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# Appointed Counsel to Protect the Child Victim's Rights

Charles L. Hobson\*

## INTRODUCTION

Child sexual abuse is one of the most destructive crimes society faces. One study has shown that thirty eight percent of females in randomly selected households in a large western city reported having been sexually abused before the age of eighteen.<sup>1</sup> A survey of college students showed that nineteen percent of the women and nine percent of the men reported having been victims of sexual abuse.<sup>2</sup> Sexual assault can have a profound effect on a child including "withdrawal, anxiety symptoms, enuresis (bed-wetting), guilt, school problems, delinquent or antisocial behavior and also lack of self-esteem."<sup>3</sup>

Unfortunately, the child's harm does not end with the molestation. Our criminal justice system is geared toward guaranteeing a fair trial for the defendant, not towards minimizing the trauma to the victim.<sup>4</sup> Thus, the act of prosecuting the molester can add to the trauma already suffered by the victimized child.<sup>5</sup>

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1. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Soc. ISSUES 125, 126 (1984).

2. *Id.*

3. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 649 (1982).

4. *See id.* at 643-644.

5. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969).

The harm our system does to the child can be minimized. Legislatures and courts can develop procedures to minimize the harm the legal system does to the child while preserving the defendant's constitutional rights. One example of this is section 288 subdivision (d) of the California Penal Code.<sup>6</sup> Subdivisions (a) through (c) of Penal Code section 288 define the crime of child molestation and set its punishment.<sup>7</sup> Subdivision (d), added by the legislature in 1981,<sup>8</sup> provides the means to help molested children through the criminal justice system.

In any arrest or prosecution under this section or under Section 288.5 the peace officer, the district attorney, and the court shall consider the needs of the child victim and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim.<sup>9</sup>

The broad wording of section 288(d) lends itself to many uses. This Article will focus on one way section 288(d) can be used—to appoint counsel for the molested child in a prosecution under section 288, and one tactic for the child's attorney to employ—using Rule 2-100 subdivision (a) of California's Rules of Professional Conduct<sup>10</sup> to keep defendant's attorney from interviewing the child outside of court without the consent of the child's attorney.<sup>11</sup> This Article will also argue that the main case interpreting section 288(d), *Hochheiser v. Superior Court*,<sup>12</sup> gives an unnecessarily restrictive reading of

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6. CAL. PENAL CODE § 288(d) (West Supp. 1990).

7. CAL. PENAL CODE § 288(a)-(c) (West Supp. 1989).

8. In 1981, the legislature enacted section 288(c) which read:

In any arrest or prosecution under this section the peace officer, the district attorney, and the court shall consider the needs of the child victim and shall do whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim.

1981 Cal. Stat. ch. 1064, sec. 1, at 4093 (enacting CAL. PENAL CODE § 288(c)). In 1987, the legislature changed subdivision (c) to subdivision (d) without any change in its language. 1987 Cal. Legis. Serv. ch. 1068, sec. 3, at 443 (West) (amending CAL. PENAL CODE § 288). In 1989, the legislature amended section 288(d) to its present form, adding section 288.5 of the California Penal Code (continuous sexual abuse of a child) to the crimes covered by section 288(d), and adding the phrase "within existing budgetary resources." 1989 Cal. Leg. Serv. ch. 1402, sec. 3, at 5256 (West) (amending Cal. Penal Code § 288). To avoid confusion all references will be made to subdivision (d).

9. CAL. PENAL CODE § 288(d) (West Supp. 1990).

10. "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 (West Interim Annot. Serv. No. 1 1989). Rule 2-100 can also be found in West's separate California Rules of Court publication. CALIFORNIA RULES OF COURT, RULES OF PROFESSIONAL CONDUCT 2-100, at 865 (West Revised ed. 1989).

11. See *infra* notes 150-196 and accompanying text.

12. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

section 288(d), and does not apply to a court appointing an attorney under section 288(d).<sup>13</sup> Finally, this Article will demonstrate that the child's attorney can use Rule 2-100 of California's Rules of Professional Conduct to limit contact between the child and defense counsel without violating defendant's constitutional rights.<sup>14</sup>

## I. APPOINTING AN ATTORNEY FOR MOLESTED CHILDREN

### A. *Helping the Victims*

Often many child abuse cases are not reported because of the treatment the child victim receives within the judicial process. Mental health professionals have found that legal proceedings can have a profoundly disturbing effect on the mental and emotional health of the child victim. Stigma, embarrassment and trauma to the child, sometimes with lifelong ramifications, are increased by involvement in the current judicial system. The effect can serve to perpetuate a problem which is already self-perpetuating, especially in incest cases.<sup>15</sup>

While our system of prosecuting criminals can be difficult for any victim of crime,<sup>16</sup> children face special difficulty as they lack the adult's maturity and sophistication to help them cope with the vicissitudes of the criminal justice system. The ordeal of the molested child is even more difficult as the child must bear the burden of being the primary source of testimony to a particularly repulsive crime.<sup>17</sup>

A criminal case can harm the molested child in many ways. "[R]epeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is a child's parent or relative can all afflict the molested child."<sup>18</sup> The harm that can be

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13. See *infra* notes 73-149 and accompanying text.

14. See *infra* notes 150-245 and accompanying text.

15. Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1, 3-4 (1983).

16. VILMOARE & BENVENUTI, CALIFORNIA VICTIMS OF CRIME HANDBOOK 8 (1988).

17. Child abuse is one of the most difficult problems to detect and prosecute, in large part because there are often no witnesses except the victim. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). See Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Soc. Sci. 125 (1984).

18. *Libai*, *supra* note 5, at 984.

done by the criminal justice system is so great that some see that "modern court procedure . . . renders the court both the child protector of last resort and one of the most serious perpetrators of child abuse."<sup>19</sup> Examples of the harms the criminal justice system can inflict on the molested child are legion.

A child was the victim of a stranger's sexual molestation at age 12. The facts did not become known to the prosecutor (often the case) until she was 17. The case was dismissed on the basis of psychiatric advice that the child could not testify without having a total emotional breakdown. The child's approach to emotional survival, typically, had been to forget, forget, forget. Reinforcing her memory of this event would have been devastating.<sup>20</sup>

California provides another example of the harm the criminal justice system can do to molested children.

The mother of eight and one-half to nine-year-old S.W. testified that when her son exited the courtroom after his 1982 preliminary hearing testimony, he was "totally distraught . . . in tears and couldn't . . . talk" and "started reverting back to baby-like behavior," such as wanting to wear diapers. When she told him the week before the June 15, 1984 hearing that he would be coming to court to testify, he burst into tears and went up to his room, indicating that there was no way he was going back to court and that if he did come back to court he would say "I don't know anything." She claimed he started to talk baby talk and picked up a diaper that his mother was using as a rag, and waived it at her.<sup>21</sup>

Not surprisingly, some experts believe that bringing charges in a child molestation case can actually compound the harm already done to the child victim.<sup>22</sup> This comports with the belief of "child psychiatrists that the degree of psychic trauma is as much, or perhaps more, dependent on the way that the child victim is treated after discovery than at the time of the offense itself."<sup>23</sup> Thus we are confronted with the problem that the benefits of successfully prosecuting the child molester may be outweighed by the harm our legal system does to the child victim.

The criminal justice system does not harm just the children; society also suffers as child victims become unwilling to testify in molestation

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19. *Parker, supra* note 3, at 643.

20. *State v. Sheppard*, 197 N.J. Super. 411, 415, 484 A.2d 1330, 1333 (1984).

21. *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 781, 208 Cal. Rptr. 273, 275.

22. *Parker, supra* note 3, at 644.

23. *Libai, supra* note 5, at 981.

cases due to the harm done to them by the criminal justice system. For example, in the New Jersey case of *State v. Sheppard*:<sup>24</sup>

One attorney, who had handled 30 to 40 of these [child molestation] cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, she could not testify in court face-to-face with the accused and other relatives advanced the opinion that their child patients could not survive the trauma attending a courtroom appearance.<sup>25</sup>

The costs to the children associated with prosecuting molesters can result in an even greater bias by prosecutors towards plea bargaining to minimize the damage court proceedings will do to the child victims.<sup>26</sup> The burden the criminal justice system places on the child also adds to the problem of the child's recanting. A major difficulty in prosecuting child molestation cases is the victim recanting his original statement.<sup>27</sup> This problem is intimately tied to the situation where the victim is compelled to participate in the judicial process.<sup>28</sup> While the child victim initially may reveal the "information about the abuse to a trusted friend, non-abusing parent, counselor or teacher,"<sup>29</sup> this statement often leads to a "confusing and frightening array of interrogations."<sup>30</sup> When added to the great distress that the initial accusation of child abuse can give to the family,<sup>31</sup> it is easy to understand why the victim later may want to recant the initial accusation. Finally, the trauma associated with the criminal justice system can stifle the reporting of child molestation due to the trauma of pretrial and trial procedures for the victim.<sup>32</sup>

The courts are also aware of the problems our criminal justice system causes to child molestation victims. For example, one court noted that:

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24. *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

25. *Sheppard*, 197 N.J. Super. at 417, 484 A.2d at 1333. Another attorney in *Sheppard* testified that "[n]early 90% of the child abuse cases were dismissed as a result of problems attending the testimony of children." *Id.*

26. *Libai*, *supra* note 5, at 1007.

27. *Avery*, *supra* note 15, at 13.

28. *Id.* at 13-14.

29. *Id.* at 14.

30. *Id.*

31. *Id.*

32. See Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 137 (1985). The harm done to the child by the criminal justice system is not limited to ordeal of the trial. One particularly harmful aspect of pretrial procedures to the child is his being repeatedly required to retell to strangers the details of his molestation. See *infra* notes 151-57 and accompanying text.

[c]ertainly a five year old girl should be spared the necessity of testifying against her father in a rape case if at all possible. . . . We do not agree . . . that five year old girls should be dragged in to re-live the horrifying experience of being raped.<sup>33</sup>

In *State v. Conklin*,<sup>34</sup> the Minnesota Supreme Court listed the litany of problems the molested child had at trial including: “[t]he unfamiliar courtroom setting, the necessity of speaking to strangers about embarrassing events, the presence of a jury [and] the problems with language and mutual comprehension.”<sup>35</sup> A California court also has recognized the harm the system can do to the child by requiring the child to describe the crime in “intimate detail” in front of the public, defendant and his supporters.<sup>36</sup>

The leading case interpreting section 288(d), *Hochheiser v. Superior Court*,<sup>37</sup> did not agree with this position. The *Hochheiser* court, in deciding that section 288(d) did not justify televising the molested children’s testimony based its decision in part on the lack of support for the idea that testifying to their molestation harmed the children.<sup>38</sup>

The *Hochheiser* court found that the people had not proven that testifying in the presence of the jury and the accused was psychologically damaging to the sexually abused child.<sup>39</sup> The court found that the literature supporting this view “contains generalized statements to this effect”<sup>40</sup> and does not provide the empirical proof necessary to justify this claim.<sup>41</sup>

The *Hochheiser* court placed excessive emphasis on empirical verification. The court failed to realize that there is a problem with verifying whether our legal system or any one part of it harms child molestation victims. The effects the component parts of the prosecution have on the child mix together. Also, the effects the prosecution have on the children mix with the effects of the crime on each child. Thus it is difficult to determine how much harm any particular part of the criminal justice system does to the child.

