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THE ROLE OF THE CHILD'S ATTORNEY IN PROTECTING THE CHILD THROUGHOUT THE LITIGATION PROCESS

ANN M. HARALAMBIE*

I. INTRODUCTION

The role of the child's attorney in child abuse and neglect cases¹ is not always clear, in statutory law, case law, or practice.² In general, attorneys assume either the traditional role of "counsel," representing the child's expressed position, or the role of "guardian *ad litem*," representing the child's best interests.³ After two decades of growing interest in representing children, "pediatric law"⁴ has become a recognized subspecialty within the practice of family and juvenile law, with its own multidisciplinary professional organizations,⁵ periodic professional literature,⁶ ongoing professional conferences, and resource centers.⁷ Various groups have begun the process of articulating standards of practice for children's attorneys, including recommending roles for such attorneys.⁸ It is clear that neither the role of "counsel" or

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1. This article refers to cases commonly called "dependency" "dependency and neglect," (CHINS), (CINA), (CHIPS), or (CHINA), (all cases typically brought by child protective services or child welfare agencies). The article does not address issues arising in delinquency, status offense, or divorce-related cases.

2. See generally ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 1-14* (1993) (discussing the broad role of a child's attorney).

3. It is beyond the scope of this article to discuss the various possible roles of a child's attorney. The terms "counsel" and "guardian ad litem" are used in this article for convenience to differentiate the two major roles and do not refer to the terms which may be used in statutes or orders appointing the child's attorney.

4. The term "pediatric law" was coined by Donald C. Bross, founder of the National Association of Counsel for Children.

5. The primary organization for attorneys representing children's rights is National Association of Counsel for Children. Other multidisciplinary organizations include the American Professional Society on the Abuse of Children and the International Society for the Prevention of Child Abuse and Neglect.

6. See, e.g., *THE GUARDIAN, LAW GUARDIAN REPORTER, THE APSAC ADVISOR, CHILD ABUSE AND NEGLECT: THE INTERNATIONAL JOURNAL, THE JOURNAL OF CHILD SEXUAL ABUSE*.

7. Resource centers include the ABA Center on Children and the Law, 740 15th Street, Washington, D.C. 20005, 202/331-2250, and the National Clearinghouse on Child Abuse and Neglect Information, P.O. Box 1182, Washington, D.C. 20013-1182, 800/FYI-3366, 703/385-3206, fax 703/385-3206.

8. The American Bar Association (ABA) Family Law Section approved standards for attorneys

“guardian *ad litem*” is adequate to protect children involved in child abuse and neglect litigation. The field of representing children has matured, its practitioners have reached a critical mass, and the time is ripe for the promulgation of standards. Hopefully national standards will emerge to more systematically develop these duties. This article reviews the existing views and ethical rules concerning the role of the child’s attorney, points out the need for updated standards, and discusses some of the practical aspects of how children’s attorneys can and should protect their child clients throughout the litigation process.

II. EXISTING VIEWS ABOUT THE PROPER ROLE OF THE CHILD’S ATTORNEY

A. BACKGROUND

Following the Supreme Court’s 1966 decision in *In re Gault*,⁹ which granted alleged juvenile delinquents the right to counsel,¹⁰ scholars began debating what the proper role of attorneys for children was in non-delinquency settings. The primary debate concerned whether the attorney should decide what was in the child’s best interests and advocate that, or whether the attorney should be guided by the child’s expressed views, even if the attorney felt they were not in the

representing children in child abuse cases to be submitted to the ABA House of Delegates at its February 1996 meeting. *Proposed ABA Standards of Practice For Lawyers Who Represent Children And Abuse and Neglect Cases* 29-3 *FAM. L. Q.* 376 (Fall 1995). The National Association of Counsel for Children is in the process of adopting standards. The American Professional Society on the Abuse of Children has created a task force to draft guidelines. *Cf. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (AAML), REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS* (1995). The American Law Institute (ALI) is also currently in the process of drafting standards for the child’s attorney in divorce-related custody cases.

9. 387 U.S. 1 (1966).

10. *In Re Gault*, 387 U.S. 1, 14 (1966).

child's best interests.¹¹ The book and articles addressing this debate never arrived at a consensus about the proper role for the child's attorney.

Courts¹² and legislatures¹³ have not provided much assistance either, and have often required attorneys to assume dual and potentially inconsistent roles. The Iowa Supreme Court recognized this problem stating:

We are mindful that in the ordinary lawyer-client relationship, the lawyer's role is not to *determine* the client's interest but to *advocate* the client's interest Such a duty may present

11. See, e.g., ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993); DONALD T. KRAMER, 1 *LEGAL RIGHTS OF CHILDREN* § 2.25 (2d ed. 1994); Stephen W. Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. RICH. L. REV. 661 (1979); Catherine M. Brooks, *When A Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757 (1990); Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); Howard A. Davidson, *Child Advocacy*, 74 A.B.A. J. 119 (1988); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 MICH. L. REV. 1 (1987); Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, BOSTON B.J. Jan.-Feb. 1991, at 6; Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad litem*, 13 CAL. W. L. REV. 16 (1976); Rebecca H. Hartz, *Guardians Ad litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 327 (1993); Jacqueline A. Jacobs, *Incompetent Clients*, 2 GEO. J. LEGAL ETHICS 305 (1988); John H. Lightfoot Jr., *Children's Rights, Lawyers' Roles*, 10 FAM. ADVOC. 4 (1988); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607 (1982-83); Angela D. Lurie, *Representing the Child-Client: Kids are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205 (1993); Tara L. Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of the Guardian ad litem*, 66 N.D. L. REV. 633 (1990); Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIM. LAW. 45 (Winter 1993); Sarah H. Ramsey, *Representation of the Child in Child Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983); James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILLANOVA L. REV. 521 (1978); Robert Schwartz, *A New Role for the Guardian Ad litem*, 3 J. DIS. RESOL. 117 (1987); Marvin Ventrell, *The Child's Attorney*, 17 FAM. ADVOC. 73 (1995); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L. J. 259 (1995); Shannan Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993); Robyn-Marie Lyon, Comment, *supra* note 40; see generally ANNOTATED BIBLIOGRAPHY OF GUARDIAN AD LITEM LAW REVIEW ARTICLES (National Legal Resource Center for Child Advocacy and Protection 1980). Cf. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 495 (1973).

12. See, e.g., In re Barnhouse, 765 P.2d 610, 612 (1988) *cert. denied*, 490 U.S. 1021 (1988) (approving attorney's conduct in recommending against following the child's wishes); In re Kramer, 580 P.2d 439, 444 (Mont. 1978) (determining that appointed attorney must advocate child's interests, not merely parrot the child's expressed wishes); In re Davis, 465 A.2d 614, 632 (Pa. 1983) (criticizing attorney's lack of representation on behalf of the child but suggested that the attorney should have submitted the child's preference to the court and explained why he disagreed).

13. In his 1988 Supplementary Practice Commentary to New York's Family Court Act, art. 2, § 241, Douglas Besharov wrote "[e]ven after twenty-five years, the role of 'law guardian' remains ambiguous and subject to controversy. It seems fair to say, though, that the New York Legislature used the term to denote something other than simply a lawyer for the child and something other than the traditional guardian ad litem." Arkansas requires the child's attorney to perform two potentially conflicting duties: "to represent the best interest of the juvenile and to advocate for the juvenile's articulated wishes." ARK. CODE ANN. § 9-27-316(e)(1) (Michie 1987). Wyoming expects the child's attorney to serve also as guardian ad litem. WYO. STAT. § 14-3-211(a) (1977).

an ethical dilemma in a juvenile proceeding where the objective is *always* the best interests of the child, not the child's personal objective. We are aware that the unsettled law in this area offers no clear direction to an attorney faced with such a predicament.¹⁴

B. STANDARDS OF PRACTICE

Standards proposed by the American Bar Association and the Institute for Judicial Administration (ABA/IJA) in the mid-1970's expressly reject the best interests role and urge advocacy of the child's expressed interests.¹⁵ According to the ABA/IJA standards, "where the juvenile is capable of considered judgment on his or her own behalf, the determination of the client's interests in the proceedings should ultimately remain the client's responsibility."¹⁶ The standards provide for a purely fact-finding role which does not require the attorney to take a position before the court for clients who are "very young persons."¹⁷

The American Academy of Matrimonial Lawyers (AAML) adopted its Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings in 1995.¹⁸ These standards explicitly do not address the role of the child's attorney in abuse and neglect actions. However, they do represent a recent restatement of one view currently held about the role of children's attorneys. The AAML standards take the general position that attorneys should represent the child's expressed wishes.¹⁹ Similar to the ABA/IJA standards, the AAML standards provide that where the child is deemed "impaired," a condition rebuttably presumed for children under the age of 12,²⁰ the attorney is to take no advocacy position at all, rather merely keeping the child informed about the case and ensure that the court has all the relevant evidence before it.²¹

The American Bar Association Family Law Section's (ABAFLS) draft guidelines, which have been approved by the Section but not yet presented to the ABA House of Delegates, take a hybrid view of the

14. In re J.P.B., 419 N.W.2d 387, 391 (Iowa 1988) (citations omitted).

15. ABA/IJA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATED TO COUNSEL FOR PRIVATE PARTIES 3.1(a) (1976) [hereinafter ABA/IJA STANDARDS].

16. *Id.* std. 3.1(b)(ii)(b).

17. *Id.* std. 3.1(b)(ii)(c) & cmt.

18. REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS (AAML 1995) [hereinafter AAML STANDARDS].

19. AAML STANDARDS, *supra* note 18, std. 2.3.

20. *Id.* std. 2.2.

21. *Id.* stds. 2.7-2.13. For a more complete critique of this aspect of the AAML standards, see Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, __ J. AM. ACAD. MATRIM. L. (forthcoming).

role of the child's attorney in child abuse cases. In general, the role is similar to that of an adult's attorney, to advocate the child's expressed position. However, the draft guidelines depart from the ABA/IJA and AAML position that there should be no advocacy for "impaired" or young clients. The ABAFLS draft guidelines provide for advocacy of an objectively determined best interests position for these children. Further, the draft guidelines permit attorneys to deviate from the client's expressed wishes where those wishes would be dangerous to the child (as opposed to merely "unwise").

C. ETHICAL RULES

Rule 1.14 of the Model Rules of Professional Conduct discusses the ethical implications of representing parties under a disability, including the disability of minority.²² Rule 1.14(a) states that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."²³ The Comment to Model Rule 1.14 states that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."²⁴ While the Model Rules do not provide more specific guidance for children's attorneys, they do allow flexibility in applying the ethical standard. Under Rule 1.14, a client can be under a disability with respect to some decisions but not with respect to others. The attorney is expected to modify the attorney-client relationship only insofar as it is not possible to maintain a normal relationship.

Similarly, Ethical Consideration 7-11 of the Model Code of Professional Responsibility²⁵ states that the attorney's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client."²⁶ The attorney must "consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client." Ethical Consideration 7-12 provides that where a client under a disability has no legal representative, the attorney "may be compelled in court proceedings to make decisions on behalf of the client."²⁷ EC 7-12 provides further that "[i]f the client is capable of understanding

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1994).

23. *Id.*

24. *Id.* at 1.14 cmt.

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1994).

26. *Id.* at 7-11.

27. *Id.* at 7-12.

the matter in question or of contributing to the advancement of his interests, the lawyer should obtain from him all possible aid.”²⁸

III. THE NEED FOR SPECIAL STANDARDS FOR CHILDREN'S ATTORNEYS

A. INADEQUACY OF EXISTING STANDARDS

The duties of attorneys representing children are not adequately addressed by existing ethical rules, standards, statutes, and case law, which often draw a sharp distinction between being “counsel” and “guardian *ad litem*.” The existing ethical rules were not drafted with child advocacy in mind and do not provide adequate guidance for how child advocates should modify their representation within the flexibility that the rules provide. Those rules “remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis, typically in business transactions or in litigation.”²⁹ This traditional model is inadequate when applied to legal proceedings involving personal family relations, particularly when the parties may be impaired to some degree.

Modification of the ethical standards is appropriate even when the “impaired” client is an adult. For example, participants in a symposium on the ethical issues involved in representing the elderly recommended that attorneys explicitly be given “discretion to act to protect individuals with diminished capacity from various types of harm,” being authorized to take protective steps even without the client’s permission, “guided by the goal of intruding into the client’s autonomy to the least extent necessary to protect that person.”³⁰

Similar modifications are necessary and appropriate for child advocacy. What we need is to know *how* to modify the attorney-client relationship “insofar as it is not possible to maintain a normal relationship.” The specialized multidisciplinary training that is recommended for child advocates should equip those attorneys with the responsibility of exercising increased discretion. It is hoped that new standards will address these problems in a comprehensive and practical way. The ABFLS draft guidelines do a good job and should be adopted.

28. *Id.*

29. Bruce A. Green & Nancy Coleman, *Foreword*, 62 FORDHAM L. REV. 961, 967 (1994) (referring to the inadequacy of ethical standards as applied to representing elderly impaired clients).

30. *Id.* at 976. A similar symposium on the ethical issues involved in representing children will be convened in December 1995. A special symposium issue of the Fordham Law Review will be devoted to that topic.

An approach similar to the one embodied in the ABA/IJA and AAML standards may be appropriate for children deemed "unimpaired," but this approach fails to offer a meaningful voice to other children. Some children's attorneys take such an extreme "expressed wishes" position that they fail to advise or counsel their child clients even to the extent that they would counsel adult clients with whom they disagreed. For example, domestic relations attorneys representing economically dependent, battered spouses often refer their clients to counseling and attempt to persuade them to make more prudent decisions. The attorney's experience and relative objectivity allows him or her to look "farther down the road" to see the long-term consequences of decisions which may look superficially appealing to extricate the client from a short-term stressor. Child advocates certainly should not offer *less* advice to child clients than to "impaired" adult clients.³¹ The child's attorney does have dual fiduciary duties to advise the client, but not to *unduly* influence the child where the attorney is governed by the child's expressed wishes. Therefore, while advice and counsel are necessary to the extent that the child can understand them, the attorney must be careful not to substitute his or her opinions for those of the informed child.

The issue of "impairment" itself is problematic. Except perhaps for young infants, it is virtually impossible to label a child client "impaired" or "unimpaired" on a global basis. "Impairment" is functional, contextual, incremental, and changing.³² As Allen Buchanan and Dan Brock point out in the context of medical decision-making, "[a] person may be competent to make a particular decision at a particular time, under certain circumstances, but incompetent to make another decision, or even the same decision, under different conditions."³³ With

31. The Preamble to the Model Rules of Professional Conduct provides:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesman for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

MODEL RULES OF PROFESSIONAL CONDUCT Preamble [2] (1992). The child's attorney, as an attorney, must serve in all of these capacities with respect to the child client. Unfortunately, the expressed wishes versus best interests debate among child advocates often has diverted attention from the other aspects of legal representation, such as the duty to counsel the client with respect to the issues involved in the case.

