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REPRESENTING THE CHILD-CLIENT: KIDS ARE PEOPLE TOO

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An Analysis of the Role of Legal Counsel to a Minor

In 1967, the United States Supreme Court recognized the right of an accused juvenile delinquent to independent counsel.[1] Since that time, the right to counsel has been extended to children in abuse and neglect proceedings,[2] parental rights termination cases,[3] custody actions,[4] and a host of other proceedings.[5] Commentators have even suggested that a child has a constitutional right to counsel in any case in which that child has an interest.[6]

With so much litigation involving minors reaching the courts, one question has repeatedly surfaced: What is the proper role of an

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[1] *In re* Gault, 387 U.S. 1, 4 (1966). In this case, the Court reversed the denial of a habeas corpus petition of a 15 year old boy charged with making lewd telephone calls. This reversal was based on due process grounds, including the child's lack of notice of his right to counsel. *Id.* at 41, 42.

[2] Almost every state now statutorily guarantees children the right to appointed counsel in abuse and neglect proceedings. Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 268 (1991).

[3] *In re* Orlando F., 351 N.E.2d 711, 717 (N.Y. 1976) (extending the right to a law guardian to children facing permanent termination of parental rights).

[4] 27 states now have provisions for lawyers or guardians to represent the rights of a child in a custody dispute. Jan Hoffman, *When a Child-Client Disagrees With the Lawyer*, N.Y. TIMES, Aug. 28, 1992, at B6.

[5] Other proceedings in which children have had counsel appointed include: mental hospital commitments, foster care decisions, paternity proceedings, and actions to compel medical treatment or education. *See* James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 570-81 (1976) (discussing proceedings in which counsel for juveniles has been suggested).

[6] Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 77 (1984) (citing Monroe L. Inker & Charlotte A. Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 113 (1971)); *see* Paul K. Milmed, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177 (1974)).

attorney representing a minor?[7] No other issue in family or juvenile court practice has generated more extensive discussion, disagreement, and debate.[8] The Supreme Court has yet to address this issue,[9] and a quarter century of litigation in lower courts has not produced a clear mandate for any particular role.

In light of this uncertainty about an attorney's proper role, this Note examines the four most common roles that have been proposed: the "champion" for the child's best interests;[10] the

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[7] This note focuses on the role of the attorney who has been appointed as independent counsel to a minor. This role is arguably different than the role of an attorney appointed as a child's guardian ad litem. A guardian ad litem, who may not be an attorney, has a clearly defined statutory role in most states: to further a child's best interests. *See, e.g.*, WIS. STAT. ANN. § 767.045 (West 1991). In the majority of proceedings this note is concerned with, the parent has an interest in conflict with that of the minor. The child's parents are therefore disqualified from their normal roles as substitute decisionmakers for the child. *See generally* Dennis Cline, *Speaking for the Child: The Role of the Independent Counsel for Minors*, 75 CAL. L. REV. 681, 684-85 (1987) (stating that if a conflict of interest arises within a family, the presumption of parental decision making can be rebutted). In this situation, the state steps in under the doctrine of *parens patriae* to protect the child. *Id.* *Parens patriae* literally means "parent of the country" and traditionally refers to the states' role as sovereign and guardian of persons under legal disability. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

[8] N.Y. FAM. CT. ACT § 241 cmt. at 181 (McKinney 1992).

[9] Although the Supreme Court has never rendered a decision on point, an analysis of decisions dealing with the rights of juveniles may give some indication as to how the Court may eventually hold on the issue of an attorney's proper role in representing a child-client. *See generally In re* Gault, 387 U.S. 1, 26 (1966) (expressing reservations about the adoption of a non-adversarial approach in juvenile court based on the belief that without following due process, the juvenile may feel that he is not being treated fairly and may resist rehabilitation); Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting in part) (supporting the proposition that if a mature child's interests conflict with the interests of his parents, the child should be permitted to express his views); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (reflecting a paternalistic approach of limiting the freedom of children to choose for themselves that could be read to indicate that the court might favor the protective role of defender of the child's best interests).

[10] Guggenheim, *supra* note 6, at 100. Professor Guggenheim uses the term "champion" to refer to an attorney who sees her duty as defending her child-client's best interests. The word "champion" originally comes from Justice Brennan's opinion in Parham v. J.R., 442 U.S. 584, 638 (1979) (Brennan, J., concurring in part and dissenting in part). ("Children incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and

traditional advocate for the child's wishes;[11] the impartial investigator who gathers all relevant information and presents it to the court;[12] and the law guardian, someone who espouses a combination of all of the above roles.[13] This Note then analyzes the ethical obligations, statutes, case law, and standards set by practitioners in light of the responsibilities they impose on an attorney in her role as counsel to a minor.

This Note concludes by advocating that the only ethically proper role for an attorney assigned to a mature child as a law guardian or legal counsel is that of an advocate for the child's expressed wishes. If the child in question is too young to adequately express a point of view, the attorney acting as a law guardian will have to substitute her own view of what is best for the child. In states where there is no statutory provision for a law guardian, an attorney acting as legal counsel for an immature child should seek to have a guardian ad litem appointed for the child. The attorney should then advocate for her client's wishes as expressed by the child's guardian.

I. Possible Roles for an Attorney with a Child-Client

A. The "Champion"

In its earliest incarnation the juvenile court was a place where there was little room for the strict legal defenses presented by an attorney.[14] Juvenile court was looked at as a benevolent institution designed to protect children accused of delinquency from the harsh realities of an adult criminal court.[15] The court focused on rehabilitation, not guilt, and as such, an adversarial setting was

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who stands ready to oppose a wrongful confinement."); *see* discussion *infra* part I.A.

[11] *See infra* part I.B.

[12] *See infra* part I.C.

[13] *See infra* part I.D.

[14] PAUL PIERSMA ET AL., LAW AND TACTICS IN JUVENILE CASES 46 (3d ed. 1977).

[15] *Id.*

thought to be inappropriate.[16] Judges excluded attorneys from proceedings in an attempt to protect the informality of the hearing and to insure a disposition that would prove to be therapeutic to the accused child.[17]

Abuses were bound to occur when there was no one to speak for the accused child. In response, the Supreme Court prescribed the right to counsel for children in proceedings in which commitment to an institution was a possible outcome.[18] This guarantee of counsel did not, however, guarantee that a child would be given an attorney who would advocate his expressed wishes.

To this day, courts continue to serve the purpose of adjudicating a child's best interests.[19] It is in this context that practitioners and commentators have argued that an attorney's proper role is to assist the court in achieving a resolution that is in the best interests of the child.[20] This role, it is argued, is reflective of the unique features of the juvenile court system[21] and the unique stature of the client.[22]

Proponents of the "best interest" approach argue that while conclusive weight should be given to an adult's decision, the same deference need not be accorded to a child.[23] Good lawyers under this approach are ones that will "employ their wisdom to advise their clients to seek what is best for the child in the long run, rather than attempt to win a Pyrrhic victory and obtain for their clients what they want but perhaps shouldn't have."[24]

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[16] Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1403 (1973).

[17] PIERSMA ET AL., *supra* note 14.

[18] *In re* Gault, 387 U.S. 1, 41 (1966).

[19] *See* Kay & Segal, *supra* note 16, at 1419.

[20] *Id.* at 1403-04.

[21] Kay & Segal, *supra* note 16, at 1401.

[22] *See id.* at 1410 (distinguishing the attorney's proper role in representing an adult-client versus a child-client).

[23] *Id.* at 1411.

[24] Paul W. Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A. J. 1206, 1209 (1960); *see* Lorna E. Lockwood, *The Role of Counsel in Juvenile Proceedings, in* GAULT: WHAT NOW FOR THE JUVENILE COURT? 93, 100 (Virginia D. Nordin ed., 1968) (stating an attorney should be concerned with the best interests of the child as opposed to winning).

Practical considerations may also call for an attorney to adopt the "best interest" approach.[25] Arguably, some juvenile courts still operate in a manner similar to the pre-*Gault* era, when a juvenile had no guarantee of counsel.[26] In this type of atmosphere, a lawyer taking a strict adversarial position may be unwelcome.[27] By appearing cooperative, an attorney may achieve a more favorable disposition for her client.[28]

Critics argue that an attorney acting as a Champion has an inordinate influence on legal proceedings.[29] By deciding what a child's best interests are, the Champion is in effect making legal decisions that are properly in the province of the judiciary.[30]

B. The "Advocate"

Under the advocate approach, the role of an attorney representing a child is no different from that of an attorney representing an adult.[31] The attorney acting in this role will advocate the child's expressed wishes.[32] This is not to say that the attorney may not counsel a client that his decision is unwise.[33] Under the advocate approach, however, final decision making authority will always rest with the client.[34]

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[25] Kay & Segal, *supra* note 16, at 1413.