As one commentator explained:

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33. *State v. Boodry*, 96 Ariz. 259, 263-65, 394 P.2d 196, 200 (1964).

34. 444 N.W.2d 268 (Minn. 1989).

35. *Id.* at 273.

36. *Eversole v. Superior Court*, 148 Cal. App. 3d 188, 200, 195 Cal. Rptr. 816, 823-24 (1983).

37. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

38. *Id.* at 791, 208 Cal. Rptr. at 282.

39. *Id.* at 792-93, 208 Cal. Rptr. at 283.

40. *Id.* at 793, 208 Cal. Rptr. at 283.

41. *Id.* at 792, 208 Cal. Rptr. at 283.

The studies do not as yet demonstrate a clear causal link between the legal proceedings and the child victim's mental disturbances; but no psychiatric study has attempted to prove, *or is likely to attempt to prove*, in the future, such a causal link. Psychiatrists agree that they cannot isolate the effects of the 'crime trauma' from the prior personality damage or either of the foregoing from the 'environment reaction trauma' or the 'legal process trauma.' But psychiatrists do agree that when some victims encounter the law enforcement system, for one reason or another, the child requires special care and treatment.<sup>42</sup>

Furthermore, some empirical support exists for the notion that criminal proceedings harm child molestation victims.<sup>43</sup> Finally, simple common sense agrees with "the opinions of most psychiatrists, psychologists, judges and parents that the mental health of the child should be given substantial consideration and protected where possible by the criminal justice system."<sup>44</sup> Litigation is an unpleasant experience for any lay participant. When the participant is a child who is the victim of one of the most atrocious crimes capable of commission, and who must repeat frequently and in graphic detail the acts committed against him, it is easy to see that the molested child can be in grave danger from our legal system.

Appointing counsel to represent the molested child is an excellent way to protect him from the emotional harm caused by the criminal action. One of the greatest problems the child molestation victim has is that he<sup>45</sup> has no one to stand up for him. The defendant has his own counsel and a host of constitutional protections to support him through the ordeal of litigation.<sup>46</sup> The child, however, has had no such protections until very recently.

While the tide has recently changed for the better, the molested child still needs more support. While he is entitled to a support person while he testifies<sup>47</sup> and will have the support of government agencies such as Children's Protective Services and the district attorney's office, the child molestation victim has no one who will stand up for *his* rights and enforce them. The support persons and social workers are invariably lay people and therefore incapable of fully

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42. *Libai*, *supra* note 5, at 1015 (emphasis added).

43. *See id.* at 982.

44. *Id.* at 1015.

45. Both the victim and the perpetrator of child molestation can be male or female. For the sake of convenience, references will be made to the masculine pronoun.

46. *Parker*, *supra* note 3, at 643-44.

47. CAL. PENAL CODE § 868.5 (West Supp. 1989).



understanding and adequately protecting the child's rights and interests. The district attorney, while well-meaning, may have a conflict of interest with the child. While district attorneys will want to minimize the trauma a prosecution does to the child, the district attorney's main interest is convicting the molester. The duty of the Attorney General and the district attorneys is "to see that the laws of the State are uniformly and adequately enforced."<sup>48</sup> They have no duty to protect the interests of the victim, regardless of the consequences to the prosecution. Thus, the district attorney may have a conflict between his interest in helping the child and his interest in successfully prosecuting the molester.<sup>49</sup>

An appointed attorney, however, combines the best of both worlds. Like the social worker, he can give his undivided attention to the child's emotional welfare, and, like the district attorney, he has the legal knowledge that allows him to protect the child's interests and rights. By having an attorney to represent him, the child will have someone who understands court procedures and thus "protect the well-being of young complaining witnesses throughout the judicial process."<sup>50</sup> The attorney will be able to recognize what is excessively harsh or repetitious questioning, how often the child will be interviewed and what steps can be taken to prevent unnecessary interviews, how long the prosecution will take, how important the child is as a witness and how to protect the child from any unnecessary procedures that may harm him.

If the child is deprived of appointed counsel he will be left alone. No one else will have the motivation and the expertise to protect him as well as appointed counsel can. Given the tender age and tremendous vulnerability of the molested child, he deserves every constitutionally permissible protection. It would be a tragedy to allow the misinterpretation of section 288(d) in *Hochheiser*<sup>51</sup> to prevent courts from appointing counsel for molested children. *Hochheiser* deprives courts of an important tool for alleviating the great pain our criminal justice system can cause the child molestation victim.

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48. CAL. CONST. art. V, § 13.

49. See CALIFORNIA ATTORNEY GENERAL'S OFFICE, CALIFORNIA CHILD VICTIM WITNESS JUDICIAL ADVISORY COMMITTEE, FINAL REPORT 67 (1988). While the district attorney also has a duty to help the child under section 288(d), his first duty must still be to prosecute the molester. The district attorney's duty to prosecute is a constitutional duty and thus not limited by section 288(d). See *supra* note 48 and accompanying text.

50. *Parker*, *supra* note 3, at 653.

51. See *infra* notes 89-149 and accompanying text.

B. Hochheiser v. Superior Court

One California case has analyzed fully the reach of section 288(d). In *Hochheiser v. Superior Court*,<sup>52</sup> the trial court ordered that the complaining witnesses' testimony in a child molestation prosecution be taken by closed-circuit television outside the courtroom.<sup>53</sup> The trial court used only its inherent power to control the courtroom and develop new procedures to justify this order.<sup>54</sup> The *Hochheiser* court did not accept the trial court's position, citing California's prosecutorial discovery cases<sup>55</sup> for the point that courts should not invent rules of criminal procedure involving important issues of constitutional law without legislative authorization.<sup>56</sup> The Attorney General tried to bolster the trial court's position by using section 288(d).<sup>57</sup>

The *Hochheiser* court gave a very narrow reading of section 288(d).<sup>58</sup> It found that the use of closed-circuit television could threaten defendant's due process, public trial and confrontation rights.<sup>59</sup> Therefore, the court felt that it should not read such a procedure into section 288(d). The court explained: "But we cannot read into this statute a legislative mandate for a closed-circuit television procedure or, indeed, any other specific procedure, which so drastically affects the rights of a defendant."<sup>60</sup>

In addition to the threat posed to defendant's public trial, due process and confrontation rights, the *Hochheiser* court also noted that "there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen."<sup>61</sup> The court felt that the lighting or

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52. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

53. *Id.* at 780, 208 Cal. Rptr. at 274.

54. *Id.* at 782, 208 Cal. Rptr. at 276.

55. *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981); *Reynolds v. Superior Court*, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974) (courts could not create rules of criminal procedure to allow the prosecution to obtain discovery from defendant).

56. *Hochheiser*, 161 Cal. App. 3d at 783-88, 208 Cal. Rptr. at 276-80.

57. At the time *Hochheiser* was decided, this subdivision was numbered 288(c), but all references will be made to 288(d). *See supra* note 8. At the time *Hochheiser* was decided 288(d) did not include the phrase "within existing budgetary resources." *See supra* note 8. This does not, however, change the analysis of *Hochheiser's* misconstruction of 288(d). *See infra* note 121.

58. *Hochheiser*, 161 Cal. App. 3d 777, 791, 208 Cal. Rptr. 273, 282.

59. *Id.* at 785-86, 208 Cal. Rptr. at 278.

60. *Id.* at 791, 208 Cal. Rptr. at 282.

61. *Id.* at 786, 208 Cal. Rptr. at 279.

the camera angle used could "affect the jurors' impressions of the witnesses' demeanor and credibility."<sup>62</sup> The court analogized the effect of closed-circuit testimony on the jury's perception of defendant to that of shackling defendant at trial. The *Hochheiser* court felt that "the presentation of a witness' testimony via closed-circuit television may affect the presumption of innocence by creating prejudice in the minds of the jurors similar to that created by the use of physical restraints in the jury's presence."<sup>63</sup>

The *Hochheiser* court supported its reasoning by purporting to ascertain the legislative intent behind section 288(d). The court determined that the Summary of 1981 Crime Legislation Report compiled by the Joint Committee for the Revision of the Penal Code found that section 288(d) only mandated a "philosophical change focusing on the minor's needs."<sup>64</sup> The court also held that "[t]he flurry of legislative activity after the passage of [then] subdivision (c) of section 288, argues against the broad interpretation of the statute."<sup>65</sup> The court felt that the enactment of Penal Code section 868.5<sup>66</sup> and the amendment of section 767 of the Evidence Code<sup>67</sup> after the enactment of section 288(d) demonstrated that the legislature did not intend for section 288(d) to be construed broadly. The court explained that "[t]here would be no reason to pass such legislation if subdivision (c) already provided such remedies."<sup>68</sup>

Finally, the *Hochheiser* court relied on the rule of construction that where "language reasonably susceptible to more than one construction is used in a penal law, the construction which is more favorable to the defendant should be adopted."<sup>69</sup> Therefore, the court justified interpreting the broadly worded section 288(d) very narrowly because such a narrow interpretation favored the defendant in this criminal case.

In its attempt to keep from making a dramatic break from current law without more specific legislative authority,<sup>70</sup> the *Hochheiser* court

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62. *Id.*

63. *Id.* at 787, 208 Cal. Rptr. at 279.

64. *Id.* at 791, 208 Cal. Rptr. at 282.

65. *Id.*

66. CAL. PENAL CODE § 868.5 (West Supp. 1989) (allowing a support person to accompany a testifying minor victim of a sex offense during the victim's testimony).

67. 1984 Cal. Stat. ch. 1423, sec. 1, at 4994 (amending CAL. EVID. CODE § 767) (permitting leading questions to a child involving prosecutions under section 288(d)).

68. *Hochheiser*, 161 Cal. App. 3d at 791, 208 Cal. Rptr. at 282.

69. *Id.* at 792, 208 Cal. Rptr. at 282.

70. *Id.*

noted its concern that televised testimony posed a serious threat to defendant's constitutional rights. "The mere presence and gravity of these significant questions and concerns render it inappropriate to create by ad hoc judicial fiat such a drastic departure from established procedures."<sup>71</sup> The court was unwilling to uphold the trial court's action unless giving testimony over closed-circuit television was specifically authorized by the legislature. As it felt that no such authority existed, the *Hochheiser* court refused to allow what it saw as a new, constitutionally-suspect procedure. The court explained "[a]s we have previously noted, legislative enactments should not be construed to overthrow long-established principles of law unless such an intention is clearly shown by express declaration or necessary implication."<sup>72</sup>

### C. Distinguishing *Hochheiser*

The question has arisen in some child abuse prosecutions as to whether *Hochheiser* prohibits appointment of counsel for the victim.<sup>73</sup> *Hochheiser* can be factually distinguished from the procedure discussed in this article, and, to the extent *Hochheiser* forbids courts from using section 288(d) to fashion new procedures to help child victims, *Hochheiser* is wrongly decided and should not be followed.

