

# Evolution of Child Representation\*

## Abstract

This chapter summarizes the academic and policy discussions regarding legal representation of the child in child welfare cases since CAPTA was first enacted in 1974.

## 2.1 In the Beginning

The creation of the juvenile court and child protection court jurisdiction is an extension of the nineteenth century Progressive Era reform movement, which in turn grew out of the nation's poor laws and policies.<sup>1</sup> Representation of children in child welfare cases developed from the practice of appointing a next friend or guardian ad litem (GAL) for a child who is suing or being sued, in order to protect the child's legal rights. Although the responsibilities of the GAL in child protection are considerably different from what they are for the GAL in civil litigation, this was the term assigned to the child's legal representative.<sup>2</sup>

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\*Part of this chapter is adapted from Duquette and Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM.L.Q. 89 (Spring 2012). Thanks to Julian Darwall for his careful research and synthesis.

1. Marvin Ventrell, *The History of Child Welfare Law*, in CHILD WELFARE LAW AND PRACTICE, (Duquette et al, eds., Bradford Publishing 2016).

2. Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 28 (1977).

Children alleged to be abused or neglected have received legal representation for a relatively short time. Before the 1970s courts only occasionally appointed attorneys to represent children. Even today, despite federal and state laws requiring independent representation, there are huge gaps in the appointment of a legal representative of the child. Unlike delinquency law, which mandates independent legal counsel of juveniles accused of a crime under the landmark U.S. Supreme Court case, *In re Gault* (387 U.S. 1 (1967)), there is not yet a similar federal or constitutional mandate in child welfare cases.

Federal authority for independent representation of the child comes from the Child Abuse Prevention and Treatment Act (CAPTA). As a condition of receiving Federal child abuse-related funds, CAPTA requires a state to appoint a guardian ad litem (GAL) for a child in every case involving an abused or neglect child that results in a judicial proceeding. CAPTA permits the GAL to be an attorney or a lay advocate or both. It also requires the GAL to obtain, first hand, a clear understanding of the situation and needs of the child and make recommendations to the court concerning the best interests of the child. The GAL is to have appropriate training in the field.<sup>3</sup>

Even prior to the passage of CAPTA in 1974 the GAL, although generally an attorney, was sometimes a non-attorney and sometimes a volunteer.<sup>4</sup> CAPTA also allows for a non-lawyer representative for the child who may be paired with an attorney or serve independently, doing separate investigations and making separate recommendations to the court. Beginning in 1982 the National Court Appointed Special Advocate Association (CASA) produced standards, training and certification for non-lawyer volunteer advocates for the child. Currently the National CASA Association reports that it has 76,000 CASA volunteers around the U.S.:

. . . through a network of 949 community-based programs that recruit, train and support citizen-volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities. Volunteer advocates—empowered directly by the courts—offer judges the critical information they need to ensure that each child's rights and needs are being attended to while in foster care.<sup>5</sup>

But what should be the duties of the child's advocate? What is the advocate's job description? What are they expected to do? CAPTA is a reasonable starting place, but it is far from a comprehensive model. CAPTA is not only silent on a great number of the

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3. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2015).

4. Nancy Neraas, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853 (1983).

5. CASA FOR CHILDREN, <http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301295/k.BE9A/Home.htm> (last visited Aug. 18, 2015).

questions about the role and duties of the child's legal representative but also no longer represents the best and latest thinking as to how advocacy services can most effectively be provided to children.

One consequence of the vague direction in CAPTA is that State implementation of CAPTA requirements has been all over the board. We have seen the creation of numerous—and often inconsistent and unclear—models of representation. Some argue that no two models of child representation among the various U.S. jurisdictions are alike.<sup>6</sup> Even within jurisdictions, there is often considerable disagreement as to which model is used and what the role of the representative is within the model. This confusion has undoubtedly contributed to the poor quality of representation children frequently receive in our system.

## 2.2 Milestones in Development of Child Representation

Since the original CAPTA in 1974, several important milestones mark the national discussion of the proper role of the child's legal representative. The American Bar Association, led by the ABA Center on Children and the Law, has provided consistent guidance and leadership in this field. In 1979 the ABA approved *Juvenile Justice Standards Relating to Counsel for Private Parties*, which include important directions for lawyers representing children in juvenile court matters generally. The ABA recommended that State and local bar associations sponsor training for lawyers representing children and endorsed carefully selected and trained Court Appointed Special Advocates (CASAs). The ABA's most recent contributions, the 1996 ABA Standards and the 2011 Model Act Governing Child Representation are discussed below.

In the 1988 reauthorization of CAPTA Congress mandated a study of “the effectiveness of legal representation through the use of guardians ad litem and court-appointed special advocates.”<sup>7</sup> In fulfillment of the mandate, CSR Inc. conducted the first national study of legal representation of children in 1994. The CSR study reviewed three major program models—1) the private attorney model; 2) the staff attorney model; and 3) a CASA model. The effectiveness of the GALs was measured against five major roles as proposed by Don Duquette in a 1990 book, *Advocating for the Child in Protection Proceedings*.<sup>8</sup> Duquette presented a framework for identifying the tasks of the child advocate. Those roles are 1) fact finder and investigator, 2) legal representative, 3) case monitor, 4) mediator and negotiator, and 5) resource broker. CSR defined effectiveness as “the degree to which the GAL performed the five roles identified as essential to GAL work and the related tasks and activities.”

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6. FIRST STAR & CHILDREN'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN (3d ed. 2012).

7. P.L. 100-294, 102 Stat 102 (April 25, 1988).

8. DONALD N. DUQUETTE, ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES, Lexington Press (1990).

The findings show that no GAL model studied was consistently superior to the others across all five GAL roles. The findings suggest that an optimal approach may involve having a GAL who either has, or has access to, the combined expertise and resources of attorneys, lay volunteers, and caseworkers to perform the broad range of functions and services contained in the definition of the child advocate.<sup>9</sup> A significant short-coming of the CSR study is that they did not use case outcomes as part of their analysis and assessment. CSR did not study whether the actions of the advocates had any impact on the outcomes of the child's case.

In August 1995 the National Council of Juvenile and Family Court Judges produced *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, which stress the importance of vigorous representation of children provided by competent and diligent lawyers and urge courts to take action to assure such representation.

In December 1995 attendees at a Fordham University Conference on Ethical Issues in the Legal Representation of Children developed a set of recommendations reported in an influential special law review issue.<sup>10</sup> The ABA Standards for Lawyers Representing Children were under consideration at that time and were reviewed by the conference.<sup>11</sup> A major issue, then as now, is the extent to which the lawyer for the child should represent the child's *best interests* versus the *stated interests* of the child. That is, should the lawyer for the child be *client-directed* in the same way that a lawyer for an adult is? The Fordham conference attendees recommended that lawyers for children should act in a traditional lawyer role, that is, be *client-directed*.

In 1996, the ABA adopted the influential *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings*.<sup>12</sup> Drawing from the national discussion up to that point, the 1996 ABA Standards recommended that all children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. Importantly, the Standards and its commentary articulated the practical steps that an assertive lawyer should take in representation of a child at various stages of a case. They reject the notion of a passive, unengaged monitor of the proceedings and set out requirements for a very engaged and active legal representative. The 1996 ABA Standards provide the foundation for the QIC Best Practice Model of Child Representation.

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9. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD ABUSE AND NEGLECT, ADMIN. FOR CHILDREN AND FAMILIES, FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM (1994).

10. *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDAM L. REV. 1301 (1996)

11. Linda Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999 (1996).

12. A.B.A., STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996) [hereinafter 1996 ABA Abuse and Neglect Standards].

The ABA Standards require appointment of either a “child’s attorney” (a client-directed lawyer owing the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client) or appointment of an attorney/guardian *ad litem* “to protect the child’s interests without being bound by the child’s expressed preferences.”<sup>13</sup> The Standards express a preference for the appointment of a child’s attorney, choosing a *client-directed* as opposed to a *best interests* approach to lawyer representation.

