

# [Article: Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys' Ethical Duties Exacerbate Children's Psychopathology](#)

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## **Reporter**

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## **Text**

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[\*369]

### Introduction

This Article demonstrates the need for coordinating the drafting of attorneys' ethical duties in representing child-client witnesses with the vast child and adolescent psychiatric empirical data concerning the mental state of abused children and the potential psychological harm to them from violations, perceived and actual, of the duty of loyalty and the duty to provide conflict-free representation.

Many child abuse victims are the most psychologically fragile witnesses in the legal system. A very high percentage of these child victims suffer "fear, anxiety, posttraumatic stress symptoms, depression, sexual difficulties, poor self-esteem, stigmatization, [and] difficulty with trust." <sup>1</sup> This Article will discuss the interrelationship between defined attorney ethical roles and the psychiatric empirical evidence regarding the effects of different legal ethical models on the psychopathology of abused children as witnesses and/or as clients. For instance, even if ethical rules permit an abused child's attorney to impeach his own client's testimony or argue against the client's stated preferences, what psychological impact might those perceived betrayals and ethical violations have on the child's mental health?

2

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<sup>1</sup> Nat'l Crime Victims Research & Treatment Ctr. & Ctr. for Sexual Assault & Traumatic Stress, *Child Physical & Sexual Abuse: Guidelines for Treatment* 25 (B.E. Saunders et al. eds., 2004); see also Dean G. Kilpatrick et al., *Nat'l Inst. of Justice, Youth Victimization: Prevalence and Implications* 7 (2003); David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 *Am. J. Orthopsychiatry* 530, 531-33 (1985); Arthur H. Green, *Child Sexual Abuse: Immediate and Long-Term Effects and Intervention*, 32 *J. Am. Acad. Child & Adolescent Psychiatry* 890, 892 (1993); Laura Ann McCloskey & Marla Walker, *Posttraumatic Stress in Children Exposed to Family Violence and Single-Event Trauma*, 39 *J. Am. Acad. Child & Adolescent Psychiatry* 108, 108, 114 (2000).

<sup>2</sup> When considering the mental health of young abused children one must be careful to look at relationship expectations from the child's perspective, not just from the view of professionals who drafted the legal ethics standards. For instance, although following the dictates of a state's rules of professional responsibility may not subject the attorney to discipline, if the child's moral structure perceives the attorney's action as violating the child's concept of ethical norms, the child will view the attorney's action as unethical, or at least as a violation of their interpersonal relationship. Therefore, even though an attorney's refusal to zealously argue a child-client's stated preference may be consistent with a state's definition of the duty of loyalty, the child may view the attorney's act as a serious act of betrayal. This dilemma is somewhat akin to the debate between legal theorists like Oliver Wendell Holmes who espouse an "external" or sanction-based model of law and those like H.L.A. Hart who promote an "internal point of view" as the basis of the public's adherence to law. See Scott J. Shapiro, *What is the Internal Point of View?*, [75 \*Fordham L. Rev.\* 1157, 1158-59 \(2006\)](#). Under the "internal point of view" a person takes a "practical attitude of rule acceptance.

[\*370]

Most law review articles and psychological studies have focused on child witnesses in adult criminal cases.<sup>3</sup> This is not surprising since the cost/benefit analysis between providing criminal defendants the full force of the Confrontation Clause of the United States Constitution, and time minimizing psychological damage to child victims raises unique constitutional, ethical, and strategic questions.<sup>4</sup> For the past several decades, scholars have

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Someone takes this attitude towards a social rule when he accepts or endorses a convergent pattern of behavior as a standard of conduct." *Id.* at 1159. Although the lawyer may be formally correct that legal ethics rules permit argument of the child's best interests instead of the child's articulated goals, the child's sense of the role of the attorney as the child's defender may lead to feelings of betrayal. "Perceptions of the law's substantive justice and procedural fairness are important causes of citizens' respect for the law and thus their adoption and maintenance of the internal point of view." Dale A. Nance, Rules, Standards, and the Internal Point of View, *75 Fordham L. Rev.* 1287, 1292 (2006).

