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## "I Know the Child Is My Client, but Who Am I?"

### Cover Page Footnote

Professor Shepherd is a Professor of Law at the T.C. Williams School of Law of the University of Richmond. He earned his B.A. and LL.B. at Washington and Lee University. Ms. England received her B.S.W. from the Pennsylvania State university and her M.S.W. from the University of Maryland and is a December 1995, graduate of the T.C. Williams School of Law. She has been a practicing social worker and social work instructor and is President of the Richmond CASA Board of Directors.

# “I KNOW THE CHILD IS MY CLIENT, BUT WHO AM I?”

*Robert E. Shepherd, Jr. and Sharon S. England\**

## INTRODUCTION

*Melinda, a neglected child*—Melinda entered the legal system as a neglected child in the early 1970s.<sup>1</sup> Melinda’s mother, who had been diagnosed as schizophrenic, suffered from numerous health problems, and was unable to provide a stable living environment for Melinda and her three younger brothers and sisters. The children were ultimately removed from their mother’s care pursuant to the state’s child neglect laws. While under the jurisdiction of the juvenile court, Melinda lived in several different foster homes, many times being separated from her younger siblings. At age sixteen, she was placed in a group home. “I did not want to be in a group home,” Melinda said, “but nobody had asked me.” She was finally released from court jurisdiction into her aunt’s care when she was eighteen-and-a-half years old. Nearly two decades after Melinda initially entered the legal system, she can still remember the name of the lawyer appointed to represent the children in the child neglect proceedings. “I will never forget him, I thought he was terrible. He didn’t spend any time with us. I saw him once outside of the courtroom, in the waiting room. He didn’t know our side of the story,” Melinda said. “He didn’t know what we wanted to do. He never asked me. I didn’t know how the court procedure worked. I didn’t know if I was sending my mother to jail or sending us back home to her. No one ever told me what was being decided.”

*Jose R., charged with possession of stolen property*—“I’ve been to court three times already and I just want to get it over with. I’m scared and I don’t know if they’re going to send me to jail. I don’t know who my lawyer is. He wasn’t there when the judge called my case.”<sup>2</sup>

*Jamie G., a 16-year-old convicted of assault and larceny*—“My lawyer doesn’t know nothing about me, or what I do. She only met me twice for a few minutes and never returned my phone calls. She

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1. Melinda’s name has been changed to protect her identity. This discussion of her experience comes from an interview conducted by Ms. England on June 17, 1992.

2. ABA Juvenile Justice Center, Juvenile Law Center and Youth Law Center, A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 3 (1995) [hereinafter A Call for Justice].

just started saying stuff to the judge about what I needed. What I needed was a new lawyer."<sup>3</sup>

MELINDA, Jose, Jamie, and thousands of other dependent, abused, neglected, delinquent, and status offending children like them came within the jurisdiction of the juvenile and family courts in this country at a time of tremendous growth and change in juvenile and family law. The diverse, and sometimes incompatible, interpretations of child and family rights emanating from these courts resulted in disparate and inequitable treatment of children and families. One significant contributor to such treatment has been the inconsistent approach taken in the assignment of lawyers to represent children, and the great confusion about the role of attorneys in representing children in the courts.

There is probably no role given to a lawyer that is more challenging than that of appearing as counsel for a child in court. Whether appearing for the child in an abuse, neglect, dependency, or custody proceeding, defending a juvenile charged with delinquency or with a status offense, or representing a child in a mental commitment or other matter, an attorney faces enormous challenges. Nowhere is an attorney invited to use all of his or her skills as completely as when dealing with the lives of children and families.

Unfortunately, it is this very same awesome responsibility which all too often creates confusion in the minds of new and veteran attorneys alike as to what their roles are when appearing in court on behalf of a child. Some lawyers believe that in all instances of juvenile representation, they are to act in the "best interests of the child." In delinquency proceedings in particular, many lawyers feel conflicted and are unsure of the role they are supposed to play. Is the attorney to "zealously defend" the rights of a juvenile client even if it means that a finding of not guilty will remove the immediate possibility of any helpful intervention in the life of that child? What is the role of the parents? How should counsel resolve the often conflicting interests of parent and child, especially when he or she has been retained by the parent? From whom is the attorney to receive guidance and direction for representing an infant or very young child? When acting in a custody or abuse and neglect proceeding, what responsibility does counsel have to represent the expressed wishes of the child when those interests are in conflict with what counsel believes to be in the "best interests of the child"? What is the role of the attorney for the child who is the subject of a custody dispute?

As increasing poverty, violence, child maltreatment, and substance abuse complicate the problems of children and families involved in court proceedings, it is imperative that counsel appearing in court for a child be equipped to handle these complexities. If the role of the

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3. *Id.* at 36.

attorney is to have any meaning at all, it is imperative that counsel appearing in court for a child understand his or her role and how it may vary and change depending upon the type of proceeding or the developmental stage and competency of the child. The role of the lawyer in an abuse and neglect proceeding representing a preverbal infant may be very different from the role of an attorney representing a child charged with a criminal offense or from counsel representing a verbal but "impaired" child in a custody dispute. The goal of this Article is to attempt to define the roles that attorneys representing children assume in the courts and to offer practical suggestions about how to assure the effective performance of those roles.

### I. HISTORICAL DEVELOPMENT OF THE CHILD'S RIGHT TO A LAWYER

Children throughout history were given little special attention by the legal system. Their interests were invariably assumed to be wrapped up in the interests and desires of the adults in their lives. Until the turn of the twentieth century, they were most likely the subjects of occasional court proceedings, and seldom parties or meaningful participants. The coming of the juvenile court initiated a new era in the legal system's focus on children. That court took a new, albeit largely paternalistic, look at the interaction between youth and the law. In a real sense, however, the juvenile court was considered to be "antilegal." The court encouraged informality and dependency on nonlegal resources.<sup>4</sup> By focusing on the "best interests" or welfare of these children, the "child savers" perceived no duty to formulate legal regulations, thus effectively "disenfranchising" children of their legal rights.<sup>5</sup> Lawyers were seen as serving little purpose other than to obstruct and delay.<sup>6</sup> "Many would say that juvenile courts in this period were not really courts at all. There was little or no place for law, lawyers, reporters and the usual paraphernalia of courts . . ." <sup>7</sup> This informality of juvenile court proceedings was almost universally upheld in appellate court decisions.<sup>8</sup> Therefore, the juvenile court, the very institution responsible for protecting children and families by overseeing the child welfare and juvenile criminal justice systems, and holding them accountable, was itself operating largely without legal oversight.<sup>9</sup>

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4. See Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 137 (2d ed. 1977).

5. *Id.* at 67.

6. Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 *Buff. L. Rev.* 501, 503 (1963).

7. Walter Wadlington et al., *Cases and Materials on Children in the Legal System* 198 (1983).

8. See, e.g., *Lindsay v. Lindsay*, 257 Ill. 328, 335 (1913) (upholding statute that limited a child's right to a jury trial because the proceeding was not the one in which a jury trial is guaranteed); *Commonwealth v. Fisher*, 213 Pa. 48 (1905) (same).

9. Wadlington, *supra* note 7, at 198.

In spite of the overall complexity of the laws affecting children and their families, the United States Supreme Court has granted the right to counsel and other significant due process protections only to those children accused of delinquent acts. In 1966, the Court intimated in *Kent v. United States*<sup>10</sup> that children have enforceable constitutional rights, including the right to be represented by counsel in cases involving juvenile delinquency.<sup>11</sup> The Court also acknowledged that many of the promises of the juvenile court system had not materialized. "[T]he child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>12</sup> In the following year, the Court rejected the traditional doctrinal supremacy of *parens patriae* in the historic case of *In re Gault*.<sup>13</sup> The Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>14</sup> The Court has not extended the right to counsel articulated in *In re Gault* to any other proceeding in the intervening years.<sup>15</sup> Many child advocates have argued, however, that the provision of legal counsel is the only effective means for securing legal rights in this country, and that "[i]ndependent counsel . . . should be required in any case where a child's interests are being adjudicated."<sup>16</sup>

Legislation expanded children's right to legal representation in court proceedings in the era following *In re Gault*. The most logical starting point for the further expansion of children's rights to counsel was in child protection proceedings where the child was alleged to be abused, dependent, or neglected. By 1973, however, only two states, Colorado and New York, required the appointment of a lawyer guardian *ad litem* ("GAL") in every case of child abuse.<sup>17</sup> In 1974, in a commendable bipartisan effort, the United States Congress responded to growing demands for legal representation of children in such proceedings by enacting the Child Abuse Prevention and Treatment Act ("CAPTA").<sup>18</sup> Hailed as a "milestone in the emergence of child rights

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10. 383 U.S. 541 (1966).

11. *Id.* at 557, 561-62.

12. *Id.* at 556. Because the Court ultimately decided the case on the basis of District of Columbia law, the due process discussions were *dicta*. They were, however, predictive of later cases.

13. 387 U.S. 1 (1967).

14. *Id.* at 13.

15. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (refusing to extend the due process protections in juvenile justice cases to mental health commitment proceedings).

16. Hillary Rodham, *Children Under the Law*, in *The Rights of Children*, 43 *Harv. Educ. Rev.* 487, 509 (1973).

17. *Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 249 (1973) (statement of Brian Fraser, Staff Attorney, National Center for the Prevention and Treatment of Child Abuse and Neglect).

18. Pub. L. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5106(h) (1988)).

in the eyes of the law,"<sup>19</sup> CAPTA established the National Center on Child Abuse and Neglect ("NCCAN"), which allocated federal grants to states for the development of child abuse and neglect programs. To qualify for federal grants prior to 1988, states were required to meet several conditions, including the appointment of GALs in every judicial proceeding involving an abused or neglected child.<sup>20</sup> "The rationale for the appointment of a GAL in civil and criminal abuse and neglect proceedings was that each child involved in judicial proceedings needs an independent voice to advocate for his/her 'best interests.'"<sup>21</sup> The federal mandate, however, did not require that these GALs be attorneys, and little of NCCAN's funding was directed to the cost of providing attorney representation for children in child protection proceedings.<sup>22</sup>

Within two years of the enactment of CAPTA, nineteen states required the appointment of GALs in child protection proceedings, three states permitted the appointment of such a representative, and eighteen states either required or permitted the appointment of GALs when certain conditions were met.<sup>23</sup> Although all states currently provide for the appointment of GALs in child protection proceedings either through statute, regulation, or court practice, an independent study by CSR, Inc., found that the congressional mandate for the GAL representation of abused and neglected children has not been met in an adequate fashion.<sup>24</sup> "[I]n some court systems there is a persistent disregard for Federal (and often State) legislative intent which is not warranted by occasional case circumstances or resource limitations."<sup>25</sup> In eight states, appointment of a GAL is discretionary or required only in some cases, resulting in a substantial number of abused and neglected children in these states not being represented.<sup>26</sup>

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19. U.S. Dep't of Health & Human Services, Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian *Ad Litem* 1-1 (1994) [hereinafter Final Report].