The obvious difference between the procedure used in *Hochheiser* and appointing an attorney for the molested child is that two completely different procedures are used to protect the victims. The difference between giving testimony via closed-circuit television and appointing an attorney to represent the victims is more than superficial. The two procedures use different methods to protect the child victim, conflict with different interests of the defendant and differ in the degree to which each conflicts with a defendant's rights.

#### 1. Different Procedures

The trial court in *Hochheiser* used closed-circuit television to help isolate the victim from the defendant.<sup>74</sup> Televising the testimony via closed-circuit television addresses the fear the victim has when testi-

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71. *Id.*

72. *Id.* at 791-792, 208 Cal. Rptr. at 282.

73. That argument has been made in the pending case of *People v. Pitts*, No. F006225 (Cal. App. 5th Dist. March 27, 1989).

74. *Hochheiser*, 161 Cal. App. 3d at 781-782, 208 Cal. Rptr. at 275-276.

fyng in front of defendant. Retelling to strangers the details of the crime committed against him is difficult enough for the child molestation victim.<sup>75</sup> The problem becomes more pronounced when the child has to give this testimony in front of the defendant and physically confront him.<sup>76</sup> Therefore closed-circuit television can be used to distance the child from the defendant and avoid the terror of having to meet his nemesis face to face in court.

While *Hochheiser* was not decided on constitutional grounds, it is clear where the court's sympathies stood.<sup>77</sup> "The issue of allowing the complaining witness to testify via closed-circuit television from a separate room, instead of being examined in the courtroom is *no less constitutionally questionable* than were the discovery issues our supreme court declined to resolve in *Reynolds* and *Collie*."<sup>78</sup>

The *Hochheiser* court's doubts about the wisdom of the trial court's actions motivated it to refuse to extend section 288(d) to cover televised testimony. The court felt that the legislature did not intend "such a fundamental change in organic law which would abrogate traditional statutory rights to the presence of the testifying witness in the courtroom with the defendant."<sup>79</sup> Because the *Hochheiser* court saw the trial court's use of closed-circuit television testimony as a radical change in courtroom procedure that endangers defendant's statutory and constitutional rights, it felt that it could not extend section 288(d) to cover such a situation.

Appointing an attorney to represent the victim's psychological interests is neither as radical nor as dangerous to defendants as was the televised testimony in *Hochheiser*.<sup>80</sup> Appointing an attorney to represent someone in a legal proceeding is hardly an original idea. Courts nationwide have been required to appoint counsel for accused felons for over twenty-five years.<sup>81</sup> California has had this rule even

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75. See *Berliner & Barbieri*, *supra* note 1, at 133. For the problems a child victim of sexual abuse has in testifying, see *Libai*, *supra* note 5 and accompanying text.

76. See *Coy v. Iowa*, 108 S. Ct. 2798, 2809 (1988) (Blackmun, J., dissenting).

77. *Hochheiser*, 161 Cal. App. 3d at 787, 208 Cal. Rptr. at 279.

78. *Id.* at 785, 208 Cal. Rptr. at 278 (citing *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981); *Reynolds v. Superior Court*, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974)).

79. *Hochheiser*, 161 Cal. App. 3d at 791, 208 Cal. Rptr. at 282.

80. This Article does not take the position that using closed-circuit television to help some child victims of sexual abuse to testify is either constitutionally suspect or contrary to defendant's statutory rights. Resolving the validity of the procedure used in *Hochheiser* is not necessary to determine the validity of appointing an attorney under section 288(d). What is important is that the *Hochheiser* court believed that the use of televised testimony was suspect.

81. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

longer.<sup>82</sup> The appointment of counsel is not limited to the criminal law. A person is entitled appointed counsel in a variety of commitment proceedings.<sup>83</sup>

Appointed counsel is especially common where children are concerned. Under section 237.5 of the Civil Code, the court must appoint counsel for the minor in emancipation proceedings "[i]f the court finds that the interests of the minor require the representation of counsel . . . whether or not the minor is able to afford counsel."<sup>84</sup> Indigent minors have a right to appointed counsel in delinquency proceedings,<sup>85</sup> and, under certain circumstances, so do their parents or guardians.<sup>86</sup> Appointing an attorney to help protect the psychological well-being of children is not a "wholesale revision in the entire procedural format of a criminal trial."<sup>87</sup> Appointment of counsel under section 288 simply extends the idea that attorneys should be provided for those people who need them but are not able to obtain counsel on their own.<sup>88</sup> While the court's power to appoint an attorney for the children under section 288(d) is neither dependent upon nor derived from these other rights to appointed counsel, the prevalence of appointed counsel in our legal system shows that allowing one more type of appointed counsel will not cause the drastic disruption of the legal system that so concerned the *Hochheiser* court.

## 2. Different Interests

Appointing an attorney for the child also does not raise the second problem feared by the *Hochheiser* court; i.e. constriction of defendant's constitutional and statutory rights. The use of closed-circuit television to obtain testimony in *Hochheiser* did raise serious constitutional problems, especially with defendant's right to confronta-

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82. *In re Newbern*, 53 Cal. 2d 786, 790, 350 P.2d 116, 119, 3 Cal. Rptr. 364, 367 (1960); CAL. PENAL CODE § 859 (West Supp. 1989).

83. *See, e.g.*, CAL. WELF. & INST. CODE §§ 5275 (habeas corpus from detention by certification for intensive treatment), 5276 (same), 5302 (petition for post-certification treatment) (West 1984 & Supp. 1989).

84. CAL. CIV. CODE § 237.5(a) (West Supp. 1989).

85. CAL. WELF. & INST. CODE § 679 (West Supp. 1989).

86. *Id.* § 634 (West Supp. 1989).

87. *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 791, 208 Cal. Rptr. 273, 282 (1984).

88. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

tion.<sup>89</sup> Unlike the order given in *Hochheiser*, however, appointing an attorney to represent the child's psychological interests does no direct harm to the defendant. While the *actions* of the child's attorney may have the potential to harm defendant,<sup>90</sup> the appointment itself has no effect on defendant's interests. As the appointment itself does no harm to defendant, it is, therefore, not as inherently dangerous as the procedure attacked in *Hochheiser*.

*Hochheiser* also gives a very suspect reading of section 288(d).<sup>91</sup> Therefore courts should decline to go beyond *Hochheiser*, even by a fraction of an inch.<sup>92</sup> The differences between giving testimony over closed-circuit television and appointing counsel for the child provide more than the fraction of the inch necessary to distinguish *Hochheiser*.

#### D. Interpreting Section 288(d)

*Hochheiser* gives a faulty interpretation of section 288(d). While the court never gave a reason for its narrow reading of section 288(d) other than a desire to interpret statutes in favor of criminal defendants,<sup>93</sup> it is logical to assume that it allowed its fear of the constitutional threat to defendant posed by televised testimony to drive the *Hochheiser* court to a very narrow interpretation of section 288(d).<sup>94</sup> The *Hochheiser* court, in its rush to protect the defendant, forgot the basic principle of statutory construction and legislated section 288(d) into nothingness. A fair reading of section 288(d), taking into account the interests served by the statute and the best way to protect those interests, will find that section 288(d) gives the court the authority to appoint counsel to protect the victim's psychological interests.

Any interpretation of a statute must begin with the text of the statute. Section 288(d) provides:

In any arrest or prosecution under this section or section 288.5 the peace officer, the district attorney, and the court shall consider the needs of the child victim and *shall do whatever is necessary, within*

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89. *Hochheiser*, 161 Cal. App. 3d at 786 n.2, 208 Cal. Rptr. at 278 n.2. See *Coy v. Iowa*, 108 S. Ct. at 2802. *But see supra* note 80.

90. See *infra* note 159 and accompanying text.

91. See *infra* notes 93-149 and accompanying text.

92. Cf., *Silverman v. United States*, 365 U.S. 505, 512 (1961).

93. See *supra* note 69 and accompanying text.

94. See *supra* notes 77-79 and accompanying text.

existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim.<sup>95</sup>

*Hochheiser*, in determining that section 288(d) did not authorize courts to order the giving of testimony via closed-circuit television, relied on its view of the legislative history of section 288(d) to support its holding.<sup>96</sup> The *Hochheiser* court ignored the actual words of the statute. Instead, it looked to committee hearings that never mentioned using closed-circuit television,<sup>97</sup> and a statement regarding section 288 in the *Summary of 1981 Crime Legislation Report*<sup>98</sup> to determine that section 288(d) only required "a philosophical change focusing on the minors' needs."<sup>99</sup>

Legislative reports, hearings, and digests can be useful in interpreting a statute.<sup>100</sup> Before resorting to legislative history, however, a court must first attempt to ascertain the plain meaning of the language of the statute. As Justice Traynor stated:

The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes . . . ¶ An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Speculation cuts brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? *The court turns first to the words themselves for the answer.* It may also properly rely on extrinsic aids . . . . Primarily, however, the words, in arrangement that superimposes the purpose of the legislature upon their dictionary meaning stand in

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95. CAL. PENAL CODE § 288(d) (West Supp. 1990). While the phrase "within existing budgetary resources" was not before the *Hochheiser* court, this phrase only strengthens the argument for a broad interpretation of section 288(d). See *infra* note 121.

96. *Hochheiser*, 161 Cal. App. 3d at 790-791, 208 Cal. Rptr. at 281-82.

97. *Id.* at 790, 208 Cal. Rptr. at 281.

98. The court explained:

S.B. 506 [the bill enacting section 288(d)] mandates that in any prosecution for child molestation the needs of the child to be protected from further psychological harm during arrest and prosecution be placed on an equal priority with the successful prosecution of the offender.

*Hochheiser*, 161 Cal. App. 3d at 791, 208 Cal. Rptr. at 282 (citing SUMMARY OF 1981 CRIME LEGISLATION REPORT at 17).

99. *Id.*

100. See, e.g., *People v. Perkins*, 37 Cal. 2d 62, 64, 230 P.2d 353, 355 (1951).



immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly under-taken and not to be disregarded.<sup>101</sup>

This principle is found throughout California law. "Also, in arriving at the meaning of a Constitution,<sup>102</sup> consideration must be given to the words employed, giving every word, clause and sentence their ordinary meaning. If doubts and ambiguities remain then, *and only then* are we warranted in seeking elsewhere for aid."<sup>103</sup> Ascertaining the plain meaning of a statute before using extrinsic legislative aids is a practice with well-respected roots.<sup>104</sup>

Courts first look to the text to prevent themselves from giving their own subjective evaluation of the motives behind legislation. "The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed, the statute is destroyed. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body."<sup>105</sup> When courts use extrinsic aids to attempt to discern the motives behind legislation, statutory interpretation becomes an increasingly subjective field that brings with it the threat of judicial legislation.<sup>106</sup> When a court departs from the text of a statute and substitutes a "legislative intent" that it gleans from extrinsic sources, it substitutes its own views for that of the legislature.

