper role of the attorney in delinquency proceedings; ethical and role confusion leaves far too many children defenseless); *see also* A CALL FOR JUSTICE, *supra*, at 26 (stating that "many of those who represent children do not understand their ethical obligations, and as a result, fail to zealously represent their young clients"); NAT'L JUVENILE DEFENDER CTR., ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION: AN OVERVIEW OF THE *JUVENILE DELINQUENCY GUIDELINES* OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 3 (2006), *available at* http://www.njdc.info/pdf/NCJFCJ_Fact_Sheet_Reprint_Fall_2012.pdf ("Many juvenile justice practitioners mistakenly believe that juvenile defenders are obliged to argue for a child's 'best interests' in court."); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 592 (2006) ("[O]ften well-meaning professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need."); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 799–800 (2010) (identifying "persistence of best-interest representation" as one of the factors that contributes to inadequate representation unique to juvenile court); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 266–67 (2005) (pointing out that "[i]n Ohio . . . judges routinely appoint advocates to serve in delinquency cases as 'attorney/guardian ad litem,' notwithstanding statutes that require appointment of 'counsel' in those proceedings . . . " and that "in Vermont [a] statute . . . [allows] the appointment of either a guardian ad litem or counsel," and that the statutes in several other states "confuse the role of counsel"); Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 529 (2003) ("Confusion is generated by the fact that New York attempts to combine several traditional roles into one entitled 'law guardian.'").

15. *See infra* note 56; Birckhead, *supra* note 6, at 967.

16. *See supra* note 14; Wallace J. Mlyniec, *In re* Gault *at 40: The Right to Counsel in Juvenile Court-A Promise Unfulfilled*, 44 NO. 3 CRIM. LAW BULLETIN 371, 409 (2008).

17. *See, e.g.*, COLO. REV. STAT. § 14-10-116(2) (2009) ("[T]he legal representative of the child is not required to adopt the child's wishes in his or her recommendation or advocacy for the child . . . .").

simultaneously[18]and, as a result, many attorneys end up acting contrary to their ethical duties or providing ineffective assistance of counsel.

In particular, many judges and attorneys believe that the role of the attorney representing a juvenile is unique and fundamentally different than that of a criminal defense attorney in that it requires the attorney to protect a child client's legal rights and best interests simultaneously. The problem is that, contrary to the claim that it is designed to protect the interests of minors, this approach to legal representation in juvenile delinquency proceedings actually operates to defeat those interests, because it eliminates the effectiveness of the attorney's role as an attorney, destroys the necessary trust upon which the attorney–client relationship must be based, jeopardizes the confidentiality of the information provided to the attorney, and essentially leaves the minor without legal representation.

This continuing confusion is the result of a profound misunderstanding of the function of attorneys in delinquency proceedings. An attorney who is also a guardian will have to choose either to advance the desired objectives of the client—as required by the duties prescribed in the rules of professional conduct—or to violate those duties in order to advocate for what the attorney believes to be the best interest of the minor. If the attorney chooses the first option, the attorney disregards the duty as a guardian. If the attorney chooses the second option, the attorney violates the professional duties as a lawyer.[19] This inherent conflict of interests, in turn, leaves the minor client, who may be facing lifelong negative consequences, legally vulnerable.

III

The most basic principle of the attorney-client relationship is that attorneys owe fiduciary duties to their clients. Attorneys also have an obligation to respect the client's autonomy to make decisions, at a

18. The applicable statute in Michigan actually mandates that the attorney act as a guardian *ad litem* rather than as an attorney. MICH. COMP. LAWS § 712A.17d(1)(d)(i) (2009) ("The lawyer-guardian *ad litem's* powers and duties include . . . mak[ing] a determination regarding the child's best interests and advocat[ing] for those best interests according to the lawyer-guardian['s] . . . understanding of those best interests, regardless of whether the lawyer-guardian['s] . . . determination reflects the child's wishes.").

19. Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857, 1871 (1996) (questioning whether attorney who conceives of her role as representing her view of the child's best interests is engaged in "the practice of law at all").

minimum as to the objectives of the representation,[20] and to pursue the client's objectives with diligence.[21]

According to generally accepted notions of professional responsibility, if an attorney disagrees with a client's position or believes that pursuing the client's stated objective is not in the client's best interest, the lawyer can advise the client accordingly, explaining the disadvantages and dangers of the client's choice.[22] Unless the attorney is willing to withdraw from the representation,[23] the attorney should ultimately follow the client's instructions rather than substitute judgment for that of the client.[24]

A second element of the attorney's fiduciary duty to the client, which is also clearly expressed in generally accepted rules of professional conduct, is the duty to avoid conflicts of interest, which means to avoid situations where the attorney faces a substantial risk that the attorney's duty to a client might be compromised.[25] Based on this principle, a lawyer has a duty to make sure that neither the lawyer's own interests nor those of others "impede or compromise fulfillment of the lawyer's duties to the client."[26]

The reason for this approach to conflicts of interest is simple. Allowing lawyers to operate under circumstances where there is a substantial risk that they would be tempted to violate their duties to their clients would damage the trust and confidence upon which the attorney–client relationship must be based.

Although establishing an attorney–client relationship with a minor may raise some concerns particular to the fact that the client is in fact a minor, the general principles reflected in the rules of professional conduct do not change much in those cases.[27] Thus, in most circumstances, rules of professional conduct demand that attorneys for minors abide by the same

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20. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012); RONALD ROTUNDA & JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE §1.2-2(a), at 104-105 (2010) ("The lawyer is the agent (not the guardian) of the client . . . . The lawyer must abide by the client's decisions concerning the objectives of [the] representation.") (internal quotation omitted).

21. *See* MODEL RULES OF PROF'L CONDUCT RS. 1.1-1.3 (2012) (addressing competence, allocation of authority to make decisions, and diligence); *see also* STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 68-69 (2009).

22. *See* MODEL RULES OF PROF'L CONDUCT RS. 1.2 & 2.1 (2002).

23. If the lawyer finds the situation intolerable, the lawyer may try to withdraw from representation. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002).

24. *See, e.g.*, State v. Joanna V., 94 P.3d. 783, 786-87 (N.M. 2004) ("Although counsel may advise the client on counsel's view of the client's best interests, counsel is ultimately required to advance the client's expressed wishes."); *see also* Annette Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1959-60 (1996) ("[L]awyers may not normally substitute their own opinions regarding the goals of [the] representation . . . .").

25. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

26. GILLERS, *supra* note 21, at 18.

27. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); *see also* Henning, *supra* note 14, at 280 ("[C]urrent impediments to a normal attorney–child relationship may not be so insurmountable as to require or justify a model of advocacy that differs so radically from the representation of adults.").

duties owed to an adult client.[28] Even in those rare circumstances where attorneys are allowed to use their own judgment to protect the interests of a minor client, it is clear that the lawyer's conduct should be guided more by respect toward the client's autonomy than by what the lawyer may think is better for the client.[29] This is why in cases where the lawyer is in doubt as to the best way to proceed, the suggested course of action is not to make decisions for the client, but to ask for the appointment of a guardian other than the lawyer.[30] Simply stated, the generally accepted approach is that attorneys should not substitute their own judgment for that of the minor.

In contrast to the attorney's role, the role of the guardian *ad litem* is to use the guardian's judgment to determine the best interests of the child and to provide that information to the court in order to help the judge make decisions affecting the disposition of the child. The lawyer owes duties to the client; the guardian owes them to the court.

Given these different roles, representing a minor client while concurrently serving as guardian *ad litem* for the child threatens the validity of the representation by disregarding the basic foundations of the attorney–client relationship.