20. 42 U.S.C. § 5106a(b)(6) (1988).

21. Final Report, *supra* note 19, at 1-2.

22. Howard A. Davidson, *The Guardian Ad Litem: An Important Approach to the Protection of Children*, in *Protecting Children Through the Legal System* 836-37 (1981).

23. Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 Cal. W. L. Rev. 16, 42-43 & n.175 (1977).

24. Final Report, *supra* note 19, at 1-2; U.S. Dep't of Health & Human Services, National Study of Guardian *Ad Litem* Representation 41 (1990) [hereinafter National Study].

25. National Study, *supra* note 24, at 43.

26. *Id.* at 9.

In Arkansas, for example, appointment [of a GAL] is required only if custody is in question. Georgia, Louisiana, and Wisconsin require appointment only in termination of parental rights cases. Georgia law also mandates appointment when the child has no parent and Wisconsin requires representation when the child is removed from the home or in cases involving custody or abuse restraining orders. Indiana requires GAL appointment in cases of termination of parental rights, Fetal Alcohol Syndrome, drug-addicted

In those states requiring the appointment of GALs in child protection proceedings, many children still are not represented.<sup>27</sup>

The appointment of counsel for young people is even less frequent in other proceedings involving children. For example, few states provide for lawyers for children involved in custody contests.<sup>28</sup> Florida, Louisiana, Minnesota, Missouri, South Dakota, and Tennessee require the appointment of a GAL or an attorney where allegations of abuse or neglect are involved.<sup>29</sup> Alabama gives a court discretion to make an appointment when "the court determines that representation of the [minor's] interest otherwise would be inadequate."<sup>30</sup> Oregon provides for an appointment "if requested . . . by one or more of the children."<sup>31</sup> Vermont mandates an appointment whenever a child is called as a witness in custody or child support matters.<sup>32</sup> Wisconsin alone requires counsel for all children in contested custody proceedings.<sup>33</sup>

With the exception of those who have fought hard for the enactment of laws and the development of standards for the representation

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newborns and whenever an abuse or neglect petition is contested. In Colorado, GAL representation is mandatory in abuse cases but discretionary in neglect cases. In Delaware, Indiana, and Texas, appointment of a GAL is completely at the discretion of the presiding judge.<sup>4</sup>

*Id.*

27. *Id.* at 11-14. The authors cautioned readers to be careful in interpreting this data, because the estimates were based on best guesses and not precise counts, and the "respondents may have been biased to overestimate the proportion of children receiving GAL representation." *Id.* at 14. The reports were not independently verified. *Id.* Alabama, Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, and Wyoming report that 100% of abused and neglected children were represented. *Id.* at 11-13. Arizona, Arkansas, Colorado, Maine, Minnesota, Mississippi, North Carolina, Ohio, Texas, Utah, Virginia, and Wisconsin estimated that 90% or more of the abused and neglected children in courts were represented. *Id.* Georgia, Kentucky, Pennsylvania, South Dakota, Tennessee, and Washington estimated over 80% of the children were represented. *Id.* California and Indiana estimated that 78% of the children were represented, while Oregon estimated 69% of the children were represented. *Id.* at 11-12. Idaho estimated that 60% were represented, and Louisiana estimated 54% of the children being represented. *Id.* at 11. Florida estimated 49% of its abused and neglected children were being represented, and Nevada estimated 32%. *Id.* at 11-12. Delaware estimated the lowest number of abused and neglected children being represented, a mere 22%. *Id.* at 11.

28. American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings* 11 (1995) [hereinafter *Representing Children*].

29. Fla. Stat. Ann. § 61.401 (West Supp. 1996); Minn. Stat. Ann. § 518.165(2) (West 1990); Mo. Ann. Stat. § 452.423(1) (Vernon Supp. 1996); S.D. Codified Laws Ann. § 25-4-45.4 (1992); Tenn. Ct. R. Ann., R. Juv. Proc. 37(c) (1995).

30. Ala. Code § 26-2A-52 (1992).

31. Or. Rev. Stat. Ann. § 107.425(3) (1990).

32. Vt. Stat. Ann. tit. 15, § 594(a) (1989).

33. Wis. Stat. Ann. § 767.045(1)(a)(2) (West 1993 & Supp. 1995).



of children, the nation continues to be ambivalent regarding the provision of quality legal representation to children. Such ambivalence has contributed to role confusion for attorneys, GALs, and other child advocates, and, consequently, turmoil for their vulnerable child clients. This uncertainty was demonstrated when Congress first enacted CAPTA with an unfunded mandate for the appointment of GALs in child protection proceedings.<sup>34</sup> It was again illustrated by numerous federal and state court rulings granting GALs absolute immunity from civil rights suits and negligence claims.<sup>35</sup> Finally, the ambivalence was dramatically demonstrated during 1995, when Congress threatened substantially to reduce funding for CAPTA and eliminate the federal requirement for the appointment of GALs in child protection proceedings. On January 4, 1995, the new Congressional majority introduced the "Personal Responsibility Act,"<sup>36</sup> which purported to restore the American family, reduce illegitimacy, control welfare spending, and reduce welfare dependence. The bill, which was approved and passed on to the Senate in two short months, also would have substantially limited federal funding for AACWA, CAPTA, and other national child support programs.<sup>37</sup> By converting federal funding for foster care and abuse programs into block grants, states would be permitted to make substantial cuts in the services they provide to children and families. National programs and standards, including the requirement that GALs be appointed to represent children in child protection proceedings, would be eliminated.<sup>38</sup> The House of Representatives took this action in spite of decades of testimony on the increase in child abuse, neglect, and child fatality incidents, and

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34. Davidson, *supra* note 22, at 836-37.

35. See *infra* part VII.A.

36. H.R. 4, 104th Cong., 1st Sess. (1995).

37. Such programs include Title IV, Child Welfare Services, and Family Preservation and Support Services Programs ("SSI").

38. Miriam A. Rollin, *Legislative Update: Selected Provisions of H.R. 4*, 17 *The Guardian*, No. 2, at 16 (National Association of Counsel For Children, Spring 1995). Title II of H.R. 4 eliminated federal guarantees for foster care and adoption assistance for children who cannot live safely at home, replaced these programs, along with Family Preservation and Support, Independent Living, Child Abuse Prevention and Treatment, and several other programs for abused and neglected children (and those at risk of abuse and neglect) and substituted a Child Protection block grant to states, which resulted in an estimated cut of \$3.5 billion over five years. *Id.* The bill allowed states, after fiscal year 1997, to reduce state spending for these purposes. *Id.* It also allowed the states to transfer up to 30% of Child Protection Block Grant funds to other block grants, eliminated enforceable protections for children, including requirements that children get services before entering foster care, be placed in licensed foster homes and group homes, have case plans and periodic case reviews to ensure progress towards permanency, and have a GAL when they have been abused or neglected. *Id.* It further repealed the Multi-Ethnic Placement Act and specified that a state may not delay or deny placement of a child on the basis of race, color, or national origin (as did the 1994 Act), but it did not specify, as did the 1994 Act, that a state may consider the cultural, ethnic, or racial background of the child as one of the factors used to determine the best interests of the child. *Id.*

documented evidence of the states' child welfare systems' inability to provide quality rehabilitative services.<sup>39</sup> The Senate Finance Committee refused to include the Child Protection Block Grant in their version of the bill that was passed on August 8, 1995.<sup>40</sup> A joint conference committee must generate a compromise between the Senate and the House regarding the future funding of these programs.

## II. STUDIES OF THE EFFECTIVENESS OF LAWYERS FOR CHILDREN

Even where attorneys are provided for children in legal proceedings where their interests are involved, several empirical studies suggest that competent legal advocacy evades many children.<sup>41</sup> According to Howard A. Davidson, the question as to whether children should be provided legal representation in legal proceedings is far from settled, but it is clear that "children . . . often lack aggressive, appropriately trained, *competent* lawyer advocacy."<sup>42</sup> Sadly, Davidson's assessment appears to personify Melinda and Jose's juvenile and family court today. Two decades after Melinda entered the juvenile court system, a private attorney's description of that same juvenile court suggests that Melinda's experiences have not become a thing of the past.<sup>43</sup> This attorney complained that many of her colleagues still rarely talk to their child clients and that others openly brag about postponing and adjourning child protection and foster care hearings.<sup>44</sup> Some attorneys even increase their fees while unnecessarily delaying dispositions and consequently prolonging the court process for their child clients.<sup>45</sup> The attorney continued, "A number of these people are extremely skillful in finding any way possible to get a case adjourned because it's another \$125 in their pocket."<sup>46</sup>

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39. *Id.*

40. 141 Cong. Rec. S11,806 (daily ed. Aug. 8, 1995) (statement of Sen. Simpson).

41. See Final Report, *supra* note 19; National Study, *supra* note 24; A Call For Justice, *supra* note 2; Jane Knitzer & Merrill Sobie, Law Guardians in New York State: A Study of the Legal Representation of Children (1984) [hereinafter Law Guardians]; U.S. Dep't of Health & Human Services, CSR, Inc., National Evaluation of the Impact of Guardians Ad Litem in Child Abuse or Neglect Judicial Proceedings (1988) [hereinafter National Evaluation]; Robert F. Kelly & Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 Rutgers L. Rev. 1217, 1219 (1988) [hereinafter Kelly & Ramsey, *Monitoring*]; Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. Mich. J.L. Ref. 341 (1987) [hereinafter Duquette & Ramsey, *Effective Representation*].

42. Howard A. Davidson, *Foreword* to Ann M. Haralambie, *The Child's Attorney* xi (1993).

43. Interview by Ms. England with Gail Mazey, Private Attorney, in Detroit, Mich. (June 1, 1992).

44. *Id.*

45. *Id.*

46. *Id.*

Given the lack of clarity concerning the lawyer's role, the ambivalence regarding the existence of children's rights, and problems in the implementation of GAL and delinquency representation programs, it is not surprising to learn that evaluations of attorneys representing children either as independent counsel or as GALs "have not been favorable."<sup>47</sup> Researchers have identified both systemic and individual attorney problems that have contributed to the poor representation of children. Systemic issues leading to problems in the quality of representation of children in child protection proceedings include: the appointment of different attorneys for the same child at different hearings, delayed attorney appointments, unavailability of training or consultation for inexperienced attorneys,<sup>48</sup> low rate of compensation for attorneys, and shortage of attorneys willing to represent children.<sup>49</sup> Problems involving attorney performance have also been characterized to be: "inadequate investigation, lack of contact with the child client, lack of knowledge of the applicable law, lack of specialized training, and passivity with regard to both adjudication and disposition."<sup>50</sup>

A 1983 study of attorney GALs representing children in North Carolina child protection proceedings concluded that the attorneys "were not only ineffective but even tended to substantially delay a child's return home."<sup>51</sup> A survey of court records revealed that the attorneys spent an average of five hours per case, including court time. Rarely did they follow their cases after the dispositional hearing.<sup>52</sup> The GALs typically agreed with the local department of social services' recommendations in 88% of the cases, leading the authors to conclude that they were simply a presence, rather than an influence, in the courtroom.<sup>53</sup> The authors noted that "[r]epresentation seemed to be a

47. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1219 (footnote omitted).