32. JAMES GARBARINO, ET AL., WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING INFORMATION FROM CHILDREN 12 (1992). It is impossible to understand children's "competence and performance apart from the contexts in which they are embedded." *Id.*

33. ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE

respect to psychoeducational decision-making Donald Bersoff argues that attorneys should presume that children are capable of making decisions as well as adults and that the burden should fall on those seeking to deprive children of choice to prove a "significant risk of irreversible damage or clear and convincing empirical evidence that at particular ages children do not have sufficiently developed skills to exercise discretion."³⁴ On the other hand, abused children of any age may have impaired ability to make rational judgments concerning their home life.³⁵

The United States Supreme Court has discussed the differences between a child's maturity to make various types of decisions, distinguishing, for example, between abortion decisions and decisions relating to marriage, voting, and pornography.³⁶ The Arizona Court of Appeals has discussed the various levels of maturity in distinguishing the age limit for various privileges from young children's capacity and standing to file a termination of parental rights petition on their own behalf.³⁷

Children may not marry, drive a car, join the armed services or consent to surgery without the consent of a parent or guardian because the legislature has determined these acts require a certain level of maturity and capacity. The same cannot be said of a severance proceeding. Maturity has nothing to do with a child's interest in the substance of such a proceeding.³⁸

Maturity, capacity, or competence do not affect a child's *interest* in child abuse proceedings; although, they clearly are relevant to the child's ability to make litigation decisions, formulate objectives, and otherwise direct his or her attorney's representation. The question becomes whether and how one can ascertain what the child's interest in the proceeding is and the degree to which such a determination should be shaped by the child's expressions. Labeling child clients as either "impaired" or "unimpaired" for purposes of determining whether or not to advocate that child's position is an unsatisfactory method for de-

DECISION MAKING 18 (1989).

34. Donald N. Bersoff, *Children as Participants in Psychoeducational Assessment*, in CHILDREN'S COMPETENCE TO CONSENT 149, 170 (Gary B. Melton et al. eds., 1983).

35. See, e.g., David L. Kerns, *The Pediatric Perspective*, in FOUNDATIONS OF CHILD ADVOCACY 23 (Donald C. Bross & Laura Freeman Michaels eds., 1987).

36. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (holding Massachusetts' abortion statute unconstitutional because it did not provide exceptions to parental consent requirement when minor could prove she had maturity to make the decision). Cf. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (determining jury trials not a constitutional requirement in juvenile cases because of the unique paternal attention of the juvenile court system).

37. *In re Pima County Juvenile Severance Action No. S-113432*, 872 P.2d 1240 (Ariz. Ct. App. 1994).

38. *Id.* at 1243.

fining the role of the child's attorney, and existing ethical standards contain no such requirement. It is also difficult to determine how attorneys can assess whether a child is "impaired" or not, something few mental health professionals are skilled to assess,³⁹ even in the forensically common situations of determining juvenile capacity to waive *Miranda* rights or the competency of juvenile delinquents to stand trial as adults.⁴⁰

Discussing the role of the guardian *ad litem*, Tara Muhlhauser points out the need to combine the roles of investigator, champion, and monitor, because only in a symbiotic combination can the guardian *ad litem* fully represent the child's interests or wishes.⁴¹ It is futile to try to "shoehorn" child advocacy standards into the traditional roles and rules. The profession is maturing, and the standards must reflect that growing maturity. It is time for a paradigm shift. Individual experienced children's attorneys have already self-defined many aspects of their roles. Now the national standards must catch up, taking attorneys out of the awkward position of practicing in ways which are not entirely protected by the existing ethical rules.

IV. PROTECTING CHILDREN DURING LITIGATION

A. DETERMINING THE ROLE

However the child's attorney's role is defined, it is crucial that both the attorney and the child, to the extent possible, understand what that role is. While this article suggests some components of what the role *should* be, that is of secondary importance to the practicing attorney representing a particular client. The attorney is bound by what the role *is*, how it is defined by statute, local case law, rule, or contract. If

39. Cf. Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101, 1138 (1994) (discussing incapacities in the context of elderly clients). The author states that:

The rule [Model Rule 1.14] does not state which of the many tests and medical models for determining competency the lawyer should use in exercising this judgment. It offers no clue about how to determine task-specific, partial, or intermittent incapacity, nor does it acknowledge what an unrealistic expectation it places on lawyers. As Professor Allee remarked, '[d]etermining competency is difficult for medical and behavioral experts, much less for lawyers'

Id. (footnotes omitted).

40. Interview with Thomas Grisso, Ph.D., Professor and Forensic Psychologist, University of Massachusetts (Jan. 21, 1995).

41. Muhlhauser, *supra* note 11, at 638-639.

[I]f they become mutually exclusive the champion's advocacy will be diluted by a lack of relevant information and the investigator will not be able to provide facts, alternatives, and recommendations to the court. Without championship and investigation, the monitor role loses effectiveness because advocacy and information must be present for an effective check on the progress of the permanent reunification plan.

Id.

the role is not clear, the appointed attorney must seek clarification from the appointing judge.⁴²

The attorney must know: 1) who determines the position to be advocated, 2) whether the child has full party status, 3) whether there is an attorney-client privilege between the child and attorney, 4) whether the attorney has full access to discovery, procedural motions, and trial participation, 5) whether the attorney must prepare a report and/or testify,⁴³ and 6) what other specific duties are required.⁴⁴

Once the role is determined, the attorney must explain that role to the child in a way the child can understand. Obviously some children are too young to be given any kind of explanation. Older children may be capable of a quite sophisticated understanding of the attorney-client relationship.

B. PROTECTIONS INHERENT IN THE ROLE

1. *Competence*

Regardless of the role of the child's attorney, that role involves certain duties in furtherance of protecting the child. The initial duty is the duty to be competent. ER 1.1 of the Model Rules of Professional Conduct requires an attorney to provide competent representation, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴⁵ DR 6-101(A)(2) of the Model Code of Professional Responsibility requires "preparation adequate in the circumstances."⁴⁶ For the child's attorney, competence extends beyond legal knowledge to encompass knowledge about child development, children's memory, and the social and psychological needs

42. See, e.g., *Leary v. Leary*, 627 A.2d 30, 36-38 (Md. Ct. Spec. App. 1993). A sample form of motion for clarification can be found in HARALAMBIE, *supra* note 3, at 4.

43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1994) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1994) (discussing the ethical problems of serving as both advocate and witness). The role of witness is sometimes assigned to the child's attorney, especially when operating under the label of guardian ad litem, and is perhaps the most problematic from an ethical standpoint. Generally attorneys are admonished *not* to become witnesses. Critics are quite correct to advise attorneys to resist being placed in this position. As an advocate for the child, the child's attorney should not be put in the position of testifying. See *S.S. v. D.M.*, 597 A.2d 870, 871, 874 (D.C. App. 1991) (determining it was error to permit guardian ad litem, who was serving as advocate for child, to also testify in adoption case; new counsel should have been appointed for child; however, since no objection was made at the time of trial, the case was not reversed); *Hollister v. Hollister*, 496 N.W.2d 642, 644-45 (Wis. Ct. App. 1992) (precluding mother from cross-examining guardian ad litem in domestic relations custody case).

44. See HARALAMBIE, *supra* note 2, at 53 (discussing the scope of the attorney's role once appointed).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994).

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(2) (1994).

of children.⁴⁷ If the attorney is not adequately trained to represent children, he or she must decline the appointment, become trained, or associate competent counsel. Children are singularly unable to monitor the quality of the attorney's performance. Therefore, the attorney owes a special duty not to undertake representation for which he or she is unqualified.

2. *Decision-Making from the Child's Perspective*

The attorney's duties should be performed with attention to the child's perspective, what is important to the child at that time in his or her life. The child's sense of time and rapidly changing developmental needs are general considerations from the child's perspective. The child's individual and idiosyncratic needs, desires, and interests (used in this context in the sense of what the child is interested in or captivated by) are the specific considerations from the child's perspective.

The attorney should attempt to reduce the trauma of separation between the child and family. This may mean objecting to removal of the child if other safeguards would be sufficient to ensure the child's safety, or if the detriments flowing from the removal exceed the risks inherent in remaining in the home. Where the child has already been removed, this may mean seeking early return home, even *pendente lite*, or suggesting placement with a neighbor, relative, or other person whom the child knows instead of an agency foster home and advocating for the placement of siblings together. It may involve obtaining some of the child's favorite possessions to accompany the child while he or she is in an out of home placement. It may mean advocating for the child to continue attending the same school and activities, regardless of where the child is placed. It may involve advocating immediate and frequent visitation between the child and parents and other family members. In all cases such advocacy involves looking at the available options from the child's perspective to make the child as comfortable as possible pending resolution of the case.

The delays inherent in the way child abuse cases make their way through the court process do not pose insurmountable problems to advocates willing to make some extra telephone calls, write some letters, and file some motions. It is not sufficient merely to wait until the

47. See generally HARALAMBIE, *supra* note 2, at 55-57 (noting that the attorney should determine the special needs of the child). The West Virginia Supreme Court has recognized that "because the practice of guardians ad litem is rather unique, and at times complex, guardians ad litem need specialized education and training to fulfill their responsibilities." In re Jeffrey R.L., 435 S.E.2d 162, 178 (W. Va. 1993). The court promulgated comprehensive guidelines for guardians ad litem in abuse and neglect cases in the appendix to the case. *Id.* at 178-80.

agency takes the next step or the court holds the next hearing. The uncertainty inherent in protracted court battles can itself be harmful to children.⁴⁸ In most cases, "expedite" should be one of the child advocate's general duties.⁴⁹

Sometimes the attorney has a duty to seek dismissal of a case the agency is pursuing⁵⁰ or, on the other hand, to recommend continuing a case the agency wants to dismiss.⁵¹ The attorney may have a duty to say "enough is enough" and recommend against continuing futile services and rehabilitation efforts in favor of placing the child for adoption.⁵² Bringing the case to a swift resolution is important. However, "permanency" which does not improve the child's situation is inappropriate expediency for expediency's sake. Martin Guggenheim expresses the concern that many parents' rights are terminated with respect to their children in foster care, but the children are not subsequently adopted, leaving them life-long legal orphans.⁵³ To be sure, some parents are so pernicious that the certainty that they will never have a legal right to intrude in the child's life justifies termination even in the absence of an adoption alternative. In some cases the child's strong sense of family warrants a plan of indefinite foster care, even throughout the child's entire minority, despite a high likelihood of adoptability, parental non-cooperation (or even absence from the picture entirely), and clear grounds for termination. There must *always* be a cost/benefit analysis from the child's perspective.

3. *Providing Information to the Client*

ER 1.4 of the Model Rules of Professional Conduct and EC 7-8 and EC 9-2 of the Model Code of Professional Responsibility require all attorneys to keep the client informed about the case and to ensure that the client's decisions are reasonably informed.⁵⁴ To the extent that the child can understand, the attorney must keep the child informed about

48. See generally JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 42 (1973) (discussing the psychological implications of delayed placements).

49. *Id.*

50. See generally DOUGLAS J. BESHAROV, *JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT* 298-309 (1974) (discussing motions to dismiss in juvenile cases).

51. See *In re R.E.*, 729 P.2d 1032, 1034 (Colo. Ct. App. 1986) (stating that a guardian ad litem can challenge state's dismissal and thus, was entitled to a hearing).

52. See Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 568-72 (1991) (discussing that the right of children to attorneys should improve their ability to obtain basic needs).

53. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 138-40 (1995).

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, 9-2 (1992).

the case and his or her options.⁵⁵ Attorneys for children have a special obligation to ensure that their clients understand what is going on in the case. This involves understanding children's language limitations and learning how to talk to children in ways they can understand.⁵⁶

4. *Independent Investigation*

The child's attorney is independent of the other parties, including any child welfare agency which may be involved in the case. The child's position is not necessarily identical to that of the agency, which serves the parents and family as well as the child and which has bureaucratic restrictions and loyalties, including how it deploys resources. The attorney for a child cannot merely rely on social workers to do the investigations or rely on one of the adult parties in the case to put forth a position to which the attorney can merely consent. It is important to visit the child, whether or not the child is verbal.⁵⁷ The attorney can learn a great deal from seeing the child and the child's home environment.⁵⁸ Ongoing contact between the attorney and the child is important throughout the litigation as new issues arise and need to be resolved.⁵⁹ Follow-up reports from service providers and the caseworker will assist the child's attorney in determining the child's needs and formulating case strategies.

The child's attorney must form an independent position on behalf of the child and independently obtain and review the evidence just as other parties do. Multiple sources of information will provide a more reliable view of the child's situation.⁶⁰ This does not mean ignoring the evidence already gathered, or redoing the social worker's job. It does mean not waiting passively for information to be provided, but taking the initiative to ensure that all of the available information is gathered.

55. See *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. App. 1991) (stating that a guardian ad litem has a duty to explain in the language, mode of communication, and terms that the child is most likely to understand, the nature and possible consequences of the proceeding, the alternatives that are available, and the rights to which the child is entitled).

56. For an excellent guide, see ANNE GRAFFAM WALKER, *HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE* (1994).

57. See, e.g., HAW. REV. STAT. § 587-34(c) (Supp. 1992) (requiring guardian ad litem in a child protection case to have in person contact in the child's home or foster home every three months); NEB. REV. STAT. § 43-272.01(2)(d)(i) (1993) (recommending that the guardian ad litem in a child protection case visit the child within two weeks of the appointment and every six months thereafter).

58. See GARBARINO ET AL., *supra* note, 32 at 136-153 (discussing observing children to obtain information).

59. See, e.g., HAW. REV. STAT. § 587-34(c) (Supp. 1992) (requiring visits every three months); NEB. REV. STAT. § 43-272.01(2)(d) (1993) (suggesting visits every six months).