[26] *Id.*

[27] *Id.*

[28] *Id.*; *see* WILLIAM V. STAPELTON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH (1972) (studying two juvenile court systems, one operating on a structured adversarial model, the other having a traditional outlook and style, and concluding that attorneys working in the more traditional system act in a manner more accommodating to the court).

[29] Guggenheim, *supra* note 6, at 135.

[30] *Id.* at 138.

[31] *See* James P. Yudes, *Children's Rights in the Emerging Reality*, N.J. L.J., Nov. 23, 1992, at 15.

[32] *See id.*

[33] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-28 (1980) [hereinafter MODEL CODE].

[34] *See* Yudes, *supra* note 31.

Proponents of the advocate approach contend that an attorney acting as an advocate is more likely to gain her client's trust.[35] Studies have shown that children trust their attorneys more when they are given the opportunity to share in decisionmaking and when they observe their attorneys taking an adversary stance.[36] Additionally, an attorney who acts as an advocate preserves her ethical responsibility to her client[37] and ensures that her client's voice will be heard in court.

C. The "Impartial Investigator"

Unlike the two previous approaches, the attorney who assumes the role of the impartial investigator will not explicitly advocate a particular outcome.[38] The attorney will investigate all relevant facts and legal issues and inform the court of any information not conveyed by other parties.[39] A lawyer in this context is, in effect, an arm of the court. It is her duty to remain neutral and assist the court in achieving a proper disposition of the case.

While it is difficult to argue that someone whose purpose is to bring the truth before the court serves no use, as one commentator pointed out, an attorney fulfilling this role is "no more an attorney for the child than a district attorney's homicide investigator is an attorney for the deceased."[40] When courts and commentators propose that an attorney should assume the role of an investigator they are in fact proposing a new form of court ordered discovery; they are not, however, giving a child legal representation as we have come to recognize it in our adversarial system.[41]

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[35] PIERSMA ET AL., *supra* note 14, at 51; *see Project—The Lawyer-Child Relationship: A Statistical Analysis*, 9 DUQ. L. REV. 627, 642 (1971) (study conducted in Pittsburgh in 1971 found that 30% of the juveniles interviewed did not tell their lawyers the entire story).

[36] PIERSMA ET AL., *supra* note 14, at 51.

[37] *See infra* part II.A.

[38] Guggenheim, *supra* note 6, at 107.

[39] *Id.*

[40] *Id.* at 108.

[41] *Id.*

Thus, a major problem with this role is that by not performing the traditional duties of an attorney, an impartial investigator is arguably acting in a manner that conflicts with her ethical duty to act as a zealous advocate for her client.[42] Additionally, the attorney who acts as an investigator may undermine legitimate parental interests in privacy and autonomy in her quest to uncover all relevant facts.[43]

D. The "Law Guardian"

The attorney who acts as a law guardian has a dual role. As the name itself implies, the law guardian is part advocate and part guardian. She has perhaps the most difficult job of all because she has a statutory mandate to represent both a child's interests and wishes.[44]

In New York, where the law guardian role is prescribed by statute, there has been substantial controversy over just how the law guardian is to put this role into effect.[45]

II. Ethical Obligations Facing the Attorney with a Child-Client

A. Professional Responsibility Standards

An attorney looking to clarify her obligations to a minor as a court appointed attorney should always refer to professional responsibility standards. Here she will find instruction as to her ethical duties to her client. The Model Code of Professional Responsibility suggests that counsel's proper function is to enable individual litigants to enforce, protect, and preserve their own legal rights.[46] Canon 7 of the Model Code requires a lawyer to represent

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[42] *See* MODEL CODE, *supra* note 33, at EC 7-1.

[43] Guggenheim, *supra* note 6, at 109. This type of infringement is most likely to occur in divorce-custody and child protective proceedings. *Id.*

[44] *See, e.g.*, N.Y. FAM. CT. ACT § 241 (McKinney 1992) (emphasis added).

[45] *See infra* notes 105-108 and accompanying text.

[46] *See* MODEL CODE, *supra* note 33.

her client zealously within the bounds of the law.[47] An attorney must diligently study the facts of the case, thoroughly research the law, and present both to the tribunal in an adversarial manner.[48] While it is a lawyer's duty to inform her client of all relevant considerations,[49] the Code cautions that "the authority to make decisions is exclusively that of the client, and if made within the framework of the law such decisions are binding on his lawyer."[50] Disciplinary Rule 7-101 proscribes a lawyer from intentionally failing to seek the lawful objectives of her client.[51]

This would seem to indicate that an attorney has an unconditional obligation to defend the wishes of her client. However, the Code acknowledges that with certain clients this obligation may not be absolute.[52] Ethical Canon 7-12 informs an attorney that she may be compelled in court proceedings to make decisions for her client if the client is under a mental or physical disability that prevents the client from making a "considered judgment."[53] The Code cautions that if the client is capable of understanding the matter in question, an attorney must obtain all possible aid from the client.[54]

While the Code pronounces that a client's right to direct the course of litigation depends on the client's ability to make a considered judgment, it does not define "considered judgment," and as such, the attorney is left without a complete answer.[55] However, if one accepts the proposition that a mature child, though not legally of age, is nonetheless capable of "considered judgment," then according to the Model Code, the attorney is ethically bound to advocate this child's views.[56] As one commentator recently noted, "there is nothing in the . . . canons which permit[s] the attorney to

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[47] *Id.* at Canon 7.

[48] *Id.* at EC 7-19.

[49] *Id.* at EC 7-8.

[50] *Id.* at EC 7-7.

[51] MODELS CODE, *supra* note 33, at EC 7-7.

[52] *Id.* at EC 7-12.

[53] *Id.* While the Model Code never defines "considered judgment," other sources have defined it as being mature enough to understand, with advice of counsel, at least the general nature of the proceedings. *See infra* note 65, at 81.

[54] MODEL CODE, *supra* note 33, at EC 7-12.

[55] *See id.*

[56] *See id.*

substitute [her] opinion for that of the [mature] child client or to compromise the zealous client directed advocacy mandated by the Code."[57]

In the case of the younger child who is not capable of considered judgment but is capable of understanding and contributing, the Code clearly states that an attorney has an obligation to consult with and obtain all possible aid from this child in making decisions.[58]

The ABA Model Rules of Professional Conduct offer similar guidance to the attorney with regard to her duties to a child-client. Rule 1.14 instructs an attorney that when a client's ability to make "considered decisions" about the case is impaired for reasons such as minority, the lawyer should, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.[59] Comment 1 does caution however, that it might not always be possible to maintain a normal client-lawyer relationship in all respects.[60] This comment goes on to advise attorneys that clients lacking legal competence often are still capable of understanding, deliberating upon, and reaching conclusions about matters affecting their own well-being.[61] Specifically, the comment states that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[62] Thus, under the Model Rules, a lawyer is obligated to maintain a normal lawyer-client relationship with a minor who is capable of making "considered decisions."[63] "Considered decisions" would appear to be the equivalent of the Model Code's "considered judgment" test. Also, like the Model Code, the Model Rules advise that an attorney should seek the input of even a young child.[64]

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[57] Merril Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y. L.J., Oct. 6, 1992, at 2.

[58] MODEL CODE, *supra* note 33, at EC 7-12.

[59] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983).

[60] *Id.* at cmt. 1.

[61] *Id.*

[62] *Id.*

[63] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983).