48. *Id.*

49. National Study, *supra* note 24, at 14-15; *see also* National Evaluation, *supra* note 41, at 18 ("The major reasons for the poor performance of private attorneys appear to be lack of adequate compensation . . . . The private attorney GALs were minimally compensated, receiving far less than needed to make a living and often not paid for all hours they devoted to a case. Attorneys who depend on clients for their livelihood cannot devote sufficient time to their cases.")

50. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1219.

51. Robert F. Kelly & Sarah H. Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation under Conditions of High Judicial Intervention*, 21 J. Fam. L. 405, 407 (1982-83) [hereinafter Kelly & Ramsey, *Impact*]; *see also* Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1219.

52. Kelly & Ramsey, *Impact*, *supra* note 51, at 452.

53. *Id.*; *see also* Donald Duquette & Sarah H. Ramsey, *Using Lay Volunteers to Represent Children in Child Protection Court Proceedings*, 100 Child Abuse & Neglect 293, 297 (1986) [hereinafter Duquette & Ramsey, *Lay Volunteers*] (concluding that "a child's representative ought not agree with the social worker's recommendations without question. While maintaining a cooperative spirit, the representative should question the worker closely and extract the underlying basis for the caseworker's po-

token affair, a mere procedural requirement with attorneys serving as a rubber stamp for the recommendation of the department of social services. This kind of system gives the illusion that abused and neglected children have their own advocate when in fact they do not."<sup>54</sup>

The authors cited several reasons for the apparent failure of lawyers to effect change in the judicial system, including confusion by both judge and attorney as to the GAL's role, "lack of training, and an expectation that cases would take a minimal amount of the [lawyer's] time."<sup>55</sup> The authors hypothesized that judges may actually resent GALs for attempting to take on what they viewed as the traditional judicial role as the protector of the child's best interest.<sup>56</sup> As a result of this resentment, the researchers surmised that judges would ignore the GAL's recommendations.<sup>57</sup> In addition, the GALs typically received minimal compensation, \$50 per case, which provided little incentive to spend adequate time on individual cases.<sup>58</sup> The authors determined, however, that some GALs did have a positive impact on their child clients; experienced lawyers who worked longer hours, spoke to their clients, emphasized their role as negotiators, and "took a critical stance in relation to the court and its system of providing representation did a better job."<sup>59</sup> Unfortunately, the authors reported that "[t]he attorneys who knew how to and did represent their clients in a manner likely to make a difference constituted a distinct minority relative to those who did little or nothing in their role as the child's representative."<sup>60</sup>

Many of the problems identified in these studies were also illustrated in 1986 litigation brought against the Office of the Guardian ad Litem in Cook County, Illinois. In *G.S. v. Goodman*,<sup>61</sup> the petitioners

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sitions and recommendations. The advocate's conclusions should be reached independently.").

54. Kelly & Ramsey, *Impact*, *supra* note 51, at 453-54.

It seems fair to say that for the most part the attorneys were not expected to spend a lot of time on these cases, and in fact most did not. They accepted the prevailing, if implicit, definition of what constituted adequate representation—a definition which seems to have emphasized their presence as a matter of procedural rather than substantive importance.

*Id.* at 453.

55. *Id.* at 453.

56. *Id.* at 451.

57. *Id.*

58. *Id.* at 452.

59. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1239. Paradoxically, in their first report of this study, the authors also concluded that younger GALs and those with little experience were "best able to avoid a child's removal from home." Kelly & Ramsey, *Impact*, *supra* note 51, at 453.

60. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1239.

61. No. 86 CH 11721 (Cir. Ct. of Cook County, Ch. Div. Consent Degree entered July 13, 1988). The Complaint alleged violations of the Juvenile Court Act, the Illinois Constitution, and, pursuant to 42 U.S.C. § 1983, the Due Process Clause of the Fourteenth Amendment. The specific complaints included that the GAL office routinely: (1) failed to notify clients and their parents of their appointment; (2) permit-

alleged that the GALs appointed to represent abused and neglected children routinely failed to fulfill their litem duties to their child clients. Like Melinda, the former foster child discussed in the Introduction, the children's primary complaint was that they were either rarely or never given the opportunity to confer with their appointed GALs.<sup>62</sup> Four months after the suit was filed, the Guardian ad Litem Office ceased to exist and the Public Guardian's Office took over the representation of children in child protection proceedings.<sup>63</sup> Nearly two years later, the parties in the case reached a settlement that was approved by the court in June of 1988.<sup>64</sup>

In response to the growing evidence that children were not receiving adequate representation in child protection hearings, the federal government authorized several evaluations to determine the effectiveness of GAL representation. The first study, the National Evaluation of the Impact of Guardians *Ad Litem* in Child Abuse or Neglect Judicial Proceedings was conducted by CSR, Inc., and was published in June 1988.<sup>65</sup> The following year, in its reauthorization of CAPTA, Congress directed the National Center on Child Abuse and Neglect to commission another study of GAL programs.<sup>66</sup> This study also was

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ted proceedings to be conducted in their clients' absence by waiving their right to be present without authorization from the children; (3) allowed more than six months to pass before contacting their client (sometimes more than a year passed); (4) allowed individual GALs to carry caseloads in excess of 400; (5) delegated decision making as to whether a child should be brought to court to the caseworkers, opposing attorneys, or foster parents; (6) failed to advise their clients about the status of the case, discuss their legal options, initiate or conduct discovery, file motions of any sort, subpoena witnesses for hearings, prepare testimony, or cross-examine witnesses; (7) assisted the state in presenting the case against a parent, even when it was contrary to the child's objectives, and deferred to the state in making legal decisions affecting their clients; (8) failed to object to policies and practices that injured their clients, including placement in overcrowded, inhumane shelters; (9) allowed their professional judgment respecting the representation of their clients to be directed and regulated by a nonattorney; (10) failed to determine the "best interests" of their clients; (11) failed to develop a fiduciary relationship with their client; (12) failed to investigate the factual circumstances concerning their clients' cases; (13) failed to protect their client from harm; (14) failed to advise the court as to their clients' circumstances; (15) failed to pursue legal rights to benefits and services for their clients; and (16) failed to fulfill their duties as GAL for plaintiffs. Class Action Complaint at 14-17, *G.S. v. Goodman* (No. 86 CH 11721).

62. For example, *G.S.*, the lead plaintiff, was in a series of placements, including one foster home, four group homes, and one temporary shelter, starting in March 1985. Eighteen months later she still had not met her GAL. *M.S.* was removed from her mother in October 1984. She was placed in fifteen different foster homes and other placements. Two years later she still had not been notified that a GAL had been appointed to represent her. She had never come to court and had never met or spoken with her attorney.

63. Stipulation at 2-3, *Goodman* (No. 86 CH 11721).

64. Notice of Order Approving Settlement of Lawsuit at 2, *Goodman* (No. 86 CH 11721).

65. National Evaluation, *supra* note 41.

66. Child Abuse Prevention and Treatment Act, Pub. L. No. 100-294, 102 Stat. 102 (1988) (codified at 42 U.S.C. §§ 5101-5106 (1988 & Supp. V 1993)).

conducted by CSR, Inc., who subcontracted with the American Bar Association Center for Children and the Law.<sup>67</sup> The study was conducted and published in two phases. Phase I of the study, the National Study of Guardian *Ad Litem* Representation, furnished descriptive information on GAL programs and was published in October 1990.<sup>68</sup> Phase II of the study, reported in the Final Report on the Validation and Effectiveness Study of Legal Representation Through *Guardian Ad Litem*, evaluated the effectiveness of GAL legislation and validated Phase I findings.<sup>69</sup> Specifically, the Final Report's purpose was to: (1) identify how legal representation to abused and neglected children is provided in each state;<sup>70</sup> (2) evaluate the effectiveness of legal representation of children through the use of GALs and court appointed special advocates;<sup>71</sup> and (3) provide recommendations on how to improve the legal representation of children in child protection proceedings.<sup>72</sup> At least three program models of GAL representation were identified in each of the reports: (1) the private attorney model, (2) the staff attorney model, and (3) the Court Appointed Special Advocate ("CASA") model.<sup>73</sup>

Originally, the Final Report was intended to validate the findings of the National Evaluation; however, the authors reported that changes in the study design and the program due to the time lapse limited the comparability between the two. The National Evaluation relied on an objective analysis of judicial and social services records and outcome measures to evaluate and compare the three different forms of GAL representation.<sup>74</sup> The Final Report adopted a procedural definition of effectiveness, and relied more heavily on self-reports of the GALs, judges and social workers on how the GALs performed in various categories of activities.<sup>75</sup>

67. See National Study, *supra* note 24.

68. *Id.*

69. See Final Report, *supra* note 19.

70. *Id.* at 1-1.

71. *Id.* at 5-13 to 5-15.

72. *Id.* at 6-1.

73. *Id.* In the private attorney model, the court appoints an attorney in private practice to represent a child and provides the attorney compensation. *Id.* at 2-11. In the staff attorney model, the court or city employs a staff of attorneys either directly or through contracts with law firms, legal aid bureaus, or public defender's office. *Id.* In the CASA model, lay volunteers are trained to provide representation to children. Additional models include supervised law students and combinations of lay volunteers with a paid attorney. *Id.*; see also Duquette & Ramsey, *Effective Representation*, *supra* note 41, at 348-50 (describing the CASA model).

74. National Evaluation, *supra* note 41, at 2. Three data sources were used: (1) information gathered in interviews with juvenile court judges, state attorneys, and GALs; (2) "information extracted from local child welfare agency records and family court records, which provided quantitative measures of GAL performance and effectiveness"; and (3) "two 'network' interviews, at each site, which provided case studies of GAL activity." *Id.*

75. Final Report, *supra* note 19, at xiii. Data were collected from interviews with GALs, caseworkers, and judges, and from case record extractions. *Id.* Five roles were

Echoing the results of earlier empirical studies, both the Final Report and the National Evaluation identified numerous deficiencies in the representation of children in child protection proceedings. The Final Report also determined that a substantial number of GALs had no contact or limited contact with their child clients. Private attorneys were the primary transgressors, with almost thirty percent of the private attorneys reporting that they had no contact with their clients.<sup>76</sup> The data also indicated that most private attorneys did not sufficiently prepare their cases for the child protection proceedings.<sup>77</sup> The judges' responses regarding their assessments of GAL performance tended to support the guardian's self-reports, as the judges agreed that the private attorneys were least likely to be effective in performing their investigatory duties.<sup>78</sup>

Focusing on outcomes, the National Evaluation concluded that the CASA model of GAL representation produced the greatest number of outcomes in their child client's best interest:

The CASA models clearly excelled as a method of GAL representation. CASAs were highly rated by professional respondents and outshone the other models on the quantitative best interest outcome measure. The network interviews also revealed outstanding performances by the volunteers. The CASA's success appeared to be due to their intimate knowledge of the case. They conducted extensive investigations, monitored the case closely for its duration and developed good relationships with their child clients. CASAs were most effective in ensuring the family was receiving services that would lead to family reunification.<sup>79</sup>

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used to evaluate GAL effectiveness: "(1) factfinder and investigator, (2) legal representative, (3) case monitor, (4) mediator and negotiator; and (5) resource broker." *Id.* at xii; see also Donald N. Duquette, *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates* 36-37 (1990).