60. See GARBARINO ET AL., *supra* note 32, at 15 (explaining multiple sources generally increase result validity).

C. PROTECTING AUTONOMY AND PERSPECTIVE

Advocacy of the child's expressed wishes gives the child the greatest measure of autonomy and represents the child's perspective to the greatest extent.⁶¹ The child client often has no voice except the voice his or her attorney provides. The parents and social worker are usually in the courtroom at all relevant times. The judge can see them and make observations and judgments about what kind of people they are, how credible they are, how well they do their jobs as parents or social workers. They are real human beings. The child often is not present except in the descriptions contained in reports or through the testimony of people who have seen the child. While the child's interests is one of the issues to be weighed in the case, it is sometimes difficult to emotionally connect with this unseen party. The child often knows that a judge is making crucial decisions that will have a long-lasting impact on his or her life. But the child does not know what the judge looks like, what kind of person the judge is, or what information the judge is using to make these decisions. Everybody is able to express an opinion about what would be best for the child, tailored to the options they have been provided or that have occurred to them, except that the child is often excluded from this process.

Maybe there are concerns the child has: Will I ever see my mom again? Who will take me to the father-son dinner, or will I have to miss it? I'd rather get spanked once or twice a year, even if it really, really hurts, than to lose all my family and friends and have to live in a whole new place with people I don't know. I hate having to visit for one hour in a play room—there's nothing to do and I feel like there's a spy watching everything I say and listening to me. Can't I go visit Susie sometimes? How come I can't go the lake with my grandparents this summer, like I always do, just because I don't live with my mom? I don't like my therapist—he has bad breath and doesn't like me either. Often the child just wants to be given the respect of being *heard*, whether or not the judge does what the child wants. The child may want to be present during some hearings to hear what is being said. The child may want to testify or talk to the judge informally. The child may just want to look at the judge who has so much power to make decisions about the child.

61. See *In Re A.W.*, 618 N.E.2d 729, 733 (Ill. App. 1993). In affirming a child's qualified right to be represented by an attorney of her choosing in lieu of being represented by the public guardian's office, which continued in the case as guardian ad litem, the Illinois Court of Appeals responded to the public guardian's objection that such representation would permit the new attorney to "simply parrot the child's wishes" by indicating that "it is within the purview of the judge, and not the attorney, to assess the evidence and determine placement which truly reflects the child's best interest." *Id.*

As a society we encourage families to include children in family meetings and discussions and to give children choices among appropriate options in matters concerning their day-to-day lives. However, we frequently exclude them entirely from any direct participation in the court proceedings that affect them directly.

There can be no rigid rule concerning children's presence or participation in the court process. However, the child's attorney is in the best position to see that the issue is raised and considered. A child who wants direct participation should be allowed to participate. There may need to be modifications, such as excluding the child from the courtroom during certain testimony. But it is inherently disrespectful to children who want to be involved to exclude them, especially if their "advocate" colludes in their exclusion rather than at least attempting to secure the client's participation. The child is not merely "along for the ride" in a child welfare proceeding, and the child's attorney should not provide only an illusion of representation by becoming an alter ego for the client. The child loses all autonomy in that situation.

When possible, the attorney should elicit the child's feelings, wishes, and beliefs with respect to the issues to be presented and decided in the case, whether or not the attorney is bound to advocate the child's expressed position. Unless the child objects to having his or her views disclosed to the court, the court should be informed of those views.⁶² This does not mean that the child should be involved inappropriately in adult matters, such as what kind of therapy the parent should receive, whether drug screens are necessary, and so forth. However, the issues directly affecting the child should be discussed with the child in an age-appropriate way.

The fact that an attorney disagrees with the child's perspective or believes that the child is making unwise choices does not, in itself, warrant refusing to advocate the child's position.⁶³ Further, such disagree-

62. See HAW. REV. STAT. § 587-34(c) (Supp. 1992) (providing that the guardian ad litem inform the court of the child's perceived interests if they differ from the guardian ad litem's position); ME. REV. STAT. ANN. tit. 22, § 4005(E) (West 1992) (providing that the guardian ad litem must inform the court of any wishes the child has expressed); WIS. STAT. ANN. § 48.23(3) (West 1987) (providing that the court may appoint a guardian ad litem unless the child wishes to retain own counsel); WIS. STAT. ANN. § 767.045(4) (West Supp. 1994) (providing that unless the child indicates otherwise, the guardian ad litem must inform the court of the child's expressed wishes).

63. Various state bar ethics committees have provided some guidance on how attorneys should deal with conflicts between the child's instructions and best interests. For example, where the attorney is both attorney and guardian ad litem, Arizona advises remaining as attorney to advocate the child's expressed position while requesting appointment of a separate guardian ad litem. ARIZONA STATE BAR COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, Op. No. 86-13 (1986). In the context of placement decisions Massachusetts advises that if the child is competent, the attorney may advocate the child's position, advocate the child's position and request appointment of a separate guardian ad litem advocate, or withdraw if the attorney cannot argue for the position because it is so inappropriate. See

ment does not permit the attorney to argue against the client's expressed position.⁶⁴ Attorneys for adults frequently disagree personally with their clients' positions in litigation but advocate them nonetheless. Sarah H. Ramsey suggests that children's attorneys in child protection cases "assess the child's cognitive ability, emotional maturity, language development, and information and experience in relation to the decision to be made."⁶⁵ Shannan Wilber views "client-centered litigation" as a reflection of "society's consensus that individuals should control their own lives and make their own decisions, even if those decisions seem illogical or unwise."⁶⁶ A child capable of forming a reasonable position should be able to have that position advocated—otherwise *nobody* is presenting the child's position from the child's perspective.

When the child's position would be *dangerous* for the child, and the attorney cannot dissuade the child from the position, the attorney should be authorized to take the minimally intrusive protective action, preserving as much of the client's autonomy as possible. Therefore, the attorney can and should continue to advocate the child's position with respect to most issues, but with respect to the dangerous position only, the attorney may have to advocate something else.⁶⁷

D. PROTECTING BEST INTERESTS

The child's attorney must consider his or her role in protecting the child's best interests, whether or not those interests control the formulation of the child's position in the litigation.

MASSACHUSETTS BAR ASS'N., OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, Op. No. 93-6 (1993). If the child is not competent, the attorney is advised to obtain as much assistance from the child as possible, consider all of the relevant circumstances, and act with care to safeguard and advance the child's interests. See *id.* Cf. *In re G.Y.*, 486 N.W.2d 288, 289 (Iowa 1992) (noting that the same person may be appointed as attorney and guardian ad litem so long as there is no conflict; if there is a conflict, the statute permits appointing a separate guardian ad litem). Wisconsin provides that if the guardian ad litem (whose role is to represent the child's best interests) determines that the best interests of the child are substantially inconsistent with the child's wishes, the guardian ad litem shall so inform the court, and the court may appoint separate counsel. WIS. STAT. ANN. § 48.235(3) (West Supp. 1994).

64. See *Bawidamann v. Bawidamann*, 580 N.E.2d 15, 23 (Ohio Ct. App. 1989). The Ohio Court of Appeals has called use of confidential communications to argue against the child client's expressed position "the antithesis of legal representation." *Id.*

65. Ramsey, *supra* note 11, at 316. Ramsey proposes seven as the presumptive age for considered decision-making. *Id.*

66. Wilber, *supra* note 11, at 353.

67. This is consistent with a position being advocated for impaired elderly clients. See Bruce A. Green & Nancy Coleman, *Foreword*, 62 FORDHAM L. REV. 961, 976 (1994) (stating that those with diminished capacity require greater protection).

1. *Whether to Determine the Child's Best Interests*

When the child cannot form a reasonable position (which is not the same as a position the attorney thinks is in the child's best interests), the child's attorney should advocate a position based on an objective assessment of the child's best interests. Where the attorney's role is clearly defined in the traditional guardian *ad litem* model, the attorney's role inherently requires him or her to make a best interests determination.⁶⁸ That determination should take into consideration the child's expressed wishes, but will not be bound by them.

2. *Determining Best Interests*

The traditional charge to the child's guardian *ad litem* is to ascertain and advocate for the child's best interests. Usually what is in the child's best interests is not an available option. Recognition that the child's best interests are rarely able to be served in litigation has prompted a more realistic standard, "the least detrimental alternative."⁶⁹ Using that terminology has the effect of reminding the child's attorney that no matter what happens in the case, the child will lose something. It is the attorney's job to advocate minimizing that loss and obtaining the best available alternative for the child.

Child advocates who are not trained have no objective basis upon which to determine a position for a child. One's subjective views are colored by biases, prejudices, cultural perspectives, life experiences, and individual values. The early well-intentioned actions of the "child-saver" child advocates (of which the author was one) earned justified criticism. Nothing about being an attorney gives one the expertise to make decisions about what is in the child's best interests. The attorney's *subjective* view of the child's best interests is an inappropriate standard upon which to base a client's position. However, there *are* objective criteria from which a child's position can be determined.⁷⁰

One of the primary tasks of the child's attorney is to identify the particular needs of this child client, as distinct from the general needs of children or the general needs of children at a particular developmental

68. Sometimes the role of the guardian *ad litem* is viewed as that of a neutral fact-finder, who advocates no position at all, rather than that person's view of the child's best interests. See, e.g., *S.S. v. D.M.*, 597 A.2d 870, 878 (D.C. Cir. 1991) (indicating that a guardian *ad litem* is viewed as an unbiased witness); AAML STANDARDS, *supra* note 18, stds. 3.2, 3.7, & 3.8. Typically, however, the guardian *ad litem* is expected to advocate the child's best interests.

69. See GOLDSTEIN ET AL., *supra* note 48, at 53 (discussing their "least detrimental alternative standard").

70. For a more complete discussion of determining the child's best interests, see Special Symposium Issue of *FORDHAM L. REV.* (forthcoming 1996).

level. Unless the child's needs are identified, the attorney cannot formulate a dispositional plan in the child's best interests. Presentation of dispositional alternatives is a fundamental part of the attorney's responsibilities.⁷¹ Even if the child's attorney is ethically directed by the child's expressed wishes, it is impossible to advise the child client properly unless the attorney has an understanding of what the child needs. There are certain hierarchical needs⁷² which do not involve the attorney's subjective values, the child's physical and emotional safety being chief among them.⁷³

Jinanne S.J. Elder has suggested that the following "presumptions and assumptions" inform decisions regarding children's needs:

1. Provision of basic needs
2. Provision and maintenance of nurturance, stability and continuity [a]nd the avoidance of unnecessary disruptions that can interfere with [the child's] growth and development.
3. Freedom from abuse or neglect
4. Maintenance of the family. . . This includes retaining ties among siblings and maintaining ties with biological fathers, even, in some cases, where a child is born to a married woman whose husband is not the biological father. . . . In certain cir-

71. See *In re D.A.H.*, 822 P.2d 640, 641 (Kan. Ct. App. 1991) (determining it to constitute reversible error to refuse to allow a guardian ad litem to present evidence at a dispositional hearing because the purpose of the hearing is to present the court with all available placement options). See also *In re Donna H.*, 602 A.2d 1382, 1385 (Pa. 1992) (remanding for full development of the record where child's attorney did not have the opportunity to cross-examine witness or introduce independent evidence).

72. See, e.g., Mary K. O'Connor, *Considering Developmental Needs*, in RESOURCE GUIDE FOR CUSTODY EVALUATORS: A HANDBOOK FOR PARENTING EVALUATIONS ch. 14 (Phil Bushard & Dorothy A. Howard eds., Preliminary Symposium Issue, 1994); ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES §§ 24.01-24.09 (2d ed. Shepard's/McGraw-Hill 1993); Rachel B. Burkholder & Jean M. Baker, *Child Development and Child Custody*, in ANN M. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 148-54 (1993).

73. See FRANK G. BOLTON, JR., WHEN BONDING FAILS: CLINICAL ASSESSMENT OF HIGH-RISK FAMILIES 28-29 (1983). One psychologist has described the following basic characteristics parents must possess to meet the needs of even very young children:

If the child is to be successful, two elements must be present: (1) The capacity for altruistic behavior must exist in the parent: (2) The parent must have the capacity to understand the reciprocal nature of what the child has to offer, as opposed to a conscious awareness of what it takes from the parent. These two capacities cannot be assumed to be present in all parents.

Id. at 28. Dr. Bolton describes the first level of the child's needs:

Early childhood development rests with the secure provision of physical needs. The establishment of a sense of security regarding these physical needs provides the child with the opportunity for developmental risk taking. This risk taking is best described as a movement from a secure base of physical satisfaction to the insecure world of behavioral options.

Id. at 45.

cumstances, it also includes at least considering the strong emotional bonds that may exist between a child and a nonbiological caretaker.⁷⁴

Using such information allows the attorney to make a relatively objective determination of the child's needs from the child's perspective, as an adjunct to the child's actual expressions of interest.⁷⁵ In addition, the child's attorney can seek the expertise of appropriately qualified medical, mental health, and social work professionals, to inform the position taken. The therapist is the most likely source of information concerning the child's special needs, including particular vulnerabilities.⁷⁶ The therapist should be asked to identify the child's special needs and what will be required to address those needs. The therapist can provide guidance about areas that are difficult for the child to talk about, whether any special techniques would help in interviewing the child, and whether the attorney should learn anything to help interpret the child's answers. For example, a child's psychological state may cause the child to protect an abusive parent. If the attorney knows that, he or she can try to ask questions in such a way as to allow the child to reveal information about the abuse rather than merely accepting at face value the denial of abuse. An experienced mental health professional who often has interviewed children can be the best source of guidance in how to interview a particular child most effectively. The therapist can also alert the attorney to people the child may be afraid of or feel pressured by.

By speaking to a variety of people, each of whom may see the child in a different environment, an attorney may determine more easily what is in the child's best interests. The attorney represents a particular client in a particular family under particular circumstances. It is the duty of the child's attorney to make an individualized assessment of the child client's needs and to consider the options available to meet the child's needs. One criterion by which a child's attorney can assess his or her own performance is the degree to which he or she can articulate what this particular child, as opposed to children in similar legal situations, needs at this stage of his or her life.

74. Elder, *supra* note 11, at 8-9 (footnotes omitted).

75. See generally David Murphey, *Identifying the Best Interests of the Child*, in DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES* 23 (1990).