<sup>3</sup> See, e.g., Task Force on Child Witnesses, Am. Bar Ass'n Criminal Justice Section, *The Child Witness in Criminal Cases* (2002); John J. Capowski, An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception, *33 Ga. L. Rev.* 353 (1999); Rebecca K. Connally, "Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony?, *Army Law.*, Mar. 2008, at 1; Richard D. Friedman, The Conundrum of Children, Confrontation, and Hearsay, *Law & Contemp. Probs.*, Winter 2002, at 243; Gail S. Goodman et al., Innovations for Child Witnesses: A National Survey, *5 Psychol. Pub. Pol'y & L.* 255 (1999); Thomas D. Lyon et al., Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions, *25 Law & Hum. Behav.* 81 (2001); Lynn McLain, Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness's Prior Consistent Statements, *74 UMKC L. Rev.* 1 (2005); Robert Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, *67 N.C. L. Rev.* 257 (1989); John E.B. Myers et al., Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science, *Law & Contemp. Probs.*, Winter 2002, at 3; Myrna S. Raeder, Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation, *82 Ind. L.J.* 1009 (2007); Paul Wagland & Kay Bussey, Factors that Facilitate and Undermine Children's Beliefs About Truth Telling, *29 Law & Hum. Behav.* 639 (2005); Gregory M. Bassi, Comment, Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court-Ordered Psychological Examinations in Child Sexual Abuse Cases, *102 Nw. U. L. Rev.* 1441 (2008); Lauren E. Parsonage, Note, Caught Between a Rock and a Hard Place: Harmonizing Victim Confidentiality Rights with Children's Best Interests, *70 Mo. L. Rev.* 863 (2005).

<sup>4</sup> L. Christine Brannon, Comment, The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation, *18 Law & Psychol. Rev.* 439, 442, 448 (1994). The greatest court-related child witness stressors include: 1) fear of facing the defendant; 2) fear of being exposed publicly; 3) anxiety regarding being cross-examined; 4) psychological damage caused by multiple interviews and testimonies by the child victim; 5) lack of a support person in court; 6) court delays; and 7) inadequate education for and preparation of the child victim witness. Julie Lipovsky & Paul Stern, Preparing Children for Court: An Interdisciplinary View, *2 Child Maltreatment* 150, 152 (1997); see also *Brief for American Psychological Association as Amicus Curiae Supporting Neither Party, Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093, at \*3-9; Jessica Liebergott Hamblen & Murray Levine, The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses, *21 Law & Psychol. Rev.* 139, 158, 163-66 (1997). Some programs have tried to address and improve the capacity and competency of young child victims so that they can testify. Jodi L. Viljoen & Thomas Grisso, Prospects for Remediating Juveniles' Adjudicative Incompetence, *13 Psychol. Pub. Pol'y & L.* 87, 97-98 (2007). Some jurisdictions have attempted to protect children by introducing videotaped interviews and/or testimony. See Allison D. Redlich et al., A Comparison of Two Forms of Hearsay in Child Sexual Abuse Cases, *7 Child Maltreatment* 312, 313 (2002); see also *id.* at 324 (explaining that videotaped evidence "did not directly affect jurors' perceptions of defendant guilt or witness credibility"). Sufficiently preparing child witnesses makes them more effective witnesses and reduces their stress. Andrea N. Welder, Sexual Abuse Victimization and the Child Witness in Canada: Legal, Ethical, and Professional Issues for Psychologists, *41 Canadian Psychol.* 160, 164-65 (2000). Legal challenges to child witness accommodations have included: 1) objections to adult support persons while child victims testify, *Czech v. State*, 945 A.2d 1088, 1093-97 (Del. 2008); *State v. T.E.*, 775 A.2d 686, 694-98 (N.J. Super. Ct. 2001); 2) claims that a child victim holding a teddy bear while testifying was prejudicial, *State v. Presley*, No. 02AP-1354, 2003 WL 22681425, at \*4, 10-11 (Ohio Ct. App. Nov. 13, 2003); and 3) that proving the necessity of child witness protections through the testimony of experts rather than by the judge's observations of the child witness "poses great danger to confrontation rights." Robert P. Mosteller, Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them," *82 Ind. L.J.* 917, 989-90 (2007). Child witness accommodations in the context of capital criminal cases is also an area that has been discussed by scholars. See, e.g., Andrew M. Luther, Comment, The Deadly Consequences of Unreliable Evidence: Why Child Capital Rape Statutes Threaten to Condemn the Innocent Defendant to Death, *43 Tulsa L. Rev.* 199 (2007).

debated and [\*371] tested child witness accommodations and have argued whether the results of those prophylactic measures unreasonably affect criminal defendants' due process rights.<sup>5</sup> However, in reality, the number of child victim witnesses who testify in adult criminal courts pales in comparison to the number of child abuse victim witnesses who testify in civil child dependency proceedings.<sup>6</sup> This [\*372] Article, in contrast, will focus on children who testify in proceedings held in civil courts to determine the best interest of abused and/or neglected children.