76. Final Report, *supra* note 19, at 5-5. Over 17% of the staff attorneys and nearly nine percent of the CASA volunteers also had no contact with their child clients. *Id.*

77. *Id.* at 5-13. Private attorneys reported that they extensively prepared in 42.3% of the cases, as compared to 71.2% of the CASA volunteers and over 60% of the staff attorneys. *Id.*

78. *Id.* at 5-15. Only 30% of the private attorneys were deemed effective in performing their investigation duties, while 53% of staff attorneys were effective and 72% of CASA volunteers were effective. *Id.*

79. National Evaluation, *supra* note 41, at 18.

There appears [sic] to be two reasons for the effectiveness of CASA models: personal motivation of the volunteers and low caseloads. CASAs are interested and committed to their work. They spend considerable time on their cases without any monetary compensation and are willing to remain involved over extended periods of time. The reasons they gave for their commitment in the network interviews—interest in children, the desire to improve the 'system' and make an impact on a child's life—suggest strong personal motivations.

*Id.*

The National Evaluation rated the private attorney model as the "weakest method" of providing GAL representation.<sup>80</sup>

Private attorneys generally did not develop independent assessments of the case or conduct adequate investigations, frequently did not meet with the child before or after court appearances, did not monitor cases, were not effective in helping the child receive services and did not assist in placement decisions. Thus, this model receives our lowest assessment.<sup>81</sup>

In spite of the similarities in these two studies' conclusions regarding private attorney performance in both performance and outcome categories, the authors of the Final Report determined that their findings did not support a conclusion that one model of GAL representation was more preferable than another.<sup>82</sup> Arguably, the disparate outcomes in these two studies could be explained by the use of different study designs, time lapse, and different subjects. These separate studies, however, arrived at different conclusions even though they reported similar findings within correspondingly similar categories of effectiveness.

The essentially negative thrust of the various evaluations of the effectiveness of lawyers as GALs or counsel for children in child protection proceedings—abuse, neglect, dependency, and termination of parental rights—has been echoed in delinquency and other juvenile or family court matters as well. Several studies have revealed that juveniles were represented by counsel in an even lower percentage of cases than were children in abuse and neglect cases,<sup>83</sup> in spite of the fact that the right to counsel in delinquency cases has been a constitutional mandate since the 1967 decision of *In re Gault*.<sup>84</sup> Professor Barry Feld has pointed out in a series of important articles that many juveniles go unrepresented in delinquency matters where the risk of loss of liberty is often quite high.<sup>85</sup> Feld found that in three of the six

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80. *Id.* at 15.

81. *Id.* at 15-18.

The major reasons for the poor performance of private attorneys appear to be lack of adequate compensation and lack of training. The private attorney GALs were minimally compensated, receiving far less than needed to make a living and often not paid for all hours they devoted to a case. Attorneys who depend on clients for their livelihood cannot devote sufficient time to their cases. Private attorneys were also the only GALs that were allowed to represent child clients with no training in their proper role. The only guidance they received were court instructions or statutes which only described the GAL role in general terms. Without training, many attorneys were not adequately informed about their role.

*Id.* at 18.

82. Final Report, *supra* note 19, at 6-20.

83. *See supra* note 27 (estimating the number of cases in which children were represented in child protection proceedings).

84. 387 U.S. 1 (1967).

85. Barry C. Feld, *Criminalizing the Juvenile Court: A Research Agenda for the 1990s*, in *Juvenile Justice and Public Policy: Toward a National Agenda* 59 (Ira M.



states where statistical data was available, less than half of the youths tried for delinquency or status offenses were represented by counsel.<sup>86</sup> Other studies that were completed shortly after the decision in *In re Gault* showed similarly low instances of advice of the right to counsel or the actual appointment of counsel,<sup>87</sup> and high incidence of lawyers doing practically nothing when they were appointed.<sup>88</sup> Similar studies on appointment rates were consistent with Feld's findings: Clarke and Koch found less than half of the youths represented in two sites in North Carolina,<sup>89</sup> Bortner discovered that only 41.8% of the juveniles had representation in a large, midwestern county,<sup>90</sup> Walter and Ostrander reported that 32% of the youngsters in a large north-central city were represented,<sup>91</sup> and Aday discovered low representation rates of 26.2% and 38.7% in two localities in a southeastern state.<sup>92</sup> Where counsel is provided, that attorney may have an incredibly burdensome caseload or be inexperienced and poorly trained.

Representation by counsel may even be a setting in which the disparate handling of children of color may be manifest. A study in Michigan revealed that African-American young people were visited less frequently in detention than white youth, and white juveniles reported a satisfaction factor of seven on a scale of ten compared with a 5.6 rating by African-American youth.<sup>93</sup> In one medium-sized city in the state, white youth reported an attorney satisfaction quotient of nine out of ten as contrasted with 3.9 for African-American youth.<sup>94</sup>

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Schwartz ed., 1992); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185 (1989); Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 Crime & Delinq. 393 (1988) [hereinafter Feld, *In re Gault Revisited*]; Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141 (1984).

86. Feld, *In re Gault Revisited*, *supra* note 85, at 416. The states surveyed were California, Minnesota, Nebraska, New York, North Dakota, and Pennsylvania, and the three states with the low representation rates were Minnesota (47.7%), Nebraska (52.7%), and North Dakota (37.5%). *Id.* at 401.

87. Norman Lefstein et al., *In Search of Juvenile Justice: Gault and Its Implementation*, 3 Law & Soc'y Rev. 491, 533 (1969).

88. Emily Zenoff Ferster & Thomas F. Courtless, *Pre-dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 Law & Soc'y Rev. 195, 207 (1972).

89. Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do lawyers Make a Difference?*, 14 Law & Soc'y Rev. 263, 297 (1980). The representations rates were 22.3% and 45.8% at the two locations in the state. *Id.*

90. M.A. Bortner, *Inside a Juvenile Court: The Tarnished Ideal of Individualized Justice* 139 (1982).

91. James D. Walter & Susan A. Ostrander, *An Observational Study of a Juvenile Court*, 33 Juv. & Fam. Ct. J. 53, 59 (1982).

92. David P. Aday, Jr., *Court Structure, Defense Attorney Use, and Juvenile Court Decisions*, 27 Soc. Q. 107, 112-14 (1986).

93. School of Criminal Justice, Michigan State University, *Disproportionate Representation in Juvenile Justice in Michigan: Examining the Influence of Race and Gender* 121 (1993).

94. *Id.*

The recently concluded study of the right to counsel by the Juvenile Justice Center of the American Bar Association, the Juvenile Law center, and the Youth Law Center for the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice opined "that large numbers of youth across the country appear in juvenile court without lawyers," that "high caseloads [was] the single most important barrier to effective representation," and that there were "substantial deficiencies in access to counsel and the quality of representation in juvenile court."<sup>95</sup> That study concluded at one point that "the assessment raised serious concerns that the interests of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless."<sup>96</sup>

A New York Bar Association study of lawyers appointed to represent children as law guardians in delinquency and other cases also concluded that many of them were ineffective.<sup>97</sup> In the New York study the researchers established several basic criteria of effectiveness: the law guardian must "meet the client, be minimally prepared, have some knowledge of the law and of possible dispositions, and be active on behalf of his or her client."<sup>98</sup> Using these criteria, the study determined that 45% of the overall observed representation was seriously inadequate or marginally inadequate, and it was effective in only 4% of the observed representation.<sup>99</sup> Nearly 50% of the transcripts revealed appealable errors made by the law guardians, or by the judges that went unchallenged.<sup>100</sup> Although law guardians were mandated by statute to represent their child client's rights or wishes, a mail-back survey revealed that they typically considered the child's best interest instead.<sup>101</sup> Also, the law guardians often described themselves as having little experience or training, and that they were unclear about their role.<sup>102</sup>

### III. TYPES OF LEGAL PROCEEDINGS IN WHICH CHILDREN MAY BE ENTITLED TO LEGAL REPRESENTATION AND DESIGNATION OF LEGAL REPRESENTATIVE

Lawyers may be called upon to represent children in a great variety of legal proceedings, including as counsel in delinquency or status offense proceedings, such as children in need of services or supervision ("CHINS" or "CINS"), children in need of assistance ("CINA"), juveniles in need of supervision or services ("JINS"), and the like, or

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95. A Call for Justice, *supra* note 2, at 7-8.

96. *Id.* at 6-7.

97. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1245.

98. Law Guardians, *supra* note 41, at 8.

99. *Id.*

100. *Id.* at 9.

101. *Id.* at 41.

102. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1246.

as counsel or GALs in child protection or termination of parental rights proceedings. Lawyers may also represent children in adoptions, or in custody or visitation cases, whether incidental to a divorce or annulment matter, or in *pendente lite* temporary determinations. Likewise, counsel may be assigned in child support or paternity matters. An attorney may also be appointed in a mental health commitment proceeding pursuant to statute, or in mental retardation certification matters. Similarly, a state statute may provide for the appointment of counsel or of a GAL in a judicial bypass proceeding in connection with an abortion. Although other types of civil proceedings are beyond the scope of this Article, a GAL may be appointed or retained in many different forms of civil litigation, such as a personal injury or wrongful death case, social security or workers compensation matters, and a whole range of probate proceedings.

#### IV. ROLE CONFUSION

The inconsistencies in the appointment of GALs for abused and neglected children are further exacerbated by the lack of clarity regarding the role and responsibilities of the GAL. Neither CAPTA, its implementing regulations, nor many state statutes have adequately defined the roles or responsibilities of GALs.<sup>103</sup> As one report has concluded:

These statutes generally charge the GAL with protecting, promoting, advocating, and/or representing the interests of the child. Most statutes specify representation of the 'best' interests of the child, regardless of the GAL's status as an attorney. Over one-half of the States stop at this general role for the GAL and offer no further guidance.<sup>104</sup>

The confusion over the GAL's role also is compounded by an ongoing debate within the legal profession regarding whether it is appropriate for attorneys to adopt the role of GAL when representing children.<sup>105</sup>

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103. 45 C.F.R. § 1340.14(g) (1994).

In every case involving an abused or neglected child which results in a judicial proceeding, the State must insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child.

*Id.*; see also Final Report, *supra* note 19, at 2-1 ("In general, the roles and responsibilities of the GAL have not been clearly defined.").