76. See GARBARINO ET AL., *supra* note 32, at 305. It has been suggested that "[t]hose who operate within the legal system must be—or at least must be advised by— informed and sensitive child development experts who can interpret the system for children and interpret children to the system." *Id.*

Lois Weithorn points out that professional relationships such as those between attorney and client are working partnerships.⁷⁷ She advises professionals not to “underestimate the degree to which children’s ideas, relative to their own needs and goals, will provide essential and valuable information.”⁷⁸ A properly trained child’s attorney should have the information, or ability to acquire information and consultation, which will permit a professional to make an objective assessment of the what the child’s position should be, incorporating any input the child client is capable of providing, in those cases where the child is not sufficiently mature to form and express a reasoned position.⁷⁹

E. PROTECTION BY LEGAL ADVOCACY

The attorney must always function as an attorney, using available legal remedies and procedures, using the discovery and litigation tools available to all attorneys. The attorney should not attempt to become a social worker or therapist for the child. But representing children requires something more than legal mechanisms. It requires an ability to use the law to protect the child and to give the child a meaningful voice in proceedings which affect the most fundamental aspects of the child’s life. The most direct method of doing so is through legal advocacy.⁸⁰

1. *Discovery and Protective Orders*

Legal tools can be used to further develop the evidence. Discovery is not used as often in child abuse cases as in other civil cases, but most states permit it. If local law does permit it, the child’s attorney

77. Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, in CHILDREN’S COMPETENCE TO CONSENT 235, 253-54 (Gary B. Melton et al. eds., 1983).

78. *Id.* at 256.

79. See HARALAMBIE, *supra* note 2, at 55-57 (discussing the importance of gathering background information about the child’s case). The suggestion to acquire and incorporate all relevant information for those questionably competent has been made with respect to attorneys representing the impaired elderly:

The various state bar associations might ameliorate this problem [of dealing with the questionably competent client] while promoting better legal services for the questionably competent elderly by requiring that lawyers who are likely to represent the elderly take a certain number of continuing legal education or other special training courses designed to assist them in providing such representation competently. These courses might cover such topics as geriatric psychology, common physical impediments of legal standards that address competence, and the nature and availability of community services to aid the elderly.

Rein, *supra* note 11, at 1141.

80. *Cf. In re Jamie TT*, 191 A.D.2d 132, 137 (N.Y. App. Div. 1993) (reversing dismissal of case because of ineffective assistance of counsel for the child; the court stated that effective representation includes “assistance by an attorney who ha[s] taken the time to prepare presentation of the law and the facts, and employed basic advocacy skills in support of [the child’s] interests in the case”).

should take the initiative to conduct discovery if the relevant information is not immediately forthcoming from other sources.⁸¹ Discovery may not be necessary in every case, but the decision not to use discovery should be a thoughtful one. Too many children's attorneys assume that because they are not being paid or not being well paid, they should do as little as possible and should only respond to what the other parties do, rather than to initiate any discovery or motions. Unless something inherent in the attorney's role precludes such actions, failure to use discovery techniques where appropriate may be malpractice.

Depositions are not usually feasible because of the cost; although, there may be funds available in some jurisdictions to pay for them, generally with prior court approval and a showing of need. If an important witness will be unavailable for trial, the attorney should consider taking a deposition to preserve testimony. In the alternative, the child's attorney can file a motion requesting to schedule that the witness' testimony before the court for some time prior to the hearing. Generally the agency's attorney would be responsible for preserving the testimony of a soon-to-be unavailable witness, but the child's attorney should not presume that it will happen. Sometimes a letter or telephone call to the agency's attorney will remind him or her to schedule a deposition or hearing. If not, the child's attorney should take the appropriate steps if that witness' testimony is expected to provide important support for the child's position.

If the parent's deposition is taken, the child's attorney can ask questions covering aspects of parenting ability,⁸² as well as abuse-related issues. Not only can such information be useful to the attorney in terms of admissions and use at trial, but the deposition transcript can be given to a mental health professional, especially one who is evaluating the parent, to provide additional information about that parent's knowledge about, abilities, and willingness to provide, appropriate care for the child.

Requests for admission, requests for production of documents, and interrogatories are relatively inexpensive forms of discovery. Sometimes a carefully worded request for admissions to a parent can streamline a trial by clarifying in a conclusive way what is contested and what is not. This saves time for the court and participants. The requests

81. See, e.g., *In re Jeffrey R.L.*, 435 S.E.2d 162, app. 179 (W. Va. 1993) (determining that discovery is one of the duties for guardians ad litem in guidelines adopted by the West Virginia Supreme Court).

82. For a tool to use in assessing parenting abilities, see JEAN M. BAKER ET AL., PARENTING ASSESSMENT DISCOVERY FORM FOR ATTORNEYS (1983), reprinted in A. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES app. 22-2 (2d ed. 1993).

should be broken down into small statements of fact concerning the allegations involved in the case. Interrogatories propounded to parents can reveal factual disputes and contentions. Interrogatories propounded to the agency can enumerate the efforts at family preservation, rehabilitation, reunification, follow-up services, and permanency planning. Interrogatories may be served contemporaneously with requests for admissions, including an interrogatory worded: "Explain in detail the factual and/or legal basis upon which you have denied any request for admission." Interrogatories can ask for information concerning potential witnesses and exhibits, the parent-child relationship, the child's needs, the parent's desired disposition of the case, and the parent's knowledge and attitudes about parenting.

A request for entry onto land can be used, for example, to verify the presence of hazards alleged to be in the home. Photographs or videotapes may be taken during such inspections to show that filthy conditions or hazards continue to exist.⁸³ On the other hand, they can verify that physical hazards have been remedied to remove an obstacle to the child's return home. This kind of investigation by the child's attorney is not an attempt to become an investigator, but rather, is a useful application of discovery devices.

The child's attorney can subpoena records, request production of expert résumés, and propound interrogatories to the agency and parent to uncover the content and basis for expert opinions. This may assist the attorney to evaluate the evaluation, perhaps with the help of a friendly colleague from the appropriate discipline. If the evaluator did not have all the relevant evidence, the child's attorney may want to provide other information to allow the expert to update or revise his or her opinion. Custodian of records depositions can be used to obtain records in the possession of third parties, including medical, school, and counseling records where the third parties will not voluntarily produce those records. Many state rules permit the custodian of records to send the records without a personal appearance, eliminating the need to pay a court reporter. Sometimes the discovery answers reveal the need for the child's attorney to request an independent or additional evaluation or to pose additional referral questions to the agency evaluator. The purpose of such procedures is not to substitute the attorney's judgment for those of the other professionals, but rather, to ensure a critical and complete presentation of the evidence in the child's interest (however that interest may be defined).

83. To avoid becoming a foundational witness at trial, the attorney should arrange to have somebody present who can lay the proper foundation for admission of the photographic evidence.

The child's attorney also has an affirmative duty to protect the child from abusive discovery practices directed against the child personally. It is not uncommon for an attorney defending a parent accused of abuse, for example, to use the child's deposition to intimidate the child into silence or to deliberately confuse and undermine the child, using questioning techniques that a judge would never permit during trial. Attorneys can be imposing and scary people. It is not a proper use of discovery to scare the child into silence or to so confuse the child that the deposition transcript is then used as a club against the child.

The attorney may seek a protective order to prohibit the taking of the child's deposition or to restrict the manner in which the deposition is conducted.⁸⁴ The motion for the protective order should be very specific concerning the relief requested. The court may limit the people to be present during the deposition, may preclude questioning on certain subjects, may specify which matters may be inquired of, or may seal the deposition.⁸⁵ Children may not be able to sit through a lengthy deposition, and the court may permit the child to take breaks or to be deposed on several different dates rather than all at once. Further, the court may allow the child's therapist or other support person to be present during the testimony to ensure that the child does not feel bullied. A therapist may even be given discretion to terminate the deposition if the child becomes too upset. Finally, the court may require that the deposition be taken in the presence of a judge, commissioner, or magistrate, to further limit the likelihood of undue trauma to the child.

If the court refuses to grant a protective order, the attorney may videotape the deposition in addition to the official stenographic record being made, which will often serve as a deterrent for outrageous conduct on the part of opposing counsel. Because the videotape picks up the demeanor and tone of the interrogator, lost in a written transcript, the child's attorney has an excellent piece of evidence to show a judge if the attorney stops the deposition mid-stream. Most civil procedural rules permit the filing of a motion to terminate or limit examination at any time during the deposition for appropriate reasons.⁸⁶ If the attorney

84. See FED. R. CIV. P. 26(c) (allowing the court to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

85. *Id.*

86. See FED. R. CIV. P. 30(d) (allowing a motion to terminate or limit examination at any time during the deposition "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent"). See also FED. R. CIV. P. 30(d) (authorizing explicitly an award of expenses related to the motion as provided for by Rule 37(a)(4)).

does not have access to video equipment, an audio recording may be made instead.

The child's attorney may also seek a protective order to prevent or limit disclosure of the child's privileged records.⁸⁷ Even if some of a child's records are relevant to the case, the court may limit the scope of which records must be produced or order that the records first be viewed *in camera*. The court may also limit dissemination of the information contained in the records. The child's attorney has a duty to ensure that the child retains as much privacy as fair litigation of the issues requires and to ensure that the child is not subjected to unwarranted embarrassment or intimidation by opposing counsel.

2. Motions

In most jurisdictions the child's attorney is permitted to file motions.⁸⁸ The filing of motions can be very a useful tool to protect the child client during the litigation. Typical procedural motions include motions to continue, motions to expedite or accelerate the hearing, and discovery motions.

Jurisdiction and venue issues may be raised by motion. One frequent situation calling for such motions involves interstate custody jurisdiction.⁸⁹ In most states the Uniform Child Custody Jurisdiction Act (UCCJA) applies to civil child abuse cases.⁹⁰ Under the federal Parental

87. See *Sosebee v. State*, 380 S.E.2d 464, 466-67 (Ga. Ct. App. 1989) (determining that guardian ad litem appointed for child victim in criminal case may refuse to release confidential medical records on behalf of the child); *In re Zappa*, 631 P.2d 1245, 1250-51 (1981) (finding that a guardian ad litem may assert or waive the physician-patient privilege in a termination of parental rights case as provided by statute).

88. See S.C. CODE ANN. § 20-7-122(6) (Law Co-op. 1994) (authorizing attorneys to make the motions necessary to enforce the orders of the court or seek judicial review); S.C. CODE ANN. § 20-7-124(B)(6) (Law Co-op. 1994) (authorizing guardians ad litem to make motions necessary to enforce the orders of the court, seek judicial review, or petition the court for relief on behalf of the child); *In re Jeffrey R.L.*, 435 S.E.2d 162, 179 (W. Va. 1993) (filing motions is one of the duties for guardians ad litem provided in guidelines adopted by the West Virginia Supreme Court).

89. For a discussion of the substantive law underlying interstate and international custody jurisdiction issues, see ANN M. HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES ch. 2 (2d ed. 1993).

90. See, e.g., *In re L.W.*, 486 N.W.2d 486, 496 (Neb. 1992) (determining that a juvenile court could not exercise jurisdiction because Iowa had continuing UCCJA jurisdiction). The following codes specifically provide that dependency cases be governed by the UCCJA: ALA. CODE § 30-3-22(3) (1989); ARIZ. REV. STAT. ANN. § 8-402(3) (1989); ARK. STAT. ANN. § 9-13-202(3) (1993); CAL. FAM. CODE. § 3402 (West 1994); COLO. REV. STAT. § 14-13-102(3) (1987); CONN. STAT. ANN. § 46b-92(3) (1986); DEL. CODE ANN. tit. 13, § 1902(3) (1993); GA. CODE ANN. § 74-503(3) (Harrison 1995); HAW. REV. STAT. § 583-2(3) (1985); IND. CODE ANN. § 31-1-11.6-2(3) (Burns Supp. 1995); IOWA CODE ANN. § 598A.2(3) (West 1981); KAN. STAT. ANN. § 38-1302(c) (1993); KY. REV. STAT. § 403.410(3) (Michie/Bobbs-Merrill 1984); MD. FAM. LAW CODE ANN. § 9-201 (1991); MICH. COMP. LAWS ANN. § 600.652(3) (West Supp. 1995); MINN. STAT. ANN. § 518A.02(c) (West 1990); MISS. CODE ANN. § 93-23-3(d) (1994); NEB. REV. STAT. § 43-1202(3)(b) (1993); N.C. GEN. STAT. § 50A-2(3) (1989); N.D. CENT. CODE § 14-14-02(3) (1991); OHIO REV. CODE § 3109.21(c) (1989); OKLA. STAT. ANN. tit. 10,

Kidnapping Protection Act (PKPA),⁹¹ some slightly different jurisdictional rules apply, prioritizing the concurrent bases of UCCJA jurisdiction. There is a division of authority concerning whether the PKPA applies to such proceedings.⁹² Where another state may already have exclusive continuing jurisdiction under the UCCJA, based on a custody determination in a divorce case, or on priority jurisdiction under the PKPA, a motion should be filed to require the courts of both states to communicate and determine which state should hear the case.⁹³ If the courts agree on which state will hear the case, the resulting order has full faith and credit under the PKPA. Otherwise, a dissatisfied party may be able to get a contradictory order in the other state. While it may be tempting for the child's attorney to maintain jurisdiction in the local state, that may be a poor decision for the child in the long run, especially if it has the effect of prolonging the proceedings, resulting in competing orders, or producing an order not entitled to enforcement by any other state.

Similarly, the Indian Child Welfare Act (ICWA)⁹⁴ provides jurisdictional limitations, as well as procedural and substantive requirements, which preempt contrary state law. ICWA applies to any third-party custody case involving an Indian child where the parent cannot regain the child upon demand, including involuntary foster care and guardianship cases, as well as termination of parental rights and adoption cases. A child is an "Indian child" if he or she 1) is a member of a federally recognized Indian tribe, or 2) is eligible for tribal

§ 1604(3) (1988); OR. REV. STAT. § 109.710 (1993); R.I. GEN. LAWS § 15-14-3(3) (1988); S.C. CODE ANN. § 20-7-786(3) (Law Co-op. 1985); UTAH CODE ANN. § 78-45C-2(3) (1992); VT. STAT. ANN. tit. 15, § 1031(3) (1989); VA. CODE ANN. § 20-125(3) (Michie 1995); WASH. REV. CODE ANN. § 26.27.020(3) (West 1986); WIS. STAT. ANN. § 822.02(3) (West 1994); WYO. STAT. § 20-5-102(3) (1977). See also TENN. CODE ANN. § 36-6-202(3) (1991) (excluding Interstate Compact on the Placement of Children cases but including dependency cases when an original party or person acting as a parent files the petition or when the petition involves facts arising from another state). But see N.H. REV. STAT. ANN. § 458-A:2(III) (1992) (stating that dependency cases are not included); N.Y. DOM. REL. LAW § 75-(c) (1988) (stating that dependency cases are not included).

91. 28 U.S.C. § 1738(a) (1994).