[64] *Id.*

B. ABA and State Bar Standards

In 1980, a joint commission of the Institute for Judicial Administration (IJA) and the American Bar Association (ABA) issued a compilation of standards for attorneys practicing in the field of juvenile law.[65] The commission took the position that when an attorney has a child client of sufficient maturity, the attorney should be bound to defend what the child determines to be his own interests.[66] "Although counsel may strongly feel that the client's choice of posture is unwise, and perhaps be right in that opinion, the lawyer's view may not be substituted for that of a client who is capable of considered judgment . . . ."[67] The standard for considered judgment, according to the commission, is that of a child who is "mature enough to understand, with advice of counsel, at least the general nature of the proceedings, the acts with which he or she has been charged, and the consequences associated with the pending action."[68]

The IJA-ABA standards deal with various types of common juvenile proceedings individually.[69] Counsel in a delinquency or person-in-need-of-supervision proceeding should ordinarily be bound to defend her client's wishes with regard to the admission or denial of the facts or alleged conditions.[70] The attorney does however, have a duty to advise her client on the probable success or consequences of these actions.[71] In a child protective proceeding, a child capable of "considered judgment," should have the ultimate responsibility for determining his own interests.[72]

In a delinquency, person-in-need-of-supervision, or child protective proceeding involving a child of a young age, the IJA-ABA

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[65] INSTITUTE OF JUDICIAL ADMINISTRATION-AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS: COUNSEL FOR PRIVATE PARTIES (1980) [hereinafter IJA-ABA STANDARDS].

[66] *See id.* § 3.1(b) at 76-77.

[67] *Id.* at 81 cmt.

[68] *Id.*

[69] This section of the IJA-ABA Standards does not distinguish between the different stages of the various proceedings it discusses. *See supra* note 65.

[70] IJA-ABA STANDARDS, *supra* note 65, at § 3.1(b)(ii)[a].

[71] *Id.*

[72] *Id.* at § 3.1(b)(ii)[b].

Standards caution that the child may not be capable of a "considered judgment" on his own behalf.[73] When this is the case, a guardian ad litem is recommended.[74] If a child has a guardian ad litem, the attorney should look to the guardian and to the child to determine the best position to take.[75] If a child does not have a guardian ad litem, the attorney should request that one, other than herself, be appointed.[76] In cases where a guardian has not been appointed, and it appears for whatever reason that some type of independent advice will not be available to the child, counsel should consider all facts and circumstances that the child would consider.[77] After consulting with the child and the child's family, if their interests are not adverse to those of the child, the attorney may remain neutral and limit her role in the proceedings to the presentation of evidence.[78] If necessary, the attorney may adopt the position that would, based upon the circumstances, result in the least intrusive invasion upon the child.[79]

Like the ABA, several state bar associations have issued their own standards for attorneys practicing in the field of juvenile law. For example, the New York State Bar Association Committee on Juvenile Justice and Child Welfare has issued its own standards for law guardians[80] representing minors.[81] In juvenile delinquency and persons-in-need-of-supervision proceedings, these standards encourage attorneys representing a child to work with the child in

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[73] *Id.* at § 3.1(b)(ii)[c].

[74] *See id.* at § 3.1(b)(ii)[1], [2], and [3].

[75] IJA-ABA STANDARDS, *supra* note 65, at § 3.1(b)(ii)[c][1].

[76] *Id.* at § 3.1(b)(ii)[c][2]. This recommendation would be at odds with the approach taken in New York and other states where a law guardian is appointed to represent a child in many juvenile proceedings. A law guardian, in this situation, serves as both legal counsel and as a guardian. *See infra* note 100 and accompanying text.

[77] IJA-ABA STANDARDS, *supra* note 65, at § 3.1(b)(ii)[c][3].

[78] *Id.*

[79] *Id.*

[80] *See infra* note 100 and accompanying text.

[81] LAW GUARDIAN REPRESENTATION STANDARDS (New York State Bar Association Committee on Juvenile Justice and Child Welfare 1988) [hereinafter 1988 LAW GUARDIAN STANDARDS]; LAW GUARDIAN REPRESENTATION STANDARDS VOLUME II: CUSTODY CASES (New York State Bar Association Committee on Juvenile Justice and Child Welfare 1992) [hereinafter 1992 LAW GUARDIAN STANDARDS].

developing a position and strategy.[82] An attorney is further advised to ascertain the desires of the child, advise the child of potential alternatives, and get the child's full *consent* to the specific position the attorney intends to argue.[83] In addition, the attorney should always advocate the "least possible restrictive dispositional alternative" which can be supported and presented.[84]

In child protective, termination of parental rights, or foster care placement and review proceedings, the New York Bar Association urges a different approach for law guardians representing children.[85] The assumption in these cases is that, unlike the majority of juvenile delinquent and persons-in-need-of-supervision proceedings, a child involved in one of these proceedings may be very young.[86] The law guardian here is referred to her statutory function of articulating the wishes and protecting the interests of the child.[87] The standards caution that "[t]he mixture of wishes and interests depends in large part on the child's age, maturity, and capacity."[88] The law guardian is warned that there may be an intrinsic conflict between the child's wishes, which should be advocated, and the child's interests and well-being.[89] This conflict

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[82] 1988 LAW GUARDIAN STANDARDS, *supra* note 81, at 36 (Standard D-9), 98 (Standard C-9).

[83] *Id.* at 51 (Standard F-7), 114 (Standard E-8)(emphasis added). This provision requiring an attorney to obtain her client's consent to a specific disposition is similar to the IJA-ABA requirement that an attorney in a delinquency or person-in-need-of-supervision proceeding should ordinarily be bound to defend her client's wishes. *See supra* text accompanying note 70.

[84] 1988 LAW GUARDIAN STANDARDS, *supra* note 81, at 53 (Standard G-1), 115 (Standard F-1).

[85] *Id.* at 126, 155 (Standard D-1), 167, 193 (Standard D-1), 206, 230 (Standard B-5).

[86] *Id.* at 125.

[87] *Id.* at 126, 155 (Standard D-1), 167, 193 (Standard D-1), 206, 230 (Standard B-5). The law guardian's statutory responsibilities are codified in the New York Family Court Act. *See infra* note 100 and accompanying text.

[88] 1988 LAW GUARDIAN STANDARDS, *supra* note 81, at 126, 167. This recommendation is similar to the IJA-ABA's position that a child involved in a protective proceeding who is determined to be capable of considered judgment should have the ultimate responsibility for determining his interests. *See supra* note 72 and accompanying text.

[89] 1988 LAW GUARDIAN STANDARDS, *supra* note 81, at 127, 167-68.

should be resolved, to the extent possible by working closely with the child.[90]

In child custody matters, the New York Bar Association advises an attorney to develop a strategy in conjunction with her client.[91] If the child is old enough to articulate his desires and to assist counsel, a plan should be developed with the child's cooperation and agreement.[92] An older child's wishes should be ascertained by testimony or interview at the trial stage.[93]

III. Statutes Dealing with the Role an Attorney Should Play in Representing a Child-Client

The attorney who turns to statutory law will find little, if any, guidance in most states. Those states that address the subject offer unclear or mixed messages.[94]

An example of an unclear provision is found in § 40-4-205 of the Montana Code which states that, "[t]he court may appoint an attorney to represent the *interests* of a minor dependent child with respect to [his] support, custody, and visitation . . . ."[95] Though the statute itself does not clarify whether the word "interests" refers to the child's expressed interests, or what is determined to be his best interests, the accompanying Commissioner's note states that, "[t]he attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests."[96] While the word "interests" is once again not clear, in comparing the role of the attorney to that of the guardian ad litem (whose role is to represent the child's best interests), this comment implies that the attorney's

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[90] *Id.* at 127, 168.

[91] 1992 LAW GUARDIAN STANDARDS, *supra* note 81, at 22 (Standard B-2).

[92] *Id.* at 23.

[93] *Id.* at 32.

[94] *See* MONT. CODE ANN. § 40-4-205 (1991); COLO. REV. STAT. ANN. § 14-10-116 (West 1992); N.Y. FAM. CT. ACT § 241 (McKinney 1992); N.J. STAT. ANN. § 9:6-8.23 (West 1992); *see also* Robert M. Horowitz & Howard A. Davidson, *Tough Decisions for the Tender Years*, 10 FAM. ADVOC. 9, 11 (1988).

[95] MONT. CODE ANN. § 40-4-205 (1991) (emphasis added).

[96] MONT. CODE ANN. § 40-4-205 Commissioner's note (1991).

role differs from that of the guardian ad litem's, namely, to represent the child's expressed wishes.