104. Final Report, *supra* note 19, at 2-1. The Final Report also provides a statutory survey of the treatment of roles and responsibilities of GALs. *Id.*

105. Emily Buss, "You're My What?": The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 *Fordham L. Rev.* 1699 (1996); Jinanne S. J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 *Boston B. J.* 6, 8 (1991); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *Fordham L. Rev.* 1655 (1996) [hereinafter *Empowerment*]; Katherine Hunt Federle, *Rights Flow Downhill*, 2 *Int'l J. Children's Rights* 343 (1994); Martin Guggenheim, *A Para-*

Regardless of the reasons for this lack of clarity over the GAL's role, according to the CSR study "[c]oherence and consistency of GAL representation clearly is the exception in most States."<sup>106</sup> Several commentators have suggested that this disparity and confusion regarding the role can lead to attorneys failing to fulfill their professional responsibilities, providing erroneous representation, and ultimately harming a child client.<sup>107</sup> In an attempt to provide guidance for attorneys and CASA volunteers, various legal organizations, child advocates, and courts have attempted to fill this gap by developing, publishing, or mandating practice standards and guidelines.

## V. ETHICAL CODE AND RULES CONSIDERATIONS

### A. *American Bar Association Model Code of Professional Responsibility*

The American Bar Association's Model Code of Professional Responsibility ("Code") was enacted in 1969 and was the model for the codes promulgated by most states until the adoption of the Model Rules of Professional Conduct ("Rules") in 1983.<sup>108</sup> It speaks only superficially to the representation of children and youth, and that just in Canon 7; which reads "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."<sup>109</sup> Ethical Consideration ("EC") 7-1 fleshes out the general mandate of Canon 7 by explicitly urging the zealous representation of the client within the bounds of legal and ethical constraints,<sup>110</sup> and EC 7-7 points out that decisions affecting the merits of the cause or substantially prejudicing the rights of the client are exclusively those of the client.<sup>111</sup> EC 7-11 offers the only possible guidance to the responsibilities of the lawyer representing a child by noting that such duties "may vary according to the intelligence, experience, mental condition or age of a client."<sup>112</sup> EC 7-12

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*digm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399 (1996) [hereinafter *Paradigm*]; Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423 (1993); Kelly & Ramsey, *Monitoring*, *supra* note 41; 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 (1996); Edward Sokolnicki, *The Attorney as Guardian Ad Litem For A Child in Connecticut*, 5 Conn. Prob. L.J. 237 (1991); Roy T. Stuckey, *Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 Fordham L. Rev. 1785 (1996); Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam. L.Q. 349 (1993).

106. National Study, *supra* note 24, at 9.

107. Kelly & Ramsey, *Impact*, *supra* note 51, at 411-16; Sokolnicki, *supra* note 30, at 240.

108. Professional Responsibility Standards, Rules and Statutes 235 (John S. Dzienkowski ed., 1995-96 ed.).

109. *Id.* at 299.

110. *Id.* at 299-301.

111. *Id.* at 304.

112. *Id.* at 306.

carries the caveat of 7-11 a step further by advising that a client who is incapable of making a considered judgment casts additional and unique responsibilities on an attorney, especially if there is no guardian or other representative to assist in making decisions.<sup>113</sup>

### B. *American Bar Association Model Rules of Professional Conduct*

The ABA's Model Rules of Professional Conduct were promulgated in 1983 to replace the earlier Code, and they have become the model for about two-thirds of the states, albeit with more substantial modifications at the state level than was the case with the Code.<sup>114</sup> The most pertinent rule to guide lawyer representation of children is Rule 1:14:

#### *Rule 1.14 Client Under a Disability*

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.<sup>115</sup>

The Comment to the rule expressly refers to the problem of representation when the client is a minor and thus "maintaining the ordinary client-lawyer relationship may not be possible in all respects."<sup>116</sup> Importantly, the Comment points out:

[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly

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113. *Id.* The ethical consideration states:

If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid.

*Id.* It goes on to admonish the lawyer, if compelled to make decisions for the client, to "act with care to safeguard and advance the interests of [the] client" while advising that the lawyer cannot perform acts or make decisions "which the law requires his client to perform or make," either by himself or through a personal representative.

*Id.*

114. *Id.* at 3.

115. *Id.* at 51.

116. *Id.* cmt.

those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.<sup>117</sup>

Other guidance offered advises that the lawyer has an "obligation to treat the client with attention and respect," that she "often must act as de facto guardian" if one does not exist, and should see to the "appointment [of a legal representative] where it would serve the client's best interests."<sup>118</sup> Little further advice or direction is given about the role of the lawyer in various proceedings or concerning the ascertainment of when the minor client requires other representation or substituted decision making.

### C. *The Duty to Provide Competent Representation.*

Both the Code and the Rules require that an attorney represent his or her client "competently," the former in Canon 6, reinforced by Disciplinary Rule ("DR") 6-101,<sup>119</sup> and the latter in the more expansive Rule 1.1, which asserts that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>120</sup> This would clearly be the most common ethical deficiency in lawyers who provide superficial or negligent representation to children and youth in various legal proceedings, and yet it is likely that few disciplinary actions are brought in any jurisdiction alleging ethical incompetency.

## VI. VARIOUS NATIONAL AND STATE STANDARDS FOR CHILD REPRESENTATION

A number of organizations and groups have attempted to develop standards governing the role and functioning of lawyers representing children, with the earliest being the Institute for Judicial Administration—American Bar Association ("IJA-ABA") Juvenile Justice Standards and other similar juvenile justice oriented guidelines developed in the late 1970s and early 1980s.

### A. *IJA-ABA Juvenile Justice Standards (1979)*

*Standard 3.1* of the Standards Relating to Counsel for Private Parties provides:

(a) Client's interests paramount.

However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Consideration of personal and professional advantage or convenience should not influence counsel's advice or performance.

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117. *Id.* at 51-52.

118. *Id.* at 52.

119. *Id.* at 297, 299.

120. *Id.* at 10.

- (b) Determination of client's interests.
  - (i) Generally.

In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.
  - (ii) Counsel for the juvenile.
    - [a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.
    - [b] Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel.
    - [c] In delinquency and in need of supervision proceedings, where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.
      - [1] Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian and the juvenile.
      - [2] Where a guardian ad litem has not been appointed, the attorney should ask that one be appointed.
      - [3] Where a guardian ad litem has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's), and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.<sup>121</sup>

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121. IJA-ABA Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties* 77-80 (1979).

B. *National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice (1980)*

The Standards for the Administration of Juvenile Justice issued by the National Advisory Committee provide, in pertinent part:

*Standard 3.134. Role of Counsel.* The principal duty of an attorney representing the state in a family court matter is to seek justice.

The principal duty of an attorney representing a private individual in a matter within the jurisdiction of the family court should be to represent zealously that individual's legitimate interests. Determination of the client's interest under the law should ordinarily remain the responsibility of the client.

If an attorney finds, after interviews and other investigation, that a client cannot understand the nature and consequences of the proceedings and is therefore unable rationally to determine his/her own interests in the proceedings, the attorney should bring that circumstance to the court's attention, ask that a guardian ad litem be appointed on the client's behalf, and advise the court of possible conflicts of interest between the client and any person under consideration for appointment as guardian ad litem.

The standards distinguish the role of the GAL from that of counsel.

*Standard 3.169. Appointment and Role of Guardian Ad Litem.* The family court should appoint a guardian ad litem to protect the rights and interests of a juvenile subject to its jurisdiction:

- a. Who is incapable of adequately comprehending the nature and consequences of and participating in the proceeding because of immaturity or a mental disability;
- b. Whose parent, guardian, or primary caretaker does not appear or has an adverse interest in the proceeding; or
- c. Whose interests otherwise require it.

The guardian ad litem should inquire thoroughly into all the circumstances that a careful and competent individual in the juvenile's position would in determining his/her interests in the proceeding.

The appointment should be made at the earliest feasible time after the need therefor has been shown. The court should inform guardians ad litem, upon appointment, of their responsibilities and powers.

Persons with interests adverse to those of the juvenile, or a public or private institution or agency having custody of the juvenile should not be appointed guardian ad litem.



C. *National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency (1976)*<sup>122</sup>

The Report of the Task Force on Juvenile Justice and Delinquency, in Standard 16.4 states:

A lawyer appointed to serve as guardian ad litem for a person subject to family court proceedings should inquire thoroughly into all circumstances that a careful and competent person in the ward's position would consider in determining his or her interests in the proceeding. When the client is the respondent, the guardian ordinarily should require proof of the facts necessary to sustain jurisdiction, and, if jurisdiction is sustained, take the position requiring the least intrusive intervention justified by the child's circumstances. In representing a child in Endangered Child, custody, or adoption proceedings, the guardian may limit his or her activity to presentation and examination of material evidence or may adopt the position requiring the least intrusive intervention justified by the child's circumstances.<sup>123</sup>

D. *The National Association of Counsel for Children, Guidelines for Guardians Ad Litem in Abuse and Neglect Cases (1987)*

These Guidelines do not seek to define the role of the GAL in such proceedings; rather, they describe the tasks which the attorney is to perform during the course of such representation.<sup>124</sup> They define a very proactive and comprehensive role for the lawyer.<sup>125</sup>

E. *American Academy of Matrimonial Lawyers, Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (1995)*<sup>126</sup>

These Standards initially state in *Standard 1.1* that counsel or GALs should not routinely be assigned in custody or visitation proceedings, but such appointment should be reserved for cases where "both parties request the appointment or the court finds after a hearing that appointment is necessary in light of the particular circumstances of the case."<sup>127</sup> *Standards 1.2* and *1.3* further propose that "a person should

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122. National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention: Report of the Task Force on Juvenile Justice and Delinquency Prevention (1976)*.

123. *Id.* at 557.

124. See Haralambie, *supra* note 42, at 283; National Association of Counsel for Children, *Deskbook and Directory* 199 (1995).

125. See Haralambie, *supra* note 42, at 283.

126. American Academy of Matrimonial Lawyers, *supra* note 28.

127. *Id.* at 1, 9-12 (Standard 1.1 & cmt.).

be trained in representation of children" before being eligible for an appointment and that the court "should specify in writing the tasks expected of the representative" whenever counsel or a GAL is assigned.<sup>128</sup> The Standards contemplate the appointment of a GAL who is not an attorney, but admonish that a lawyer who accepts a guardian appointment "should not combine the roles of counsel and guardian" except in compliance with other Standards.<sup>129</sup> The major body of the Standards focuses on the role of the attorney, which is based in large part on whether the child client is "impaired" or "unimpaired."<sup>130</sup> The representation of the "unimpaired" child is to be identical to the representation of an unimpaired adult client,<sup>131</sup> and such a child has "the right to set the goals of representation."<sup>132</sup> With the "impaired" child client, the lawyer is to maintain as normal a relationship as possible and should "not advocate a position with regard to the outcome of the proceeding or issues contested during the litigation."<sup>133</sup>

F. *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995).*<sup>134</sup>

The proposed ABA Standards in abuse and neglect cases urge the appointment of a "child's attorney" who will provide legal services in much the same way as would be provided an adult client.<sup>135</sup> This "child's attorney must advocate the child's articulated position."<sup>136</sup> This role is contrary to an appointed "guardian ad litem" who may be obligated "to protect the child's interests without being bound by the child's expressed preferences."<sup>137</sup>

G. *Various State Representation Standards for Lawyers Representing Children*

Several states have promulgated standards governing the appropriate function of GALs. New York was an early pioneer in this effort, with its Law Guardian Representation Standards, promulgated by the New York State Bar Association in 1988.<sup>138</sup> The Guardians Ad Litem

128. *Id.* at 1, 13-15 (Standard 1.2 & 1.3 & cmts.).