In December 1996 President Clinton initiated a project called *Adoption 2002: The President’s Initiative on Adoption and Foster Care*. Providing some of the strongest Presidential-level leadership on foster care ever, President Clinton addressed the problem of America’s foster children spending far too long waiting—deprived of the permanent and stable homes necessary for their healthy development. In an Executive Memorandum of December 14, 1996, President Clinton said: “I am committed to giving the children waiting in our Nation’s foster care system what every child in America deserves—loving parents and a healthy, stable home. . . . Each year State child welfare agencies secure homes for less than one-third of the children whose goal is adoption or an alternate permanent plan. I know we can do better.”<sup>14</sup>

Among other things, *Adoption 2002* recommended developing model guidelines for State legislation to achieve these goals. A multidisciplinary workgroup of national leaders in child welfare developed *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, which included recommendations for legal representation of children:

*Zealous Attorney Representation for Children:* We recommend that States guarantee that all children who are subjects of child protection court proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process. The attorney owes the same duties of competent representation and zealous advocacy to the child as are due an adult client.<sup>15</sup>

The *Guidelines* address the duties of the advocate separately from the question of who determines the goals and objectives of the child advocate and “tries to avoid a false dichotomy between wishes and best interests and focuses instead on duties of the child’s lawyer, regardless of who (or how) the ultimate advocacy goals of the lawyer are determined.”<sup>16</sup> No matter whether the advocate represents the child’s best interests as determined by the advocate or assumes a client-directed role as recommended by the

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13. 1996 ABA Standards at 1-A & 1-B.

14. Donald Duquette & Mark Hardin, *Adoption 2002: The President’s Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. Health & Human Servs, ACYF, Children’s Bureau (1999) [hereinafter *Adoption 2002 Guidelines*].Page I-2

15. *Adoption 2002 Guidelines* at VII-11.

16. *Adoption 2002 Guidelines* at VII-19.

ABA Standards, the *Guidelines* expect a vigorous and active participation of the child's lawyer.

In 1997 Professor Jean Koh Peters, director of the Child Advocacy Clinic at Yale Law School, developed a major contribution to the field in her book *Representing Children In Child Protective Proceedings: Ethical And Practical Dimensions* in which she ties theory to a broad view of a child's needs and specific actions by the legal advocate.<sup>17</sup>

In 1998, a survey by the National Council of Juvenile and Family Court Judges (NCJFCJ) determined that 40 States appoint counsel for children in abuse and neglect cases. In 30 of those States an "attorney-guardian ad litem" is typically appointed who serves a dual function of representing both the best interests and wishes of the child. In the 10 other States that appoint counsel for a child, a GAL is appointed in addition to the attorney, so that the attorneys perform the single role of representing the child (i.e., the child's stated wishes). In 10 States, the NCJFCJ reported that an attorney is usually not appointed for the child, but in nine of those States a non-attorney GAL is appointed for the child.<sup>18</sup>

In 2005, a conference informally billed as "Fordham II" convened the major child welfare law players at the University of Nevada Las Vegas, Boyd School of Law. The UNLV conference reaffirmed the Fordham recommendations and promulgated its own recommendations, aimed at empowering child participation. The Working Group on the Best Interests of the Child and the Role of the Attorney "unanimously reaffirmed the Fordham commitment to client-directed representation," stating that a client-directed approach is the preferred approach even in best interests representation and that "the children's attorneys' community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation."<sup>19</sup>

The UNLV Conference recommended strengthening the role of the child's voice in CAPTA by mandating that CAPTA comply with the United Nations Convention on the Rights of the Child ("CRC"). The CRC requires a child be given the opportunity to be heard in any judicial proceeding affecting the child.<sup>20</sup> The conference results are reported in a Special Issue of the Nevada Law Journal.<sup>21</sup> A client-directed model

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17. JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (3d ed., LEXUS Law Publishing 2007).

18. Shirley Dobbin et al., *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, National Council of Juvenile and Family Court Judges 45 (1998).

19. *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (Spring 2006).

20. U.N. Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, art. 7 (Sept. 2, 1990), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

21. SPECIAL ISSUE ON LEGAL REPRESENTATION OF CHILDREN, 6 NEV. L.J. (Spring 2006).

of representation for children of all ages was not the unanimous view of the field, however. Other commentators stood strong on a best interest model for children and youth of all ages.<sup>22</sup> Others advocated for a “bright-line” age limit above which a child received a client directed attorney and below which a child received a best interest advocate charged with including the child’s wishes in determining the goals of the case.<sup>23</sup>

After many years of debate, development and consensus building, the ABA Section on Litigation, Children’s Rights Litigation Committee collaborating with the ABA Center on Children and the Law, drafted the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings which the ABA House of Delegates adopted in August 2011.<sup>24</sup> The Model Act mandates that a “child’s lawyer” who owes essentially the same duties as to an adult client, be appointed for every child in abuse or neglect proceedings. The Model Act provides for a client-directed model of representation but makes careful provision for a client with diminished capacity and provides guidance to attorneys in making the diminished capacity decisions and deciding on protective action to protect the client.

The lawyer for the child is expected to be qualified through training and experience with reasonable caseloads. The child’s lawyer is required to complete a thorough and independent investigation, consult the child and otherwise participate fully in all stages of the litigation.<sup>25</sup>

The child’s lawyer may request authority from the court to pursue ancillary issues, even those that do not arise in the child protection action, when necessary to ensure the child’s needs are met. The Act also provides for the appointment of a “best interest advocate” who may serve in addition to the lawyer.

These milestone events reflect a debate that is at once legal, philosophical, psychological, and political. Does a child have a legal right to counsel? If so, who directs the counsel? Is a child a rights holder in his or her own right? Is a child developmentally capable of directing counsel? Who is going to pay for lawyers for children? And finally, what are the fundamental duties and tasks of a child’s lawyer? We begin to unpack these questions with the legal framework.

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22. Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J. 1284 (Spring 2006).

23. Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (Spring 2006).

24. ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, 2011, [https://apps.americanbar.org/litigation/committees/childrights/docs/aba\\_model\\_act\\_2011.pdf](https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf).

25. *Id.*, at § 7

### 2.3 Constitutional Arguments for Child's Right to Counsel

Children arguably have well-defined liberty interests at stake, face a high risk of erroneous deprivation in the absence of attorneys, and states' interests in access to justice may outweigh the financial burden required to provide attorneys.<sup>26</sup> The child has an interest in being protected from harm, but he or she also shares a fundamental right with the parent to remain together without the coercive interference from the state. If the court places the child in the custody of the state, the child has a right to reasonable services and care. Court decisions in a few states addressed and affirmed a child's right to counsel based on the U.S. and state constitutions.<sup>27</sup>

One scholar distinguishes the Supreme Court's decision in *Lassiter*, which held that parents did not have a constitutional right to counsel in termination of parental rights proceedings, from the case of children, who cannot call witnesses, cannot cross-examine witnesses, or do anything that the U.S. Supreme Court considered Ms. Lassiter, an adult, competent to do in the absence of counsel. Children's constitutional right to representation cannot be met with a non-lawyer advocate, such as a Court Appointed Special Advocate (CASA).<sup>28</sup> Others have argued that the similarities between the court's function and role in delinquency and dependency cases suggest the Supreme Court's rationale in *Gault* for requiring counsel for children in delinquency proceedings also applies to dependency proceedings.<sup>29</sup> Others have found a basis for appointment of lawyers for children by analogy to existing victims' rights laws.<sup>30</sup>

### 2.4 Equal Dignity for Children in the Judicial Process

A number of commentators have argued that appointing attorneys for children is critical to respecting child's right to participate in the judicial decisions affecting their lives.<sup>31</sup> Katherine Hunt Federle argues that children's right to participate arises as a

26. Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEM. POL. & CIV. RTS. L. REV. 663 (2006); Jacob E. Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485 (2003)

27. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976); *Kenny A. ex rel. Winn. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005); *Matter of Jamie TT*, 191 A.D.2d 132, 599 N.Y.S. 2d 892 (1993). See also Barbara Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L. Q. 63, 85-86 (2008).