### I. The Psychopathology of Abused Children

As early as 1985, psychiatrists determined that many child abuse victims suffer posttraumatic stress disorder<sup>7</sup> (PTSD), and that those emotional scars last years after the initial abuse.<sup>8</sup> In the last decade, developmental

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<sup>5</sup> Although many countries during the last several decades have modified their court procedures and rules of evidence to help protect child witnesses, in many of those countries the task was easier than in the United States because Fifth Amendment concerns were not involved. See, e.g., Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, S.C., ch. 32, §§ 486.3-486.6 (2005) (Can.) (discussing child victim witness accommodations regarding cross-examination, confidentiality, and publication of identifying information); Pamela Hurley et al., Child Witness Project, Children as Witnesses: Helping Young People Give their Evidence in Court, Helping Courts Hear the Evidence of Children 33-37 (2002), available at <http://www.lfcc.on.ca> (a seven-volume study of the Canadian child witness protection and preparation program); Nicholas Bala et al., Children as Witnesses: Understanding Their Capacities, Needs, and Experiences, 10 J. Soc. Distress & Homeless 41, 62-67 (2001) (discussing efforts to accommodate children in Canada); Frank Lindblad & Katrin Lainpelto, When Superior Courts Reach Different Conclusions in the Same Child Sexual Abuse Cases - Is There a Lesson to be Learned?, 5 J. Investigative Psychol. Offender Profiling 171, 172-73 (2008) (discussing child abuse investigative techniques in Sweden); Margaret-Ellen Pipe & Mark Henaghan, Accommodating Children's Testimony: Legal Reforms in New Zealand, 23 Crim. Just. & Behav. 377, 379-80, 382-88 (1996) (a history of child victim/witness accommodations in New Zealand). For a general discussion of international child witness accommodations, see Andy Bilson & Sue White, Representing Children's Views and Best Interests in Court: An International Comparison, 14 Child Abuse Rev. 220 (2005); John E.B. Myers, A Decade of International Reform to Accommodate Child Witnesses, 23 Crim. Just. & Behav. 402 (1996). For a history of child witness accommodations within the United States, see Goodman et al., supra note 3, at 255-57.

<sup>6</sup> See, e.g., William Wesley Patton, Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation, 31 U. Louisville J. Fam. L. 37 (1992). For instance, in Los Angeles County, one of the largest counties in the country, in 2006 there were only 1,538 child sexual abuse cases investigated by the Los Angeles Police Department and only 12.39% of those cases were even prosecuted. ICAN Data/Info. Sharing Subcomm., Inter-Agency Council on Child Abuse and Neglect, The State of Child Abuse in Los Angeles County 192, 195, 367 (2007). However, in 2007 in Los Angeles County, 162,711 children were referred as abused and/or neglected children to the Department of Children and Family Services, and 11,232 of those cases involved allegations of sexual abuse. *Id.* at 138-39. Therefore, the number of potential child abuse witnesses in the child dependency system dwarfs the number of potential child witnesses in criminal child abuse proceedings. The probability of child abuse victims testifying in criminal court is very low. For instance, in California in 2006-2007, only two percent of all felony convictions were based upon jury trials. Judicial Council of Cal., 2008 Court Statistics Report, Statewide Caseload Trend, 1997-1998 Through 2006-2007, at 52 (2008). In a study of 451 child sexual abuse allegation cases in Chicago, only seventy-seven defendants were charged with felonies and only twenty-four resulted in a criminal trial. Mary Martone et al., Criminal Prosecution of Child Sexual Abuse Cases, 20 Child Abuse & Neglect 457, 459-60 (1996). That study concluded that "[m]ost cases of alleged child sexual abuse never go to trial because the defendant pleads guilty; a small number of cases are dismissed at the trial stage for lack of evidence . . . . Therefore, very few children (5%) ever have to appear as a witness in court." *Id.* at 461. Even though few children testify in criminal court, the odds of testifying are increased if the child is seven years old or older, the case involves abuse in a non-relative custodial arrangement, or the defendant is neither a biological father nor the mother's boyfriend. Hamblen & Levine, supra note 4, at 172.