92. For decisions which have concluded the PKPA applies to interstate dependency actions involving concurrent jurisdiction. see *Stanley v. State Dept. of Human Resources*, 567 So.2d 310, 312 (Ala. Civ. App. 1990); *In re Appeal Juv. Action No J-78632*, 711 P.2d 1200, 1205-06 (Ariz. Ct. App. 1985), *rev'd. in part & approved in part*, 712 P.2d 431 (1986); *In re Anthony R.*, 588 A.2d 672, 678 (Conn. 1990); *Kennedy v. Kennedy*, 559 So.2d 713, 715-16 (Fla. Dist. Ct. App. 1990); *Thomas B.H. v. Marion County Dept. of Pub. Welfare*, 624 N.E.2d 471, 472 (Ind. 1993); *State ex rel. D.S.K. v. Kasper*, 792 P.2d 118, 128 (Utah 1990); *King v. Department of Social & Health Servs.*, 738 P.2d 289, 292 (Wash. 1987). For cases holding that the PKPA does not apply because it does not include dependency and neglect actions within its definition of custody proceedings, see *In re L.W.*, 486 N.W.2d 486, 499 (Neb. 1992); *State ex rel. Dept. of Hum. Servs. v. Avinger*, 720 P.2d 290, 292 (N.M. 1986).

93. See UCCJA § § 6(c), 7(d) (providing for inter-court communication).

94. 25 U.S.C. §§1901-1951 (1983 & Supp. 1995)

membership and is the biological child of a tribal member.⁹⁵ Failure to recognize and apply the applicable ICWA provisions can result in void or voidable state court orders and can further prolong instability and uncertainty in the child's status. If the child's attorney becomes aware of ICWA violations, the attorney should file an appropriate motion to remedy the problem as soon as possible. While some child advocates believe that ICWA prefers tribal rights over children's rights and, therefore, that they should resist application of ICWA, the rules concerning applicability of the Act are quite clear.⁹⁶ Further, it does not serve the attorney's ethical duties nor the child's long-term interest to merely avoid the Act, hoping that nobody will notice, or to argue that the child's best interests should apply regardless of the clear requirements of the law.⁹⁷ Rather, the child's attorney should argue as best as he or she can, for the least detrimental process and result provided for by the controlling law.⁹⁸

95. *Id.* § 1903(4).

96. For a more complete discussion of ICWA, see B.J. Jones, THE INDIAN CHILD WELFARE ACT HANDBOOK (1995); ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, A BUSE AND A DOPTION CASES ch. 15 (2d ed. 1993, Supp. 1995).

97. This may have been one of the problems with the well-publicized non-ICWA "Baby Jessica," and "Baby Richard" adoption cases. See *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) (determining that statutory grounds for termination must be established as well as serving the child's best interests); *In re Clausen*, 502 N.W.2d 649, 662 (Mich. 1993) (determining that when there is no legal claim to custody, a best interests evaluation is not required); *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994) (rehearing denied), *cert. denied*, 115 S. Ct. 499 (1994) (stating that parental rights termination must be completed prior to a best interests analysis). In those cases the clear application of jurisdictional and substantive law fairly early in the cases should have resulted in the prospective adoptive parents' relinquishment of their custodial claims, which were doomed to failure. Rather, those adults held on to children who were not wholly available for adoption, undoubtedly knowing that public sympathy would increase the longer they could keep possession, bolstering their argument that they were "the only parents the child has ever known." As much as these adoptive parents wanted these children and became attached to them, they should have realized they had no legal right to keep them. The loving thing to have done would have been to transfer these children when they were still infants, and avoid the inevitable trauma involved in separation, the effects of which may reach into the adult years.

Some child advocates lamented how insensitive to children's interests removal at age 3 or 4 was for these victims of the adult battles. More profound questions are: Where were the child advocates when these children were two and three months old? Why did they not have appointed attorneys to bring their cases to quick resolution, with visitation during the pendency of the proceedings? Children's attorneys do their clients no good by trying to stretch things out to bootstrap grounds for termination where none exist. Children's attorneys need to mitigate the adult manipulations of the affections and attachments of children, even when they are done unknowingly by good people, full of love, who want to give the children a better life. One does well to remember that adoption is a wonderful institution to provide homes for children who need them. It is not a procedure primarily designed to provide children for adults who want them. The child's attorney who ensures timely application of the law best serves his or her client.

98. Affording respect to the tribe by recognizing its right to intervene and even to assume jurisdiction may well result in a tribal court willing to listen to the child advocate's position sympathetically. The tribal court may be willing to order or recommend the disposition recommended by the child's attorney. On the other hand, disrespect for the tribe's federally secured rights is more likely to result in greater hostility toward the child advocate's position and rejection of his or her suggestions.

The child's attorney may want to file other substantive motions, such as requests for independent psychological evaluations or physical examinations.⁹⁹ If the child needs immediate therapeutic intervention or other services, the child's attorney can file motions to bring those needs to the court's attention. Rather than lamenting what the agency is not doing, if the social worker or agency attorney is unable or unwilling to be responsive to the child's needs, the child's attorney should be proactive in enlisting the court's assistance through available procedural methods. The child's attorney can file motions for change of placement.¹⁰⁰

Many motions that prove helpful to children's attorneys do not appear in form books. The attorney must be creative in fashioning motions for the relief deemed appropriate on the child's behalf. For example, a child may have certain personal possessions in the family home that are important to the child, but that the parents refuse to provide. Motions can be filed seeking certain clothing, books, toys, bicycles, and so forth.¹⁰¹ The attorney may file motions for court authorization for the child to attend a camp, church outing, school field trip, or vacation with a friend or relative.¹⁰² Motions for visitation can be brought, especially when the child seeks third-party visitation with siblings, grandparents, or other significant persons.

3. *Trial Memoranda and Briefs*

There is a growing body of law and scholarship in the field of child abuse.¹⁰³ Filing trial memoranda or briefs is one way to present

99. See *In re Jeffrey R.L.*, 435 S.E.2d 162, 170 (1993) (stating that the newly appointed guardian ad litem was entitled to request further evaluations of the mother and grandfather prior to making a custody recommendation).

100. See, e.g., WIS. STAT. ANN. § 48.235(4)(a)(2) (1987).

101. The attorney should consider carefully what to ask for in such motions. For example, items may be broken, lost, or stolen in foster care, especially where children must share rooms. Children who move from place to place during the pendency of the case often report that some of their belongings were invariably left behind during a move. It is impractical to move many of the child's belongings into a foster home, even if certain that those belongings would not be lost or damaged. A few meaningful items may help to make the child more comfortable in an out-of-home placement. Relative placements may be much more secure and flexible in terms of safeguarding more of the child's belongings.

102. In most cases the agency or other legal custodian will be able to sign permission for extracurricular activities. However, when the legal custodian cannot or does not, the child's attorney can seek court approval through filing a motion. This is most often the case when the child seeks to travel out of county or out of state.

103. For recent multi-volume treatises addressing children's legal issues, see THOMAS A. JACOBS, *CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS* (1995); A. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES* (2d ed. 1993); DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* (2d ed. 1993); JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* (2d ed. 1992). Specialized multidisciplinary journals include *CHILD ABUSE & NEGLECT*, *J. CHILD SEXUAL ABUSE*, and *CHILDREN'S LEGAL RTS. J.* Beginning in February 1996, the American Professional Society on the Abuse of

that information to the court in an organized and compelling way. Attorneys handling child abuse cases often have controlling or persuasive statutory or case law to support their positions, but too often they rely on vague "best interests" arguments that sound like nothing more than the attorney's own opinions about what should be done.

Preparing a trial memorandum or brief analyzing the evidence and making recommendations is not an improper role for a child's attorney. A factual report accepted as an evidentiary exhibit is quite another matter and raises the same ethical and competency concerns as the attorney's testifying to the matters which would be included in the report. For example, it is proper to argue that the child wants the court to order placement with a grandparent, even though the child never testified. Similarly, the parent's attorney can argue that the parent wants the child returned home, even though the parent may never have testified.

Filing legal memoranda not only enhances the view of the child's attorney as a real attorney, but also protects the record on appeal and provides the court with legal reasons authorizing or compelling the result being sought.¹⁰⁴

4. *Stipulations*

In many cases the issues can be narrowed by factual or legal stipulations. As is discussed further *infra*, the child's attorney can focus the case on the child's needs and interests. A parent may be more willing to sign a stipulation proposed by the child's attorney than by the agency attorney, who is perceived in a more adversarial light. Where the

Children (APSAC) will publish AM. PROF. J. ON THE ABUSE OF CHILDREN. See also ABA JUV. & CH. WEL'F. L. RPTER., a monthly law reporter.

104. See *In re D.K.L.*, 652 So.2d 184, 188 (Miss. 1995). The Mississippi Supreme Court reversed and remanded a child abuse case based, in part, on the failure of the guardian ad litem to advocate zealously a position on behalf of the child, noting that the guardian ad litem had "deferred to the therapist's recommendations and stated that he did not have any specific recommendation as to what was in the child's best interest." *Id.* The court found that:

[T]he brief filed by [the guardian ad litem] on behalf of the minor child merely defers to the facts and authority contained in the briefs of [the mother and abusive stepfather] and the State of Mississippi. . . . [The guardian ad litem] did not have an option to perform or not perform, rather he had an affirmative duty to zealously represent the child's best interest. The record is devoid of any actions on the part of [the guardian ad litem] demonstrating such a role.

Id.

child is a party, the child's attorney must join in all stipulations that affect the child's interests.¹⁰⁵

5. *Cross-Examination, Objections, and Voir Dire of Witnesses*

The child's attorney is an active participant in the trial, not a mere bystander. He or she must prepare to cross-examine the witnesses presented by the other parties in order to advance the child's position.¹⁰⁶ In many cases all of the appropriate witnesses are called by the other parties, and all of the attorney's questions will be during the cross-examination of those witnesses. Prior to coming to trial, the attorney should make a list of points he or she desires to make during the testimony of each potential witness. The list should also contain information to be elicited to undercut negative testimony from that witness. As the witness testifies about those points, they should be checked off. If those points are not made, or are not made effectively, during the other attorneys' questioning, the child's attorney should raise them during his or her cross-examination.

The child's attorney often can focus the trial to concentrate on the child's interests by phrasing questions that identify the child's needs and determine possible plans for maximizing those interests. It is almost always in the child's best interests to reduce the antagonism between the parents and case worker, and the child's attorney should not get caught up in unnecessarily negative cross-examination. This does not mean that the attorney should not ask pointed or even impassioned questions; however, the child's attorney is not there to attack the parent, which too often results in resentment taken out on the child. Even negative information can be elicited without the attorney becoming snide and

105. Cf. NEB. REV. STAT. § 43-272.01(2)(a) (1993) (providing that the guardian ad litem "may enter into such stipulations and agreements concerning adjudication and disposition deemed by him or her to be in the juvenile's best interests," even contrary to the wishes of the child); *State v. Fitterer*, 820 P.2d 841, 842 (Or. Ct. App. 1991) (reversing acceptance of civil compromise in criminal child sexual abuse case because no guardian ad litem had been appointed for the child victim to sign the stipulation). *But see Boeddeker v. Reel*, 517 N.W.2d 407, 409 (N.D. 1994) (approving stipulation between husband and wife regarding custody of children, despite recommendation of guardian ad litem that custody remain with county because of both parents' alleged unfitness to care for children).

106. Some statutes authorize children's attorneys and guardians ad litem to call and cross-examine witnesses. CAL. WELF. & INST. CODE § 317(e) (Supp. 1995); 23 PA. CONS. STAT. ANN. § 6382(b) (Supp. 1995); S.C. CODE ANN. § 20-7-124(C) (Supp. 1994). *See also* *Knock v. Knock*, 621 A.2d 267, 276 (Conn. 1993) (determining that a child's attorney in divorce case was permitted to cross-examine witnesses); *In re Jamie TT*, 599 N.Y.S.2d 892, 895 (N.Y. App. Div. 1993) (reversing dismissal of abuse petition based on ineffective assistance of counsel for the child, who, among other failings, "engaged in only the most perfunctory cross-examination of [the alleged abuser] consisting of only three questions, none of which had any bearing on [his] credibility"); *Haugen v Haugen*, 262 N.W.2d 769, 773 (Wis. 1978) (finding that a guardian ad litem in modification of custody action was entitled to examine and cross-examine witnesses).

belligerent. The child's attorney should be careful not to burn family bridges unnecessarily.

Indeed, it is possible for the child's attorney to start the healing process through some of the questions asked on cross-examination. For example, the parents should be asked questions designed to elicit their own positive parenting qualities and willingness to address their shortcomings in order to be able to provide a better home for the child. The case worker and evaluator should be asked to identify the parents' strengths and areas where they have cooperated.

Inarticulate witnesses who may not have been able to get out all of the expected testimony during direct examination may respond more easily to the leading questions permitted on cross-examination by the child's attorney. Some witnesses are relatively hostile to the parents' attorneys but may be more cooperative for the child's attorney, because the child is seen as the innocent victim in the litigation. The attorney should use these natural advantages to elicit helpful information on cross-examination. The other attorneys may have even forgotten to cover some areas, which the child's attorney can address during cross-examination.

The child's attorney should make proper evidentiary objections when such objections would advance the child's position.¹⁰⁷ Sometimes it is strategically helpful to object to questions posed by the agency's attorney to demonstrate even-handedness to the parents. Such objections may be merely technical, such as objections to the form of the question, or substantive. The fact-finding process is not assisted by the opinions of unqualified witnesses. The child's attorney should voir dire witnesses when appropriate if there is insufficient foundation for the witness' testimony and object to the proposed testimony if the voir dire demonstrates inadequate foundation.

6. *Presentation of a Case-in-Chief*

The child's attorney may present a case-in-chief.¹⁰⁸ In most cases the other parties call all of the relevant witnesses. However, the attorney should always prepare a case-in-chief and consider issuing independent

107. *Knock v. Knock*, 621 A.2d 267, 276 (Conn. 1993).

108. *See In re R.G.*, 470 N.W.2d 780, 794 (Neb. 1991) (authorizing the guardian ad litem to argue to the court for the disposition it had concluded as best for the child); *In re Jeffrey R.L.*, 435 S.E.2d 162, 170 (W. Va. 1993) (providing that each child was entitled to effective representation at every stage); CAL. WELF. & INST. CODE § 317(e) (West Supp. 1995) (authorizing the guardian ad litem to call own witnesses and make recommendations); 23 PA. CONS. STAT. ANN. § 6382(b) (1995) (providing the guardian ad litem with the authority to participate in order to adequately represent the child's interests); S.C. CODE ANN. § 20-7-124(C) (Law Co-op. 1994) (authorizing a guardian ad litem through counsel to introduce, examine, and cross-examine witnesses).

subpoenas. Such preparation serves several purposes. First, it helps the attorney to organize the child's position. Second, it ensures that appropriate evidence will be offered in support of the child's position. Third, it serves as a blueprint at trial.