129. *Id.* at 4, 37 (Standard 3.1).

130. *Id.* at 2, 16-23 (Standards 2.1-2.2).

131. *Id.* at 2, 23 (Standard 2.3).

132. *Id.* at 2, 24 (Standard 2.4).

133. *Id.* at 3, 27 (Standard 2.7).

134. 29 Fam. L.Q. 375 (1995).

135. *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375, § A-1 (1995).

136. *Id.* at 376, § A-1 cmt.

137. *Id.* § A-2.

138. New York State Bar Association, Committee on Juvenile Justice and Child Welfare, *Law Guardian Representation Standards* (1988). The Standards applicable to delinquency matters may be found at pages 1-64, those relating to persons in need of supervision ("PINS") proceedings are at pages 65-123, and those governing child

Committees of the Justices of the Superior Court and Clerks of the Superior Court in New Hampshire also issued guidelines, and a number of states define the GAL's role statutorily.<sup>139</sup> *Standards of Practice for Guardians ad Litem* were subsequently developed by a joint GAL Standards Committee of the Colorado Bar Association Family Law Section and Juvenile Law Forum in 1991,<sup>140</sup> and Hawaii's Family Court has issued *Standards on Duties of a Guardian Ad Litem*, which are incorporated in the court's *Order Substituting Guardian Ad Litem*. The Virginia Supreme Court has adopted *Rule of Court 8:6* for the state's juvenile courts, which provides that:

When appointed for a child, the guardian ad litem shall vigorously represent the child fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.<sup>141</sup>

The same rule provides that in cases such as delinquency and status offenses in which the lawyer is "counsel," "the role of counsel for a child is the representation of the child's legitimate interests."<sup>142</sup>

## VI. WHAT SHOULD BE THE ROLE OF THE LAWYER FOR THE CHILD CLIENT?

There appear to be some clear trends developing in the delineation of roles for lawyers representing children. Most recent sets of Standards seem to advance a model of representation that is substantially identical to that for an unimpaired adult when the child is able to give direction to the attorney in performing tasks in the case. This model has the distinct advantage of consistency. Given the likely continuation of forces that militate against ideal representation—poor compensation, large caseloads, occasional recalcitrant judges, little in the way of investigative and other resources—a role that is familiar to the lawyer is more apt to be performed competently. Even with the conscientious lawyer, considerable confusion can arise if too many differ-

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protective proceedings, termination of parental rights, and foster care placement and review may be found at pages 124-237. *Id.*

139. For an excellent discussion of these various Standards and statutes, as well as some further helpful information, see Haralambie, *supra* note 42, at 239-88.

140. *Id.*

141. Va. R. Ct. 8:6 (1995). The Official Comment to the Rule indicates that the language is designed "to track that of the ABA Standards and Virginia case law." *Id.* A GAL in Virginia must be an attorney. Va. Code Ann. § 16.1-266.A (Michie 1988). Virginia Unauthorized Practice of Law (UPL) concludes that a nonlawyer expert on child custody and child welfare may not be appointed as a GAL. See Forty-Seventh Ann. Rep. of the Virginia State Bar (Adv. Op. No. 62, June 30, 1985).

142. Va. R. Ct. 8:6 (1995). The Official Comment to the Rule again states that the language is intended "to track that of the ABA Standards and Virginia case law." Va. R. Ct. 8:6. ABA Standard 3.1 addresses the determination of the child's "legitimate interests."

ent models of representation are advocated. Since the 1967 *In re Gault* decision,<sup>143</sup> the zealous advocate,<sup>144</sup> client empowerment, or client-centered<sup>145</sup> role has widely been accepted as the standard and exemplary approach.<sup>146</sup> Thus, attorneys accustomed to that role in delinquency matters can more readily fit into the same role in other child representation scenarios. In addition, it is more common for other participants in the legal process to have counsel clearly dedicated to an advocacy role, and the judge or jury will usually hear from other participants whose positions are being articulated by counsel to assist in the definition of the child's "best interests."

To place the burden of advocating the child's "best interests" on the lawyer for the child rather than merely advocating the child's wishes is to deny the child an effective voice in the proceedings. Of course most abused or neglected children wish to go back to the abusive home, but who will articulate the child's desires or wishes, however irrational it may seem to adults, if the lawyer for the minor will not do so? In child protection proceedings, lawyers should more frequently urge the appointment of an independent GAL, or a court-appointed special advocate, to articulate the child's "best interests" position, and seek to be only an advocate for what the child wants. Obviously, it is necessary to discriminate among the child clients who are verbal and unimpaired, those who are verbal but impaired, and those who are pre-verbal, such as infants or older children with other disabilities. The attorney, however, should stick primarily to an advocacy model and at least initiate representation premised on a presumption that the child is competent and needs autonomy and empowerment.<sup>147</sup> The lawyer appointed should serve as the child's legal representative, or attorney/champion,<sup>148</sup> and leave the role of the GAL or the advocate for the child's "best interests" to another person who is specially trained in child development or child psychology, or who is serving as a CASA.<sup>149</sup>

Lawyers, and lay or expert GALs or CASAs, need much more training; it is a sad commentary on the commitment of the traditional

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143. 387 U.S. 1 (1967). See *supra* notes 13-16 (discussing *In re Gault*).

144. See, e.g., Model Code of Professional Responsibility Canon 7.

145. See, e.g., Federle, *Empowerment*, *supra* note 105, at 1658-63.

146. 1 Randy Hertz et al., Trial Manual for Defense Attorneys in Juvenile Court 13-14 (1991); Guggenheim, *Paradigm*, *supra* note 105, at 1422-23.

147. Peters, *supra* note 105, at 1519-21; Federle, *Empowerment*, *supra* note 105, at 1661-63.

148. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301, 1301-02 (1996).

149. Indeed, there is much to be said for the particular competency of the Court-Appointed Special Advocate to perform better in that role than an attorney. See *supra* text accompanying notes 79-82; see also Rebecca Hertz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 338-41 (1993) (noting that lay volunteers are more effective than attorneys as advocates for children).

legal system to children that CASA volunteers probably receive more and better education in representing children and their interests than do the lawyers. The many recent sets of standards providing for training and education prior to being eligible for appointment must be heeded as seriously as the definition of roles.<sup>150</sup> A great deal more focus needs to be placed on the interviewing and counseling of children as a central part of the lawyer's role in representing children.<sup>151</sup> Lawyers also need to be sensitized about child-centered decision making,<sup>152</sup> child development,<sup>153</sup> and family dynamics,<sup>154</sup> so they will not grudgingly trudge off to so-called "touchy, feely" continuing legal education programs, grumbling all the time.

Once the duties of attorneys have been defined with some relative degree of precision, the more difficult task that remains are the monitoring and accountability functions in policing representation of children. This takes us inevitably beyond the intellectual exercise of role definition into the more tenuous task of effective implementation.

## VII. ENFORCEMENT OF THE COMPETENCY OF LAWYERS FOR CHILDREN

### A. *Lawsuits and the Immunity Doctrine*

Federal and state courts have generally ruled against the civil liability of GALs and counsel in cases involving the representation of children in a variety of hearings, including child protection proceedings. Like with judges, witnesses, police officers, prosecutors, probation officers, and social workers, most federal courts have accorded lawyers for children, especially GALs, quasi-judicial status and held them to be immune from civil liability under 42 United States Code § 1983. In *Kurzawa v. Mueller*,<sup>155</sup> for example, the Sixth Circuit Court of Appeals held that a GAL acting in the best interests of a child is clearly within the judicial process and is entitled to immunity.<sup>156</sup> The court stated: "A guardian ad litem must . . . be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. . . . A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in judicial pro-

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150. See Va. Code Ann. § 16.1-266.1 (Cum. Supp. 1995) (requiring the development of training for lawyers who serve as GALs representing children in Virginia, and mandating the maintenance of a list of qualified attorneys).

151. See Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 Creighton L. Rev. 1369 (1985).

152. *Id.* at 1423-25.

153. See *id.* at 1371-75 (providing an overview of child development within the context of counseling a child).

154. *Id.* at 1415-17.

155. 732 F.2d 1456 (6th Cir. 1984).

156. *Id.* at 1458.

ceedings."<sup>157</sup> In *Myers v. Morris*,<sup>158</sup> the Eighth Circuit Court of Appeals similarly held that "nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions,"<sup>159</sup> such as when questioning children, testifying in court, and providing reports and recommendations to the family court.<sup>160</sup> The court reasoned that GALs were appointed by the court "to fulfill quasi-judicial responsibilities under court direction . . . [pursuant to] its statutory authority to seek the assistance of experts,"<sup>161</sup> therefore they should be accorded the same judicial protection. The court in *Myers* also stated in dicta, however, that if a GAL's conduct were to fall outside the scope of their official duties, the guardian would not be protected by absolute immunity.<sup>162</sup> Other cases have ruled the same way.<sup>163</sup>

Some other federal courts have refused to grant absolute or qualified immunity to GALs when the court determined that their actions were not within the scope of their judicial duties. In *Lenz v. Winburn*,<sup>164</sup> the court held that the GAL was not entitled to either absolute or qualified immunity when engaged in activities outside the scope of her authority.<sup>165</sup> In *Lenz*, the GAL had accompanied a social worker to the home of a child client, assisted in removing the child's

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157. *Id.* In the case, John Kurzawa, who was blind, and Frances, his visually impaired wife, had sought assistance from the Department of Social Services with their son Cass. *Id.* at 1456. Eventually, the Department successfully petitioned for the termination of the Kurzawa's parental rights. *Id.* at 1457. The Michigan Court of Appeals, however, reversed the Probate Court's decision, and Cass was returned to his parents. *Id.* The Kurzawas brought a federal civil rights action, a negligence claim, and a pendent state claim against the Department, a psychiatrist, a psychologist, and the GAL appointed to represent the best interests of Cass. *Id.* They brought suit pursuant to a Michigan statute which prohibited discrimination against the handicapped. *Id.*

158. 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987). This case involved the infamous child sexual abuse investigation in Jordan, Minnesota. *Id.* at 1440. The investigation began with the arrest of one individual who later pleaded guilty to multiple counts of child sexual abuse. *Id.* at 1441. Later, over 13 individuals, including many parents and neighbors of the children, were charged with child sexual abuse. *Id.* Only one case went to trial and the defendant was acquitted. *Id.* All of the other charges were thereafter dismissed. *Id.* Many of the defendants in those cases brought civil rights lawsuits against the prosecutor, therapists, social workers, and GALs. *Id.*

159. *Id.* at 1466-67.