<sup>7</sup> Green, supra note 1, at 892; see also Kilpatrick et al., supra note 1; McCloskey & Walker, supra note 1, at 108. Child abuse victims have "rates of PTSD of greater than 30%" and "children in foster care are some [sixteen] times more likely to have psychiatric diagnoses, eight times more likely to be taking psychotropic medications and utilize psychiatric services at a rate eight times greater compared with children from similar socio-economic backgrounds and living with their families." Robert Racusin et al., Psychosocial Treatment of Children in Foster Care: A Review, 41 Community Mental Health J. 199, 202-03 (2005). One study found that as adults child victim witnesses who testified compared to child victims who did not testify "self-reported significantly more aggressive acts, were more likely to commit crimes against persons, and were more likely to have

victimology studies have determined that abused children develop a sense of [\*373] powerlessness,<sup>9</sup> suffer social stigmatization,<sup>10</sup> internalize self-blame,<sup>11</sup> and [\*374] have a deep sense of betrayal.<sup>12</sup> Many experts

engaged in serious delinquent acts before turning [eighteen]." Robin S. Edelstein et al., *Child Witnesses' Experiences Post-Court: Effects of Leal Involvement, in Children's Testimony: A Handbook of Psychological Research and Forensic Practice* 261, 266 (Helen L. Westcott et al. eds., 2002).

<sup>8</sup> Malgorzata Ligezinska et al., *Children's Emotional and Behavioral Reactions Following the Disclosure of Extrafamilial Sexual Abuse: Initial Effects*, 20 *Child Abuse & Neglect* 111, 112, 121 (1996). In addition, the number of abusive events has a determinant effect on physical health in adulthood. See Tamerra P. Moeller et al., *The Combined Effects of Physical, Sexual, and Emotional Abuse During Childhood: Long-Term Health Consequences for Women*, 17 *Child Abuse & Neglect* 623, 635-36 (1993).

<sup>9</sup> Commentators note that: Abused children's experiences of lack of control in the early environment lead to the perception of subsequent events as similarly uncontrollable, resulting in the development of anxiety problems [and they are] less likely to have the protective characteristic of perceived internal control and [are] thus more likely to demonstrate higher levels of internalizing problems later in life. Julie B. Kaplow & Cathy Spatz Widom, *Age of Onset of Child Maltreatment Predicts Long-Term Mental Health Outcomes*, 116 *J. Abnormal Psychol.* 176, 183-84 (2007). In addition, the age of onset of the child abuse affects the predictability of the level of antisocial personality disorder in adulthood. *Id.* at 181-84.

<sup>10</sup> Abused children are often bullied by their peers. In one study of child witnesses "[twelve] percent had been taunted by fellow students who knew of the abuse and prosecution. These taunts were often homophobic references or hateful and hurtful comments about incest." Child Witness Project, *Ctr. for Children & Families in the Justice Sys., Three Years After the Verdict: A Study of The Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project* 91 (1993), available at [www.lfcc.on.ca/threeyrs.htm](http://www.lfcc.on.ca/threeyrs.htm). Peer rejection is even more traumatic for adolescents. "Unlike younger children, adolescents are more likely to depend on their own and their peers' appraisal of traumatic events. Rather than focusing on escape and protection from trauma, adolescents are more likely to struggle with their own decision-making about what interventions might have altered the event's outcome." Patricia Lester et al., *The Neurobiological Effects of Trauma*, in 27 *Adolescent Psychiatry: The Annals of the American Society for Adolescent Psychiatry* 259, 271-72 (Lois T. Flaherty ed., 2003). "Children's stress responses are also sensitive to social experiences beyond the context of the family. Negotiating peer interaction in school settings is a potent challenge to the stress system, particularly at the stage in development when social skills are just emerging." Megan Gunnar & Karina Quevedo, *The Neurobiology of Stress and Development*, 58 *Ann. Rev. Psychol.* 145, 163 (2007). Peer rejection results in several unhealthy physical responses in children, including "increased activation of the dorsal anterior cingulate cortex (dACC), a region of the brain" and increased levels of cortisol, "a hormone that is secreted presumably to rally the organism's efforts to survive and deal effectively with danger. Gunnar . . . report[s] higher levels of cortisol levels in children for whom sociometric measures indicated peer rejection." Kipling D. Williams, *Ostracism*, 58 *Ann. Rev. Psychol.* 425, 433-34 (2007). Ironically, increased cortisol levels affect the accuracy of memory. "[I]ncreased cortisol shortly after a stressful event could be negatively correlated with accurate and complete memory, and therefore possibly positively correlated with increased suggestibility." Mitchell L. Eisen et al., *Maltreated Children's Memory: Accuracy, Suggestibility, and Psychopathology*, 43 *Dev. Psychol.* 1275, 1276 (2007).