Making matters worse, confusion over the role of an attorney for a minor can affect the duty of confidentiality owed to the minor. An attorney for a minor, just like an attorney with any other type of client, is bound by the duty of confidentiality.[31] In contrast, a guardian must be available to testify at the request of the court about the guardian's conclusions regarding the best interests of the child. For this reason, an attorney who concurrently represents and serves as a guardian for a child has incompatible duties: to keep the child's information confidential *and* to disclose it.

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28. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

29. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002). On this point, the comment to Model Rule of Professional Conduct 1.14 states that "[i]n 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 of 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." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5 (2002).

30. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5 (2002).

31. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012). The issues related to the competing duties regarding confidentiality as they relate to the confusion of roles of attorneys and guardians is examined by Bruce Boyer in *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1374 (1996); *see also* STERLING, *supra* note 10, at 12 ("[J]uvenile defense counsel has an affirmative obligation to safeguard a client's information . . . from parents or guardians . . ." and "parents or guardians do not have any right to inspect a juvenile defense counsel's file, notes, discovery, or any other case-related documents without the client's . . . consent . . . . Even if revealing the information might allow the client to receive sorely-needed services, defense counsel is bound to protect the client's confidences, unless the client gives the attorney express permission to reveal the information to get the particular services, or disclosure is impliedly authorized to carry out the client's case objectives.").

Again, under those circumstances, the attorney would have to decide whether to disclose confidential information against the client's wishes, in which case the attorney would violate the duty of confidentiality,[32] or not to disclose the information, in which case the attorney would violate the duty to the court as a guardian.

Moreover, minors who understand the possibility that the attorney may have to disclose the information may not feel free to share information with their attorneys, which can negatively affect their representation. This is contrary to the public policy that supports recognizing the duty of confidentiality in the first place.[33]

IV

Surprisingly, however, by all accounts, this type of conflicted representation is allowed all over the United States. In each and every one of those instances, it can be argued that the minor client has been, or is being, deprived of the constitutional right to counsel.[34] From any perspective, the role-confusion generated by the prevailing practice ends up hurting rather than helping the minors whose rights courts are supposed to be protecting.[35]

One case will suffice to illustrate the problem. In *In re K.M.B.*,[36] for example, a thirteen year old asked her court-appointed attorney to argue in favor of allowing her to remain at home. Instead, the attorney, in agreeing with the State's position, argued exactly the opposite—that the minor should be removed from the home. On appeal, the minor argued the attorney's conduct violated her constitutional right to counsel, but the court held that a court-appointed juvenile counsel is obligated to protect a child

32. Hollister v. Hollister, 496 N.W.2d 642, 644 (Wis. 1992) (explaining that a guardian appointed under statute in a custody matter functions as lawyer and therefore could not be called as a witness or cross-examined in a custody proceeding); Michigan Informal Ethics Op. RI-318 (2000) (noting that a lawyer-guardian for a minor in a protective proceeding is bound by rules of professional conduct and, therefore, must not reveal child's confidences).

33. *See* Emily Buss, *"You're my What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1713-16 (1996).

34. This was one of the conclusions of the Fordham Conference on Ethical Issues in the Legal Representation of Children. *See Report of the Working Group on Conflicts of Interest*, 64 FORDHAM L. REV. 1379, 1387 (1996). This problem is also specifically mentioned in an assessment report of juvenile justice system in South Carolina when it says that "[t]he ethical and role confusion that often characterizes juvenile court practice leaves far too many children literally defenseless."; *see also* MARY ANN SCALI & JI SEON SONG WITH PATRICIA PURITZ, SOUTH CAROLINA JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 21, 51 (2010), *available at* http://www.njdc.info/pdf/south_carolina_assessment.pdf.

35. Henning, *supra* note 14, at 285 ("[A] model of advocacy that denies the child a meaningful voice in the attorney-client relationship, and thus in the juvenile justice system as a whole, may actually hinder the rehabilitative and public safety objectives of the court.").