160. *Id.*; *see also* McCuen v. Polk County, 893 F.2d 172, 174 (8th Cir. 1990) (finding that GAL's actions in preparing and signing a motion for an order to stay a proceeding were entitled to absolute immunity).

161. *Myers*, 810 F.2d at 1467.

162. *Id.* at 1467.

163. *See, e.g.*, Gardner v. Parson, 874 F.2d 131, 146 (3d Cir. 1989) (holding that GALs are absolutely immune when acting as part of the judicial process).

164. 51 F.3d 1540 (11th Cir. 1995). Although the GAL had raised absolute immunity as a defense in the trial court, she expressly waived it in the appellate court. *Id.* at 1547 n.5.

165. *Id.* at 1547.

personal belongings, and provided comfort to the child while she was being removed from her father's and grandparent's home.<sup>166</sup> In making its determination that the GAL was not immune, the court relied upon the Florida Guardian Ad Litem Program Training Manual, which excluded nonjudicially related activities from being within the role of the GAL.<sup>167</sup> The court concluded that although the GAL might "have acted as a compassionate and decent person in deciding to provide support and a 'neutral presence,'" she acted outside the scope of her authority as the child's GAL.<sup>168</sup> Likewise, in *Oltremari v. Kansas Social & Rehabilitative Service*,<sup>169</sup> a child brought suit against her GAL alleging that he had acted outside the scope of his duties and had acted to her detriment, rather than her best interest, by 1) conspiring with another attorney to recommend a custody battle to cover the dysfunctional handling of her case, 2) attempting to influence the judge, 3) threatening and intimidating witnesses with lawsuits, 4) stealing her mother's child support, 5) stopping her therapy, and 6) engaging in gender discrimination.<sup>170</sup> The magistrate judge recommended that the court overrule the GAL's motion to dismiss because he "ha[d] not shown that he acted solely within the scope of his duties as guardian ad litem. Nor ha[d] he shown that he conducted himself non-maliciously and in good faith. Absent such showings, the immunity afforded GALs does not attach."<sup>171</sup> In *Kohl v. Murphy*<sup>172</sup> the court held that the GAL was not automatically entitled to immunity when he engaged in allegedly nonjudicial acts such as "interviews with the Cable News Network (CNN), appearing on television interview shows, and writing an article for Good Housekeeping magazine."<sup>173</sup>

Recently, the Fourth Circuit Court of Appeals held that a GAL was entitled to absolute immunity from a § 1983 claim, but could be held liable to a child client under South Carolina common law. In *Fleming v. Asbill*,<sup>174</sup> the GAL was charged with lying to a judge in open court. The guardian had filed an *ex parte* affidavit requesting a "pick-up" order to permit authorities to seize a child client from school for delivery to his grandparents, allegedly lying by saying she did not know the whereabouts of the child's father.<sup>175</sup> Although the court held she was absolutely immune from civil liability under federal law,<sup>176</sup> it refused

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166. *Id.* at 1543-44.

167. *Id.* at 1546.

168. *Id.* at 1547.

169. 871 F. Supp. 1331 (D. Kan. 1994).

170. *Id.* at 1346.

171. *Id.* at 1347.

172. 767 F. Supp. 895 (N.D. Ill. 1991).

173. *Id.* at 901.

174. 42 F.3d 886 (4th Cir. 1994).

175. *Id.* at 888.

176. *Id.* at 889.

to dismiss the child's common law claims for negligence against the guardian under state law.<sup>177</sup>

Because the empirical evidence clearly demonstrates that not all GALs are adequately performing their duties, some commentators suggest that providing near blanket immunity to lawyers undermines the protection of child clients. One respected writer has observed that:

By following this immunity doctrine, the court assumes that guardians *ad litem* are doing their jobs or that appropriate mechanisms exist to challenge them when they do not. . . .

In some cases, the child's attorney does not do a competent job in representing the child's interests. Immunity may become a way of shielding guardians *ad litem* from accountability, even to their own clients.<sup>178</sup>

### B. *Monitoring Representation by Judges*

Some have asserted that judicial oversight of GALs and attorneys is sufficient to assure that they will perform their duties adequately. In the event of poor performance, judges have the power to remove a GAL or court-appointed attorney from the case.<sup>179</sup> The empirical evidence and anecdotes, however, suggest that they rarely receive adequate supervision from judges. The Final Report on GALs completed for the United States Department of Health and Human Services identified an apparent lack of accountability and quality control of guardians. Of the private attorneys questioned, seventy percent reported that they were not supervised.<sup>180</sup> Apparently, the attorneys did not perceive the judges' presence in the courtroom as supervision. Some commentators maintain that judges seldom take action to penalize "incompetent [lawyer] performance."<sup>181</sup> Others have offered reasons for the lack of forcible response by the court to apparent attorney incompetency in child protection proceedings.

The trial judge . . . may empathize with the lawyer who does not want to commit a large number of hours to a case at a below-market rate. The judge also may be concerned with the court's caseload

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177. *Id.* at 890. Under state law, a paid GAL could be held liable to a child for negligent acts during a custody dispute if those acts caused the child damage. The circuit court expressed reluctance in applying such a rule to this case, referring to it as contrary to the trend in other jurisdictions and of debatable wisdom. *Id.*

178. Haralambie, *supra* note 42, at 43-44 (citations omitted).

179. *See, e.g., In re Jaeger's Will*, 259 N.W. 842, 846 (Wis. 1935) (stating that the court should relieve a GAL who cannot perform his duties); *Spotts v. Spotts*, 55 S.W.2d 977, 983 (Mo. 1932) (holding that a GAL is an officer of the court and subject to its control when he fails in his duties); *Parks v. Barnes*, 191 S.W. 447, 450 (Ky. 1917) (noting that it is the court's duty to remove a GAL when he is ill-suited to represent the interests of the child).

180. Final Report, *supra* note 19, at 4-11.

181. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1224.



and with the costs of the program that pays the attorney. . . . [T]he judge may also feel that little harm can be done since it is the judge's decision, based on the principle of the best interests of the child, that ultimately results in the case's disposition.<sup>182</sup>

Judges, or their designees, also may be unaware of their authority to remove an incompetent attorney or GAL. Judges may be aware that lawyers "are not prepared or knowledgeable, but continue to appoint them anyway because . . . there are no formalized standards for GAL performance."<sup>183</sup> Judges and lawyers alike also are plagued with systemic problems, such as huge dockets and caseloads and inadequate resources.<sup>184</sup>

Some courts, however, not only have established specific standards of performance for GAL performance, but have imprinted those standards on the back of each appointment order to assure that the attorneys comply with them.<sup>185</sup> Other judges have reported that they do not tolerate unprepared or ineffective attorneys or GALs, and they will be reprimanded, removed, or not be reappointed.<sup>186</sup> In the case of *In the Interest of MFB*,<sup>187</sup> the Supreme Court of Wyoming, *sua sponte*, admonished a GAL for his poor performance and failure to participate in the appeal on his child client's behalf. The court said,

[W]e would remind all members of the bar serving in this capacity that the guardian ad litem fulfills an essential duty. . . . [T]he guardian ad litem must act with reasonable diligence in the role of an advocate for the child . . . and participate as necessary in all phases of the process, including subsequent appeals, to insure the rights of the client are protected.<sup>188</sup>

The Iowa Court of Appeals, in *In the Interest of J.V. and C.W., Jr.*,<sup>189</sup> publicly reprimanded a GAL who was alleged to have provided ineffective assistance to his child clients. The parents, whose parental rights had been terminated, claimed "the [GAL] had failed to act independently and had simply adopted the State's position."<sup>190</sup> The court concluded "[i]t simply is not sufficient for a guardian ad litem to sit back, review the record and the arguments, and arrive at a decision. . . . Otherwise, the guardian ad litem is merely perfunctory, serv-

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182. *Id.* at 1224-25.

183. Shari F. Shink, *The Justice System: It Has Forgotten the Children*, Colo. Law. 689, 690 (Apr. 1991).

184. *Id.*

185. *See, e.g.*, State of Hawaii, Family Court, First Circuit, Order Substituting Guardian *Ad Litem*; Jefferson County, Kentucky, Family Court, Division Four, Order Appointing Guardian *Ad Litem*.

186. Interviews by Ms. England over a period of time with Michigan and Virginia juvenile court judges.

187. 860 P.2d 1140 (Wyo. 1993).

188. *Id.* at 1152.

189. 464 N.W.2d 887 (Iowa 1991).

190. *Id.* at 891.

ing only to fulfill arcane, if not empty, requirements of due process."<sup>191</sup>

Unfortunately, many juvenile court judges are unable to take effective action to remove ineffectual GALs, especially in the rural areas. Because of the low pay, attorneys are often unwilling to accept appointments as GALs. Therefore, judges do not have the luxury of dismissing attorneys because replacements would be difficult to find. Some commentators suggest that "[i]f the rate of compensation is so low that the attorneys view the time spent on the case as a charitable contribution, they might welcome non-appointment."<sup>192</sup> The Iowa court reported in *In re J.V.*<sup>193</sup> that all of the appointed counsel in the case had candidly discussed the pervasive problem in providing counsel for minor children involved in child protection proceedings.<sup>194</sup>

Two commentators also suggest that in addition to "a market incentive that acts against competence,"<sup>195</sup> some courts may decline to appoint "active lawyers because they will challenge the way the court usually handles cases and take up additional court time and resources."<sup>196</sup> The 1983 North Carolina study of attorneys for children in child protection proceedings also demonstrates this concern regarding attorney independence.<sup>197</sup> The authors concluded that younger, inexperienced attorneys were more able to take critical and independent positions from the court.<sup>198</sup> These findings suggested to the authors that a prerequisite for an effective representation system would include institutional structures which provided autonomy and independence for lawyers who represent children in child protection proceedings.<sup>199</sup> The same issues are presented in delinquency cases where lawyers say that they are sometimes reluctant to file motions because "[j]udges don't like it when you file motions."<sup>200</sup> A recent major study of legal representation in delinquency cases revealed that some attorneys were reluctant to challenge judges and that they "opted for a pleasant courtroom experience by keeping in the court's good graces."<sup>201</sup>

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191. *Id.* at 893.

192. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1221.

193. 464 N.W.2d 887 (Iowa Ct. App. 1991).

194. *Id.* at 891; *see also* *Cumbe v. Cumbe*, 139 S.E.2d 477, 480 (S.C. 1964) (stating that it was apparent that the GAL made no effort whatever to protect the interest of the minors).

195. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1221.