Case law in Montana supports a converse interpretation of the word "interests" in § 40-4-205.[97] In 1985, the Montana Supreme Court interpreted the word "interests" in this statute to mean a child's "best interests" not a child's wishes.[98]

In New York, the Family Court Act provides attorneys seeking guidance with somewhat of a mixed message.[99] In 1970, this act was revised to say, "[t]his part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their *interests and* to help them express their *wishes* to the court."[100] While there are those that believe that this provision gives law guardians the flexibility necessary to carry out their jobs,[101] this statute has nonetheless provoked substantial controversy over the specific role attorneys representing minors in New York should play in various family court proceedings.[102] This statute, like the Montana statute previously cited, does not clarify whether the word "interests" refers to a child's expressed interests, or what is determined to be his best interests.[103] Additionally, nowhere in this statute is it stated under what circumstances an attorney should help protect a child's interests and under what circumstances an attorney should help a child express his wishes.[104]

Perhaps because of this ambiguity, courts in New York have interpreted this statute in several ways: some have required an attorney to represent a child's needs and wishes;[105] some have implied

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[97] *See In re* Marriage of Rolfe, 699 P.2d 79, 86 (Mont. 1985).

[98] *Id.*

[99] *See* N.Y. FAM. CT. ACT § 241 (McKinney 1992).

[100] N.Y. FAM. CT. ACT § 241 (McKinney 1992) (emphasis added).

[101] Interview with Laura Cohen, Assistant Director of Training, Juvenile Rights Division, Legal Aid Society of New York in New York, N.Y. (Feb. 18, 1993).

[102] *See* N.Y. FAM. CT. ACT § 241 cmt. (McKinney 1992).

[103] *See* N.Y. FAM. CT. ACT § 241 (McKinney 1992).

[104] *See id.*

[105] *See In re* Sandra "XX", 565 N.Y.S.2d 269, 271 (App. Div. 3d Dept. 1991); *In re* Dewey S., 573 N.Y.S.2d 769 (App. Div. 2d Dept. 1991).

that an attorney should represent a child's best interests;[106] and some have implied that an attorney has a duty to represent the views of any child mature enough to adequately express an opinion.[107] One New York court has found that an attorney has a duty to remain neutral.[108]

Despite the apparent confusion this statute has caused in New York courts, one commentator has taken the position that the statute does offer attorneys a clearly defined mandate.[109] The latter clause, expressing the child's wishes to the court, is a straightforward obligation to convey the child's expressed wishes to the court.[110] The former clause, helping to protect the child's interests, is borrowed directly from the Model Code's Ethical Consideration 6-4 which states that "[h]aving undertaken representation, a lawyer should use proper care to safeguard the interests of his client."[111] In analyzing the statute, this commentator argues that protecting interests and safeguarding interests are synonymous, yet no one, when considering the application of the above ethical rule, would consider suggesting that an attorney independently determine a client's interests and act accordingly.[112]

In 1990, the New York State Legislature arguably clarified the law guardian's role in the post-dispositional stage of child protective proceedings by adding § 1075 to the Family Court Act:[113] This statute effectively turns the law guardian into an auxiliary child protective worker[114] by requiring the guardian to "apply to the court for appropriate relief" when she has "reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been

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[106] *See In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 2d Dept. 1985); *In re* Peter "VV", 565 N.Y.S.2d 271 (App. Div. 3d Dept. 1991); *In re* Tina PP, 591 N.Y.S.2d 84 (App. Div. 3d Dept. 1992).

[107] *See In re* Elianne M., 601 N.Y.S.2d 481 (App. Div. 1993); Fagnoli v. Farber, 481 N.Y.S.2d 784 (App. Div. 1984); P. v. P., N.Y. L.J., Nov. 10, 1992, at 29 (N.Y. Sup. Ct. 1992).

[108] *See In re* Apel, 409 N.Y.S.2d 928, 930 (Fam. Ct. 1978).

[109] Sobie, *supra* note 57.

[110] *Id.*

[111] *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980)).

[112] *Id.*

[113] N.Y. FAM. CT. ACT § 1075 (McKinney 1992).

[114] N.Y. FAM. CT. ACT § 241 cmt. (McKinney Supp. 1990).

a substantive violation of a court order."[115] No mention is made of the child's wishes in this section of the statute.

No corresponding indication of the role an attorney should take at other stages of a child protective proceeding or in other types of proceedings can be found in the Family Court Act. As a result, the exact role of a law guardian in most proceedings remains largely unclear under New York statutory law.

The Montana and New York statutes discussed above are representative of other statutes that do nothing to clarify the role an attorney with a child-client should play. The lack of clear definitions of terms, and the failure to clearly distinguish between a child's expressed interests and a child's best interests, leave attorneys and the courts in a quandary. These statutes seem even more unclear when contrasted with statutes that clearly define the role of a guardian ad litem.[116]

IV. Case Law Dealing with the Role an Attorney Should Play in Representing a Child-Client

Some courts have directly addressed the issue of an attorney's proper role in representing a minor. Those that have are divided between two popular roles, the champion for the child's best interests and the traditional advocate for the child's expressed wishes.[117]

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[115] N.Y. FAM. CT. ACT § 1075 (McKinney 1992).

[116] Chapter 767 of the Wisconsin Statutes Annotated describes the responsibilities of the guardian ad litem as "an advocate for the *best interests* of a minor child as to legal custody, physical placement and support. The guardian ad litem . . . shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child." WIS. STAT. ANN. § 767.045 (WEST 1991) (emphasis added).

[117] For cases holding or implying that an attorney's proper role is to advocate a child's best interests, see *In re* J.P.B., 419 N.W.2d 387 (Iowa 1988); *In re* Marriage of Rolfe, 699 P.2d 79 (Mont. 1985); *In re* Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988); *In re* Marriage of Kramer, 580 P.2d 439 (Mont. 1978); *In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 2d Dept. 1985); *In re* Peter "VV", 565 N.Y.S.2d 271 (App. Div. 3d Dept. 1991); *In re* Tina "PP", 591 N.Y.S.2d 84 (App. Div. 3d Dept. 1992); Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa 1978), *rev'd*, 442 U.S. 640 (1979)). For examples of cases holding or implying that an attorney's proper role is to act as an advocate for a child's expressed wishes, see

There are also courts which have held that an attorney must advocate both a child's needs and wishes,[118] as well as courts that have held that one person cannot fulfill both of these roles because of an inherent conflict of interest.[119] One court has stated that an attorney's proper role is to remain a neutral assistant of the court.[120]

A. The "Champion": The Courts and The "Best Interests" Approach

Several state and federal courts have held or implied that an attorney's proper role is to defend a child's best interests in a variety of proceedings.[121] In a termination of parental rights proceeding, the Iowa Supreme Court found that the traditional lawyer-client relationship should be modified when the client is a child.[122] The attorney's proper role is to advocate a child's best interests, not a child's wishes.[123] In this case, the two children involved, who were nine and thirteen years old, expressed their opinions. However, the court stated that the very nature of the proceeding implied that the

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Haziel v. United States, 404 F.2D 1275 (D.C. Cir. 1968); Fagnoli v. Farber, 481 N.Y.S.2d 784 (App. Div. 3d Dept. 1984); P. v. P., N.Y. L.J., Nov.10, 1992, at 29 (Sup. Ct. Kings County 1992); *In re* Elianne M. 601 N.Y.S.2d 481 (App. Div. 1993); Rob Karwath, *Girl Raped By Stepdad Granted New Lawyer*, CHI. TRIB., Sep. 5, 1992, at 5.

[118] *See In re* Sandra "XX", 565 N.Y.S.2d 269, 271 (App. Div. 3d Dept. 1991); *In re* Dewey S., 573 N.Y.S.2d 769 (App. Div. 2d Dept. 1991).

[119] *See In re* Dobson, 212 A.2d 620 (Vt. 1965); State v. Ovitt, 268 A.2d 916 (Vt. 1970); *In re* J.V., 464 N.W.2d. 887 (Iowa Ct. App. 1991).

[120] *See In re* Apel, 409 N.Y.S.2d 928, 930 (Fam. Ct. 1978).

[121] *See In re* J.P.B., 419 N.W.2d 387 (Iowa 1988) (person-in-need-of-supervision); *In re* Marriage of Rolfe, 699 P.2d 79 (Mont. 1985) (divorce action); *In re* Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988) (divorce action); *In re* Marriage of Kramer, 580 P.2d 439 (Mont.1978) (divorce action); *In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 1985) (abuse/neglect proceeding); *In re* Peter "VV", 565 N.Y.S.2d 271 (App. Div. 1991) (person-in-need-of-supervision); *In re* Tina "PP", 591 N.Y.S.2d 84 (App. Div. 1992) (person-in-need-of-supervision); Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa 1978), *rev'd*, 442 U.S. 640 (1979) (commitment proceeding).

[122] *In re* J.P.B., 419 N.W.2d at 392 (Iowa 1988).