The foremost embodiment of legislative intent is in the text of the statute. The legislature, when approving a statute, approves the text, not the legislative history. When the governor signs a bill, he signs the text into law, not the debates, hearings or commissioner's comments. When a statute is enacted it is reasonable to assume the

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101. *People v. Knowles*, 35 Cal. 2d 175, 182, 217 P.2d 1, 5 (1950) (emphasis added).

102. Principles that apply to construction of constitutions should also apply to statutory construction. *See Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 303, 248 Cal. Rptr. 115, 120 (1988).

103. *State Board of Education v. Levit*, 52 Cal. 2d 441, 462, 343 P.2d 8, 20 (1959) (emphasis added). *See, e.g., Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 303-04, 248 Cal. Rptr. 115, 120 (1988); *People v. Craft*, 41 Cal. 3d 554, 559-60, 715 P.2d 585, 588, 224 Cal. Rptr. 626, 629 (1986); *In re Lance W.*, 37 Cal. 3d 873, 886, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985); *Solberg v. Superior Court*, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977).

104. "[W]hile courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the Legislature." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1948).

105. *United States v. Constantine*, 296 U.S. 287, 298-99 (1935) (Cardozo, J., dissenting).

106. "We have no alternative but to resort to judicial construction, that is, to judicial legislation." *People v. Higgins*, 87 Cal. App. 2d Supp. 938, 941, 197 P.2d 417, 419 (1948).

legislature intended what was written into the text of the statute. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing as the ordinary man has a right to rely on ordinary words addressed to him."<sup>107</sup>

The first task in interpreting section 288(d) is to determine whether its words can be given a plain meaning. The majority of the text of section 288(d) is relatively straightforward.<sup>108</sup> The most difficult part of section 288(d) to interpret is the phrase "shall do whatever is necessary and constitutionally permissible." The *Hochheiser* court found that section 288(d) only stated a "mandate for philosophical change."<sup>109</sup> This renders the operative phrase "shall do whatever is necessary . . . and constitutionally permissible" superfluous as the phrase "shall consider the needs of the child victim" already gives the philosophical position of the legislature.

The word "shall" is typically given either a mandatory or directory reading by the courts.<sup>110</sup> The word "shall" is not always read to be mandatory, but California courts frequently have given "shall" this literal interpretation. In determining whether the word "shall" is mandatory or directory, courts have tried to discern which reading best fits the statute's purpose. "The entire statute may be resorted to in order to ascertain its proper meaning. If to construe it as directory would render it ineffective and meaningless, it should not receive that construction."<sup>111</sup>

A directory interpretation of section 288(d) would prevent it from accomplishing its purpose. The purpose of section 288(d) is "to prevent psychological harm to the victim."<sup>112</sup> If section 288(d) is viewed as directory, courts have the option of doing nothing to help the child victim. By giving "shall" a mandatory meaning, courts must address the child molestation victim's problems. Obviously, it will be easier to help child molestation victims if courts are required

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107. *Addison v. Holly Hill Fruit Products, Co.*, 322 U.S. 607, 618 (1944).

108. For the sake of convenience, the text of section 288(d) will be repeated: "In any arrest or prosecution under this section or under section 288.5 the peace officer, the district attorney and the court shall consider the needs of the child victim and shall do whatever is necessary, within budgetary resources, and constitutionally permissible to prevent psychological harm to the victim." CAL. PENAL CODE § 288(d) (West Supp. 1990).

109. *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 791, 208 Cal. Rptr. 273, 282 (1984).

110. *See, e.g., Jacobs v. State Bar*, 20 Cal. 3d 191, 198, 570 P.2d 1230, 1233, 141 Cal. Rptr. 812, 815 (1977).

111. *Carter v. Seaboard Finance Co.*, 33 Cal. 2d 564, 573, 203 P.2d 758, 764 (1949).

112. CAL. PENAL CODE § 288(d) (West Supp. 1990).

to help them instead of being given the option of doing nothing for the children. "When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose."<sup>113</sup> The construction of "shall" goes to the heart of section 288(d). "In constructing a statute matters of substance are to be construed as mandatory."<sup>114</sup>

Giving "shall" a mandatory reading also aligns it with its commonly understood definition. Webster's dictionary defines "shall" as expressing "determination, compulsion, obligation, or necessity in the second or third person."<sup>115</sup> *Black's Law Dictionary* also gives "shall" a mandatory definition.

As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the word shall *is a word of command*, and one which *has always or which must be given a compulsory meaning*; as denoting obligation.<sup>116</sup>

Therefore, giving "shall" a mandatory meaning follows both the common law and common sense. The phrase "whatever is necessary" sets the scope of the duty imposed by "shall." Webster's dictionary defines "whatever" as "anything that, [such] as, tell her *whatever* you like."<sup>117</sup> Given the broad objective of section 288(d) to help child molestation victims, "whatever" should be given its plain meaning. The word "necessary," however, has been treated in different ways by the courts. The common definition of "necessary" is restrictive. "[T]hat cannot be dispensed with; essential; indispensable; as water is *necessary* to life."<sup>118</sup> Black's recognizes the different meanings courts attach to "necessary:"

This word must be considered in the connection in which it is used as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, appropriate, suitable, proper or conducive to the end sought. It is an adjective expressing degrees and may express mere convenience or that which is indispensable or an absolute physical necessity.<sup>119</sup>

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113. *Pulcifer v. County of Alameda*, 29 Cal. 2d 258, 262, 175 P.2d 1, 3 (1946).

114. *People v. Butler*, 20 Cal. App. 379, 384, 129 P. 600, 602 (1912).

115. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1666 (2d ed. 1983).

116. BLACK'S LAW DICTIONARY 1223 (5th ed. 1979) (emphasis added).

117. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 2081 (emphasis in original).

118. *Id.* at 1200 (emphasis in original).

119. BLACK'S LAW DICTIONARY 928 (5th ed. 1979).

California courts also recognize the flexibility of the term "necessary."<sup>120</sup> Given the broad purpose behind 288(d) the more flexible definition of "necessary" should be used. While it may be easy to determine what is necessary to achieve some physical goal such as "water is necessary to life," a child's psychological well-being, being much more abstract, is therefore much more difficult to define precisely than some physical objective. Therefore, "necessary" should be given a flexible definition to match the inherently difficult to define standard of "psychological harm to the victim."<sup>121</sup> Thus "necessary" should be read to mean "suitable, proper, or conducive" to give courts sufficient latitude to deal with the psychological harm that can befall the child molestation victim.

Under section 288(d) courts are therefore under a duty to do everything suitable to prevent psychological harm to the child molestation victim. The final question to answer in interpreting section 288(d) is the reach of this duty—what is "suitable" under section 288(d)? This question is answered by the phrase "and constitutionally permissible." A court's duty under section 288(d) is only limited by the constitution. Therefore, if a court's action does not violate a defendant's United States or California constitutional rights or California's separation of powers doctrine,<sup>122</sup> the court's action is immune from attack.

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120. See *Westphal v. Westphal*, 122 Cal. App. 379, 382, 10 P.2d 119, 120 (1932); *Danley v. Merced Irrigation Dist.*, 66 Cal. App. 97, 105, 226 P. 847, 850 (1924).

121. The phrase "psychological harm to the victim," while addressing an inherently abstract topic, the mental health of a child, does not render 288(d) so ambiguous that its plain meaning cannot be determined. The key issue of section 288(d) as *Hochheiser* recognized, is whether section 288(d) gives the courts additional authority to help child molestation victims. The phrase "psychological harm to the victim," other than stating the goal of section 288(d), has no bearing on the reach of the statute.

The phrase "within existing budgetary resources," added by the legislature in 1989, does not justify the interpretation taken by the *Hochheiser* court. See 1989 Cal. Leg. Serv. ch. 1402, sec. 3, at 5256 (West) (amending CAL. PENAL CODE § 288). By imposing a financial limit for the expenditure or resources under this section, the legislature has indicated a belief that some substantive action is expected under section 288(d). This further undercuts the *Hochheiser* court's belief that section 288(d) only mandated a "philosophical change" as philosophical changes do not cost money. *Hochheiser*, 161 Cal. App. 3d at 791, 208 Cal. Rptr. at 282. By providing for the expenditure of money, the legislature has noted that section 288(d) is meant to accomplish substantive goals such as providing for the appointment of counsel for children.

As the phrase "within budgetary resources" was not contained in section 288(d) when *Hochheiser* was decided, this new phrase also provides a means for distinguishing *Hochheiser* from any use of section 288(d) under the new statute. As this phrase is only concerned with the means provided to finance acts under section 288(d) it has no other direct bearing on a court's power under section 288(d) to appoint counsel for the child for the fiscal effects of the phrase "within existing budgetary resources." See *infra* note 231.

122. See CAL. CONST. art. V, § 13 (powers of the Attorney General).

A court should refuse "to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purpose of the legislation as a whole or led to absurd results."<sup>123</sup> Giving section 288(d) its plain meaning would not frustrate the legislature's plan, but would instead enhance it. It would give courts the power to help child molestation victims, an end the legislature wanted to achieve when it passed section 288(d). Giving courts the power to aid child molestation victims does not lead to any absurd results. There is nothing absurd in allowing courts to fashion curatives to help some of the most vulnerable victims of crime.

In determining a statute's meaning, courts "are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.'"<sup>124</sup> If the legislature only wanted section 288(d) to "mandate a philosophical change focusing on the minors needs,"<sup>125</sup> then it would have written section 288(d) differently. Section 288(d) would then read:

It is the policy of the State of California that in any arrest or prosecution under this section the peace officer, the district attorney and the court ought to consider the psychological needs of the child victim.

Courts recognize that different words have different meanings, and that the legislature is aware of this when it writes statutes.<sup>126</sup> Thus, if the legislature wanted section 288(d) to have the meaning *Hochheiser* gave it, the legislature would have written section 288(d) to look like the passage above. As the legislature did not do this, the judiciary should not rewrite the section.

The chief constitutional objection that can be made to appointing an attorney for victims of child molestation is that it violates the separation of powers. The separation of powers doctrine is violated when the district attorney's decision to institute criminal proceedings is subject to the control of a private citizen.<sup>127</sup> The child's attorney is not a private citizen appointed special prosecutor by a court.<sup>128</sup>

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123. *People v. Belleci*, 24 Cal. 3d 879, 884, 598 P.2d 473, 477, 157 Cal. Rptr. 503, 507 (1979).

124. *Moyer v. Workmens's Compensation Appeal Board*, 10 Cal. 3d 222, 230, 514 P.2d 1224, 1229, 110 Cal. Rptr. 144, 149 (1973).

125. *Hochheiser v. Superior Court*, 161 Cal. App. 3d at 791, 208 Cal. Rptr. at 282.

126. *See Hogya v. Superior Court*, 75 Cal. App. 3d 122, 133, 142 Cal. Rptr. 325, 333 (1977) (the legislature recognizes the difference between "shall" and "may").

127. *People v. Shults*, 87 Cal. App. 3d 101, 106, 150 Cal. Rptr. 747, 750 (1978).

128. *See People v. Municipal Court (Bishop)*, 27 Cal. App. 3d 193, 207, 103 Cal. Rptr. 605, 656 (1972).