The attorney can create an outline listing required elements of proof for each of the necessary factual findings and for the child's requested relief. Next to each element the supporting evidence, whether testimony, admissions, or exhibits, should be listed. The list should include the name of the witness through whom the testimony or exhibit will be offered. The attorney should note any elements covered by stipulations or admissions and then should determine which evidence is expected to be provided by the other parties. The attorney should arrange for the evidence to support any unaccounted for item to be presented during the child's case-in-chief. The attorney should consider making arrangements for all important evidence, even if the attorney expects the another party to present it, in case the expected party does not present it.

During the other parties' case, the attorney should check off required items as the relevant evidence is presented. Anything which has not been checked off must be presented either during cross-examination or in the child's case-in-chief.

Some evidence is most effectively presented during the child's case-in-chief. In those circumstances the attorney should consider coordinating with the other attorneys to permit presentation during the child's case. If the child is going to testify, it is often done during the child's case to have the direct examination done by the child's attorney, with whom the child is familiar, and by whom the child has been prepared to testify.

7. *Closing Argument*

The child's attorney is an advocate for a position, and as such, he or she should present closing argument.¹⁰⁹ This argument should be based on matters in evidence. There is an inherent ethical problem with the child's attorney arguing based on matters not in the record or reasonably inferred from the record. The frequent practice of the child's attorney "testifying" during closing argument is unfair to the parties, who have no opportunity to cross-examine the "evidence"

109. See *S.S. v. D.M.*, 597 A.2d 870, 876 (D.C. 1991) (stating that the guardian ad litem has a duty to offer arguments to protect and further the child's interests); *In re A.C.*, 357 A.2d 536, 538 (Vt. 1976) (finding that refusing to allow the child's attorney to present closing argument was reversible error); *In re C.E.W.*, 368 N.W.2d 47, 58 (Wis. 1985) (concluding that it was error to preclude guardian ad litem from presenting closing argument in a termination proceeding).

presented.¹¹⁰ The child's attorney's personal observations and opinions are no more relevant those of the other attorneys. However, this prohibition on testimony by the attorney does not prevent the attorney from expressing the child's litigation position, any more than it prevents the other attorneys from presenting their clients' positions.¹¹¹

Formulating a position in the litigation and advocating that position, even in the form of recommendations, is not the functional equivalent of becoming a non-cross-examined fact witness. Adults' attorneys may express in opening statement and closing argument their clients' positions, for which no direct evidence is presented. For example, even if the parent does not testify, the parent's attorney is not precluded from stating, "my client does not want supervised visitation, and the evidence does not support any reason for supervision. But if the court does impose that requirement, my client wants his current wife to be the supervisor, he wants overnight and extended visits, and he wants the visits to start next Friday." That expression of a position (which might even be termed a recommendation) is not testimony by the attorney. Except for the comment about what the evidence does not support, it does not refer at all to matters in evidence. This is no different than a child's attorney stating, "my client wants to see his mother. He wants to live in his own neighborhood. If he can't live with his mother, he wants to live with his grandmother. Reasonable visitation with his mother under those circumstances would be alternate weekends." In both situations the attorneys are free to comment on the evidence, drawing reasonable inferences, and suggesting ways the court can dispose of the case.

110. See *In re Poole*, 455 N.E.2d 887, 891 (Ill. App. Ct. 1983) (stating that it was error to permit guardian ad litem to present closing argument, based on facts not admitted into evidence and to include personal opinions; however, errors were waived for lack of objection at trial). Cf. *People ex rel. J.E.B.*, 854 P.2d 1372, 1375 (Colo. Ct. App. 1993) (citation omitted). The Colorado court stated that:

Insofar as the guardian ad litem chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence, the guardian functions as a witness in the proceedings and, thus, should be subject to examination and cross-examination as to the bases of his or her opinion and recommendation.

If, on the other hand, the guardian ad litem's recommendations are based upon the evidence received by the court from other sources, then they are analogous to arguments made by counsel as to how the evidence should be viewed by the trier of fact. Opinions and recommendations so based and presented are not those of a witness, but are merely arguments of counsel and examination and cross-examination concerning these should not be permitted.

Id.

111. See *In re Miller*, 451 N.W.2d 576, 580-81 (Mich. App. 1990) (stating there was no error in permitting guardian ad litem to make closing argument which did not depart from stating what the evidence showed and what inferences could be drawn from the evidence); *Haugen v Haugen*, 262 N.W.2d 769, 773 (Wis. 1978) (finding that a guardian ad litem's opinions stated during closing argument is not an expert's opinion but rather an advocate's opinion).

What is important is that the attorney present the child's position in a cogent manner, with reference to the relevant law and factual support adduced during the trial. Closing argument is a time when the child's attorney can offer creative alternatives to the court, focusing the court's attention on the specific needs and interests of the child, as well as on the jurisdictional and substantive findings the court must make.

F. PROTECTING THE CHILD WITNESS

1. *Deciding Whether to Call the Child as a Witness*

One of the most difficult decisions an attorney must make in a child abuse case is whether to call the victim to testify. In most cases, the child's testimony is not necessary to prove the abuse. Occasionally, however, direct testimony from the child is necessary. The attorney must assess how crucial the testimony is. For many children, testifying about abuse is extremely traumatic.¹¹² For others, however, it is a therapeutic experience. The attorney should spend sufficient time with the child to determine whether the child wants to testify. It is disrespectful to the child to deprive him or her of a direct voice if the child wants to testify or otherwise speak to the judge directly. If the child's testimony is crucial, the attorney must determine whether the child is at least willing to testify. Many abused children are in therapy or have been psychologically evaluated with respect to their abuse. That therapist or evaluator should be asked for an assessment of the impact of testifying on the child and the abilities of the child to effectively discuss the abuse in a courtroom setting.

There are six primary dangers to having child abuse victims testify, all of which must be considered in weighing the decision to call the child as a witness: 1) revictimization of the child by the process of testifying, 2) unconvincing demeanor, which may undermine the child's credibility, 3) inaccurate chronology, 4) failure to substantiate the allegations of abuse, 5) recantation of the allegations, and 6) confusion during cross-examination.¹¹³ The decision to call the child as a witness should be a thoughtful one, taking into account the particular circumstances of the child and the case.

112. See generally Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perceptions of Stress in and out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613 (1993).

113. These criteria are discussed in more detail in Ann M. Haralambie, *The Child Witness in a Sexual Abuse Case*, in ULTIMATE TRIAL NOTEBOOK II (1992).

2. *Resisting Opposing Parties' Calling the Child as a Witness*

Parties generally have a due process right to call competent witnesses to testify, even if the witness is a child.¹¹⁴ However, if the child does not want to testify, the attorney should attempt to negotiate an agreement that the child not be called as a witness. The parties may be able to stipulate as to what the child would have said or introduce prior hearsay statements of the child. Failing that, the attorney may apply for a protective order upon a showing of specified harm to the child. The parents generally can be excluded during the child's testimony so long as their attorneys are present.¹¹⁵

3. *Preparing the Child to Testify*

Once the decision has been made to have the child testify, it is important for the child to be thoroughly prepared for the experience. The attorney proposing such testimony should be aware of all existing legal safeguards to reduce trauma to the child witness, as well as the evidentiary exceptions which permit the child's statements to be introduced into evidence through another witness or exhibit.¹¹⁶ The therapist often can assist in the preparation of the child and the attorney doing the questioning. The attorney must alter both the vocabulary and sentence structure of the direct examination to accommodate the child's developmental limitations and emotional fragility.¹¹⁷

The courtroom can be an intimidating place for adults. For children, it may be even more terrifying. Most children draw their image of court from what they see on television, typically very dramatic criminal trials. Most such television shows are very unrealistic,

114. For further discussion of whether children must testify, see *Ex Parte Harris*, 461 So.2d 1332 (Ala. 1984); *Crownover v. Crownover*, 337 N.E.2d 56 (Ill. App. Ct. 1975); *Bowers v. Bowers*, 475 N.W.2d 394 (Mich. App. 1991); *Jethrow v. Jethrow*, 571 So. 2d 270 (Miss. 1990); *Duncan v. Duncan*, 528 S.W.2d 806 (Mo. Ct. App. 1975); *Cook v. Cook*, 169 S.E.2d 29 (N.C. Ct. App. 1969); *Glimcher v. Glimcher*, 278 N.E.2d 37 (Ohio Ct. App. 1971); *Schafer v. Schafer*, 412 P.2d 793 (Or. 1966); *Harrison v. Harrison*, 462 P.2d 170 (Utah 1969); *Hepler v. Hepler*, 79 S.E.2d 652 (Va. 1954). *Cf.* *Beran v. Beran*, 450 N.W.2d 688, 692 (Neb. 1990) (determining it error to preclude child's testimony for limited purposes, even though guardian ad litem recommended against the child's testifying).

115. See *In re Maricopa County Juv. Action No. JD-561*, 638 P.2d 692, 695 (Ariz. 1981) (determining that parent had due process right to cross-examine child that alleged sexual abuse, but noting that reasonable accommodations could be made); *In re Mary S.*, 230 Cal. Rptr. 726, 727 (Cal. 1986) (stating that due process rights to confront witnesses were not violated when children testified outside of parents presence); *In re Jo-Nell C.*, 493 A.2d 1053, 1056 (Me. 1985) (finding no error by permitting child to testify in chambers with counsel).

116. See generally 1 KRAMER, *supra* note 11, § 13.07; 2 HARALAMBIE, *HANDLING CHILD CUSTODY*, *supra* note 72, § 21.12; J. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* §§ 7.17-7.49 (1992 & Supp. 1994).

117. See generally WALKER, *supra* note 53, ch.3; 2 HARALAMBIE, *HANDLING CHILD CUSTODY*, *supra* note 72, § 24.21; Saywitz, *infra* note 119, at 15.

permitting bullying and sarcastic cross-examinations that would never be permitted in a real trial, especially in juvenile courts.¹¹⁸ Children are likely to think that going to court means that someone will be going to jail or will be executed, or even that they will go to jail if they make a mistake while testifying.¹¹⁹ It is little wonder that they fear going to court. It is the attorney's obligation to familiarize the child with what will happen in court, the purpose of the testimony, who will be present, and what the courtroom looks like. A courtroom tour well before the date of the child's testimony is one of the best ways to accomplish this task, and most judges are willing to cooperate.

Before the child is brought to the courtroom, the attorney should go over the purpose of the tour and give the child a general idea of what will be seen there. Arrangements should be made for the child to spend some time in an empty courtroom and to talk to court staff who will be present in the court. Perhaps the biggest "hook" to put the child at ease is the court reporter's demonstration. Children old enough to testify are old enough to be fascinated by the steno machine. Court reporters are generally willing to show the child how the machine works, to transcribe a sentence or two of the child's and to give him or her the paper. Because the child's wonder is engaged, the courtroom then takes on some sense of positive excitement.

The child should be permitted to sit in the witness chair. The attorney should ask a few non-threatening questions (about hobbies, for example, rather than about the case) from the position which will be used at trial. The attorney should then stand or sit where the cross-examiner is expected to be during cross-examination, and again ask some non-threatening questions. Children often wonder whether judges wear clothes under their robes. It will save distractions at trial to answer that question before trial.

If the judge is available, the judge may be asked to sit at the bench so the child can become accustomed to the judge. The judge should first meet the child without wearing a robe. However, if the judge will be wearing a robe at trial, the judge should at some point sit at the bench in his or her robe. Sometimes judges hearing the case prefer to have child witnesses meet another judge in order to avoid the appearance of favoritism. Some courts have special programs for children who may testify, and the child's attorney should make arrangements for the child to participate in any such programs.

118. The term "juvenile court" is used by this author generically to refer to whatever court hears the child abuse case.

119. See, e.g., Karen J. Saywitz, *Children's Conceptions of the Legal System: Court is a Place to Play Basketball*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 131 (Stephen J. Ceci et al. eds., 1989).

4. *Accommodations for Child Witnesses*

It is very difficult for many children to testify about abuse with the abuser in the courtroom. The United States Supreme Court has held violative of the Sixth Amendment confrontation clause a statute permitting all child witnesses to testify behind screens or one-way mirrors,¹²⁰ but has permitted a child victim's testimony by one-way closed circuit television where there was a particularized showing that testifying in the defendant's presence would cause the child trauma, impairing the child's ability to communicate.¹²¹ Because the Sixth Amendment is inapplicable in civil cases, courts in civil matters are generally willing to permit the child to testify outside of the presence of the abuser, as well as the public, with a less compelling showing of serious trauma to the child, based on a Fourteenth Amendment due process analysis.¹²² The attorney should introduce some evidence that testifying in the presence of the abuser would be traumatic for the child. The inherently sensitive nature of the testimony should be sufficient in itself to warrant exclusion of the public during the child's testimony. Due process requires that the attorneys be present and/or the testimony be recorded in the absence of a stipulation to allow the judge to speak to the child alone *in camera*.¹²³

Witnesses of any age are likely to be more relaxed when testifying if a supportive friend is with them. For children, the difference may mean being able to face the prospect of testifying as opposed to sitting mute with fear. Some judges permit the child to have a relative, therapist, social worker, or victim-witness advocate present in the courtroom during the child's testimony.¹²⁴ Sometimes the child is permitted to testify

120. *Coy v. Iowa*, 487 U.S. 1012, 1020-21 (1988) (determining that a conclusive rule was unconstitutional).

121. *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

122. *See In re Amber S.*, 19 Cal. Rptr.2d 404, 409 (1993) (finding that a court in dependency case has the inherent power to have young children testify by one-way closed circuit television outside the presence of their parents).

123. *See Ex parte Wilson*, 450 So.2d 104, 107 (Ala. 1984) (determining it error not to comply with defendant's request to have the child's testimony in chambers recorded); *Watermeier v. Watermeier*, 462 So.2d 1272, 1275 (La. Ct. App. 1985) (holding that attorneys and court reporter must be present during in-chambers competency interview); *In re Marriage of Donley*, 819 S.W.2d 98, 99 (Mo. Ct. App. 1991) (determining that it was reversible error to fail to record the interview even though counsel were present); *Fisher v. Fisher*, 535 A.2d 1163, 1165 (Pa. Super. Ct. 1988) (finding that the interview must be transcribed and made part of record).