[123] *Id.* at 391.

children involved were not yet mature enough to determine with whom they should be placed.[124]

The "best interest" approach has also been followed in divorce/custody actions.[125] In a case involving two children, ten and fourteen years old, the Montana Supreme Court detailed the proper role of an attorney in a custody action.[126] The court referred to § 40-4-205 of the Montana Code, which states in relevant part, "[t]he court may appoint an attorney to represent the *interests* of a minor dependent child with respect to his support, custody, and visitation."[127] The court determined that the word "interest" in this statute referred to "the child's best interests, not the child's wishes."[128] Although the attorney in this case was not an appointed guardian ad litem, the court found that given the immaturity of the clients and the pressures that exist in a divorce situation, it would be in the best interests of the children if the traditional lawyer-client relationship was modified.[129] The court cautioned that the attorney who concluded that a child's expressed wishes were not in his best interests had a duty to inform the court of the child's wishes and the attorney's basis for the conclusion that the child's desire to live with a particular parent was not in the child's best interest.[130]

In a divorce related custody matter a Colorado appellate court made an identical conclusion about the role of an attorney representing three siblings.[131] In *In re Barnthouse*,[132] the court held that a father's contention that his children's attorney should have followed their wishes was without merit.[133] This court referred to § 14-10-116 of the Colorado Statutes which states that in a divorce

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[124] *Id.*

[125] *See In re* Marriage of Rolfe, 699 P.2d 79 (Mont. 1985); *In re* Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988); *In re* Marriage of Kramer, 580 P.2d 439 (Mont. 1978).

[126] *In re* Marriage of Rolfe, 699 P.2d at 85-87.

[127] *Id.* at 86 (citing MONT. CODE ANN. § 40-4-205 (1979)) (emphasis added).

[128] *Id.* The court did not state how it came to the conclusion that the word "interests" referred to a child's best interests and not the child's wishes.

[129] *Id.* The court indicated that an attorney in this situation should assume the role of a guardian ad litem and represent the child's best interests.

[130] *Id.* at 87.

[131] *In re* Barnthouse, 765 P.2d 610 (Colo. Ct. App. 1988)

[132] *Id.*

[133] *Id.* at 612.

action a court may appoint an attorney "to represent the *interests* of a . . . child with respect to his custody, support, and visitation."[134] The court interpreted this statute to mean that an appointed attorney in a custody dispute has a duty to determine and recommend those available alternatives which are in the best interests of a child.[135] The court advised that an attorney in this situation should represent the children's interests alone.[136] An attorney must not take a passive role, but instead must gather all available evidence as to the child's best interests.[137] "The attorney is not simply to parrot the child's expressed wishes."[138] Thus, in representing a child, an attorney must maintain a higher degree of objectivity than if she was representing an adult.[139] Although the attorney in this case was not appointed as a guardian ad litem, the court said that the attorney's obligations were similar to those imposed on a guardian ad litem.[140]

In an abuse/neglect proceeding and two person-in-need-of-supervision proceedings, two New York courts have implied that an attorney has a duty to advocate a disposition that is in a child's best interest.[141] In *In re Jennifer G.*, a law guardian adopted the position that her clients should be returned to their mother.[142] The mother,

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[134] *Id.* (citing COLO. REV. STAT. § 14-10-116 (1987) (emphasis added).

[135] *Id.*

[136] *In re* Barnthouse, 765 P.2d at 612.

[137] *Id.*

[138] *Id.* (citing *In re* Marriage of Kramer, 580 P.2d 439 (Mont. 1978)).

[139] *Id.*

[140] *Id.*

[141] *See In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 2d Dept. 1985); *In re* Peter "VV", 565 N.Y.S.2d 271 (App. Div. 3d Dept. 1991); *In re* Tina PP, 591 N.Y.S.2d 84 (App. Div. 3d Dept. 1992). *But cf. In re* Sandra "XX", 565 N.Y.S.2d 269 (App. Div. 3d Dept. 1991). In this decision, issued the same day as *In re* Peter "VV", the Third Department found that a law guardian should have advocated for the needs and wishes of a child client able to make fundamental case handling decisions. *Id.* at 271.

[142] *In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 2d Dept. 1985). The Juvenile Rights Division of the Legal Aid Society in New York took a strong stand against the Appellate Division's holding in *In re* Jennifer G. in a practice note issued by the Division. JRD maintains "that the Court's action constituted a significant departure from legal principles regarding protection of the attorney-client relationship, thus chilling the independence of the bar by undercutting the ability of attorneys to appropriately represent their clients." Janet R. Fink, Practice Note: In the Matter of Jennifer G.—Maintaining the Integrity of the Law Guardian-Client Relationship (unpublished

who had admitted beating her children, was found by two social workers to be making substantial progress.[143] She had also attended guidance and training programs.[144] The Second Department required the appointment of a new law guardian because according to the court, the law guardian had not acted in the best interests of the child.[145]

In *In re Peter "VV"*, the appellate court held that while a law guardian normally has a duty to advocate for a child's needs and wishes,[146] the child in this case was not denied effective assistance of counsel when his law guardian acknowledged that there was a conflict between his client's wishes and what he determined to be his client's need for the "structure and resources available in placement."[147] The court found that "in light of the Law Guardian's otherwise strong advocacy on respondent's behalf, his failure to urge an alternative disposition unsupported by the evidence does not establish that respondent was denied the effective assistance of counsel."[148] The court justified this decision by pointing to the fact that there was no evidence in the record that would have supported a less restrictive alternative disposition.[149]

Almost two years later another appellate division again found that a law guardian did not provide ineffective assistance of counsel to a child client when the guardian acknowledged a conflict between the child's desire to go home and the law guardian's belief that the family court "should also take into consideration [respondent's] age [15 years] and the material in the Probation Investigation."[150] The law guardian in this case failed to vigorously advocate an alternative to placement with the County Department of Social Services.[151] Once

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memorandum prepared for the New York Legal Aid Juvenile Rights Division) (on file with author).

[143] *In re* Jennifer G., 487 N.Y.S.2d 864 (App. Div. 2d Dept. 1985).

[144] *Id.*

[145] *Id.*

[146] *In re* Peter "VV", 565 N.Y.S.2d 271, 273 (App. Div. 3d Dept. 1991).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *In re* Tina "PP", 591 N.Y.S.2d 84, 85 (App. Div. 3d Dept. 1992).

[151] *Id.*

again, the Third Department justified its holding with the comment that there was nothing in the record that could realistically support a less restrictive alternative than the one favored by the court.[152]

A federal court has also found that an attorney representing a juvenile has a duty to advocate for the child's best interests.[153] That case involved a challenge to the validity of Pennsylvania statutes and regulations governing the voluntary commitment of mentally ill and mentally retarded juveniles. The court found that juveniles subject to commitment were entitled to counsel at all significant stages of the commitment process.[154] This counsel was to have the "sole responsibility of advancing the child's best interests."[155]

B. The "Advocate": Approach in the Courts

Case law also supports the proposition that an attorney serving as counsel to a minor has a duty to advocate for the expressed wishes of the child. Courts have held that an attorney must act as a traditional advocate in a variety of proceedings.[156] In holding that an attorney cannot waive a hearing in connection with the transfer of a case from juvenile court to district court without first consulting her minor client, a federal appellate court implied that an attorney must

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[152] *Id.*

[153] Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30, 43-44, (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979). The district court held that children have a right to be represented by counsel at a precommitment hearing. *Id.* This counsel should represent the best interests of the child. *Id.* at 44, n.47. On appeal, the Supreme Court never reached the issue of the proper role of counsel, holding instead that due process did not require an adversary precommitment hearing with counsel. Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640, 649 (1979).

[154] Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. at 43-44.

[155] *Id.* at 44 n.47. The children involved in this proceeding were either mentally ill or mentally retarded. As such, their capacity to direct their attorneys was questionable. This may have played a part in the court's decision.