28. Gerald F. Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J. L. & FAM. STUD. 53 (2007).

29. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 612 (Oct. 2009). See also Pitchal, *supra* note 26, at 681 (“[T]he *Gault* argument has power . . . because all children in state custody are at the whim of state officials to decide where they will live at any given moment.”).

30. Myrna Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUST. 12 (2009).

31. Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1564 (1994) [hereinafter Federle

remedy for powerlessness, situating children on equal footing to challenge subordination. Empowering children to contribute to decisions about their future often contributes to children's psychological well-being. Another scholar notes that society has a broader interest in providing attorneys than the mere protection of children.

Providing attorneys is critical to preserving the dignity of the parties that come before the governmental decision maker and preserving the dignity of the judicial process.<sup>32</sup> Many commentators have described the therapeutic nature of the attorney-client relationship for children involved in the child welfare system.<sup>33</sup> Through the counseling and advice process of the attorney-client relationship, children are told what to expect, given a chance to talk confidentially with someone about their legal needs and desired outcome, given advice about the likelihood of their desired outcome, and often given options for expressing their desires to the decision-makers.<sup>34</sup> Children who feel a sense of participation in the process may be more likely to abide by the court's decision, often take an enhanced interest in the proceedings that affect their futures, and may more readily provide important information to their attorneys.<sup>35</sup>

One scholar suggests that from the child's perspective, a lawyer's failure to advocate his views might be one more betrayal by the adult world or insult to dignity by the foster care system and courts charged with caring for the child.<sup>36</sup> One commentator has also argued that greater bar involvement in the cases of children in foster care would have a salutary effect on the legal culture generally.<sup>37</sup>

## 2.5 The Critique of Attorneys for Children

A few commentators argue against attorney representation for children in dependency proceedings. Martin Guggenheim has maintained that children's lawyers commonly fail to accurately distinguish between serious safety cases and those in which the child

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*Looking for Rights*]; Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1658 (1996); Barbara Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 *J. AM. ACAD. MATRIM. L.* 183, 194-95 (2005); Taylor, *supra* note 29, at 613-14.

32. Pitchal, *supra* note 26, at 689.

33. Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1746 (1996); Manuela Stötzel & Jörg Fegert, *The Representation of the Legal Interests of Children and Adolescents in Germany: A Study of the Children's Guardian from a Child's Perspective*, 20 *INT'L J. L. POL'Y & FAM.* 201 (2006).

34. Glynn, *supra* note 28.

35. Taylor, *supra* note 29, at 619; Buss, *supra* note 33, at 1760-61. See also Victoria Weisz et al., *Children and Procedural Justice*, 44 *CT. REV.* 36 (2007); Keri K. Gould & Michael L. Perlin, *Johnny's in the Basement/Mixing Up His Medicine: Therapeutic Jurisprudence and Clinical Teaching*, 24 *SEATTLE U. L. REV.* 339, 359-71 (2000).

36. Atwood, *Representing Children*, *supra* note 31, at 221.

37. Emily Richardson, *Lawyers Were Children Once: An Ethical Approach to Strengthening Child Abuse and Neglect Legislation*, 31 *J. LEGAL PROF.* 357, 365 (2007).

faces no serious risk of suffering serious harm.<sup>38</sup> For Guggenheim, allowing lawyers freedom to determine for themselves what position to advocate to a court threatens a balanced application of the rule of law.<sup>39</sup> Commentators have argued that children's attorneys may improperly insert their own worldview into individual client representation, may regard the child in isolation from his or her family and culture, and may primarily serve the state's interest in exercising broad control over impoverished families.<sup>40</sup>

Annette Appell has suggested that the unimproved condition of children and the lack of research about the effectiveness of attorneys leave the value of attorney representation unclear.<sup>41</sup> She argues that the increased number of children's attorneys arose from a series of policy decisions defining child welfare in individual rather than social and economic justice terms. For Appell, these individual legal solutions amount to "tinkering" with individual rights within existing frameworks, at the expense of broader community development remedies.<sup>42</sup>

Others have questioned the suitability of the adversarial legal system in matters addressing complex interpersonal relationships.<sup>43</sup> One survey of empirical studies suggested that the involvement of a CASA volunteer in a case, compared to advocacy by an attorney alone, may improve key factors in child representation, such as face-to-face

38. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

39. *Id.*

40. *Id.* at 806 & 832; Annette Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 623 (2008). See also Naomi Cahn, *Family Boundaries: Symposium on Third-Party Rights and Obligations with Respect to Children, State Representation of Children's Interests*, 40 FAM. L.Q. 109, 110 (2006).

41. Appell, *supra* note 40, at 605. See also Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 94 (2006) ("lawyers [with a 'child-saving' mentality] are frequently seen as an impediment to producing good outcomes").

42. Appell, *supra* note 40, at 620 (citing Robin West, *Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 340 (2002) (noting how rights discourse may side-step systemic problems and reform); Report of the Working Group on the Role of Race, Ethnicity, and Class, 6 NEV. L. J. 634, 670-72 (2006)).

43. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1 (2006). See also Hollis Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1110 (2006); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 138-139 (1997); Appell, *supra* note 40, at 620; Susan L. Brooks, *Therapeutic and Preventive Approaches to School Safety: Applications of a Family Systems Model*, 34 NEW ENG. L. REV. 615, 618 (2000); Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1, 3-4 (1996). Cf. Ann Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 47 NO. 1 JUDGES' J. 23, 26 (2008) (emphasizing that children are necessarily involved in child welfare cases, and that denying them representation will not shield them from a dispute and its ramifications).

contact, and may improve services ordered and number of placement moves.<sup>44</sup> Attorneys for children also constitute a financial burden on states.<sup>45</sup>

## 2.6 The Role of the Child's Attorney: Competing Models

### 2.6.1 Best Interests or Client Directed

While providing attorneys for children is recognized as necessary by the child welfare field, opinions differ as to the role attorneys should adopt. The traditional controversy pits “best interests” models—in which attorneys represent the child’s best interests—against “expressed wishes/client-directed” models, where the attorney advocates for the child client’s wishes in the traditional attorney-client role. Best interests models typically find greater favor with judges and lawmakers, while the preferred model among child advocates and child welfare academics is the expressed wishes model.<sup>46</sup>

Jean Koh Peters has suggested that child competency is a “dimmer switch,” in that the client can shed light on some aspects of the representation, even though she cannot participate in all of it.<sup>47</sup> Don Duquette notes that even a best interests model might charge the attorney to express and advocate the child’s preferences according to age and maturity since it may be in the best interests of the child to have his voice expressed and advocated for.<sup>48</sup> Emily Buss has maintained that few attorneys adopt an absolutist position under either model.<sup>49</sup> Duquette has also argued that the field might embrace both attorney models, with older youth receiving a client-directed attorney and younger children receiving a best interests attorney. Some authors consider the actual percentage of cases in which a child’s best interests and expressed wishes conflict to be relatively small and many warn against a preoccupation with the subtleties of the child’s voice in directing the attorney at the expense of exploring other dimensions of quality attorney practice.<sup>50</sup>

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44. Davin Youngclarke, et al., *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 109 (2004). For history and structure of CASA program, see *id.*, at 109-112; see also Rebecca Ellis, *The Heartbeat of Texas Children: The Role of Court-Appointed Special Advocates in the Wake of the 2005 Family Code Amendments*, 38 TEX. TECH. L. REV. 1065 (2006).

45. See Harris, *supra* note 22, at 1294 (citing *In re B.K.*, 833 N.E.2d 945 (Ill. App. Ct. 2005)). *But see* Taylor, *supra* note 29, at 614 (noting that the cost of counsel may be mitigated by the financial benefits of increased permanency).

46. Atwood, *Representing Children*, *supra* note 31, at 91-92.

47. Koh Peters, *Representing Children*, *supra* note 17, at §3-2(b)(2).

48. Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L. Q. 441, 442 (2001).

49. *Id.* See also Buss, *supra* note 33, at 1705. (“Those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rational decision-making process about the particular issue in question. Those advocating the guardian ad litem role for most children, generally still concede that at some age—at least in the late teenage years—children should be able to direct their counsel, on some, if not all, issues.”)