36. *In re* K.M.B., 462 N.E.2d 1271 (Ill. App. Ct. 1984).

client's legal rights and best interests simultaneously.[37] What is shocking about this result is that in this particular case, the court's ruling would have required the attorney to advocate that the court should allow the child to remain at home while arguing at the same time that it would be better if the court did not allow her to stay at home.

Attempting to explain this contradiction, the court then firmly concluded that "[i]f protecting a juvenile's best interest requires that the counsel make a recommendation contrary to the juvenile's wishes, then the counsel has . . . a 'professional responsibility and obligation' to make that recommendation."[38] This would be a fine way to solve the problem were it not for the fact that it amounts to asserting that the attorney has a professional obligation to violate the attorney's duties of professional responsibility.

In this case, as in so many others like it, the attorney for the minor simply abandoned the representation of the client. Thus, even though the minor supposedly had an attorney providing legal representation, in reality all she had was a guardian who was not performing the duties of an attorney. Therefore, under these circumstances, the minor was forced to face the proceedings without legal representation—a violation of her constitutional rights—and the court not only allowed it to happen, but took the position that it was better that way.

V

When it comes to delinquency proceedings, the view expressed by courts that have allowed—or worse, encouraged—attorneys to serve as attorneys and guardians at the same time is based on two basic ideas: that juvenile delinquency proceedings are (1) still significantly different from criminal trials, and (2) designed to have a panel of people, including the juvenile's lawyer, put their arms around the minor's shoulder and work together to determine the child's best interests in order to plan the minor's future.[39] That is a description of the original juvenile justice system—a system in which legal representation was thought to be an obstacle, rather

37. *Id.* at 1272-73.

38. *Id.* at 1273.

39. *See, e.g.*, *In re* Beasley, 362 N.E.2d 1024, 1026 (Ill. 1977), in which the Illinois Supreme Court stated that although a juvenile delinquency proceeding "retains certain adversary characteristics, it is not in the usual sense an adversary proceeding, but it is one to be administered in a spirit of humane concern for and to promote the welfare of the minor as well as to serve the best interests of the community." Also, a report on the juvenile justice system in Mississippi quotes a juvenile defense attorney as saying, "I don't always listen to what [the clients] say . . . . Mine is not the role of the typical defense attorney; I must consider what is best for the child, and I do not take the position that I must 'get the child off at all costs.'" PATRICIA PURITZ & ROBIN WALKER, MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 42 (2007), *available at* http://www.njdc.info/pdf/mississippi_assessment.pdf.

than a benefit, to the process. That may be a nice system, but it is most certainly not the current system.[40] In fact, that is a description of the type of system that was found to deny minors their right to due process.

Fortunately, with its decision in *People v. Austin M.*,[41] the Illinois Supreme Court has finally broken away from the national trend and has set a good example for other jurisdictions to follow. In this case, a lawyer was hired to represent two minors in a delinquency proceeding. The attorney was hired to appear as the minors' lawyer, and at a pre-trial hearing, the trial court underscored this by informing the boys' parents that the appointed counsel represented the minors and not the parents.[42] However, the judge then stated that the attorney "represents what's in the best interest" of the boys.[43] To make matters worse, notwithstanding the fact that the lawyer was hired to appear as the attorney for the minors and that he told the judge during the pre-trial conference that he would do so, the attorney apparently understood his role to be that of a guardian instead. He understood his role to be the same as that of the prosecutors, aligning himself with the prosecution and the judge in what was referred to as "a common search for the truth."[44]

After the minors were convicted, one of them appealed, arguing among other things, that he had been denied his right to counsel.[45] The court of appeals agreed that even though the attorney had not been officially appointed as a guardian, it was clear he thought his role was to act like one and, in fact, did act like one, thus creating a problematic issue of role confusion.[46] The court, therefore, treated the issues raised by the minor as if the trial court had formally appointed the attorney as guardian *ad litem*.[47] However, the court did not find that the minor's rights had been violated and affirmed the lower court's decision, basing its conclusion on the common rhetoric that "the responsibility of the court-appointed juvenile counsel varies from that of other court-appointed counsel because juvenile proceedings . . . are not as adversarial as traditional, criminal

40. For a more detailed description of the development of juvenile justice system in Illinois, see Bernabe, *supra* note 3, at 840-49.