[156] Haziel v. United States, 404 F.2d 1275, 1278 (D.C. Cir. 1968) (hearing to transfer a case from juvenile court to district court); Fagnoli v. Farber, 481 N.Y.S.2d 784 (App. Div. 3d Dept. 1984) (hearing to determine visitation rights); P. v. P., N.Y. L.J., Nov. 10, 1992, at 29 (Sup. Ct. 1992) (divorce/custody proceeding); Bowman v. Two, 704 P.2D 140 (Wash. 1985) (petition for alternative residential placement); *In re* Elianne M., 601 N.Y.S.2d 481 (App. Div. 1st Dept. 1993).

act in the role of a traditional advocate in a juvenile delinquency proceeding.[157] The court here compared the child's right to insist that a hearing be held with that of an adult's right to determine his own plea in a criminal court.[158]

In holding that a minor has a right to counsel of his own choosing, courts in New York and Illinois have implied that a minor has a right to an advocate for his wishes.[159] In 1984, a New York appellate court held that in a family court matter children are entitled to be represented by counsel of their own choosing.[160] In November 1992, a New York trial court went one step further and allowed the substitution of counsel where a child had a difference of opinion with his counsel.[161] The court stated that upon a "showing that the relationship between the child and the court appointed counsel is in some way tainted . . . substitution is permitted."[162] The eleven year old child in this case complained to the court that he felt uncomfortable with his attorney and that he felt she had taken actions he had not authorized.[163]

In August 1993, a New York appellate court acknowledged a child's right to counsel of his own choosing in the context of a neglect proceeding.[164] In *In re Elianne M.*, the First Department overturned a family court's denial of an application for substitution of counsel.[165] In this case the fourteen year old child had expressed a fear that her law guardian would not communicate her wishes to the court. Based on the child's concern, the child's expression of a lack of communication and trust, and the child's belief that the law

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[157] Haziel v. United States, 404 F.2d 1275, 1281 (D.C. Cir. 1968).

[158] *Id.* at 1278.

[159] *See* Fargnoli v. Farber, 481 N.Y.S.2d 784 (App. Div. 3d Dept. 1984); P. v. P., N.Y. L.J., Nov. 10, 1992, at 29 (Sup. Ct. 1992); *In re* Elianne M., 601 N.Y.S.2d 481 (App. Div. 1st Dept. 1993); Rob Karwath, *Girl Raped by Stepdad Granted New Lawyer*, CHI. TRIB., Sept. 5, 1992, at 5.

[160] *Fargnoli*, 481 N.Y.S.2d at 786 (affirming a denial of the children's motion to substitute counsel based on a possible conflict of interest because the counsel chosen by the children had previously represented the children's mother).

[161] P. v. P., N.Y. L.J., Nov. 10, 1992, at 29 (Sup. Ct. 1992).

[162] *Id.*

[163] Daniel Wise, *Child Wins Right to Counsel*, N.Y. L.J., Nov. 9, 1991, at 1.

[164] *In re* Elianne M. 601 N.Y.S. 2d 481 (App. Div. 1st Dept. 1993).

[165] *Id.*

guardian had been influenced by the child's adoptive mother, the court permitted substitution of counsel of the child's choosing.[166]

A similar situation arose in a Juvenile Court in Illinois in September 1992.[167] A thirteen year old girl requested that the court allow her to change counsel because she felt that the court appointed attorney was not adequately representing her point of view.[168] The girl complained that her representative from the Public Guardian's Office had not vigorously argued for her wish to resume unsupervised visits with her family, including the stepfather previously convicted of raping her.[169] Although the girl's lawyer tried to show that the girl's therapist and others had conspired to manipulate her into requesting a new lawyer, the judge granted the child's request and appointed new counsel stating that he would not stand in the way if the girl wanted another lawyer to represent her.[170]

C. The "Impartial Investigator" Approach as Followed by the Courts

In 1978, a New York Family Court took the position that an attorney representing a child should remain neutral.[171] In *In re Apel*, the Commissioner of Social Services moved for an order dismissing a court appointed law guardian on the ground that the law guardian was biased in favor of keeping his clients in foster care.[172] The court denied the motion but found that normally a law guardian, has an obligation, at least during the dispositional phase of the proceeding, to assist the court in arriving at a proper disposition.[173] Thus, the

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[166] *Id.*

[167] Karwath, *supra* note 159.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *In re* Apel, 409 N.Y.S.2d 928, 930 (Fam. Ct. 1978). This case is an example of the impartial investigator role that an attorney representing a child might play. *See supra* part I.C. for a description of the "Impartial Investigator" role.

[172] *In re* Apel, 409 N.Y.S.2d at 929.

[173] *Id.* at 930.

court concluded, a law guardian, like a judge, must remain neutral.[174] A "meaningful role" for a law guardian in this court's perspective would be to provide the court with any information concerning the child's interests that is not provided by the petitioner or respondent in the action.[175]

D. The "Law Guardian" Approach: Two Views

1. Courts That Have Followed the "Law Guardian" Approach

In New York, where § 241 of the Family Court Act provides for the appointment of law guardians "to help protect [children's] interests and to help them express their wishes to the court,"[176] some courts have found that an attorney must advocate not only a child's needs but also his wishes.[177]

In *In re Sandra "XX"*, the appellate division remitted a case to family court after finding that the record revealed a child's law guardian did not play an active role in ensuring her client's rights to alternative placements in a person-in-need-of-supervision proceeding.[178] The court stated that "the law guardian should advocate for the needs and wishes of the child he or she represents if the child is of sufficient maturity 'to make reasoned decisions about how the case will be handled.'"[179] The child in this case had an I.Q. of 100 and was in ninth grade although records revealed that she had been administratively promoted.[180] The court cited to Douglas J.

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[174] *Id.* at 931. The court found that the law guardian in question did not act improperly when he advocated the continuation of foster care for his clients. The law guardian in this case had represented the children in question for more than five years. The court felt that at some point in extended litigation the law guardian had the right to advocate the opinion he had formed. *Id.*

[175] *Id.*

[176] N.Y. FAM. CT. ACT § 241 (McKinney 1992).

[177] *See In re* Sandra "XX", 565 N.Y.S.2d 269, 271 (App. Div. 3d Dept. 1991); *In re* Dewey S., 573 N.Y.S.2d 769, 770 (App. Div. 2d Dept. 1991).

[178] *In re* Sandra "XX", 565 N.Y.S.2d at 271.

[179] *Id.* (citing N.Y. FAM. CT. ACT § 241, cmt. (McKinney 1992)) (emphasis added).

[180] *Id.* at 270.

Besharov's Practice Commentary in McKinney's Consolidated Laws of New York to show that "an adolescent alleged to be a juvenile delinquent or a person-in-need-of-supervision will presumably be able to make the fundamental case handling decisions."[181]

The second department of the appellate division also detailed the role of the law guardian in the case of *In re Dewey S.*[182] Dewey S. was an infant in a neglect proceeding that was removed from his home and placed in foster care.[183] After he had been in their home for two years, Dewey's foster parent's moved to discharge his law guardian when the guardian sought to move Dewey to the care of a maternal aunt.[184] The appellate division overturned the family court's dismissal of the law guardian stating that there was no conflict of interest involved in her actions.[185] The court stated that a law guardian's proper role in a child protective proceeding "not only includes serving as counsel and advocate for the child, but also encompasses aiding the court in arriving at an appropriate disposition."[186] As such, a law guardian may present to a court "that position which, in the law guardian's judgment, would best promote the child's interest."[187]

2. *Courts That Have Found the "Law Guardian" Approach to Involve an Inherent Conflict of Interest*

Although case law exists in New York that implies that an attorney should play a role that is part advocate and part guardian ad litem, case law in other states urges that one attorney cannot fill both of these roles because of an inherent conflict of interest.[188] The Supreme Court of Vermont has repeatedly stated this since 1965. In

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[181] *Id.* at 271 (citing N.Y. FAM. CT. ACT § 241, cmt. (McKinney 1992)).

[182] *In re* Dewey S., 573 N.Y.S.2d 769 (App. Div. 2d Dept. 1991).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *In re* Dewey S., 573 N.Y.S.2d at 770.

[188] *See In re* Dobson, 212 A.2d 620, 622 (Vt. 1965); State v. Ovitt, 268 A.2d 916, 918 (Vt. 1970); *In re* J.V., 464 N.W.2d. 887, 892 (Iowa Ct. App. 1991).

In re Dobson,[189] the court overruled its previous position in *In re Moses*,[190] and found that whenever a minor is charged with a crime in any court a guardian ad litem should be appointed.[191] The court reasoned that an attorney can effectively argue alternative strategies only to a client capable of making a discriminating choice.[192] A minor, the court held, "is presumed incapable and under disability, hence the need of a guardian ad litem to weigh alternatives for him."[193] The court further reasoned that a lawyer could not serve as both a guardian ad litem and as counsel because she would be in effect acting as both attorney and client.[194] This would be a detriment to both positions and could potentially jeopardize the client's interests.[195] Minors, the court concluded, are best represented by a "separation of the roles of guardian ad litem and attorney."[196]

Five years later, in *State v. Ovitt*,[197] the Vermont Supreme Court cited its decision in *Dobson* in the case of a teenager convicted of operating a motor vehicle on a public highway with defective equipment.[198] This court held that a guardian ad litem could not properly fulfill the role of guardian ad litem and legal counsel.[199] In this case, the trial court refused the minor's request that his brother, who was his guardian ad litem, be allowed to act as his counsel.[200] Though this refusal was based in part on the fact that the brother in question was not an attorney, the court referred to *Dobson*[201] to show

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[189] 212 A.2d 620 (Vt. 1965).