His job is to minimize the damage the judicial process does to the child, not decide whether charges are brought.

While it is not necessary to use legislative history to support this reading of section 288(d), the legislative history of section 288(d) provides support for a court's authority to appoint counsel for the child. Before passing section 288(d), the legislature held extensive hearings on the problem of child molestation and the failings of the legal system in dealing with it.<sup>129</sup> The *Hochheiser* court determined that these hearings were unfavorable to support the use of closed-circuit television under section 288(d), even though the use of closed-circuit television was never mentioned during the hearing.<sup>130</sup> Representation for the victims was, however, mentioned several times during the hearings.<sup>131</sup> While these usually addressed the need for someone to advocate the child's position, at one point the testimony did specifically mention the need for counsel for the victims.<sup>132</sup>

The child molestation hearings support a much broader reading of section 288(d) than the *Hochheiser* court gave it. Numerous references were made to the trauma the legal process inflicts on molested children.<sup>133</sup> As Senator Omer Rains, chairman of the Joint Committee for Revision of the Penal Code stated:

California's laws in this area lag far behind other states which have revised their laws to deal more efficiently and effectively with persons who molest children. For example, there are no courtroom procedures in California designed to lessen the psychological harm done to the victim. The psychological effects on the victim caused by present courtroom procedures and prosecution methods are frequently every bit as serious and long lasting as the criminal act itself.<sup>134</sup>

Senator David Roberti also recognized the need to help child molestation victims.

Studies indicate that both the initial molestation and the reliving of it as the case goes through the criminal-justice [*sic*] process have

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129. JOINT COMMITTEE FOR REVISION OF THE PENAL CODE, HEARING ON CHILD MOLESTATION, December 16, 1980, April 10, 1981, April 24, 1981; ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, CHILD MOLESTATION HEARING, November 12, 1980 [hereinafter to be referred to as CHILD MOLESTATION HEARINGS].

130. *Hochheiser*, 161 Cal. App. 3d at 790-91, 208 Cal. Rptr. at 281-82.

131. See CHILD MOLESTATION HEARINGS, Nov. 12 at 78-79, 196-97; CHILD MOLESTATION HEARINGS, Dec. 16 at 54.

132. CHILD MOLESTATION HEARINGS, Nov. 12 at 78-79.

133. See CHILD MOLESTATION HEARINGS, Nov. 12 at 196-97; CHILD MOLESTATION HEARINGS, Dec. 16 at 1-2, 53-54, 73, 86-87, Appendix D at 4; CHILD MOLESTATION HEARINGS, April 10 at 2, 19, 38, 56; CHILD MOLESTATION HEARINGS, April 24 at 2, 10, 37, 41, 78.

134. CHILD MOLESTATION HEARINGS, Apr. 10 at 2.

long-range detrimental effects on the victim, yet much of the law centers around the punishment and rehabilitation of the offender. Is enough attention being given to the needs of the victim?<sup>135</sup>

As the *Hochheiser* court recognized, the hearings considered many different techniques for lessening the psychological harm to the victim. These techniques included "videotaping procedures to avoid victims having to repeat their testimony, strictly prohibiting continuances, closing hearings, providing for the attendance of a supporting parent, and limiting the kind of questioning and voir dire."<sup>136</sup> The legislature was both acutely concerned with the problems of child molestation victims and aware of a broad spectrum of techniques that could lessen the harm the system did to the children. Section 288(d) was the legislature's response to this. In response to these problems facing the victims of child molestation, the legislature enacted section 288(d) and gave the courts the ability to engage in a variety of measures to help meet the many different needs of child molestation victims.

*Hochheiser* also attacks the ameliorative purpose of section 288(d) by citing subsequent legislative efforts to help child molestation victims.<sup>137</sup> *Hochheiser's* emphasis on subsequent legislative acts is misplaced, however, as the relevant legislative intent is the intent of the legislature that enacted the statute. Subsequent legislation cannot change the plain meaning or legislative history of section 288(d) without amending it. As no such amendment has been made, the original interpretation of section 288(d) is still valid.

The *Hochheiser* court had two final justifications for narrowly construing section 288(d). The first, that it should not construe a statute to overthrow long-established principles of law unless such intention is clearly shown,<sup>138</sup> is inapplicable, as the appointment of counsel is not a new principle. Appointed counsel is a well-established procedure in criminal cases.<sup>139</sup> Furthermore, in California appointed counsel is particularly common in proceedings involving children.<sup>140</sup> Thus appointing counsel does not overthrow any long-established principles that the *Hochheiser* court wanted to protect.

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135. CHILD MOLESTATION HEARINGS, Dec. 16 at 1-2.

136. *Hochheiser*, 161 Cal. App. 3d at 791 n.9, 208 Cal. Rptr. at 282 n.9.

137. *Id.* at 791, 208 Cal. Rptr. at 282.

138. *Id.* at 791-92, 208 Cal. Rptr. at 282.

139. See *infra* notes 81-82 and accompanying text.

140. See *infra* notes 84-88 and accompanying text.

The second reason is the rule of construction that penal statutes are to be construed in favor of the defendant.<sup>141</sup> This rule of construction, however, is only applicable when the language is susceptible to more than one construction.<sup>142</sup> Furthermore, "that rule will not be applied to change manifest, reasonable legislative purpose."<sup>143</sup> This rule is only a tool of construction. It cannot be invoked where the statute is unambiguous. "The rule comes into operation at the end of the process of construing what Congress had expressed, not at the beginning as an overriding consideration of being lenient to wrong-doers. That is not the function of the judiciary."<sup>144</sup> The *Hochheiser* court did not come up with any reasonable alternative to the plain meaning of section 288(d)—that a court must do anything practical that is not constitutionally forbidden to help protect the child molestation victim from any further psychological harm as the result of a prosecution under section 288. "[T]he canon entitles defendant only to the benefit of every *realistic* doubt. This rule of construction 'is not an inexorable command to override common sense and evident statutory purpose.'"<sup>145</sup> There is no realistic doubt to justify veering from the plain meaning of section 288(d).

The *Hochheiser* court was concerned with a possible violation of defendant's constitutional rights when it interpreted section 288(d).<sup>146</sup> While this may explain the *Hochheiser* court's narrow construction of section 288(d), it does not justify such a narrow construction. The *Hochheiser* court, in its zeal to protect defendant ignored the primary source of a statute's meaning — the text of the statute.<sup>147</sup> A thorough examination of the text of section 288(d) shows that the statute gives courts a broad grant of power to help molested children through the ordeal of the child molestation prosecution.<sup>148</sup>

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141. *Hochheiser*, 161 Cal. App. 3d at 792, 208 Cal. Rptr. at 282.

142. *See id.*

143. *People v. Banks*, 53 Cal. 2d 370, 391, 348 P.2d 102, 116, 1 Cal. Rptr. 669, 683 (1959).

144. *Callanan v. United States*, 364 U.S. 587, 596 (1961).

145. *People v. Anderson*, 43 Cal. 3d 1104, 1145-46, 742 P.2d 1306, 1330, 240 Cal. Rptr. 585, 609 (1987) (emphasis in original) (quoting *United States v. Brown*, 338 U.S. 18, 25 (1948)). As Justice Black stated:

No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress.

*United States v. Raynor*, 302 U.S. 540, 552 (1938).

146. *See supra* notes 61-63 and accompanying text.

147. *See supra* notes 101-07 and accompanying text.

148. *See supra* notes 108-22 and accompanying text.



“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>149</sup> This principle, not the various rationales offered by the *Hochheiser* court, should be followed to allow section 288(d) to do what the legislature intended it to accomplish—help the molested child through the ordeal of the criminal prosecution.

## II. PREVENTING DEFENSE COUNSEL FROM TALKING TO THE VICTIMS

### A. Rule 2-100

An attorney for the child molestation victim has many means to minimize the trauma of legal proceedings.<sup>150</sup> One of the most effective techniques to protect the child witness would be for the child’s attorney to bar defense counsel from having any contact with the victim without the consent of the child’s attorney. The child’s counsel could then limit the number of times a child would have to repeat his story and prevent unnecessary encounters between the child and potentially hostile attorneys.

Among the greatest burdens a molested child must bear is the burden of having to incessantly repeat the story of his molestation to other people. In addition to making the initial complaint, usually to “a trusted friend, non-abusing parent, counselor or teacher,”<sup>151</sup> the child must go through an odyssey of retelling his experiences over and over again. First, he usually must “relate, in vivid detail, the specifics of the sexual encounter” to a police officer.<sup>152</sup> Then he will be transported to the local emergency room for physical examination, where he “is confronted with more strangers and the setting in all too many cases is a frightening environment.”<sup>153</sup> In this setting he may again be required to retell his story.<sup>154</sup> Next, he will be interviewed by the detectives and district attorney(s) assigned to his

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149. *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

150. *See, e.g.*, CAL. ATTORNEY GENERAL, CALIFORNIA CHILD VICTIM WITNESS JUDICIAL ADVISORY COMMITTEE 69 n.5 (1988). *See also infra* notes 153-55 and accompanying text.

151. *Avery, supra* note 15, at 14.

152. *Id.*

153. *Id.* at 15.

154. *Id.*

case to determine the strength of his case.<sup>155</sup> This may also involve a polygraph examination.<sup>156</sup> If the district attorney decides to prosecute, the child, as the main witness, will have to testify at the preliminary hearing, and, if necessary, the trial.<sup>157</sup>

In addition to all of these interviews, the unrepresented child will frequently be interviewed by defendant's counsel. While the victim is under no obligation to talk to defense counsel, the uninformed victim is likely to be unaware that he does not have to talk to defense counsel.<sup>158</sup> The attorney for the child, in addition to informing the child and his guardian about his right to refuse to talk to defense counsel<sup>159</sup> can also prevent defense counsel from contacting the victim by virtue of the attorney-client relationship between the victim and his counsel.

Rule 2-100 subdivision (a) of the Rules of Professional Conduct of the State Bar of California<sup>160</sup> provides that

while representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

The purpose of this rule is preserving the attorney-client relationship.

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155. *Id.*

156. *Id.*

157. See *Berliner & Barbieri*, *supra* note 1, at 125.

158. See *People v. Municipal Court (Runyon)*, 20 Cal. 3d 523, 531, 574 P.2d 425, 429, 143 Cal. Rptr. 609, 613 (1978); *People v. Mersino*, 237 Cal. App. 2d 265, 269, 46 Cal. Rptr. 821, 824 (1965) (defendant has no right to depose witnesses).

159. The district attorney would have a much more difficult time telling the victim that he did not have to talk to defense counsel. See *People v. Hannon*, 19 Cal. 3d 588, 601, 564 P.2d 1203, 1211, 138 Cal. Rptr. 885, 892-93 (1977) (state cannot tell witness not to talk to defense counsel).

160. CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 (West Interim Annot. Serv. No. 1 1989). The predecessor of Rule 2-100 was Rule 7-103 which provided that:

[a] member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

CAL. CIV. & CRIM. R., PROF. CONDUCT 7-103 (West Supp. 1989) (repealed). This Article also will discuss several ethical rules promulgated by the American Bar Association. The Model Code of Professional Responsibility is based upon ethical considerations ("EC") and disciplinary rules ("DR"). The ethical considerations "are aspirational in character and represent the objectives towards which every member should strive." AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 3 (1979). The disciplinary rules, however, "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* Thus, the Ethical Considerations can be seen as providing interpretive guidance to the Disciplinary Rules. *Id.* at 4. The Model Rules of Professional Conduct designed to replace the Model Code of Professional Responsibility do not have any Ethical Considerations. They consists only of rules, with comments to each rule indicating the drafters' intent.

This rule [former Rule 12] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice . . . . It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches, which are well intended but misguided.

The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.<sup>161</sup>

The key to determining whether the relationship between the molested child and his appointed counsel is protected by Rule 2-100 is determining if the victim of a crime is a "party" within the meaning of Rule 2-100. If the child is a party under Rule 2-100, then his relationship with his attorney will be protected, and his attorney will be able to invoke the rule to insulate the child from the unwanted attention of defense counsel.

The objection that would be made against this use of Rule 2-100 is that the term "party" under Rule 2-100 is limited to the parties to the action. This objection, however, understates the reach of Rule 2-100 as it fails to appreciate the intent behind Rule 2-100. California's Penal Code defines the formal parties to the criminal case. Section 684 of the Penal Code states that "[a] criminal action is prosecuted in the name of the people of the state of California, as a party, against the person charged with the offense,"<sup>162</sup> and Section 685 provides that "[t]he party prosecuted in a criminal action is designated in this code as the defendant."<sup>163</sup> These do not, however, provide much help in determining the definition of "party" for Rule 2-100. The comment to Rule 2-100 specifically states that the term "party" is not limited to its litigation context. "As used in subparagraph (a) [of Rule 2-100] 'the subject of representation,' 'matter,' and 'party' are not limited to a litigation context."<sup>164</sup> Thus, these Penal Code sections cannot address the reach of Rule 2-100.

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161. *Mitton v. State Bar*, 71 Cal. 2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (1969).

162. CAL. PENAL CODE § 684 (West 1985).

163. *Id.* § 685 (West 1985).

164. Rule 2-100, comment (West Interim Annot. Serv. No. 1, 1989). This interpretation

The cases are similarly unenlightening. In *People v. Jung Qung Sung*,<sup>165</sup> the California Supreme Court determined that the parties to a criminal action were the people and the defendant.<sup>166</sup> But the court only needed to define the minimum extent of "parties" to hold that defendant was present throughout the trial when the trial record only stated that "the parties" were present throughout the trial.<sup>167</sup>

The only case that addressed the question of who is a "party" within the meaning of Rule 2-100 is *Kain v. Municipal Court*.<sup>168</sup> In *Kain*, the defendant attempted to disqualify the entire district attorney's office from his prosecution for molesting his daughters, as the office at the same time was representing the children in the dependency action against defendant.<sup>169</sup> The court of appeal did not accept defendant's argument that Rule 7-103<sup>170</sup> would prevent his counsel from communicating with the children concerning defendant's criminal prosecution. The court summarily rejected this argument, stating that the victims are not parties to a criminal action under Rule 7-103.<sup>171</sup>

*Kain*, however, does not prevent attorneys for child molestation victims from invoking Rule 2-100 to protect their clients because

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of Rule 2-100 does not contradict this Article's textual interpretation of section 288(d). The comment which shows the ambiguity of the term "party," is very closely related to the text of rule 2-100. In the code containing rule 2-100, the comment immediately follows rule 2-100. See CAL. CIV. & CRIM. R. PROF. CONDUCT 2-100 comment (West Interim Annot. Serv. No. 1 1989). As the comment is literally on the same page as the text of Rule 2-100, it should be given substantial weight in interpreting Rule 2-100. This stands in contrast to the legislative materials used by the *Hochheiser* court in interpreting section 288(d) which were not included anywhere near the text of section 288(d). See *supra* notes 64-68 and accompanying text. Thus, the drafters of Rule 2-100, by including the comment with Rule 2-100, introduced the ambiguity into Rule 2-100 for all people to see. Therefore an interpretation of Rule 2-100 based on the comment does not contradict the text of the Rule 2-100 because the comment is effectively a part of the text of Rule 2-100.

165. 70 Cal. 469, 11 P. 755 (1886).

166. *Id.* at 472, 11 P. at 757.

167. *Id.* See also *Oppenheimer v. Clifton's Brookdale, Inc.*, 98 Cal. App. 2d 403, 220 P.2d 422 (1950). In *Oppenheimer*, the court found that bribery of a police officer was a public offense and therefore could only be prosecuted in the name of the people. *Id.* at 404, 220 P.2d at 423. *Oppenheimer*, however, concerned the institution of a civil action, and whether alleging bribery of a public official was sufficient to state a cause of action. *Oppenheimer* did not determine who constituted the parties to a criminal case and thus is not applicable to determining the scope of Rule 2-100. *Id.* at 405, 220 P.2d at 423.

168. 130 Cal. App. 3d 499, 181 Cal. Rptr. 751 (1982).

169. *Id.* at 98 Cal. App. 2d at 501-02, 181 Cal. Rptr. at 752.

170. The predecessor of Rule 2-100 was Rule 7-103 which provided that:

[a] member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

CAL. CIV. & CRIM. R., PROF. CONDUCT 7-103 (West Supp. 1989) (repealed).

171. *Kain*, 130 Cal. App. 3d at 504, 181 Cal. Rptr. at 753-54.

*Kain* involved two different attorney-client relationships. The attorney-client relationship between the district attorney's office and the children in *Kain* arises from the dependency action.<sup>172</sup> The dependency action is commenced under section 300 of the Welfare and Institutions Code, and its purpose is "to protect and promote the welfare of the child, not to punish the parent."<sup>173</sup> The purpose of criminal law, however, is concerned with the punishment of defendant.<sup>174</sup> While the district attorney, as public prosecutor, may want to see that the child's best interests are served, his duty as public prosecutor is to see that the defendant is punished for his crimes.<sup>175</sup> Thus, as each has a different interest in the criminal action, the children have no attorney-client relationship with the district attorney's office in its role as public prosecutor.<sup>176</sup> Furthermore, the prosecutor already has a client in the criminal action, the people of California.<sup>177</sup> Therefore, as the district attorney is not the attorney for the molested children in a criminal action, he does not have standing to invoke Rule 2-100 to protect the children.<sup>178</sup> Thus, *Kain* can be distinguished because the *Kain* court did not deal with an attorney appointed to represent the children in the criminal case.

The Drafters' Comments present the best evidence of who is a party within the meaning of Rule 2-100. In addition to stating that the term "party" is not to be used in its litigation context,<sup>179</sup> the Drafters' Comments also show the intent behind the rule. "Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel . . ."<sup>180</sup> The word "party" is conspicuously absent from this part of the Drafters' Comments. This indicates that Rule 2-100 is intended to

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172. See *id.* at 501, 181 Cal. Rptr. at 752.

173. *Collins v. Superior Court*, 74 Cal. App. 3d 47, 52, 141 Cal. Rptr. 273, 276 (1977).

174. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18 (2d ed. 1960).

175. See CAL. CONST. art. V, § 13; *City of Merced v. County of Merced*, 240 Cal. App. 2d 763, 766, 50 Cal. Rptr. 287, 289 (1966).

176. See CAL. CIV. & CRIM. R., PROF. CONDUCT 3-310 (West Interim Annot. Serv. No. 1 1989) (representation of adverse interests).

177. See *supra* note 175.

178. California Rule of Professional Conduct Rule 2-100 states in relevant part:

[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 (West Interim Annot. Serv. No. 1 1989).

179. See *supra* note 164 and accompanying text.

180. CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 comment (West Interim Annot. Serv. No. 1 1989).

cover more than the formal parties to the litigation. Instead, as the Drafters' Comments suggest, it should cover any person who has retained counsel regarding a matter, regardless of whether that person is a formal party to any litigation.

This reading of Rule 2-100 follows the standards set by the American Bar Association. EC 7-18 provides that

[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a *person* he knows to be represented in the matter by a lawyer, unless pursuant to law . . . or unless he has the consent of the lawyer for that person.<sup>181</sup>

EC 7-18 demonstrates the purpose behind the rule against communication with represented persons. If someone is represented by counsel regarding a matter, that person's relationship with his attorney should be respected regardless of the client's status in litigation, if any, and no other attorney should interfere with it without the client's attorney's consent.

The newer Model Rules of Professional Conduct agree. Model Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.<sup>182</sup>

The comment to this rule shows the broad meaning that should be given to the term "party." "This rule covers any person, *whether or not a party to a formal proceeding*, who is represented by counsel concerning the matter in question."<sup>183</sup> The comment to rule 4.2 gives the proper definition of party for Rule 2-100. "Party" must mean more than the formal parties to litigation.<sup>184</sup> Extending the definition of party to include anyone who is represented by counsel concerning the matter in question advances the goal of Rule 2-100 of preserving the attorney-client relationship while at the same time allowing attorneys to speak with represented people on matters outside the representation. "This Rule does not prohibit communication with a

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181. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1980). See *supra* note 160, for the differences between an ethical consideration "EC" and the disciplinary rule "DR."

182. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

183. *Id.* Rule 4.2 comment (emphasis added).

184. See *supra* note 164 and accompanying text.

party, or an employee or agent of a party, concerning matters outside the representation."<sup>185</sup>

The ABA's third pronouncement on this subject, DR 7-104(A) is less certain.

DR 7-104 Communication With One of Adverse Interest. (A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.<sup>186</sup>

The Textual and Historical Notes provide no additional information regarding the intention of the drafter's in using the term "party."<sup>187</sup> Given the similarity between rule 4.2 and DR 7-104(a)(1)<sup>188</sup> and that rule 4.2 has a drafter's comment, while DR 7-104(a)(1) has no statement of the drafter's intent, there is no reason to interpret DR 7-104(A)(1) any differently.<sup>189</sup>

The broad definition of party also has academic support.

Both DR 7-104(A)(1) and MR 4.2 prohibit contact with a represented "party." The lawyerism *party* sometimes refers only to parties in litigation but evidently is here intended to refer broadly to any "person" represented by a lawyer in a matter. Vide 'party of the first part' in ancient contracts.<sup>190</sup>

This view is taken as a given by some in the field of continuing legal education. "Witnesses in a criminal case who testify for the prosecution are not considered to be represented by the prosecutor and may be directly approached by defense counsel unless they are represented by another attorney concerning their testimony in that case."<sup>191</sup>

Allowing people other than the formal parties to the litigation to be protected by Rule 2-100 makes good law and good sense. The purpose of the rule is not just to insure that neither side of a litigation gains unfair advantage over the other; it is also designed to preserve the attorney-client relationship. "[T]he ultimate purpose of [then] Rule 7-103 is to preserve the confidentiality of attorney-

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185. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

186. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1). See *supra* note 160, for the differences between ethical consideration "EC" and disciplinary rule "DR."

187. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-104(A)(1).

188. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

189. See WOLFRAM, MODERN LEGAL ETHICS § 11.6.2, at 611 (1986).

190. *Id.* at 611 n.33 (emphasis in original).

191. BURR & FEFFER, PREPARATION AND PRESENTATION OF CASE AND ARGUMENT IN CALIFORNIA CRIMINAL LAW § 29.9, at 596 (Cal. Cont. Ed. of the Bar 1986).

client communications."<sup>192</sup> Extending Rule 2-100 beyond the formal parties to the litigation will help preserve the attorney-client relationship wherever it is threatened by unwarranted communication from another attorney.

The relationship between the molested child and his appointed counsel is the type of attorney-client relationship that should be protected under Rule 2-100 from unwarranted intrusions from defense counsel. Counsel is appointed for the child to minimize the psychological trauma a prosecution under section 288 can do to the child.<sup>193</sup> Defense counsel, by interviewing the child, adds to the harm done to the child by forcing him to retell the story of his molestation.<sup>194</sup> Thus, defense counsel, when interviewing the child without the consent of the child's attorney, strikes at the heart of the child's attorney-client relationship. The reason behind appointing counsel for the child is to minimize the psychological harm done to the child by the legal system.<sup>195</sup> Given the great vulnerability of children, especially when victims of molestation,<sup>196</sup> it is particularly important that Rule 2-100 protect the relationship between the molested child and his attorney. While the attorney-client relationship is always important, it takes on extra meaning when the fragile psyche of the molested child is involved.

### B. *The Constitutionality of Using Rule 2-100*

When an attorney for a molested child uses Rule 2-100 to prevent defense counsel from interviewing the child, a firestorm of protest

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192. *Bobelev v. Superior Court*, 199 Cal. App. 3d 708, 712, 245 Cal. Rptr. 144, 146 (1988).

193. See *supra* notes 108-21 and accompanying text.

194. See *supra* notes 151-57 and accompanying text. One cost of unnecessary contact between the child and defense counsel could be the child's testimony at trial. A child could be willing to retell his story only a limited number of times. Therefore, interviews with defense counsel could be the proverbial "last straw" and make the child unwilling to testify. See *Mlyniec & Dally, supra* note 32, at 137.

195. The district attorney should be equally susceptible to Rule 2-100. The comment states that "[t]here are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule . . . . Other applicable law includes the authority of government prosecutors and investigators as limited by relevant decisional law." CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 comment (West Interim Annot. Serv. No. 1, 1989). If the prosecutor wants to interview the child and the child's attorney refuses, then the prosecutor will have to subpoena the child and have the child testify before the grand jury. CAL. PENAL CODE § 939.2 (West Supp. 1989). The child's attorney must determine whether the child's psychological interests are best served either by testifying before the grand jury or by being interviewed by the district attorney subject to whatever conditions that can be agreed upon between the district attorney and the child's attorney.

196. See *supra* notes 15-36 and accompanying text.



from defense counsel will inevitably ensue. Protests from defense counsel should not, however, prevent the child's attorney from limiting access to his client, nor should it prevent courts from upholding such decisions, as there is nothing in either the United States or California constitutions to prohibit the child's counsel from restricting defense counsel's access to the child.

### 1. Confrontation

Preventing defense counsel from interviewing the child will not deny defendant his right to confront witnesses against him.<sup>197</sup> The right to confrontation is not a right to pretrial discovery. "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."<sup>198</sup> The purpose of the confrontation right is not to give defendant carte blanche in preparing for his trial. "The primary object of [the confrontation clause] was to prevent depositions or ex parte affidavits . . . being used against prisoner in lieu of a personal examination and cross-examination of the witness."<sup>199</sup> Therefore, as long as the defendant is allowed to confront and cross-examine the child *at trial*,<sup>200</sup> his confrontation rights are not violated. "It was clear . . . that the 'confrontation' guaranteed by the Sixth and Fourteenth Amendments is confrontation *at trial*—that is the absence of defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial."<sup>201</sup> Therefore, as long as defendant is not prevented from cross-examining defendant at trial there will be no violation of his rights to confrontation.<sup>202</sup>

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197. U.S. CONST. amends. VI, XIV; CAL. CONST. art. I, § 15.

198. Barber v. Page, 390 U.S. 719, 725 (1968).

199. Mattox v. United States, 156 U.S. 237, 242-43 (1895). Using Rule 2-100 to prevent defense counsel from interviewing the child outside of court will not prevent the early dismissal of meritless cases. The preliminary hearing is the vehicle designed to weed out meritless cases. "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses." People v. Eliot, 54 Cal. 2d 498, 504, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960). Thus, as long as defendant can cross-examine the child at the preliminary hearing, defendant should be safe from meritless cases.

200. See People v. Harris, 165 Cal. App. 3d 1246, 1256, 212 Cal. Rptr. 216, 221-22 (1985) (defendant entitled to confrontation at the preliminary hearing).

201. Nelson v. O'Neil, 402 U.S. 622, 626 (1971).

202. In Pennsylvania v. Ritchie, 480 U.S. 39 (1987), a plurality of the court found that the confrontation clause was only a trial right. *Id.* at 53-54. While three justices opposed this

## 2. Adequate Defense

Allowing the child's counsel to invoke Rule 2-100 also would not violate defendant's right to prepare an adequate defense. The prosecution has a duty not to suppress evidence favorable to the accused.<sup>203</sup> Furthermore, the prosecution cannot order a potential witness to refuse to speak to defendant's attorney.<sup>204</sup> Thus, if appointing counsel for the child is perceived as a government ploy to deprive the defendant of a chance to interview the witness, then the child's attorney's use of Rule 2-100 could be described as an intentional suppression by the government of whatever evidence defendant would get from interviewing the child.

### a. Sufficient Preparation

A defendant is not prevented from interviewing the child because defendant already has an opportunity to interview the child before trial at the preliminary hearing. While the primary function of the preliminary hearing is to "weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial,"<sup>205</sup> the preliminary hearing can also serve as an important discovery tool for defendant. In *Hawkins v. Superior Court*,<sup>206</sup> the California Supreme Court recognized the important discovery function an adversarial preliminary hearing can play.<sup>207</sup> The *Hawkins* court recognized that one of the most important advantages given to defendants in preliminary hear-

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holding, *id.* at 61 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 66 (Brennan, J., and Marshall, J., dissenting), two other justices did not address the confrontation clause issue, dissenting on the grounds that the case lacked finality. *Id.* at 72 (Stevens, J., Brennan, J., Marshall, J., and Scalia, J., dissenting). While California courts have been willing to extend defendant's confrontation right to the preliminary hearing, defendant will still be able to confront the child at the preliminary examination and trial, preserving his right to confrontation under the California Constitution (art. I, section 15). *See, e.g.,* *People v. Harris*, 165 Cal. App. 3d 1246, 1256, 212 Cal. Rptr. 216, 221-22 (1985) (confrontation right extends to preliminary hearing). Finally, the state right to confrontation may be the same as the federal right. *People v. Contreras*, 57 Cal. App. 3d 816, 820, 129 Cal. Rptr. 397, 399 (1976).

203. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

204. *Walker v. Superior Court*, 155 Cal. App. 2d 134, 140, 317 P.2d 130, 134 (1957).

205. *Jaffe v. Stone*, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941).

206. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

207. *Id.* at 588, 586 P.2d at 918-19, 150 Cal. Rptr. at 437-438.

ings was the ability it gave defense counsel to elicit information from hostile prosecution witnesses.

There is no other effective means [than the preliminary examination] for the defense to compel the cooperation of a hostile witness [citation]; in the unlikely event that all the prosecution witnesses agree to submit to defense interviews, the defense still must incur unnecessary expense and hardship which may be substantial.<sup>208</sup>

The United States Supreme Court also recognized defendant's ability to interview hostile witnesses at the preliminary examination.

First, the lawyer's skilled examination and cross-examination of witnesses [at the preliminary hearing] may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial . . . . Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at trial.<sup>209</sup>

Under California law, the defendant has the right to cross-examine prosecution witnesses<sup>210</sup> and to call witnesses on his own behalf at the preliminary hearing.<sup>211</sup> Given the importance of the victim's testimony to the typical child molestation case,<sup>212</sup> the prosecution will usually have the child testify at the preliminary examination and therefore leave him open to cross-examination by defense counsel. This cross-examination may be for the purpose of raising an affirmative defense<sup>213</sup> or to impeach the witness.<sup>214</sup> Furthermore "[i]t is not a valid objection that the examination may lead to discovery . . . or that the cross-examiner is unable to predict what the testimony will develop."<sup>215</sup> Given the latitude defendant has in cross-examination he should have little difficulty in conducting a thorough examination of the child at the preliminary hearing. If the prosecution decides not to call the child at the preliminary hearing then defendant can call the child as a defense witness and can examine him with

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208. *Id.* at 589, 586 P.2d at 919, 150 Cal. Rptr. at 438.

209. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion).

210. CAL. PENAL CODE § 865 (West 1985).

211. CAL. PENAL CODE § 866 (West 1985).

212. *See supra* note 17 and accompanying text.

213. *Jennings v. Superior Court*, 66 Cal. 2d 867, 877-78, 428 P.2d 304, 311, 59 Cal. Rptr. 440, 447 (1967).

214. *Alford v. Superior Court*, 29 Cal. App. 3d 724, 728, 105 Cal. Rptr. 713, 715-16 (1972).

215. *Foster v. Superior Court*, 107 Cal. App. 3d 218, 225, 165 Cal. Rptr. 701, 705 (1980).

similar thoroughness.<sup>216</sup> The defendant's right to a preliminary hearing,<sup>217</sup> when combined with the broad scope that defense counsel's questioning can take at the preliminary hearing, satisfies whatever right defendant has to interview witnesses to prepare for his defense.<sup>218</sup>

*b. No State Action*

In addition to not depriving the defendant of any rights, invoking Rule 2-100 survives constitutional scrutiny because the child's attorney's actions cannot be fairly attributed to the state. "[M]ost rights secured by the Constitution are protected only against infringement by governments."<sup>219</sup> The defendant's confrontation right and his right to prepare a defense, to the extent they are derived from the United States Constitution, come from the Due Process Clause of the Fourteenth Amendment.<sup>220</sup> As the fourteenth amendment only applies to state actions, not the actions of private individuals,<sup>221</sup> the attorney's action in invoking Rule 2-100 must in some way be attributed to the state for it to violate defendant's federal constitutional rights.<sup>222</sup>

216. See *McDaniel v. Superior Court*, 55 Cal. App. 3d 803, 805, 126 Cal. Rptr. 136, 137 (1976) (applying the principles of *Jennings* to direct examination by defendant at the preliminary hearing).

217. *Hawkins*, 22 Cal. 3d at 593, 586 P.2d at 922, 150 Cal. Rptr. at 441.