50. Glynn, *Unauthorized Practice*, *supra* note 28, at 62.

### 2.6.2 *Child Representative as Advocate for the Child's Best Interests*

Those who advocate the best interests lawyer model argue that children lack the maturity or the cognitive capacity for appropriate decision-making in their own interests. The best interests model is characterized as flexibly allowing for individualized client advocacy. Young children may appear more appropriately served by a best interests model than a client-directed model, which offers little guidance in the case of the non-verbal child or the infant.<sup>51</sup> Advocating for the child's legal interests may even defeat the major rationale of the client-directed approach, because it provides no guarantee of attorney objectivity.<sup>52</sup> A lawyer should not employ her skills to advocate a position exposing the young child client to serious harm, nor should attorneys owe "robotic allegiance" to each directive of minimally competent young children.<sup>53</sup>

Practical realities of representation are also argued to favor the best interests model. Lawyers will often have to determine the goals and objectives of the representation with little input from the child. Children may face pressures from families, the court process, or other circumstances that lead them to misidentify their own interests.<sup>54</sup> A lawyer emphasizing best interests considerations may more ably communicate and forge agreement with state social workers, therapists, teacher, or counselors in the child's case.<sup>55</sup>

Requiring children to be responsible for taking difficult positions and decisions may constitute too heavy a psychological burden.<sup>56</sup> Society has a greater obligation to protect children from their own bad judgments.<sup>57</sup> And because overworked caseworkers may be unable to provide relevant information to the judge, unless the child's attorney provides a full factual picture in court, the judge will be not be in a position to make a determination of the child's best interests.<sup>58</sup>

As a practical matter, a statutory right of children to best interests attorneys is often considered more politically realistic because state legislators and judges have favored

51. Duquette, *Bright Line Test*, *supra* note 23.

52. Duquette, *Two Roles Required*, *supra* note 48; Harris, *supra* note 22, at 1291.

53. Atwood, *Uniform Representation*, *supra* note 27, at 79; Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC CHILDREN'S LAW MANUAL SERIES (1999 ed.).

54. Buss, *supra* note 33, at 1702-03.

55. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1514 (1996).

56. Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 *ARIZ. L. REV.* 621, 622 (2003); Atwood, *supra* note 27, at 194; *cf.* Buss, *supra* note 33, at 1702-03.

57. *See* Buss, *supra* note 33, at 1702-03.

58. *Id.*; Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 *FAM. L. Q.* 287, 304-05 (1983).

this model.<sup>59</sup> Debra Lehrman has suggested that client-directed models may be rooted less in the needs of children than a desire of adults to understand themselves as respecting children.<sup>60</sup> Barbara Atwood contends that those who criticize best interests lawyering because lawyers lack expertise to make such determinations unfairly envision lawyers as litigating in a vacuum.<sup>61</sup> Further, Atwood argues that other standards emphasizing the client-directed model nevertheless allow considerable discretion under complex substituted judgment assessments.<sup>62</sup>

### 2.6.3 *Problems with the Best Interests Model of Child Representation*

Critics of best interests models contend that the best interests role is outside the requirements of professional ethics.<sup>63</sup> The drafters of the 2009 ABA Model Act argue that consistency with previous ABA Model Rules of ethics require that the child's lawyer form an attorney-client relationship which is "fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise."<sup>64</sup> The Model Rules of Professional Conduct require attorneys to maintain confidential communications with the client (Rule 1.6); not use confidential information adverse to the client without informed consent (Rule 1.8); abide by the client's determinations as to the objectives of the litigation (Rule 1.2); maintain client loyalty (Rule 1.2); refrain from intentionally or knowingly engaging in any activity which creates a conflict of interest (Rule 1.7); and refrain from testifying in cases in which

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59. Duquette, *Bright Line Test*, *supra* note 23, at 1249; Duquette, *Two Roles Required*, *supra* note 48, at 441; Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TUORO L. REV. 745, 791-93 (2006); Haralambie, *supra* note 43, at 23; Sarah L. Marx, *Seen But Not Heard: Advocating For Children in New York State*, 25 TUORO L. REV. 491, 514 (2006); Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L. Q. 393, 409 (2007).

60. Debra H. Lehrmann, *Who Are We Protecting?* 63 TEX. B.J. 123, 126 (2000). *See also* Atwood, *Representing Children*, *supra* note 31, at 193-94.

61. Atwood, *Uniform Representation*, *supra* note 27, at 95.

62. *Id.* *See also* Haralambie, *supra* note 43, at 23.

63. JENNIFER L. RENNE, *Special Issues for Guardians ad Litem*, in LEGAL ETHICS IN CHILD WELFARE CASES, 79 (American Bar Association 2004); Federle, *supra* note 31; Taylor, *supra* note 29, at 618; Atwood, *Uniform Representation*, *supra* note 27, at 92-93; Glynn, *Unauthorized Practice*, *supra* note 28. *See also* Tania M. Culley, *What Does It Mean to Represent Delaware's Abused, Neglected, and Dependent Children?*, 4 DEL. L. REV. 77, 87 (2001). *Cf.* Atwood, *Representing Children*, *supra* note 31, at 207 ("The lawyer for the impaired client is impliedly authorized under Model Rule 1.6(a) to reveal information about the client to the extent necessary to protect the client's interests.").

64. *Report and Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 42 FAM. L.Q. 145, 147-48 (2008) [hereinafter 2009 ABA Model Act Report].

they are also advocates (Rule 3.7).<sup>65</sup> Best interests attorneys often break the Model Rules when disclosing to the court all relevant and necessary information provided by the child. Attorneys in the best interests role may not necessarily advocate for their child client's desired litigation objectives.

Critics also contend that attorneys lack expertise required to adequately determine children's interests, because legal training does not prepare a person to make the nuanced judgments the determination requires.<sup>66</sup> Even specially trained attorneys may not be equipped to make these determinations.<sup>67</sup> With an infant or young child, the pure best interests approach fails to set out principles to guide the advocate's discretion in identifying the child's best interests.

Another objection is that the best interests role is a substituted judgment model that inappropriately substitutes the view of a lawyer for that of the child while at the same time usurping the role of the court to make such determinations.<sup>68</sup> Additionally, critics contend that best interests representation does not respect children as rights-bearing individuals and that the paternalism involved in best interests approaches disempowers children.<sup>69</sup> These critiques will be discussed further as reasons to adopt client-directed models.

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65. See ABA Model Rules of Professional Conduct. See Taylor, *supra* note 29, at 621-22; *Introduction, Recommendations of the UNLV Conference on Representing Children in Families*, 6 NEV. L.J. 592 (2006) (“[T]he children’s attorneys’ community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation.”); Buss, *supra* note 33, at 1715–1745.

66. Atwood, *Uniform Representation*, *supra* note 27, at 92-93; Appell, *supra* note 40, at 599-600; 2006 UNLV Recommendations, *supra* note 65 (“[T]hese often 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.”); 2009 ABA Model Act Report, *supra* note 64, at 147-48 (“Children’s lawyers are not social workers or psychologists and should not be treated as such. To the extent that courts need information about what is in the child’s best interest, the court should use a court appointed advisor or an expert, subject to the rules governing all court experts.”).

67. Haralambie, *supra* note 43, at 24

68. Duquette, *Two Roles Required*, *supra* note 48.

69. Ventrell, *supra* note 41, at 96; Federle, *supra* note 31; Taylor, *supra* note 29; Buss, *supra* note 33, at 1703-05. See also *Special Populations: Mobilization for Change*, 25 Touro L. Rev. 467 (2009) (breakout session transcript) (“There is no real right [to counsel for children in New York] at this point because the law guardian can substitute his or her judgment as an attorney for that of the young person.”).