41. *See People v. Austin M.*, 975 N.E.2d 22 (Ill. 2012).

42. *Id.* at 25.

43. *Id.*

44. *Id.* at 26.

45. As explained later in the Supreme Court's opinion, "Austin's initial claim on appeal is that the legal representation he received at his delinquency trial amounted to a denial of his right to counsel . . . . More specifically, Austin contends that, as a minor tried for a criminal offense in a delinquency proceeding, he had the right to a *defense attorney*, that is, an attorney who gives his client his undivided loyalty, who zealously safeguards his client's rights and confidences, and who acts in accordance with his client's wishes. Austin asserts that he was deprived of this type of counsel because his attorney . . . performed less as a defense attorney and more as a guardian *ad litem* (GAL)." *Id.* at 36.

46. *In re* Austin M., 941 N.E.2d 903, 912, 916 (Ill. App. Ct. 2010).

47. *Id.* at 916.

proceedings."[48] The court cited the terms of the Illinois Juvenile Court Act to support the position that "appointment of separate counsel is unnecessary when the trial court has already appointed a guardian *ad litem* who is also a licensed attorney,"[49] which simply misses the point of the argument.

Fortunately, the Illinois Supreme Court understood the point of the argument.[50] It is precisely because a guardian and an attorney do *not* have the same obligations that the roles are in conflict. For this reason, the court correctly found that combining the roles of attorney and guardian creates too much of a risk that the minor's constitutional "right to counsel will be diluted, if not denied altogether."[51] Courts simply cannot say that appointing an attorney to serve as a guardian *at litem* would satisfy the right to counsel.

Further, the court was emphatic that because "a juvenile's right to counsel in a delinquency proceeding is firmly anchored in . . . due process,"[52] a "minor in a delinquency proceeding has a nonwaivable right to be represented by a *defense attorney*," and thus, "[t]here, is no statutory exception which would permit representation by a [guardian *ad litem*]—even one who is also an attorney at law."[53] With a clear understanding of the differences between the roles of a guardian and an attorney, the court explained its conclusion:

> [W]hen a guardian *ad litem* [GAL] is appointed in a delinquency case, it is generally because there is no interested parent or legal guardian to represent the child's best interests. In these situations, the GAL must act in the role of a concerned parent, which is often in opposition to the position of defense counsel. . . . Further, a GAL—unlike a defense attorney—owes a duty to the court and to society. A guardian *ad litem* need not zealously pursue acquittal if he does not believe acquittal would be in the best interests of the minor or society.
>
> When counsel attempts to fulfill the role of GAL as well as defense counsel, the risk that the minor's constitutional and statutory right to counsel will be diluted, if not denied altogether, is

48. *Id.* at 917.

49. *Id.*

50. As the court explained, "Austin's claim requires us to decide . . . whether 'hybrid representation' is inconsistent with the statutorily and constitutionally guaranteed right to counsel afforded minors in delinquency proceedings . . . ." *Austin M.*, 975 N.E.2d at 37.

51. *Id.* at 42.

52. *Id.* at 39.

53. *Id.* at 38.

> too great. . . . We conclude, therefore, that the interests of justice are best served by finding a *per se* conflict when minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*.[54]

Thus, the court concluded that the type of representation which due process requires in delinquency proceedings is that of defense counsel, that is, that of "an attorney whose singular loyalty is to the defense of the juvenile."[55] This has been the position of professional organizations and scholars for a long time,[56] and now it is the official position of the state of Illinois. Hopefully, other states will take notice and begin moving in the right direction.