[190] 163 A.2d 868 (Vt. 1960) (finding competency to waive counsel in a knowledgeable minor verging on adulthood).

[191] *In re* Dobson, 212 A.2d at 622.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *In re* Dobson, 212 A.2d at 622.

[197] 268 A.2d 916 (Vt. 1970).

[198] *Id.* at 918.

[199] *Id.*

[200] *Id.*

[201] *In re* Dobson, 212 A.2d at 622.

that a quandary exists when one person attempts to fill these two roles.[202]

The necessary separation of the roles of guardian ad litem and legal counsel has also been emphasized in a child in need of supervision proceeding.[203] In *In re J.V.*, an Iowa court of appeals took a strong stand against what the court viewed as a reluctance by the bench and bar to provide for a separate guardian ad litem and legal counsel in many cases.[204] The court attributed this reluctance to appoint separate counsel to the "most insidious of reasons," namely the fact that "a person performing two functions may be entitled to more compensation than a person performing one."[205]

V. Standards Set By Practitioners For Attorneys Representing A Child-Client

An attorney looking for further clarification of her duty to her child-client might look to standards set by others in the field. One such set of standards is the Practice Manual for Law Guardians distributed to new attorneys in the Juvenile Rights Division of the Legal Aid Society in New York City.[206]

This manual relies heavily on The Lawyer's Code of Professional Responsibility for guidance.[207] Based on ethical considerations, it concludes that all children have a right to expect their law guardian to communicate their wishes to the court and to take those wishes into account when deciding upon an appropriate

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[202] State v. Ovitt, 268 A.2d 916, 918; *see* State v. Barrette, 571 A.2d 1137, 1139 (Vt. 1990) (advising the appointment of a guardian ad litem in order to avoid the conflicts that may arise when a minor's attorney takes on two roles).

[203] *In re* J.V., 464 N.W.2d. 887 (Iowa Ct. App. 1991).

[204] *Id.* at 892. The court's view here was dictum. The court was considering the question of whether the children's guardian ad litem, who was also the children's attorney, had provided effective counsel. The court discussed what it felt was a necessary separation of the roles of guardian ad litem and legal counsel in the context of what duties it felt where in the proper province of a guardian ad litem. *See id.*

[205] *Id.* at 892-93.

[206] Michael R. Gale ed., Practice Manual for Law Guardians, Legal Aid Society of New York, Juvenile Rights Division (1993)[hereinafter Practice Manual].

[207] *Id.* at 253-254.

course of action.[208] It further states that an older, more intelligent, and more mature child should have more impact on his law guardian's decisions.[209] When a child is sufficiently mature, the Legal Aid Society advises that a law guardian should advocate for the result the child desires.[210]

This manual also discusses how a law guardian can best determine if a particular child's level of maturity justifies giving the child control over the decision-making in his case.[211] It concludes that the best approach is to make determinations on a case by case basis.[212] While no rigid guidelines for determining a child's maturity are given,[213] the law guardian is cautioned that she may take into account "any serious lack of judgment and good sense which inheres in the child's decisions."[214] She is further advised that when a mature child wants her to advocate a position which she believes is unwise, she should act as an advisor and attempt to persuade the child to change his position. This approach is particularly advised in cases where the child wants his law guardian to advocate a position that may place him in danger. The manual cites to the Code of Professional Responsibility which states that a lawyer "should advise the client of the possible effect of each legal alternative" and may "emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions."[215]

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[208] *Id.* at 254.

[209] *Id.* at 255.

[210] *Id.*

[211] Practice Manual, *supra* note 206, at 257-58.

[212] *Id.* at 257.

[213] While the current Legal Aid manual offers no specific guidelines, the prior version of this manual provided that the child should determine which interests are paramount in all cases in which "the attorney is satisfied, after full disclosure and discussion with the client, that the client understands the proceeding, the alternatives available to the court, the consequences and risks to the client, and further, that the client possesses sufficient maturity to weigh these factors with a reasonable degree of dispassion and objectivity . . . ." Jonathan S. Dick et al., (Michael R. Gale ed.), Practice Manual for Law Guardians in the Family Court of the State of New York, Legal Aid Society, Juvenile Rights Division (1976).

[214] Practice Manual, *supra* note 206, at 258.

[215] *Id.* at 257 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8).

VI. The Impact of the Child's Age on his Attorney's Role

If an attorney views her role as being that of the "champion", then she will argue for a child's best interests, whether that child is two or seventeen. If the attorney is fulfilling the role of the "impartial investigator" she will have an unwavering commitment to present all facts to the court and will be similarly unaffected by differences in the child's age. But what of the attorney who views her role as that of the "advocate" or "law guardian"; does her commitment to her client differ according to the child's age?[216]

A five year old child may be capable of vocalizing his wishes, but are they sufficiently mature enough views for an attorney to argue in court? And what of the infant who is incapable of expressing any opinion? Whose views should the attorney appointed as counsel to such a child represent?[217]

A law guardian has a duty to represent both a child's needs and wishes, and as such, it could be argued that her duty to give preference to her client's wishes varies according to her client's age. A law guardian's responsibility to her client can thus be viewed as a sliding scale, the more mature the client, the more weight is given to

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[216] While this section takes the position that an attorney's duties to a child client will vary when the child is very young, an in depth discussion of how to determine at exactly what age children should be allowed to determine their legal interests is a subject of much debate and is beyond the scope of this note. Chronological cutoffs have been suggested as a simple procedural way to establish a right to direct counsel. This approach, however, ignores the reality that not all children mature at the same rate. *See* FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 127 (1982); *cf.* Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision—Making Capacity*, 17 FAM. L.Q. 287, 320 (1983) (recommending a presumption in protection proceedings that children seven years and older are capable of decisionmaking). Maturity tests have also been suggested as a way to determine a child's ability to instruct counsel. These tests could potentially be administered by either the attorney or the court. One such test is the IJA-ABA's standard of "considered judgment." IJA-ABA STANDARDS, *supra* note 65, at 81. Another approach would be to establish a presumption that children of a certain age are capable of decisionmaking.

[217] *But cf.* RICHARD E. FARSON, BIRTHRIGHTS (1974); JOHN HOLT, ESCAPE FROM CHILDHOOD (1984) (arguing that birth itself confers on a child the moral right to make decisions for himself).

the child's preferences.[218] Obviously, this may at times present the law guardian with some difficult dilemmas that most likely will be resolved by giving preference to what the law guardian, not the child, views as most important.

But what of the "advocate?" Her duty to her client is to advocate the child's views, not to determine them. Even among authorities who agree that a mature minor is entitled to an advocate, there is much disagreement as to what role, if any, counsel assigned to an immature minor should play.[219]

One solution to the problem of a client incapable of instructing his attorney is for the attorney to request the appointment of a guardian ad litem.[220] The attorney will then advocate for her client's views as espoused by the guardian.[221] An advantage of this solution is that it allows an attorney to maintain the position of advocate. However, a disadvantage is that the guardian's decisions may be arbitrary and counsel will be obligated to argue them nonetheless.[222]

Another possible solution to the problem of representing a very young client is for the attorney acting as an advocate to use the doctrine of substituted judgment to determine the views of her client.[223] An attorney in this position would attempt to formulate a position based on what the child-client would advocate if he were able to sufficiently comprehend the situation and vocalize his opinions.[224]

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[218] This view is in accord with the New York State Bar Association Law Guardian Representation Standards which state that in the case of a young child, "the mixture of wishes and interests [advocated by the law guardian] depends in large part on the child's age, maturity, and capacity." 1988 LAW GUARDIAN STANDARDS, *supra* note 81, at 126, 167. The view expressed by the Legal Aid Society of New York, however, differs in that a law guardian representing an immature minor is instructed not to advocate an outcome but merely to present all relevant information and inform the court of the child's expressed wishes. Practice Manual, *supra* note 206, at 156.