#### 2.6.4 *Client-Directed Child Representation*

Most recent academic and practitioner commentary has favored a client-directed role for attorneys representing children in dependency proceedings.<sup>70</sup> Client-directed representation also finds support abroad.<sup>71</sup>

Those who advocate assuming the traditional attorney role, argue that best interests attorneys usurp the role of the judge in determining the child's best interests.<sup>72</sup> The judge should be able to base her decision on the evidence elicited through an adversarial process, and the child has the right to have his position zealously advocated.<sup>73</sup> Proponents of the traditional attorney model also emphasize that lawyers' lack of psychology and social work expertise and training that should disqualify them from making best interest judgments.<sup>74</sup> As discussed at II.B, *supra*, allowing children a voice in their own proceedings empowers children.<sup>75</sup> This is also justified as a restorative measure, given children's status disempowered status under the circumstances that bring them into custody.<sup>76</sup>

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70. KOH PETERS, REPRESENTING CHILDREN, *supra* note 17, at § 2(a)-3(c)(2) (“[F]rom Guggenheim on, the vast majority of literature has resoundingly embraced the traditional lawyering role for children above a certain age); Sobie, *supra* note 59, at 794; Taylor, *supra* note 29, at 615 (arguing that the legal profession supports providing attorneys for children in dependency proceedings.); Glynn, *supra* note 28, at 63-64 (“There is a growing scholarly consensus that children need, at a minimum, a lawyer in these proceedings. . . .”); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L. J. 299, 301 (1998) (“[A] growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding);” Atwood, *Uniform Representation*, *supra* note 27, at 90-91 (“The literature evinces a significant distrust of any model of lawyering that authorizes the lawyer to make decisions for the child based on the lawyer’s independent assessment of the child’s welfare”); Aditi Kotheekar, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 WASH. U. L. REV. 481, 484 (2008) (“National conferences establish a growing consensus”). See also Appell, *supra* note 40, at 634-65 (“Despite the broad-based and growing critique of lawyers’ and the law’s use of children as vehicles to advance dominant norms, many attorneys persist in using a model of representation focusing on the best interests of the child . . .”); Haralambie, *supra* note 43, at 24 (“There is consensus among commentators to move in the direction of child-directed representation . . .”)

71. Andy Bilson & Sue White, *Representing Children’s Views and Best Interests in Court: An International Comparison*, 14 CHILD ABUSE REV. 220, 223, 236 (2005).

72. Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 81 (1984); Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L.J. 1385, 1390; Kotheekar, *supra* note 70.

73. Buss, *supra* note 33, at 1703-05.

74. *Id.*; Appell, *supra* note 40, at 634-65. See also Guggenheim, AAML’s Revised Standards, *supra* note \*, at 264

75. Ventrell, *supra* note 41, at 96; Bilson & White, *supra* note 66, at 236.

76. Buss, *supra* note 33, at 1703-05.

Two practical considerations are also important to note in evaluating client-directed advocacy. Attorneys are often influenced and inspired by the wisdom of children, whose judgment about their best interests often proves sound.<sup>77</sup> Children may effectively prevent decisions the children oppose from being effectively implemented, and the child's sense of inclusion in the court process may be critical to the success of placements and services.<sup>78</sup>

### 2.6.5 *Problems with Client-Directed Representation*

It is difficult to understand just what client-directed representation means for young children who cannot speak or express a point of view or whose ability to make considered judgments is lacking.<sup>79</sup> Client-directed representation might also under-protect children who lack sufficient fore-sight or understanding of the future or may leave them with a burdensome psychological responsibility in the context of complicated relationships.<sup>80</sup>

### 2.6.6 *An Alternative Model: The Bright Line Test*

Duquette has expressed the concern that neither a best interests model nor client-directed lawyer can meet the needs of all children, given their differing levels of development.<sup>81</sup> The older child needs a traditional attorney; the youngest child is incapable of directing counsel and requires a representative to define and advocate for his or her best interests. Under a "Two Distinct Lawyer Roles" model the court must appoint either a best interest lawyer or a traditional attorney under certain conditions defined in the law. Duquette has proposed that a bright line age standard should determine which sort of representative a child is provided. Above a certain age, e.g. seven, the youth would receive a client-directed advocate, and below that age a child would receive a best interests advocate.<sup>82</sup>

### 2.6.7 *ABA Model Rule 1.14*

The ABA Model Rule of Professional Conduct 1.14 provides some of the most authoritative guidance to practitioners in those states which have adopted it.<sup>83</sup> It pro-

77. *Id.*

78. *Id.*; Stötzel & Fegert, *supra* note 33.

79. Duquette, *Two Roles Required*, *supra* note 48.

80. John Anzelc et al., *Comment on the Committee's Model Act Governing Representation of Children in Abuse and Neglect Proceedings*, 12 MICH. CHILD WELFARE L. BAR. J. 4; Emery, *supra* note 56.

81. Duquette, *Two Roles Required*, *supra* note 48.

82. Duquette, *Bright Line Test*, *supra* note 23.

83. ABA 2011 Model Act, Section 7(e): "Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child's lawyer should determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgements and engaging in meaningful communication."

vides: “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”<sup>84</sup> The commentary to Rule 1.14 says: “Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings governing their custody.” The default position, therefore, is for the child’s lawyer to maintain as normal an attorney-client relationship as possible.

Rule 1.14 requires the lawyer to determine whether the child has diminished capacity. The lawyer is permitted to consult others but is ultimately left to his or her own subjective judgment as to capacity. It further complicates the question that a child may be competent for some things and not for others. (“A determination of incapacity may be incremental and issue-specific.”<sup>85</sup>) Yet there is little direction as to *how* the diminished capacity determination is to be made.

Lawyers are not trained in child development. The question of competency and maturity is an evolving and elusive judgment that doctoral level psychologists have a difficult time making. In the case of the very young child or the older child, the question of competence to instruct counsel may not be so difficult. If the client is an infant and cannot speak, the client cannot instruct counsel.

If a client is a normally developed 15- or 16-year-old, however, he or she is quite likely to have clear and reasonable views as to the proper decisions affecting his or her life. Those views should be aggressively argued to the court and most would urge traditional client-directed representation for the older youth. But determining capacity for the middle-years child, from 8 to 12 for instance, or the immature or mentally challenged child, and the weight to be given to that child’s preferences is perhaps the most difficult question in child advocacy today, and it does not yet have a clear answer.

Despite its limitations in guiding the determination of client competency, however, Model Rule 1.14 provides helpful guidance as to what an attorney is to do if the client is determined to have diminished capacity. Rule 1.14(b) provides: “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad

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84. The older version of the Model Rules refer to a client who is *impaired*, rather than with *diminished capacity*. The term “diminished capacity” better reflects the current understanding of child development as a process in which a child may be competent for some matters and not others and competent some days and not others.

85. *Id.* See also ABA 1996 Standards.

litem, conservator or guardian.” Rule 1.14(b) gives the child’s attorney broader guidance on what “other protective action” might be appropriate, including allowing consultation with other persons or entities.

Further, the 2002 Rule 1.14(b) provides more guidance regarding the previous trigger for acting (“only when the lawyer reasonably believes that the client cannot act in the client’s own interest”) to include situations in which the client “is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.” This change reflects the loosening of the confidentiality rules under some circumstances.

The Comment to the new Rule 1.14 provides helpful guidance to the child’s attorney wishing to take protective action on behalf of the child client:

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include:

- consulting with family members,
- using a reconsideration period to permit clarification or improvement of circumstances,
- using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals 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.

[6] In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary

to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

The new Comment 4 to Rule 1.14 provides that in "matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor." Even in the child welfare context where parents are accused of neglect or even abuse, the child's attorney may find helpful insights and guidance from the parents on custody alternatives as well as child's needs and preferences, important persons in the child's life, education and health care.

### 2.6.8 Analysis

The vast majority of legal scholars and authorities who have addressed this issue recommend that a lawyer should take direction from his or her child client if the child is determined to have developed the cognitive capacity to engage in reasoned decision making. The national trend is in the direction of a more traditional lawyer role, giving more deference to the child's wishes and preferences on as many issues as possible, and turning to a more objective process for determining the child's position when that is required. Determining the decision-making capacity of any particular child and the weight to be given to that child's preferences remains a difficult and elusive question, however.<sup>86</sup>

## 2.7 Promising Practices for Child's Attorneys

The intense debate on who directs the child's lawyer and how, has often detracted from consideration of what that child representative should actually do. That is, what are the duties and practices that create successful representation?<sup>87</sup>

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86. DONALD DUQUETTE & ANN M. HARALAMBIE, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES (Duquette et al. eds., 3d ed. 2016).