124. For cases determining the due process right to a fair trial is not implicated by permitting a counselor, guardian, or relative to be present and near the child when they testify, *see State v. Menzies*, 603 A.2d 419, 429 (Conn. App. Ct. 1992); *Miles v. State*, 411 S.E.2d 566, 569 (Ga. Ct. App. 1991); *Hall v. State*, 634 N.E.2d 837, 841-42 (Ind. Ct. App. 1994); *State v. Rowray*, 860 P.2d 40, 44 (Kan. Ct. App. 1993); *Commonwealth v. Amirault*, 535 N.E.2d 193, 207 (Mass. 1989); *State v. Pollard*, 719 S.W.2d 38, 42 (Mo. Ct. App. 1986). *See also* 2 MYERS, *supra* note 103, § 8.1; Carol A. Crocca, Annotation, *Propriety and Prejudicial Effect of Third Party Accompanying or Rendering Support to Witness During Testimony*, 82 A.L.R.4th 1038 (1990). Current research supports common sense in

from the lap of the support person.¹²⁵ The proper inquiry for the court is whether the presence of the support person will allow the child to feel comfortable and safe enough to testify truthfully or whether the presence of the support person will bias the child's testimony.

Sometimes all a child needs for security is a "support" object, such as a favorite doll, stuffed animal, or blanket.¹²⁶ The child may need something in his or her hand as a distraction while discussing private and emotionally difficult topics. While adults often find it annoying to talk to a child who is repetitively twisting into knots a piece of string or turning a toy car end over end, that distractive action may actually enable the child to be more forthcoming with testimony. The attorney should ask the child in advance whether he or she would feel more comfortable taking a support object to the witness stand with him or her. Children have much shorter attention spans than adults, and if they are not allowed frequent breaks during testifying, they may become silly, nonresponsive, or worse, may give any answers which they think the questioner wants to hear just to get the testimony over with. As much as it may inconvenience the adults, frequent breaks during the child's testimony are necessary to maximize the quality of the testimony. Similarly, children may need snacks or juice as an incentive to remain on track with their testimony when they really would rather be somewhere else doing something else. Judges who permit snacks and breaks for children are not conveying special favor for the child. They are merely recognizing the special needs and limitations of children and creating an environment with the greatest potential to facilitate complete and accurate testimony.

A few courthouses have courtrooms specially designed for children, with colorful posters on the wall, child-size furniture, and other accommodations for children. Most courts have little flexibility in rearranging the furnishings to be more child-friendly. However, some ac-

demonstrating that abused children are better able to testify in criminal cases with a support person present. See Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS OF THE SOC. FOR RESEARCH IN CHILD DEVELOPMENT (Serial No. 229, No. 5, 1992). In one military case a young child was permitted to whisper her answers to her mother, who then repeated them loudly enough to be heard. *United States v. Romey*, 32 M.J. 180, 183-84 (C.M.A. 1991).

125. See, e.g., *State v. Rogers*, 692 P.2d 2, 5 (Mont. 1984) (determining that it was not prejudicial error to allow the child to testify from the prosecuting attorney's lap); *State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986) (determining it was not constitutional error to allow the eight year old child to testify from the lap of a relative). But see *State v. Rulona*, 785 P.2d 615, 616 (Haw. 1990) (concluding it was error to allow child to testify from counselor's lap when not shown necessary). See generally Crocca, *supra* note 123, at 1038.

126. See *Commonwealth v. Amirault*, 535 N.E.2d 193, 205, 207 (Mass. 1989) (permitting child victim to testify in a criminal case while holding a toy). But see *State v. Palabay*, 844 P.2d 1, 5-6 (Haw. 1992) (determining that in the absence of a showing of compelling need, it was error to permit 12 year old child victim to testify in a criminal case while holding a teddy bear).

commodations can often be made to make the child feel more comfortable. For example, a small table and chair may be brought into the room so the child does not feel overwhelmed by the court room environment. The judge can sit on the same level as the child, rather than sitting high above the child on the bench. Some judges preside over the child's testimony without wearing judicial robes. Judges who typically hear child abuse cases are much more likely than other courts to make their court rooms and procedures child-friendly.

5. *Direct Examination of the Client*

Direct examination of a child abuse victim is very difficult, but it may be the only way to present a crucial piece of evidence. The attorney must decide whether to present the child's testimony directly from the witness chair or whether to make some other arrangements, such as presenting videotaped testimony,¹²⁷ having the child testify via closed circuit television from another room,¹²⁸ or having the child testify in chambers.

Abuse, particularly sexual abuse, is a very difficult thing for people of any age to talk about. When the topic must be discussed in a formal court environment, it is particularly difficult. It is important, therefore, to begin the direct examination with a discussion of familiar and non-threatening issues. Unless the child is an excellent and confident student, it is not a good idea to ask about school, which may be a stressful topic for the child. The attorney can certainly ask what school the child goes to and what grade the child is in, but it may be a mistake to ask if the child likes school or what kind of grades the child gets. The attorney should ask the child about hobbies, pets, fun activities, favorite television shows, and similar topics. This warm-up discussion should continue until the child seems at least somewhat relaxed.

Children have more difficulty remembering non-essential, peripheral details about what happened to them.¹²⁹ Their memory is much better and more accurate for the important details involving the primary aspects of the abuse. The child's credibility will suffer if the direct exam-

127. See *In re Brock*, 499 N.W.2d 752, 757 (Mich. 1993) (using a videotaped deposition of child did not deprive the accused parents of due process); *State v. Naucke*, 829 S.W.2d 445, 450 (Mo. 1992), *cert. denied*, 113 S. Ct. 427 (1992) (determining that admission of videotaped deposition of a child was properly admitted because of trauma caused by in court testifying).

128. See *In re Amber S.*, 19 Cal. Rptr. 2d 404, 409 (Cal. 1993) (determining that, in a dependency case, a court has the power to permit young children to testify by one-way closed circuit television outside the presence of their parents).

129. See, e.g., L. Rudy & Gail S. Goodman, *Effects of Participation on Children's Reports: Implications for Children's Testimony*, 27 DEVELOPMENTAL PSYCHOL. 1 (1991). For a more complete discussion of children's memory and testimony, see 2 HARALAMBIE, *HANDLING CHILD CUSTODY*, *supra* note 72, §§ 24.11-24.12. See also Saywitz, *supra* note 119, at 15.

iner asks for non-essential details which the child may have forgotten or confused with another time or place. Therefore, during direct examination the attorney should avoid asking about such peripheral details as color of clothing.

While courts generally permit some leading questions with young children,¹³⁰ the more information comes through the child's own mouth, the greater weight the trier of fact will give the information. When the attorney must lead the child, it is better to ask a question that gives the child more than one option. For example, instead of asking "was his penis hard?" the attorney should ask "was his penis hard or soft?" Options reduce the appearance that the child is merely going along with whatever the questioner asks. The attorney should not interrupt the child's answer when the child is relating information about abuse. Details can be elaborated upon by further questioning. A child who is interrupted in order to answer a narrow series of questions may never remember to complete all of the original answer.

Most child abuse victims have spoken to many people about the abuse before they ever get to testify. The direct examiner should ask the child whom the first person he or she told was. The circumstances of that disclosure are very important. Why did the child tell this person? Why did the child tell him or her at that time? Of course, before asking any of these questions, the attorney must have gone over them with the child and been satisfied that child is able to answer. "Why?" is one of the questions many children have difficulty with. The attorney needs to convey the fact that the child trusts the person he or she told and tells that person things that scare or hurt or bother the child. Just as a child would tell his mother when someone at school picked on him or the bus driver yelled at him, he will tell his mother that daddy hurt him. Establishing this type of context (if it is true) demonstrates the normality of the discussion, rebutting the inference that the mother and child conspired to fabricate the allegations.

The attorney should also point out the other people the child has spoken to about the allegations: teachers, other relatives, law enforcement officers, social workers, psychologists, and other people. If the

130. For further discussion of the proper use of leading questions on direct examination of a child witness, see *State v. Jerousek*, 590 P.2d 1366, 1372 (Ariz. 1979); *Clark v. State*, 870 S.W.2d 372, 376 (Ark. 1994); *Begley v. State*, 483 So.2d 70, 72 (Fla. Dist. Ct. App. 1986); *State v. Moore*, 377 A.2d 1365, 1371 (Me. 1977); *Commonwealth v. Baran*, 490 N.E.2d 479, 480 (Mass. 1986), *rev. denied*, 494 N.E.2d 388 (Mass. 1986); *Jones v. State*, 606 So.2d 1051, 1059 (Miss. 1992); *In re R.R.*, 398 A.2d 76, 84 (N.J. 1979); *State v. Orona*, 589 P.2d 1041, 1046 (N.M. 1979); *State v. Lewis*, 448 N.E.2d 487, 490 (Ohio App. 1982). See generally 1 MYERS, *supra* note 103, § 5.7; C. McCORMICK, *McCORMICK ON EVIDENCE* § 6 (E. Cleary ed., 3d ed. 1984) (discussing leading questions); J. WIGMORE, 3 *EVIDENCE IN TRIALS AT COMMON LAW* § 778 (Chadbourn rev., 1978) (discussing the use of leading questions when examining children).

child's statement has not changed despite the large number of people told, any allegation of fabrication is likely to be rebutted. It is very difficult to retell a fabrication consistently. It is difficult enough to retell an accurate memory of an experienced event the same time after time. If there have been changes in the details of the child's statement, the great number of separate interviews can help to explain that. If those subsequent interviewers have taken accurate notes, it should be possible to trace any differences in the child's statement. If details were *added* later, the child should testify about later remembering the information, not previously having been asked about the information, or whatever the correct explanation is. If the child has *changed* details, if they are important, the child should be given an opportunity to explain the changes. If the child has *recanted* important details later, the child should also be asked to explain. The child may have forgotten, may have been incorrect in previous statements, or may have been threatened. The child's explanation may have a great impact on the trier of fact. The child's attorney should ensure that the court has sufficient information, from the child and from experts, to assess accurately the child's testimony.¹³¹

Demonstrations are often effective adjuncts to the child's testimony, especially with a young child. Either anatomically detailed or regular dolls may be used to have the child show how and where he or she was abused.¹³² Before using dolls, it is important to talk to the child's therapist about the procedure and to have the child successfully demonstrate for the attorney what the abuse was like. If the child is unable to demonstrate with the dolls what happened, that inability will hurt the child's credibility.

131. See generally Saywitz, *supra* note 119, at 15.

132. State v. Jarzbek, 529 A.2d 1245, 1247 (Conn. 1987), cert. denied, 484 U.S. 1061 (1988); People v. Carter, 614 N.E.2d 452, 455 (Ill. App. Ct. 1993); State v. Hood, 846 P.2d 255, 256 (Kan. Ct. App. 1993); People v. Garvie, 384 N.W.2d 796, 799 (Mich. Ct. App. 1986); Commonwealth v. Trenholm, 442 N.E.2d 745, 746 (Mass. App. Ct. 1982); State v. Evans, 802 S.W.2d 507, 514 (Mo. 1991) (en banc); State v. Madden, 472 N.E.2d 1126, 1130 (Ohio Ct. App. 1984); Vera v. State, 709 S.W.2d 681, 687 (Tex. Ct. App. 1986); Kehinde v. Commonwealth, 338 S.E.2d 356, 358 (Va. Ct. App. 1986). See ALA. CODE § 15-25-5 (Supp. 1994) (stating that a child under 10 may use anatomically correct dolls to assist testimony in certain criminal and juvenile cases); N.Y. CONSOL. LAW 642-a(7) (McKinney Supp. 1994) (providing that it is within the court's discretion to allow a child to use anatomically correct dolls to assist testimony). See also N.J. STAT. ANN. § 2A:84A-16.1 (West 1994) (providing that a child under 16 may use anatomically correct dolls or drawings to assist testimony in certain criminal cases); W. VA. CODE § 61-8B-11(d) (1992) (providing a child under 11 may use anatomically correct dolls to assist testimony in criminal incest cases). See generally HARALAMBIE, HANDLING CHILD CUSTODY ABUSE AND ADOPTION CASES, *supra* note 72, § 16.07A.

G. CREATIVE SOLUTIONS

The child's attorney should be creative in fashioning and considering the options available to the child. The attorney should not be bound by the options suggested by the parties but should make an affirmative effort to fashion alternatives which will best suit the child's needs. The child's attorney is often the best person to propose a "middle ground" which will be acceptable to the parties.

1. *Negotiating a Settlement*

One of the greatest services the child's attorney can provide is that of negotiator. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the child's attorney is in a pivotal position to negotiate. Further, because the child's attorney is impartial *vis á vis* the parents and agency, the recommendations or position of the child's attorney often carries a great deal of weight. Especially when the attorney is functioning as guardian *ad litem*, the attorney's view of the case may be seen as a preview of what a judge is likely to rule.¹³³ Therefore, parents' attorneys may advise their clients to settle after hearing what the child's attorney's position will be.

If the parents are represented by counsel, it is unethical for the child's attorney to negotiate with the parents directly without the consent of their attorneys. The child's attorney can conduct negotiation with the parties and their attorneys effectively by focusing of the needs of the child. The child's attorney's recommendation of particular types of treatment (generally proposed initially by the therapist or evaluator in the case) as a means of regaining more time with the child and building a better parent-child relationship in the long-term may get the parent refocused on the child's needs in a positive way.

Two caveats warrant mention for the child's attorney during negotiation. First, the primary goal of the child's attorney is to serve the *child's* interests. Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. However, the child's attorney should never become merely a facilitator to the parties' reaching a negotiated settlement (a trap some mediators fall into). The child does not need yet another person trading bargaining

133. The effect of the child's guardian ad litem as substitute judge has been criticized as beyond the expertise and proper role of the attorney. See, e.g., Martha L. Fineman, *The Role of Guardians ad litem in Custody Contests*, in WHO SPEAKS FOR THE CHILDREN? THE HANDBOOK OF INDIVIDUAL AND CLASS CHILD ADVOCACY 92 (Jack C. Westman ed., 1991).

chips with his or her interests. The attorney's role in negotiation must focus on what the child wants or what is in the child's best interests, whichever standard the attorney is governed by. Regardless of whether the attorney is a guardian *ad litem* or not, the attorney has a fiduciary duty to the child client. To the extent feasible the child should be consulted prior to any settlement becoming binding. Second, the attorney should insist on being a participating party to any settlement which will affect the child's interests.¹³⁴

2. *Suggesting Alternatives*

As was discussed *supra*, the child's attorney may be able to offer alternate non-agency placement for the child. Such an alternate placement would save a foster care bed and may save the agency financial responsibility for the child. The child's attorney should provide the case worker with as much information about the alternate placement as possible and request a home study if necessary.