[219] *See infra* text accompanying notes 220-233.

[220] IJA-ABA STANDARDS, *supra* note 65, at § 3.1(b)(ii)[c][2].

[221] *Id.* at § 3.1(b)(ii)[c][2].

[222] *See generally* Guggenheim, *supra* note 6, at 94 (arguing that courts should hesitate before appointing guardians ad litem in cases where the best interests of the child are not obvious).

[223] Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 702 (1987).

[224] *See id.* at 702.

In formulating this position, the attorney would consider any information obtainable from the child as to his interests, as well as the opinions of individuals who know the child and can form conclusions as to what the child desires.[225] The attorney would also consult with other more mature children who at one time were similarly situated to the child in question.[226] In effect the attorney would determine "what choices a competent person with the characteristics, tastes, preferences, history and prospects of the incompetent would make to maximize his interests or wants—both those he presently has and those he is likely to have in the future."[227]

The advantage of this approach is that if properly enacted it would enable an attorney to advocate not what the attorney thinks is best or what she thinks the child would want, but what the particular child, if mature, would want.[228] The reality of this approach, however, is questionable. Commentators have criticized the substituted judgment doctrine, arguing that an attorney using this approach to make decisions for her client is really just deciding what she wants to do with her client not what her client would want to do if he were competent to decide for himself.[229] Arguably, an attorney who uses the substituted judgment doctrine to determine her client's wishes is introducing one more element of arbitrariness into the system. While it sounds logical enough, one must question whether anyone can predict what a particular child would want if only he were more mature. After all, part of the process of maturing involves growing and changing. How a particular child will turn out is nearly impossible to predict. A farmer can estimate the quantity and quality of her next season's crop based on those of years past, but this estimate can be radically altered by an unpredicted drought or hurricane. The same holds true for a child. We can generalize, but we cannot ascertain what a child will be like or what a child will

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[225] *Id.* at 703.

[226] *Id.* at 705.

[227] John A. Robertson, *Organ Donations By Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 65 (1976).

[228] Lyon, *supra* note 223, at 702.

[229] *See, e.g.*, Kevin W. Bates, *Live or Let Die; Who Decides an Incompetent's Fate? In re Storar and In re Eichner*, 1982 B.Y.U. L. REV. 387, 392.

desire when so many unpredictable factors play a part in shaping who he will be and how he will think.

Finally, it has been suggested that if a child is too young to formulate a position, then the child should not have legal counsel.[230] In an article focusing on legal representation for young children, Professor Martin Guggenheim argues that children under the age of seven should not normally be given legal counsel.[231] Guggenheim concludes that a lawyer cannot represent a young child and yet still be a lawyer.[232] Though this suggestion does eliminate the potential for the arbitrary decisions possible with the two previous suggestions it does run contrary to the notion that children of any age are entitled to independent representation in many court proceedings.[233]

In sum, if an attorney is acting as a law guardian or as an advocate, her role will differ if her client is of a very young age. The attorney acting as a law guardian will give less weight to a young child's wishes. As for the attorney acting as an advocate, the preferable solution would be for the attorney to request the appointment of a guardian ad litem and for the attorney to take her directions from this individual.

VII. Conclusions and Recommendations

Realistically, in the majority of cases an attorney representing a child will never face the dilemma of having to determine her proper role. In delinquency or person-in-need-of-supervision proceedings a liberty interest is at stake, and as such a child should be treated no differently than an adult.[234] In these proceedings an attorney should

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[230] Guggenheim, *supra* note 6, at 154. This suggestion does not preclude a child having a guardian ad litem.

[231] *Id.* at 91. While Professor Guggenheim has chosen the age of seven based on the fact that children under this age cannot be prosecuted for delinquency in most jurisdictions, he points out that the exact age and the method of determining that age are not essential parts of his argument. *Id.* at 78 n.4.

[232] Guggenheim, *supra* note 6, at 154.

[233] *See supra* notes 1-6 and accompanying text.

[234] Interview with Laura Cohen, Assistant Director of Training, Juvenile Rights Division, Legal Aid Society of New York in New York, N.Y. (Feb. 18, 1993); *see* IJA-ABA Standards, *supra* note 65, at § 3.1(b)(ii)[a].

act as an advocate regardless of her client's age or her status as a law guardian or counsel.[235] In other types of proceedings, if the child's parents are completely disinterested parties they will have the authority to direct the child's attorney.[236] It is only in situations where a child's parents have been disqualified from their roles as substitute decisionmakers that conflicts about an attorney's proper role are likely to arise.[237] But, even in these situations, a child and his attorney will often agree on the course litigation should follow. Difficulties arise for an attorney only in situations where there is an actual or potential conflict over the course of action the attorney should pursue on behalf of her client.

Despite the fact that conflicts rarely arise, it is important for an attorney with a child-client to clarify her role at the outset. A review of the statute, court rule, or order appointing the attorney should be the first step in clarifying this position.[238] An attorney should ascertain from these sources whether she has been appointed as legal counsel, a law guardian or as a guardian ad litem.[239] If the appointment is not clear, the attorney should immediately request judicial clarification.[240]

If the attorney has been appointed as a guardian ad litem, she has a clearly defined role. She must act to further the "best interests of the child."[241] It should be noted, however, that the attorney acting in this capacity is not acting as legal counsel.

If the attorney has been appointed as a law guardian or as legal counsel her role may not be as clear. Statutes are unclear as to the exact role an attorney placed in one of these positions should play.[242] Case law on the subject varies widely.[243] However, ethics

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[235] *Id.*; *see* Guggenheim, *supra* note 6, at 86-87.

[236] Parents are most likely to be disinterested parties in tort or contract actions. *See generally* Cline, *supra* note 7.

[237] *See* Cline, *supra* note 7, at 684-85.

[238] *See* Robert M. Horowitz & Howard A. Davidson, *Tough Decisions for the Tender Years*, 10 FAM. ADVOC. 9, 11 (1988).

[239] *See id.*

[240] *Cf. id.* (recommending that as a matter of practice all attorneys should routinely request judicial instruction as to their appropriate role).

[241] *See, e.g.*, WIS. STAT. ANN. § 767.045 (WEST 1991).

[242] *See supra* part III.

[243] *See supra* part IV.

codes and bar association standards tend to favor the advocate approach, at least in the case of a mature child.[244]

When a child is mature enough to be capable of considered judgment, that is, he is mature enough to understand, with advice of counsel, at least the general nature of the proceedings,[245] an attorney acting as his law guardian or his legal counsel has an ethical obligation to abide by this child's wishes.[246] An attorney may counsel a client she feels is advocating an unwise option, but the final decision should be left to the client.[247] An attorney who follows this course of action will preserve her ethical responsibility to her client[248] and will ensure that her client's voice is heard in court.[249] It will then properly be for the court, and not the attorney, to decide what is best for the child.[250]

When a child is not mature enough to make a "considered judgment" an attorney's responsibilities may differ according to whether she has been appointed as a law guardian or as legal counsel. If an attorney has been appointed as a law guardian, her defined statutory responsibility is two-fold.[251] She must be an advocate for her client's interests and she must express her client's wishes.[252] Because of this dual responsibility, a law guardian with an immature client must advocate what she believes to be in the child's best interests.[253] She should, however, inform the court of the child's wishes if they are in conflict with the position she is advocating.

If an attorney has been appointed as legal counsel to a child too young to be capable of considered judgment she has several options.[254] Requesting the appointment of a guardian ad litem would

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[244] *See supra* part II.

[245] *See supra* part II.A.

[246] *See supra* part II.

[247] *See* MODEL CODE, *supra* note 33, at EC 7-8, EC 7-7.

[248] *See supra* part II.

[249] *See* Yudes, *supra* note 31, at 15.

[250] *See* Guggenheim, *supra* note 6, at 138.

[251] *See, e.g.*, N.Y. FAM. CT. ACT § 241 (McKinney 1992).

[252] *Id.*

[253] *See id.*

[254] *See supra* notes 220-233 and accompanying text.

appear to be the best solution.[255] In this instance the attorney would avoid confusion and any inference of impropriety by taking direction from an independent person that has been expressly appointed to protect the interests of the child.[256]

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[255] *See* IJA-ABA STANDARDS, *supra* note 65 at § 3.1(b)(ii)[c][2] (recommending that if a child not capable of "considered judgment" and does not have a guardian ad litem, his attorney should seek to have one appointed); *see also* Sobie, *supra* note 57.

[256] Sobie, *supra* note 57.