87. Buss, *supra* note 33 at 1749 ("I am convinced, however, that it matters far less which role is assumed than that the role is communicated to the child"); Katherine Kruse, *Standing in Babylon*,

### 2.7.1 *Basic Duties and Characteristics*

The 1996 ABA Standards maintain that attorneys for children should:

- obtain copies of all pleadings and relevant notices;
- participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- inform other parties and their representatives that they are representing the child and expect reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- identify appropriate family and professional resources for the child.<sup>88</sup>

The 1996 ABA Standards, upon which the QIC Best Practice Model of Child Representation is based, reflects a considerable national consensus on the duties of the child's representative, i.e., what it is that the advocate for the child should actually do.<sup>89</sup> In a similar vein, the UNLV Conference attendees recommended that children's attorneys should be able to recognize issues that require the services of other professionals and know how to access those services. Children's attorneys should have sufficient knowledge of other disciplines to formulate requests for evaluations and services from other professionals and to evaluate and use professional opinions.<sup>90</sup>

### 2.7.2 *Understanding the Child Client*

Commentators note that awareness of the client's individual context is necessary to reducing the role of race, culture, or class biases in representation.<sup>91</sup> According to Jean Koh Peters, the child's attorney "whether assigned to represent a child's wishes or her

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*Looking Toward Zion*, 6 NEV. L.J. 1315, 1316 (suggesting that the UNLV conference was an ultimately practical endeavor that can inform a lawyer's day-to-day ethical choices); Glynn, *Unauthorized Practice*, *supra* note 28 ("In the debate about best interests versus articulated wishes, the value of legal counseling and advice is often lost"). See also Duquette, *Bright Line Test*, *supra* note 23, at 1249 ("how to determine the best interests of a child. . . is among the least developed part of our jurisprudence and should be a central focus of our discussion as a field").

88. 1996 ABA Abuse and Neglect Standards, at B-1.

89. *Id.*

90. *Id.* at (1)(A)(2)(a)(ii). See also 2007 ULC Model Act, § 7 cmt.

91. Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN'S L. REV. 601, 617 & 630 (2007); Taylor, *supra* note 29, at 615; Kisthardt, *supra* note 43; Stötzzel & Fertgert, *supra* note 33, at 220; 2007 ULC Model Act § 11.

best interests, must ground her representation in a thickly textured understanding of the child's world and the child's point of view."<sup>92</sup> The UNLV Recommendations emphasize that attorneys should continually reflect on and assess the extent to which their personal opinions, values, and biases may affect the representation of their child clients, and attempt to understand their individual client's needs and interests, resisting boilerplate responses.<sup>93</sup> A child's age, legal status, and social attributes can mask the child's individuality, leading to decisions and processes that marginalize the child's identities, needs and interests.<sup>94</sup>

Ann Haralambie and Lauren Adams discuss the importance of planning for relationship building.<sup>95</sup> Building client relationships is crucial not only to understand the individual client, but also because the attorney must establish rapport with the child before the child is likely to provide much useful information. The attorney should learn as much background information as possible before speaking with a child client from caseworkers, social workers, teachers, coaches, family members, friends, school records, case reports, medical records, police reports, or other historical documents.

Meeting with a child client in the child's environment provides the attorney with important information for representation and may allow the client to feel more at ease in developing a relationship. Important elements of relationship include building trust by keeping promises, maintaining honesty, and by managing client expectations about what the attorney is able to provide. Attorneys may strengthen rapport by not rushing children during interviews, actively listening during meetings, being aware of how their own responses may be perceived, and arranging for a trusted adult to emphasize that the attorney may be trusted.

The UNLV recommendations note that attorneys should have competency in child cognitive development, effective child interviewing skills, and should structure all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.<sup>96</sup> Emily Buss has examined the importance of understanding children's development in their representation.<sup>97</sup> The 2011 ABA Model Act expects attorneys to be able to gauge the developmental capacity of their child clients.

The UNLV conferees also maintained that children's attorneys should become familiar with the child's family, community and culture, and should take precautions to avoid imposing the lawyer's own standards and cultural values.<sup>98</sup> Children's attorneys

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92. KOH PETERS, REPRESENTING CHILDREN, *supra* note 17.

93. 2006 UNLV Recommendations, *supra* note 65, at (1)(B)(1).

94. *Id.*

95. Ann Haralambie & Lauren Adams, *Lawyering—Child Client Interviewing and Counseling*, NACC GUIDE (2010); *see also* KOH PETERS, REPRESENTING CHILDREN, *supra* note 17, at § 4-3(a)(3).

96. 2006 UNLV Recommendations, *supra* note 65, at (1)(C)(2)(b), 1996 ABA Abuse and Neglect Standards A-3; 2007 ULC Model Act § 7.

97. Buss, *supra* note 33.

98. 2006 UNLV Recommendations, *supra* note 65, at (1)(A)(2)(a).

should engage the entire family, and help the family understand how they can participate in the proceedings.<sup>99</sup> Children's attorneys should recognize the importance for most clients of maintaining connections to their families and communities.

Attorneys should solicit feedback from clients and families as to their representation.<sup>100</sup> Attorneys should challenge policies and practices that purport to protect the safety of lesbian, gay, bisexual or transgender children solely by isolating them from other children, and children's attorneys should challenge policies and practices that criminalize or pathologize adolescent sexual behavior that is typical or common from a developmental perspective.<sup>101</sup>

### 2.7.3 *The Role of Children in Dependency Proceedings*

Commentators argue for a renewed emphasis on the child's status as a full party to the proceedings, with the appropriate level of the child's presence, participation, and involvement.<sup>102</sup> Children, as parties, should be represented throughout the proceedings, receive all papers and communications with the court, attend all hearings, participate in formal discovery, including depositions, participate in settlement agreements, present evidence, including the calling of witnesses, and make arguments to the court.<sup>103</sup>

In 2007, the ABA resolved to provide "all youth with the ability and right to attend and fully participate in all hearings related to their cases."<sup>104</sup> Along these lines, the UNLV Conference recommends strengthening the role of the child's voice in CAPTA by mandating compliance with the United Nations Convention on the Rights of the Child Article 12, allowing that a child be given the opportunity to be heard in any judicial proceeding affecting the child. The UNLV Recommendations also maintain that children's attorneys should promote the development of organizations that support the engagement of youth in child welfare processes.<sup>105</sup>

On a broader level, attorneys should advocate that youth, including youth representing diverse experiences and perspectives, participate in developing policies and practices affecting children and their families.<sup>106</sup>

99. *Id.* at (1)(A)(2)(i)

100. *Id.* at (1)(B)(2)(g).

101. 2006 UNLV Recommendations, *supra* note 65, at (3)(C)(2)(d).

102. Sobie, *supra* note 59, at 747. *See also* Glynn, *Unauthorized Practice*, *supra* note 28 at 70 (enumerating state statutes on child's status as a party to the litigation); 2007 ULC Model Act, at II cmt. (describing state law on party status); Jonathan Whybrow, *Children, Guardians and Rule 9.5*, 34 FAM. L.Q. 504 (2004) (describing English law on party status.) On a child's right to choose counsel, see Sobie, *supra* note 59, at 769-71; *see also* Barry J. Berenberg, *Attorneys for Children in Abuse and Neglect Proceedings*, 36 N.M. L. REV. 533, 561-564 (2006).

103. Glynn, *supra* note 28.

104. ABA Resolution 104a, adopted August 2007. Youth Transitioning from Foster Care (Youth at Risk), available at <http://www.abanet.org/child/parentrepresentation/PDFs/060.pdf>.

105. 2006 UNLV Recommendations, *supra* note 65, at (3)(A)(2)(b).

106. *Id.*, at (3)(B)(2).