CONCLUSION

In delinquency proceedings, the duties of an attorney for a minor client are fundamentally different than those of a guardian *ad litem*. They are so different, in fact, that attempting to serve as an attorney and a guardian at the same time has often eliminated the effectiveness of the attorney's role as an advocate for the minor client, thus making it impossible for the attorney to provide the type of effective assistance of counsel that is guaranteed by the Constitution.

For this reason, the roles of attorneys and guardians *ad litem* should never be combined or confused. To the extent that this is happening across the United States, attorneys are attempting to do the impossible. In order to fulfill one role, they must fail at the other.

Remedying this problem is a critical element in the effort to improve the quality of juvenile justice. Because juveniles facing delinquency proceedings have the right to counsel and the right to effective assistance of counsel, the recommendations and adopted standards of numerous organizations, scholars, commentators, and conferences are in agreement that it is imperative to abandon the approach to juvenile justice that allows

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54. *Id.* at 42.

55. *Austin M.*, 975 N.E.2d at 40.

56. For example, this is the view adopted by the American Academy of Matrimonial Lawyers, the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, and the Juvenile Delinquency Guidelines of the National Council of Juvenile and Family Court. It is also the conclusion reached by the two most important national conferences on issues related to the representation of children. *See*, Bernabe, *supra* note 3, at 874-75, 877 (discussing the findings of Fordham University School of Law's Conference on Ethical Issues in the Legal Representation of Children, held in 1995, and the University of Nevada-Las Vegas Law School's Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, held in 2006); *see also* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES, IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 40 (2005), *available at* http://www.ncjfcj.org/sites/default/files/juvenileedelinquencyguidelinescompressed[1].pdf.

the possibility of representation by an attorney who, in reality, acts as a guardian *ad litem*.[57]

The Supreme Court of Illinois has now added its voice to this list. As the court explained in *People v. Austin M.*, the problem can be avoided simply by making sure that the appointed guardian *ad litem* is someone other than the minor's lawyer, thus allowing the lawyer to fulfill the role of advocate and preserving and protecting the minor's right to counsel.

Adopting this approach would result in many benefits. First, it would reduce the danger of lawyers interjecting their personal opinions and values into the proceedings. Second, it would promote the same type of performance from all lawyers, regardless of who happens to represent the minors in any given case. Third, it would place the lawyers in the best position to perform the role for which lawyers are best trained. Fourth, children will be assured that the state will comply with its duty to protect their right to counsel. Fifth, if the child needs a guardian, the child will get the benefit of one in addition to the benefit of an attorney. Sixth, the best interests of the child are better served if the child's attorney can work together with a guardian who is not an attorney and who is trained to serve as a guardian.[58] Seventh, children will benefit from being able to participate in their own defense with full confidence that their attorney will not disclose confidences and will be committed to advocating their preferences. Finally, by not having the child's attorney act as a guardian, the state will be forced to do its own investigation in order to prove its case against the minor beyond a reasonable doubt. The result will be a system that is fairer and that protects the rights and the interests of minors more efficiently.

The Illinois Supreme Court has cleared the way for the state to begin building such an improved system. Others should follow its example. With its decision in *People v. Austin*, the Illinois Supreme Court has taken a good step forward in the right direction. As it was in the past, Illinois is now back at the forefront in the creation of a fair and equitable juvenile justice system.[59]

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57. For a more detailed discussion of the recommendations of some of these organizations, commentators, and conferences, see Bernabe, *supra* note 3.

58. For a discussion of this topic, see Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023 (1996).

59. CATHRYN CRAWFORD, BERNARDINE DOHRN, THOMAS F. GERAGHTY, MARJORIE B. MOSS & PATRICIA PURITZ, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 1 (2007), *available at* http://www.state.il.us/defender/acrobatdocs/jreport.pdf ("From the inception of the world's first juvenile court over 100 years ago [in Chicago] . . . Illinois has historically been a place where new ideas and strategies that impact children and families have been born, tested and refined . . . .").