As an alternative to out-of-home placement, the child's attorney may be able to suggest safeguards which would allow the child to remain at home. For example, if one parent is protective, the abusive parent may be ordered to leave the home, often a more fitting result than removing the victim. Perhaps there is a responsible relative, such as a grandparent, who would be willing to move into the home to provide care and supervision. The child's attorney may know of services to the family which could address the reasons for removal from the home. For example, a physically unsafe dwelling may be repaired by friends or church groups. After school care might be located for a child removed for lack of supervision at home. While the child's attorney is not a social welfare agency or information and referral service, he or she can sometimes move relatively quickly to secure nonagency or agency-contracted services that a harried social worker with an enormous caseload would not find until much later. Zealous advocacy for one's client entails that kind of creativity.

134. See, e.g., *State v. Fitterer*, 820 P.2d 841, 842 (Or. Ct. App. 1991) (reversing acceptance of civil compromise in criminal child sexual abuse case because no guardian ad litem had been appointed for the child victim to sign the stipulation). But see, *Boeddeker v. Reel*, 517 N.W.2d 407, 411 (N.D. 1994) (approving stipulation between husband and wife regarding custody of children, despite recommendation of guardian ad litem that custody remain with county because of both parents' alleged unfitness to care for children).

Under some circumstances visitation must be supervised.¹³⁵ This is often the case with children who have been removed from their homes, at least until the parents make progress in therapy. The child should be consulted about his or her thoughts and feelings about supervision and possible supervisors. The child's attorney should discuss with the child's therapist what type of supervision, if any, would best ensure the child's *emotional*, as well as physical safety. Sometimes it is not enough to protect the child from further physical or sexual abuse. For example, a child who has been abused or molested may feel very violated by the parent and may want to have no contact. There may be great emotional trauma involved in having to continue to see the abusive parent even if a supervisor will be able to protect the child from a recurrence of the abuse during the visit.

On the other hand, typical agency visitation plans may be unduly restrictive, often based on the unavailability of supervisors. The child's attorney should consider proposing alternative supervisors. The supervisor should be someone with whom the child feels comfortable and whom the child trusts to supervise. For example, a child may feel comfortable with a grandparent but not feel that that person can protect him or her when the grandparent does not believe that the child was abused or is not sufficiently vigilant during the visits. Relatives, neighbors, church leaders, scout leaders, teachers, coaches, parents of the child's friends, and similar people may be willing to supervise visits.

The child may prefer to have visits take place in a park, mall, or other public place instead of in a more artificial setting, such as an agency play room. Alternate supervisors may be more accommodating of such visits and may be available on evenings or weekends, when agency personnel may not be available. The attorney should discuss location and supervisor options with the child to maximize the child's enjoyment and comfort during the visits. If the people the child suggests are willing to supervise, the caseworker should be asked to meet with the potential supervisor or supervisors for possible approval. The agency may welcome the offer of a responsible supervisor because that gives agency supervisors more time for other cases. Often the one hour per week visitation offered by the agency has more to do with agency resources than a determination of the child's needs and safety.

When the case does not settle, the child's attorney can suggest the child's alternatives to the court even though the agency may have reject-

135. For a discussion of the factors warranting restrictions on visitation, largely in the divorce context, see 1 KRAMER, *supra* note 11, §§ 3.07-3.15; 1 HARALAMBIE, *HANDLING CHILD CUSTODY*, *supra* note 72, §§ 5.06-5.07; Linda D. Elrod, *CHILD CUSTODY PRACTICE AND PROCEDURE* §§ 6:15-6:23 (1993); J. ATKINSON, 1 *MODERN CHILD CUSTODY PRACTICE* §§ 5.23-5.32 (1986).

ed those suggestions.¹³⁶ Those recommendations should be based upon evidence presented to the court. Therefore, if the child's attorney proposes an alternate placement or visitation supervisor, that person should testify, both to verify a willingness to serve in that capacity and also to allow the court to make some judgments about the person. The child's position on all aspects of the disposition should be presented to the court with as much detail as necessary to demonstrate the feasibility and appropriateness of the recommendations. The child's position during litigation is advanced by creative thinking and vigorous advocacy of that position.

H. FOLLOW-UP

It is not always clear when the role of child's attorney ends. However, it is likely that in all jurisdictions the role continues at least through the time for appeal of the adjudicatory order. Children need to know whether the attorney is still involved in the case, what will happen, what their options are, and what can be done in the future if a problem arises. The attorney should be clear on what the answers to those questions are and should communicate that information to the child client.

Most child abuse cases do not end neatly, with a clear conclusion. If there is an adjudication, the court will set periodic review hearings. In addition, there may be periodic agency reviews or citizen review board hearings. There may be compliance issues which arise between hearings. Circumstances may change for the child, parents, or agency (including changes in service providers). Representation during follow-up phases may be critical to the child's interests. The attorney can best serve the child's interest by remaining involved until the final disposition of the case (dismissal or termination of the court case).¹³⁷ If the statute, case law, or order appointing the attorney do not provide for termination of representation, the attorney should either assume con-

136. See *In re D.A.H.*, 822 P.2d 640, 649 (Kan. App. 1991) (determining it error to disallow the guardian ad litem from presenting alternative placement options to the court); *In re Donna H.*, 602 A.2d 1382, 1385-86 (Pa. Super. 1992) (stating that all alternatives must be examined to determine the child's best interests). It has been held to be error to fail to appoint an attorney for children where that attorney could have ensured that the record before the court contained reasons supporting placement and could have explored alternative placements. *In re Juvenile Action No. J-8545*, 680 P.2d 146, 151-52 (Ariz. 1984).

137. See *In re Jeffrey R.L.*, 435 S.E.2d 162, 180 (W. Va. 1993) (adopting guidelines for guardians ad litem as an appendix to the case providing for continued representation "until such time as the child is adopted, placed in a permanent home, or the case is dismissed after an improvement period"); CAL. WELF & INST. CODE § 317(d) (West Supp. 1995) (including representation in dependency through representation in termination proceedings and proceedings relating to the institution or setting aside of a legal guardianship); WIS. STAT. ANN. § 48.235(7) (West Supp. 1994) (providing that a guardian ad litem's appointment terminates upon the entry of the court's final order or upon the termination of any appeal in which the guardian ad litem participates).

tinued representation until the final disposition or seek court permission to continue representation.

The child's attorney should take steps during the litigation to preserve the record on appeal. In appropriate cases the child's attorney should initiate an appeal of an adverse ruling.¹³⁸ Similarly, the child's attorney should take a position in any appeal filed by the parent, agency, or other party.¹³⁹

One of the important roles an attorney can play in protecting the child's interest is to ensure that services are offered and that the case moves quickly toward the goal.¹⁴⁰ Children's needs often change during the time the case is open. Further, families may make progress or regress. A case plan that was appropriate at one time may need to be modified, or a new plan may need to be adopted. The child's attorney should stay in touch with the client, case worker, and any relevant third parties, such as foster parents and therapists to determine whether the case is progressing or changes need to be made. If necessary, the attorney can bring any problems to the attention of the court.¹⁴¹

Under the Adoption Assistance and Child Welfare Act of 1980¹⁴² state agencies are federally mandated as a prerequisite for receiving federal funding to make reasonable efforts to prevent the need for out of home placement and to reunify the child with the family if the child is removed.¹⁴³ Each child in federally funded or state supervised foster care must have a case plan specifying the services to be offered to prevent out of home placement or facilitate return to the family.¹⁴⁴ While agencies are required to make reasonable efforts to return children home as soon as possible, overburdened caseworkers usually cannot keep up with every child in their caseload. The child's attorney may be the only person to monitor the agency in its provision of services to the child and family and the timely institution of termination of parental rights actions

138. *See, e.g.*, In re *Scottie D.*, 406 S.E.2d 214, 221 (W. Va. 1991) (stating that an attorney is required to maintain a normal client-lawyer relationship and that "normal" entails prosecuting an appeal if necessary); WIS. STAT. ANN. § 48.235(7) (Supp. 1992) (providing that a guardian ad litem may appeal a termination of parental rights judgment).

139. *See, e.g.*, WIS. STAT. ANN. § 48.235(7) (Supp. 1992) (providing that if a guardian ad litem does not participate in an appeal of a termination of parental rights judgment, he or she must file a statement of the reasons for not participating). In rare cases the issues on appeal will not affect the child. Usually, however, the child's position or interest will be affected at least indirectly.

140. *See, e.g.*, In re *Jeffrey R.L.*, 435 S.E.2d 162, 179-80 (W. Va. 1993) (referring to the guidelines for guardians ad litem that outline how to effectively expedite a case).

141. *See, e.g.*, *Wilkinson v. Riffel*, 324 S.E.2d 31, 33 (N.C. App. 1985) (stating that a guardian ad litem has continuing duty to conduct follow-up investigations and report to the court when the child's needs are not being met.)

142. Pub. L. No. 96-272 (codified as amended in scattered sections at 42 U.S.C. §§ 602-1397 (1991)).

143. 42 U.S.C. §§ 670-1397 (West 1991).

144. 45 C.F.R. § 1356.21(d)(4) (1994).

where warranted. If the case is transferred to another case worker, the attorney should remain in touch with the supervisors of the old and new caseworkers until the case is in fact fully transferred to make sure that essential services and case planning are not lost or delayed because of the transfer.

There comes a time when a permanent decision is more important than waiting for a potentially better option to be in place. Permanency planning is recognizing the need for a final decision to be made consistently with the child's developmental needs and sense of time. The child's attorney should be actively involved in the permanency planning process.¹⁴⁵

Some children's need for affiliation with their family, even if they must remain in an out-of-home placement until their majority, outweighs the need for a legally permanent adoptive home. For others, termination of parental rights is the preferred plan. Because agencies have a dual responsibility to rehabilitate families and to protect children, some agencies may not move as quickly towards termination as the child's needs would warrant. In such cases, the child's attorney may be able to initiate a termination action.¹⁴⁶

In some states an open adoption may be permitted, which allows the child to continue to have contact with family members after adoption.¹⁴⁷ Parents whose rights might otherwise be terminated involuntarily may be willing to consent to adoption if they and/or their relatives may continue to visit the children.

As with all other decisions concerning the child, the child should have as much input regarding the permanency plan as possible. If the

145. See, e.g., WIS. STAT. ANN. § 48.235(4)(a)(1) (Supp. 1994) (providing that a guardian ad litem may participate in permanency planning).

146. See, e.g., *Id.* § 48-235(4)(a)(3) (providing that a guardian ad litem may petition for termination). Compare *In re Pima County Juvenile Severance Action No. S-113432*, 872 P.2d 1240, 1243 (Ariz. Ct. App. 1994) (holding that children have standing to file termination actions in their own names) with *Kingsley v. Kingsley*, 623 So.2d 780, 783 (Fla. Dist. Ct. App. 1993) (determining that children do not have standing to file termination actions in their own names).

147. See N.M. STAT. ANN. § 32A-5-35 (Michie 1993); N.Y. DOM. REL. LAW § 110 (McKinney 1988); WASH. REV. CODE ANN. § 26.33.295 (West Supp. 1995); *Michaud v. Wawruck*, 551 A.2d 738, 738 (Conn. 1988) (permitting visitation by natural parents if in best interest of child); *Weinschel v. Strople*, 466 A.2d 1301, 1305 (Md. 1983) (permitting agreement between adoptive and natural parents to continued visitation as long as in the best interests of the child). But see, e.g., *In re M.M.*, 619 N.E.2d 702, 708 (Ill. 1993) (determining that a court may not condition public guardian's right to consent to ward's adoption on a requirement that the adoptive parents permit ongoing contact with siblings); *In re C.P.*, 717 P.2d 1093, 1095 (Mont. 1986) (determining that termination and adoption statutes do not authorize post-adoption visitation orders); *Cage v. Harrisonburg Dep't of Social Servs.*, 410 S.E.2d 405, 406 (Va. App. 1991) (prohibiting even voluntary, discretionary open adoption agreements); *J.S. v. F.V.*, 787 P.2d 968, 970 (Wyo. 1990) (stating that post-adoption visitation agreements contravene public policy). See generally 2 ADOPTION LAW AND PRACTICE §§ 13.02-13.03 (Joan H. Hollinger ed., 1988 & Supp. 1994); 2 HARALAMBIE, HANDLING CHILD CUSTODY ABUSE AND ADOPTION CASES, *supra* note 72, § 14.21.

child does not want to be adopted, the attorney should object to adoption as a plan.¹⁴⁸ If the child wants to be adopted by a particular person, the attorney should attempt to arrange for such an adoption.

V. CONCLUSION

The child's attorney is involved in the case to advocate for the child. However, because the content of that advocacy is informed, it is clear that the attorney's duty is more than to merely ensure procedural fairness, or some other equally passive position. Advocacy sometimes requires taking an adversarial position, sometimes requires facilitating settlement. Most children's attorneys are not trained as behavioral health or social science professionals. Multidisciplinary consultations are almost always necessary to ensure appropriate representation of children. Attorneys are trained as attorneys, and they should have litigation skills. Those skills should be brought to bear on behalf of the child client to present the child's case *from the child's perspective*.

The bottom line of child representation is the relationship with the child client. The time spent getting to know the child will allow the child to feel that somebody cares and is advancing his or her interests. That time also enables the attorney to understand the case from the child's point of view and to present the child's case from that point of view. It is only when *all* parties are represented by independent and competent counsel that the court can have access to all of the relevant information and alternatives. No judge's decision can be better than the data upon which it is based. The child's piece of the puzzle may be crucial in ensuring justice and a compassionate resolution of the case which is truly in the child's best interests.

148. In some states children over a certain age may not be adopted without their consent, unless the court makes certain findings warranting waiver of the child's consent. ARIZ. REV. STAT. ANN. § 8-106(B) (Supp. 1995) (stating that consent is not necessary under age 12); FLA. STAT. ANN. § 63.062(5)(c) (West 1995) (providing consent unnecessary under age 12); ILL. ANN. STAT. ch. 50, para. 12 (Smith-Hurd 1993) (providing consent unnecessary if under age 14); MASS. GEN. LAWS ANN. ch 210, § 2 (Law Co-op. 1987) (providing consent unnecessary under age 12); N.J. STAT. ANN. § 9:3-49 (West 1993) (stating consent unnecessary under age 10); N.Y. DOM. REL. LAW § 111.1(a) (McKinney 1988) (providing consent unnecessary under age 14); UTAH CODE ANN. § 78-30-4.1(1)(a) (1995) (consent required if child is over the age of 12 unless the child lacks mental capacity to consent); WASH. REV. CODE ANN. § 26.33.160(1)(a) (West 1986 & Supp. 1995) (providing consent unnecessary under age 14).