Emily Buss has described her own experience of involving clients directly in proceedings, which increased the quality of attorney-client interaction. She argues that there is value in children seeing precisely what happens in court, because understanding how the court functions is essential to a child's understanding of how the lawyer functions in that system, and how the system makes decisions on the child's behalf.<sup>107</sup>

#### 2.7.4 Systemic Pressures Confounding Child Representatives

A variety of systemic pressures that significantly impede the quality of representation are acknowledged in the literature.<sup>108</sup> Commentators have emphasized the difficulty of providing quality representation in states with overburdened foster care systems.<sup>109</sup> Inadequate representation and adjudication often result from unreasonably high caseloads and crowded dockets.<sup>110</sup> Attorneys with high caseloads are unable to carry out the most basic tasks required for legitimate representation according to any model, including client meetings.<sup>111</sup> Overwhelmed judicial caseloads result in delays.<sup>112</sup> In many jurisdictions, attorney compensation is limited, and is sometimes inadequate to compensate attorneys for basic statutory duties.<sup>113</sup> Inadequate compensation is also cited as an issue internationally.<sup>114</sup>

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107. Buss, *supra* note 33, at 1760-61.

108. Glynn, *Unauthorized Practice*, *supra* note 28, at 58; Adoption 2002 Guidelines, at 1-5.

109. Kruse, *supra* note 87, at 1316; Buss, *supra* note 33, at 1761; Lois A. Weinberg, et al., *Advocacy's Role in Identifying Dysfunctions in Agencies Serving Abused and Neglected Children*, 2.3 CHILD MALTREATMENT 212, 212 (1997).

110. Taylor, *supra* note 29, at 621-22 (describing state statistics and guidelines); Howard Davidson & Erik S. Pitchal, *Caseloads Must Be Controlled So All Child Clients Can Receive Competent Lawyering*, in THE SPECIALIZED PRACTICE OF JUVENILE LAW: MODEL PRACTICE IN MODEL OFFICES (National Association of Counsel for Children, 2006); Glynn, *Unauthorized Practice*, *supra* note 28, at 58; Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U CHI. L.J. 1 (2000); Marx, *supra* note 59, at 531. *See also* Nolan Clay & Randy Ellis, *National Panel Faults Oklahoma County System*, THE OKLAHOMAN, Apr. 27, 2008 (assistant public defenders in Oklahoma County had caseloads between 1000 and 1250 children).

111. Buss, *supra* note 33, at 1759-61; Margulies, *supra* note 91, at 621; Sobie, *supra* note 59, at 825; Kisthardt, *supra* note 43, at 11; Marcia Robinson Lowry & SaraBartosz, *Looking Ahead to the Next 30 Years of Child Advocacy Symposium Presentations*, 41 U. MICH. J.L. REFORM 199 (2007); Marx, *supra* note 59, at 531.

112. 2006 UNLV Recommendations, *supra* note 65, at (5)(D)(2)(d).

113. *See* Charlotte A. Carter-Yamauchi, *Issues Relating to Guardians Ad Litem*, HAWAII LEGISLATIVE REFERENCE BUREAU (2003); Marx, *supra* note 59, at 531; Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U. L. REV. 411, 440-446 (2008); Kisthardt, *supra* note 43; Melissa Breger et al., *Building Pediatric Law Careers: The University of Michigan Law School Experience*, 34 FAM. L. Q. 531, 532-33 (2000); Richardson, *supra* note 37. *See also* Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the U.S. and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1074 (2006) (surveying state practice in appointing counsel for children in dependency cases).

114. Stötzel & Fegert, *supra* note 33, at 222.

Attorney training and competence are recognized as a shortcoming in many jurisdictions.<sup>115</sup> Children's lawyers are not social workers or psychologists, and commentators emphasize the benefit of multidisciplinary decision-making.<sup>116</sup> Children's legal representatives often lack funding for important support personnel, for example, social workers and paralegals.<sup>117</sup>

Commentators have described additional pressures arising from the context of child welfare proceedings. Martin Guggenheim argues that too few children's advocates are guided by a presumption in favor of family unification because insisting upon a child's prompt reunification poses a risk to their professional reputations. Judges, as well, are rarely criticized in public for wrongfully ordering the removal of a child. The media focuses its attention on the notorious "false negative" cases, where children are not removed but later suffer serious harm or even death. This skewed media attention creates intense pressure to "err on the side of safety," and the prevailing culture offers emotional rewards for children's lawyers to play a "heroic" role in rescuing children from risk, without a similar reward for minimizing disruption of their lives by providing in-home safety plans and the like.<sup>118</sup> Howard Davidson notes that advocates must constantly be wary of the "rubber stamp" of judicial approval of agency actions. Overextended courts systems do not often have sufficient or qualified staff to understand the needs of children placed with foster agencies.<sup>119</sup>

Commentators have also noted that ambiguity of the representative's role and the lingering notion of the attorney as an agent of the court creates pressure toward general passivity in representation,<sup>120</sup> and that relationships and communication between attorneys and social workers may be strained because of their different languages and training.<sup>121</sup> The informality of proceedings is also noted to be an issue, contributing to

115. Fines, *supra* note 113, at 412; *Fostering the Future: Safety, Permanence, and Well-being for Children in Foster Care*, PEW COMMISSION ON CHILDREN IN FOSTER CARE (2004); *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, ABA Child Custody & Adoption Pro Bono Project, 41 FAM. L.Q. 365, 381 (2007); ABA Resolutions on Foster Care and Adoption: Foster Care Reform, Aug. 2005 (urging development and implementation of national protocols and standards for reasonable attorney caseloads); Lowry & Bartosz, *supra* note 111, at 207; Susan A. Snyder, *Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania*, JUVENILE LAW CENTER 38 (2001), <http://www.jlc.org/File/publications/pkpd.pdf>; Appell, *supra* note 40, at 609-611.

116. 2009 ABA Model Act, *supra* note 64, at 147-48; Kisthardt, *supra* note 43; Haralambie, *supra* note 43, at 24.

117. Fines, *supra* note 113, at 413-14; Davidson & Pitchal, *supra* note 110.

118. Guggenheim, *State Interests*, *supra* note 38, at 830-31; Margulies, *supra* note 91, at 620 (describing the asymmetry of penalty and reward facing attorneys for children).

119. Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of our Child Welfare System Been Successful?*, 42 FAM. L.Q. 481, 482 (2008).

120. Fines, *supra* note 113, at 440-46.

121. Kisthardt, *supra* note 43.

attorney-driven outcomes, an insufficient focus on children, limitations on appellate review, and weakened child confidence in judicial proceedings.<sup>122</sup>

### 2.7.5 *Problem-Solving Courts and Holistic Representation of Children*

Alternative or problem-solving court systems such as unified courts, family drug courts, and domestic violence courts are discussed in the academic literature. According to Sarah Ramsey, these courts tend to downplay the role of the court as decision-maker and enforcer, instead emphasizing a service function, team decision-making, and a focus on ultimate outcomes benefiting the litigants and community.<sup>123</sup> These courts are noted to raise due process concerns, such as the blending of criminal and civil proceedings and the potential for judicial bias, but may be structured to incorporate due process protections.<sup>124</sup>

The UNLV Recommendations maintain that jurisdictions should permit lawyers to represent youth in more than one system, engaging in concurrent or dual representation.<sup>125</sup> Ramsey also describes how lawyers may participate in programs such as medical-legal partnerships that seek to improve children's health.<sup>126</sup> Additional models have been thought to strengthen the relationship between representation in court and service delivery.<sup>127</sup> Foster care review panels may also provide oversight of children's cases.<sup>128</sup>

## 2.8 Caseloads

What is a reasonable caseload for lawyers representing children? Crushing caseloads in urban settings have been a troubling feature of child welfare law practice for many years. The 2005 ABA resolution and Pew Commission recommendations also included standards for reasonable attorney caseloads.<sup>129</sup> In 2005, the finding in *Kenny A.* that children have a constitutional right to adequate legal representation resulted in a

122. Pitchal, *supra* note 26, at 686-687; Buss, *supra* note 33, at 1760-61; Kothekekar, *supra* note 70, at 504-05.

123. Sarah Ramsey, *Child Well-Being: A Beneficial Advocacy Framework for Improving the Child Welfare System?*, 41 U. MICH. J.L. REFORM 9, 19-20 (2007).

124. *Id.*

125. 2006 UNLV Recommendations, *supra* note 65, at (5)(D)(2)(a).