218. *Cf.*, *Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (1957). In *Walker*, the defendant was indicted by a grand jury. *Id.* at 139, 317 P.2d at 134. While the court did not mention whether a preliminary hearing had taken place, as it was 20 years before defendant had a right to a post-indictment preliminary hearing, *Hawkins*, 22 Cal. 3d at 593, 586 P.2d at 922, 150 Cal. Rptr. at 441, it is logical to assume that the defendant in *Walker* had no preliminary hearing to give him the opportunity to examine the witness. *Walker* is based on defendant's right to "obtain witnesses to testify on his behalf and to prepare a defense." *People v. Hannon*, 19 Cal. 3d 588, 601, 564 P.2d 1203, 1210-11, 138 Cal. Rptr. 885, 892-893 (1977). This right is amply protected by defendant's ability to examine the child at the preliminary hearing.

219. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

220. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

221. *United States v. Price*, 383 U.S. 787, 799 (1966).

222. California also requires state action to invoke its constitution. California's equal protection and due process provisions both require state action. CAL. CONST. art. I, §§ 7, 15. *Gay Law Students' Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 467-69, 595 P.2d 592, 597-598, 156 Cal. Rptr. 14, 19-20 (1979) (equal protection); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366-67, 521 P.2d 441, 449-450, 113 Cal. Rptr. 449, 457-458 (1974) (due process). No California case discusses the relationship between state action and California's confrontation clause, California Constitution article I, section 15. As California's confrontation clause is in the same part of the constitution as California's due process clause, which does require state action, there is no reason not to require state action for California's confrontation clause. The confrontation clause's concern with criminal matters provides all the more reason to limit

Therefore, for any constitutional issue to be raised by the use of Rule 2-100 by the child's attorney, the actions of the child's attorney in using Rule 2-100 must in some way be attributed to the state.

When analyzing whether a person's actions can be attributed to the state, the key issue is whether the private actor exercises powers that are usually reserved to the state.<sup>223</sup> If the private actor exercises "power traditionally exclusively reserved to the State" such as elections or running towns, then these actions can be considered state actions.<sup>224</sup> The powers of the attorney are by no means exclusively reserved to the state.<sup>225</sup>

The public importance and heavy regulation of the practice of law does not make it a state function. "Doctors, optometrists, lawyers, Metropolitan [Edison Company], and Nebbia's Upstate New York Grocery selling a quart of milk are all engaged in regulated businesses providing arguably essential goods and services 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State."<sup>226</sup>

California's enactment of Rule 2-100 into law does not turn the child's attorney's use of Rule 2-100 into state action. A state must compel the action of a private actor to be responsible for the act.<sup>227</sup> California, in enacting Rule 2-100, does not compel an attorney to use it to prevent contact between his client and another attorney. Indeed, under certain circumstances the child's attorney may want to let the defendant's attorney talk to the child.<sup>228</sup> It is up to the attorney, not the state, to decide whether the client can speak to another attorney about the subject of the representation.<sup>229</sup> "Some-

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its prohibitions to state action. *See* *Dyas v. Superior Court*, 11 Cal. 3d 628, 632, 522 P.2d 674, 676, 114 Cal. Rptr. 114, 116 (1974) (California's exclusionary rule does not apply to the actions of private citizens). While the California Supreme Court has defined state action differently from the United States Supreme Court on occasion, it has done so in the heavily regulated area of public utilities. *See* *King v. Meese*, 43 Cal. 3d 1217, 1229, 743 P.2d 889, 896, 240 Cal. Rptr. 829, 836-837 (1987); *Gay Law Students Ass'n*, 24 Cal. 3d at 469, 595 P.2d at 598-99, 156 Cal. Rptr. at 20-21. Since the attorney's use of Rule 2-100 does not involve such a situation, there is no reason to include the use of Rule 2-100 in a broader definition of state action than the federal courts use.

223. *See* 2 ROTUNDA, NOWAK, & YOUNG, TREATISE ON CONSTITUTIONAL LAW § 16.2, at 163 (1986).

224. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

225. *See, e.g.*, CAL. BUS. & PROF. CODE § 6060 (West Supp. 1989) (qualifications for admission to California State Bar).

226. *Jackson*, 419 U.S. at 354.

227. *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 164.

228. *See* SMITH, CHILDREN'S STORY: CHILDREN IN CRIMINAL COURT 43 (1985).

229. "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by

one's exercise of the choice allowed by state law where the initiative comes from [him] and not from the state does not make [his] action in doing so 'state action' for the purposes of the Fourteenth Amendment."<sup>230</sup>

The closest relationship the child's attorney has with the state is in his appointment by the court under section 288(d) and whatever compensation, if any, he receives from California. While this article has not discussed whether and how the child's attorney is to be compensated for his services, it is possible that, like appointed counsel for indigent criminal defendants, the attorney appointed under section 288(d) could be paid by the government.<sup>231</sup> Even if the child's attorney is paid by the state or any subdivision of the state,<sup>232</sup> this does not make the state responsible for his actions. "The Government may subsidize private entities without assuming constitutional responsibility for their actions."<sup>233</sup>

another lawyer in the matter, unless the member has the consent of the other lawyer." CAL. CIV. & CRIM. R., PROF. CONDUCT 2-100 (West Interim Annot. Serv. No. 1, 1989).

230. *Jackson*, 419 U.S. at 354 (footnote omitted). Thus California does not encourage the child's attorney to prevent defense counsel from interviewing the child. Rule 2-100 is a neutral statement that allows any attorney to prevent an opposing attorney from talking to his client. "The existence of a state law which recognizes the legitimacy of an action taken by an otherwise private person will not give rise to 'state action' being present in the private activity. To imbue an activity with state action there must be some non-neutral involvement of the state with the activity." ROTUNDA, NOWAK, & YOUNG, *supra* note 223, § 16.3 at 176. Therefore it is the child's attorney, not California, that keeps defense counsel away from the child.

231. The first place to start in determining how to finance the appointment of counsel under section 288(d) is with the phrase "within existing budgetary resources." CAL. PENAL CODE § 288(d) (West Supp. 1990). As this Article is concerned with the extent of a court's authority under section 288(d) and not the interpretation of financing provisions of statutes, a detailed analysis of the phrase "within existing budgetary resources" will not be provided.

The legislative counsel believes that the inclusion of the phrase "within existing budgetary resources" into section 288(d) makes section 288(d) a state-mandated local program. 1989 Cal. Leg. Serv. ch. 1402, at 5253 (West) (legislative counsel's digest). Article XIII B, section 6 of the California Constitution requests that the state provide a "subvention of funds" to local governments whenever "the legislature or any other state agency mandates a new program or higher level of service on any local government." CAL. CONST. art. XIII B, § 6 (West Supp. 1989). Therefore, the county could pay the cost of the child's counsel and seek reimbursement from the state. By adding the clause "within existing budgetary resources" to section 288(d), the legislature is attempting to avoid the application of article XIII B, section 6 to the state. 1989 Cal. Leg. Serv. ch. 1402, sec. 15, at 5276-77 (West).

The legislature's success in exempting the state from liability and the correctness of the legislative counsel's analysis of section 288(d) is beyond the scope of this article. What is clear is that legislature believes at least some funding should be provided from somewhere under section 288(d). What is also clear is that payment of the state does not change the child's counsel into an agent of the state. See *infra* notes 232-33 and accompanying text.

232. See, e.g., CAL. PENAL CODE § 987.2 (a)-(b) (West Supp. 1989) (assignment of counsel chargeable to county government).

233. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987).

The attorney's appointment by the court does not make him a state actor either. In determining that appointed criminal defense counsel in a federal case was not absolutely immune to a state malpractice suit brought by his client, the Supreme Court stated that: the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client.<sup>234</sup>

The child's attorney's sole goal is to prevent psychological harm to the child.<sup>235</sup> Like appointed defense counsel, he will achieve his goal by serving the "undivided interests of his client." Thus, like appointed defense counsel, his appointment does not make him a creature of the state.

In *Polk County v. Dodson*,<sup>236</sup> the Supreme Court rejected the assertion that a public defender acted under color of state law when exercising her independent professional judgment.<sup>237</sup> Here a full-time employee of the state<sup>238</sup> was not a state actor when acting in her professional capacity because public defenders act independently from the state in exercising professional judgment.<sup>239</sup> While the child's attorney is not in the same adversarial position as the public defender is against the district attorney,<sup>240</sup> his interests are not the same as the district attorney's and may conflict with them. The state is chiefly concerned with convicting the defendant, while the child's attorney's duty is to shield the child from psychological harm.<sup>241</sup>

When the attorney prevents the defense attorney from speaking with his client he is not doing it out of any desire to convict defendant at all costs; he is doing it out of a legitimate concern for the well-being of a particularly vulnerable client. The child's attorney does not control the prosecution.<sup>242</sup> His only client is the child; the people are the clients of the district attorney.<sup>243</sup> The role of the child's

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234. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

235. See CAL. PENAL CODE § 288(d) (West Supp. 1990).

236. 454 U.S. 312 (1981).

237. *Id.* at 325.

238. *Id.* at 314.

239. *Id.* at 319.

240. See *id.* at 318.

241. See *supra* notes 48-50 and accompanying text.

242. See *supra* note 128 and accompanying text.

243. See *supra* note 175 and accompanying text.

attorney is closest to that of appointed counsel for defendant. Each represents the interests of a private individual in a criminal action. Each is solely concerned with preventing certain harms from befalling their respective clients. Neither has ultimate control over the prosecution of the case. The only connection either has with the government is the appointment as counsel and possibly the manner of compensation.<sup>244</sup> Both are essentially private attorneys doing a public service<sup>245</sup> and the state is not constitutionally responsible for the actions of either.

#### CONCLUSION

Penal Code section 288(d), if properly applied by the courts, can provide the molested child with a host of protections throughout the criminal case.<sup>246</sup> Courts should not be afraid to use section 288(d) to help the children. As long as a procedure is constitutional and beneficial to the child's psyche, a court is required by section 288(d) to implement that procedure. The *Hochheiser* court was concerned about infringing upon defendants' rights.<sup>247</sup> Once this hurdle is overcome there is no barrier to broad, creative uses of section 288(d) to alleviate the myriad of harms our criminal justice system can inflict upon the child. Appointing counsel to represent the child is just one of many potential uses of section 288(d). The only barriers to the use of section 288(d) should be the constitution and the hurt the child feels. While the former will place real limits on what a court can do under section 288(d),<sup>248</sup> the latter, unfortunately, is virtually limitless under our current criminal justice system.

Using section 288(d) to get counsel for the child is one major remedy to the child's problems. The child will be less alone in the criminal proceedings. He will have someone who can and will protect his interests. He will have a champion who will fight for his rights when he is incapable of asserting them and will protect him from the greater interests that threaten to crush him. He will have someone who is not a tool of the prosecution, the courts or defendant. He

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244. See *supra* notes 231-34 and accompanying text.

245. See *supra* note 245 and accompanying text.

246. For a list of some of the procedures section 288(d) could be used to support, see *Hochheiser*, 161 Cal. App. 3d at 791 n.9, 208 Cal. Rptr. at 282 n.9.

247. See *supra* notes 59-63 and accompanying text.

248. See *Coy v. Iowa*, 108 S. Ct. 2798 (1988).



will have someone who knows what his rights are and how to defend them. He will have someone with a duty to act only in his interests and protect all his rights.