196. *Id.*

197. Kelly & Ramsey, *Impact*, *supra* note 51, at 438-39; Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1232-40.

198. Kelly & Ramsey, *Impact*, *supra* note 51, at 438-39; *see also* Bortner, *supra* note 90, at 140-43 (comparing legal representation by a public defender with that of a private attorney).

199. Kelly & Ramsey, *Impact*, *supra* note 51, at 453.

200. A Call for Justice, *supra* note 2, at 32.

201. *Id.* at 52.

### C. Policing by Parents and by Child Clients

Although parents can ask a court to terminate a GAL's representation of their child, and they can appeal a judge's decision, as was discussed above, many of the parents involved in child protection proceedings are unable to assert effectively their own rights due to their lack of sophistication and impoverished living conditions.<sup>202</sup> Many of these parents have become abusive or negligent because of their own experience with poor parenting, severe personal problems, inability to constructively problem solve, or deal with serious situational crises. These parents typically acquiesce to social service and juvenile court intervention rather than challenge the quality of the legal representation their children receive or the judges' decisions. In the event parents attempt to challenge a GAL's appointment or a judicial decision, it is unlikely that they will be successful. Courts generally will presume, in the absence of specific allegations, that the GAL was attentive to his or her duties rather than negligent.<sup>203</sup> This presumption may control even when the GAL was not present in the courtroom at the time of trial.<sup>204</sup>

If children were permitted to initiate actions on their own behalf they could serve as a possible safeguard against ineffective GAL representation. "Many of the problems created by unresponsive caseworkers and guardians ad litem may be avoided by giving children a formal, independent means of initiating . . . proceedings."<sup>205</sup> Other commentators acknowledge, however, that children have proven to be ineffective in addressing inadequate representation.<sup>206</sup>

Unfortunately, the client in child protection proceedings suffers from major limitations with regard to control over the attorney. First, the child client may lack the knowledge necessary to assess the lawyer's performance, to determine that it is inadequate and to know how to request a new lawyer. Second, since the lawyer's employment typically is controlled by the appointing agency, the market incentive for the attorney primarily is to perform according to the agency's expectations, rather than to the client's.<sup>207</sup>

Even if children possessed the ability to both recognize ineffective representation and take action, they can be thwarted by judicial holdings that prohibit children from initiating court proceedings on their

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202. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1220 (arguing that control mechanisms have been ineffective in child abuse cases due to the low status of cases involving powerless and unsophisticated clients).

203. *In re Adoption of P.J.K.*, 359 S.W.2d 360, 367-68 (Mo. Ct. App. 1962).

204. *See Meyers v. Smith*, 349 S.W.2d 412, 414 (Mo. Ct. App. 1961).

205. Christina D. Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 Cornell L. Rev. 1200, 1228 (1994) (footnote omitted).

206. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1223; Haralambie, *supra* note 42, at 44.

207. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1220 (footnotes omitted).

own behalf, or by GALs who oppose their child clients' requests for independent counsel. In *Kingsley v. Kingsley*,<sup>208</sup> the court denied a child the right independently to initiate a termination of parental rights proceeding against his mother.<sup>209</sup> The court in *In re A.W.*,<sup>210</sup> however, did permit a teenage girl's request in a sexual abuse case for the appointment of independent counsel when the child's wishes conflicted with what her public guardian represented to be in her "best interests."<sup>211</sup> Because children are not able to address effectively the problems of inadequate representation, some commentators suggest that perhaps they can be addressed best through professional associations and standards.<sup>212</sup>

#### D. *The Court's Ability to Reject Recommendations*

Another possible safeguard resides in the fact that the court is not bound by, and need not accept, the recommendations of the GAL. This possible safeguard, however, is negated by the empirical evidence discussed above that suggests that GALs, especially private attorneys, rarely make meaningful recommendations to the court. Often the GAL's recommendations merely parrot the department of social service's recommendations in abuse and neglect cases, when they should be challenging the department's recommendations vigorously. Studies also have shown that due to large dockets, inadequate time, and scarce resources, a significant number of child protection proceedings are decided during quick and brief hearings.<sup>213</sup> It is of no consequence to the child that a GAL's recommendation can be ignored if it occurs in the context of a brief inattentive hearing. This inability to provide close attention to children involved in child protection proceedings can have tragic results.

In one urban juvenile court, a court official, the parent's attorney, the child's independent counsel, and a social services attorney all agreed after a brief hearing to return a three-month-old baby to his mother's care.<sup>214</sup> The baby, who had suffered a fracture to his right leg and had evidence of old fractures to his arm and shoulder, was returned to his mother even though the hospital staff, after witnessing the mother shaking and throwing the baby into his hospital crib, sus-

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208. 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

209. *Id.* at 790.

210. 618 N.E.2d 729 (Ill. App. Ct. 1993). The public guardian had appealed a lower court's ruling granting the girl's request to substitute "guardian ad litem" representation for independent counsel. The public guardian believed that the girl was manipulated into making the request. *Id.* at 733.

211. *Id.* at 734.

212. Haralambie, *supra* note 42, at 44.

213. Duquette & Ramsey, *Lay Volunteers*, *supra* note 53, at 348.

214. Conversation by Ms. England during February 1992, with a supervising attorney who wished to remain anonymous.

pected child abuse.<sup>215</sup> A psychologist also stated unequivocally in his report that, because the mother was incapable of caring for him, the baby should not be returned home.<sup>216</sup> Although the court and the attorneys later stated that the psychologist's report had not been made available to them, a supervising staff attorney maintained that all of the parties, as well as the court, had copies of the psychologist's report.<sup>217</sup> According to this supervisor, the report was either overlooked in the rush to expedite a busy docket or ignored.<sup>218</sup> Shortly after the baby was returned to his mother, protective services case workers were unable to locate him.<sup>219</sup> Several years later he is still missing and presumed to be dead.<sup>220</sup>

### E. *Professional Ethics as a Safeguard*

Although attorney activities are regulated by the ABA Model Code of Professional Responsibility and the Model Rules of Professional Responsibility, commentators have observed that neither the Code nor the Rules adequately address the special problems of child advocates.<sup>221</sup> Even the Juvenile Justice Standards Relating to Counsel for Private Parties are said not to "address with adequate specificity the practical conflicts of interest and ethical questions that regularly arise in the context of representing children, particularly in cases related to child abuse and neglect."<sup>222</sup> Even if the regulations provided clear guidelines for the representation of children, some experts suggest adequate representation of children would continue to be elusive. They contend that empirical studies and case examples have demonstrated that individual members of the bar are frequently unable to regulate themselves, and that a "flexible code of ethics" appears to "justify a less than competent performance in representation of children, since attorneys in these cases typically view themselves as underpaid."<sup>223</sup>

Commentators have suggested that there is a clear need for additional regulations in the representation of poor and powerless clients.<sup>224</sup> Given the inability of the bar, the judiciary, and clients to monitor effectively the performance of attorneys in child protection proceedings, these commentators argue for the establishment of monitoring programs to evaluate the quality of child representation.<sup>225</sup> As Kelly and Ramsey have urged, "A well-designed monitoring and eval-

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Haralambie, *supra* note 42, at 24.

222. Davidson, *supra* note 42, at xiii.

223. Kelly & Ramsey, *Monitoring*, *supra* note 41, at 1223.

224. *Id.* at 1218.

225. *Id.* at 1225.

uation program can serve not only to deter inadequate work, but also can be extremely useful to attorneys because the development of such a system demands that standards for attorney performance and program goals be clearly defined and readily accessible."<sup>226</sup>

### CONCLUSION

Although many attorneys do provide aggressive and effective advocacy on behalf of their child clients in court proceedings, the numbers of children who are not provided quality representation are substantial. Effective and aggressive representation of children in legal proceedings is "within our reach."<sup>227</sup> Many child advocates, judges, attorneys, probation officers, and CASA volunteers already know what works. The improvement of the quality of representation of children, however, must include both a systemic and an individual approach. A systemic approach must include the identification and enforcement of clearly defined roles and standards for the representation of children. The Fordham Conference on Ethical Issues in the Representation of Children, and the products of its deliberations contained in these pages, may assist in defining those roles and standards more precisely and carefully. The Conference Recommendations, when combined with other standards and a plethora of well-designed training programs, may serve to facilitate judges, lawyers, and other child advocates in assuring that children are provided proper and dedicated representation. Rather than "reinventing the wheel," they merely need to select one that best meets their community's needs.

Many commentators would urge that a particular role (advocate counsel over GAL, or attorney over CASA volunteer) should be adopted or that a particular set of standards should be implemented uniformly throughout the country. In the absence of a federal prescription, however, and given that a substantial amount of representation of children currently occurs within a vacuum, the prompt implementation of well-chosen roles and standards should take precedence over the arduous, if not impossible, task of attainment of uniformity. Once the roles and accompanying standards are elected, monitoring devices, either through the courts, bar associations, or other review mechanisms to assure the proper implementation of these roles and standards must be implemented. Finally, those factors that contribute to unmanageable dockets, large caseloads, and inadequate reimbursement of legal counsel and GALs must be identified and remedied. Obviously, budget constraints and legislators' reluctance to allocate funds to legal services for children will be a major

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226. *Id.* Kelly & Ramsey urge that to be effective the monitoring and evaluation programs should be inclusive and provide sanctions and control. *Id.* The system should be self-starting, rather than simply triggered by referrals. *Id.* at 1225-31.

227. Lisbeth B. Schorr & Daniel Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* (1989).

barrier. Without adequate resources to support the implementation of these roles and standards, however, representation of children in legal proceedings, often designed for their protection, is unlikely to improve.

Individual attorneys, bar associations, CASA volunteers, and other child advocates also should contribute to the improvement of child representation in court proceedings. First, these individuals and groups must make a personal and professional commitment to provide children with quality representation. In particular, private attorneys should not accept appointments if they are not willing or able to devote the necessary time to perform their duties properly. Staff attorneys should challenge their agency structures that permit excessive caseloads, making it impossible to provide individual children effective legal representation. CASA volunteers and other child advocates should only agree to volunteer if they can make a substantial commitment of time to their child clients. All of these individuals should personally assure that they attend the necessary training programs to guarantee that they are knowledgeable and qualified to perform their legal duties.

The American Bar Association, in its landmark report *America's Children at Risk: A National Agenda for Legal Action*,<sup>228</sup> stated that which may be obvious but is seldom observed:

Even when children are represented, the representation they receive is sometimes inadequate.

. . . Children's cases are often 'processed,' not advocated, and too frequently children's interests are poorly represented. In the past decades, courts have been increasingly inundated with cases concerning family matters; rarely have resources for competent representation or services grown to meet the expanded needs.

. . . Meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings. Competent professional representation in proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided.<sup>229</sup>

Thousands more pages can, and perhaps shall, be written regarding the appropriate role for attorneys or others representing children in legal proceedings, but unless society and the legal profession are willing to provide truly competent and highly committed lawyers and lay advocates, the only consequence of these continuing efforts will be more dead trees.

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228. ABA, *America's Children at Risk: A National Agenda for Legal Action* (1993).

229. *Id.* at 7.