126. Ramsey, *supra* note 123, at 21.

127. Shelly L. Jackson, *A USA National Survey of Program Services Provided by Child Advocacy Centers*, 28 CHILD ABUSE & NEGLECT 411, 412 (2004); Gail Chang Bohr, *Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings*, 32 WM. MITCHELL L. REV. 989 (2006); Gail Hornor, *Child Advocacy Centers: Providing Support to Primary Care Providers*, 22 J. PEDIATRIC HEALTH CARE 35 (2008).

128. See Youngclarke et al., *supra* note 44, at 112.

129. ABA Resolutions on Foster Care and Adoption: Foster Care Reform, Aug. 2005, <http://www.abanet.org/child/foster-adopt.shtml>. See also Adoption 2002 Guidelines (urging that compensation of children's attorneys should closer to that for attorneys handling matters of similar demand and complexity).

settlement agreement limiting caseloads to 90 children per attorney in DeKalb County.<sup>130</sup> A 2006 survey for the NACC showed that 18 percent of respondents had more than 200 cases and an addition 25% had between 100 and 199.<sup>131</sup>

The NACC recommends a standard of 100 active clients for a full-time attorney.<sup>132</sup> The NACC based this recommendation on a rough calculation that the average attorney has 2000 hours available per year and that the average child client would require about 20 hours of attention in the course of a year.<sup>133</sup> In *Kenny A* the court heard expert testimony from NACC along these lines and this evidence became a key consideration in the court's finding that foster children have a right to an effective lawyer in dependency cases who is not burdened by excessive caseloads.<sup>134</sup>

A 2008 caseload study by the Judicial Council of California based on time and motion measures recommended a caseload of 77 clients per full-time dependency attorney to achieve an optimal best practice standard of performance.<sup>135</sup> The California Judicial Council set 141 as the maximum ceiling of cases a full-time attorney may carry. The Council also recognized the value of multidisciplinary representation when it proscribed a modified *maximum* caseload standard of 188 clients per attorney if there is a 0.5 FTE investigator/social worker complement for each full-time attorney position. New York law sets the maximum caseload at 150.<sup>136</sup>

The Massachusetts Committee for Public Counsel Services, which provides counsel for children and parents in dependency cases, enforces a caseload of 75 open cases.<sup>137</sup> In a systematic study a Pennsylvania workgroup carefully broke down the tasks and expected time required throughout the life of a case and matched that to attorney hours available in a year. They concluded that caseloads for children's lawyers should be set at 65 per full time lawyer.<sup>138</sup>

130. *Kenny A. ex rel. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

131. Davidson & Pitchal, *supra* note 110.

132. National Association of Counsel for Children, *Child Welfare Law Guidebook*, 2006, at 54

133. Erik S. Pitchal et al., *Evaluation of the Guardian ad Litem System in Nebraska*, NACC 42-43 (2009), [http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/nebraska/final\\_nebraska\\_gal\\_report\\_12.pdf](http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/nebraska/final_nebraska_gal_report_12.pdf)

134. In re *Kenny A*, *supra* note 130. Also see Pitchel, note 133 at 43.

135. Dependency Counsel Caseload Standards: A Report to the California Legislature, Judicial Council of California Administrative Office of the Courts, April 2008, <http://www.courts.ca.gov/documents/DependencyCounselCaseloadStandards2008.pdf>.

136. 22 N.Y. Comp. Codes & Regs. Tit. 22 § 127.5(a).

137. Massachusetts Committee for Public Counsel Services, Policies and Procedures Governing Billing and Compensation, revised November 2011, [https://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2010/MANUALChap5links3.pdf](https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf).

138. 2014 Pennsylvania State Roundtable Report: Moving Children to Timely Permanency through high quality Legal Representation (May 9, 2014) <http://www.sdgrantmakers.org/Portals/0/AboutUs/2014%20PA%20Roundtable%20Report%20Moving%20Children%20to%20Timely%20Permanency.pdf>.

## 2.9 Implementing Training Programs

Both the 1996 and 2011 ABA Standards recommend training content for lawyers representing children. Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.<sup>139</sup> Attorneys must understand applicable state and federal statutes, case law on applicable legal standards; agency and court rules; authoritative representation guidelines and standards; the family court process, service implementation, and key personnel in child-related litigation, including custody evaluations and mediation; child development, family dynamics, and communicating with children.<sup>140</sup> In 2005, the ABA passed a resolution that included an exhortation to Congress, states, and territories to enact policies consistent with the recommendations of the May 2004 Pew Commission on Children in Foster Care. The Pew recommendations included federal and state support for attorney training; and development, implementation of, and funding for, qualification and training standards.<sup>141</sup>

The UNLV Recommendations note that bar associations and other legal organizations should provide continuing legal education ("CLE") so attorneys can stay current in related subject areas and the operations of other systems affecting children and families.<sup>142</sup> The 2009 First Star state survey found that 34 jurisdictions require attorneys for children to have training prior to appointment or CLE after appointment.<sup>143</sup>

The NACC developed a Child Welfare Law Specialist certification currently available in 43 jurisdictions.<sup>144</sup> The 2008 Fostering Connections to Success and Increasing Adoptions Act expanded the availability of federal funds to train attorneys representing children in child protection proceedings.<sup>145</sup>

Certain commentators examined the increasing role of child advocacy education in law schools, including clinical programs.<sup>146</sup> Like the UNLV Recommendations, these

139. 1996 ABA Standards I-1; 2011 ABA Standards, Section 4; *see also* Fines, *supra* note 113; Marx, *supra* note 14, at 507; Taylor, *supra* note 29; Harris, *supra* note 22, at 1294.

140. 1996 ABA Standards, at I-2.

141. ABA Resolutions on Foster Care and Adoption: Foster Care Reform, Aug. 2005, <http://www.abanet.org/child/foster-adopt.shtml>.

142. 2006 UNLV Recommendations, *supra* note 65, at (2)(F)(3)(a).

143. First Star, A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children (2009), <http://www.firststar.org/library/report-cards.aspx>.

144. NACC Certification is currently available in 42 states. *See* NACC Certification, NACC Website, <http://www.naccchildlaw.org/?page=Certification>. *See also* Marvin Ventrell & Amanda George Donnelly, *NACC Certifies Nation's First Child Welfare Law Specialists*, CHILDREN'S VOICE MAG., Apr. 1, 2007.

145. Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, 122 Stat. 3949; Taylor, *supra* note 29, at 620.

146. Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J. L. REF. 1 (1997); Ventrell, *The Practice of Law for Children*, *supra* note 41; Christina A. Zawisza, *Two Heads Are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FLA. COASTAL L.

writers emphasize the importance of multidisciplinary education, practice-oriented modeling, and collaboration with related fields such as a social work.<sup>147</sup> Child law education must also support law students and graduates in pursuing “pediatric,” i.e. child welfare law, careers.<sup>148</sup>

## 2.10 Literature Review Conclusion

The recent literature on child representation has analyzed the law defining child representation; assessed whether a lawyer must be appointed for the child; debated the roles of the child representative; examined the recommendations and standards contributed by authoritative bodies and conferences; illustrated preferred practices for child representatives; and emphasized systemic challenges and progress.

The academic and policy literature supports the view that children require legal representation in child welfare cases, yet point out that the current child representation is inadequate to the need. Commentators recognize the value of individual child advocacy in getting each individual child the specific and unique supports necessary for their safety and well-being in an extremely complex social system, but identify many technical, practical and philosophical issues that must be addressed.

The current academic literature provides an essential theoretical context for framing the QIC Best Practice Model of representation, but the Best Practice Model must be considered in the practical and day to day context of child representation. We turn to that next.

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REV. 631, 631 (2006); Fines, *supra* note 113; Kisthardt, *supra* note 43; Breger et al., *supra* note 113, at 532-33.

147. See also 2006 UNLV Recommendations, *supra* note 65, at (2)(A)–(F) & (3)(E) (“Bar associations and other legal organizations should promote collaborative approaches to learning and provide cross-disciplinary education . . .”); Zawisza, *supra* note 146, at 631

148. Breger et al., *supra* note 113, at 532–33.