<sup>11</sup> One study suggests that [w]hen children's childhood abuse is disclosed it often results in acute shame and embarrassment, misdirected self-blame, and uncertainties about how others might respond to the disclosure[, and the] disclosure becomes something of a 'cruel paradox'; the desire to share the event with others may be countered by realistic fears that listeners will be unsympathetic and skeptical with respect to the veracity of the abuse. George A. Bonanno et al., *Context Matters: The Benefits and Costs of Expressing Positive Emotion Among Survivors of Childhood Sexual Abuse*, 7 *Emotion* 824, 826 (2007) (internal citations omitted). Another study found that although levels of self-blame are only indirectly related to gender, age at the time of abuse is relevant, and "young children may exhibit higher levels of self-blame than older children because of biased attributional processes." Jodi A. Quas et al., *Predictors of Attributions of Self-Blame and Internalizing Behavior Problems in Sexually Abused Children*, 44 *J. Child Psychol. & Psychiatry* 723, 723-24 (2003). Unlike guilt, shame does not provide "a multitude of paths to redemption." June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 *Ann. Rev. Psychol.* 345, 353 (2007). Rather, it can increase other mental and social problems, and in younger children has been shown to "predict[] later risky driving behavior, earlier initiation of drug and alcohol use, and a lower likelihood of practicing safe sex." *Id.* at 354. Further, shame "disrupt[s] individuals' ability to form emphatic connections with others." *Id.* at 350.

<sup>12</sup> Elissa J. Brown & David J. Kolko, *Child Victims' Attributions About Being Physically Abused: An Examination of Factors Associated with Symptom Severity*, 27 *J. Abnormal Child Psychol.* 311, 311-12 (finding that child victims' self-blame contributed almost twice as much to the magnitude of psychological distress as the objective variables of the event itself).

recommend a treatment regime for abused children where the child is placed in a safe environment in which he can regain a sense of control over his life and in which his level of trust in others can be strengthened.<sup>13</sup> Psychological treatment is necessary to rearrange abused children's moral compasses. The authority figures that abuse children "legitimate something which the child knows at the same time to be wrong," which can lead to the following faulty reasoning:

What is happening is wrong, yet who is doing it to me is right. Therefore I must be wrong. It is 'dirty', therefore I must be dirty. Good children are rewarded and bad children are punished. Therefore I must be a bad child. What did I do wrong? I must have done something wrong without even knowing. Therefore I am not a good judge of whether I am right or wrong.<sup>14</sup>

It is the abused child's sense of betrayal and inability to trust that are most relevant to questions regarding the psychological effects of legal professional responsibility rules upon child witnesses/clients.<sup>15</sup> "Betrayal in abuse [\*375] dynamics" has proven to be the most "significant abuse characteristic" related to long-term levels of serious emotional distress in survivors, and "[b]etrayal can lead to depression, anger, dependency, and problems in relationships with others."<sup>16</sup> Physical or sexual abuse at the "hands of trusted caregivers is strongly associated with feelings of distrust of others, disconnection, and isolation in adulthood."<sup>17</sup> Children abused by a trusted adult also "lack a template for developing self-defense behaviors" and are thus at risk of further psychological trauma and victimization in a host of different environments.<sup>18</sup>

The legal system and legal procedures often confound abused children's psychopathology.<sup>19</sup> It is sad and ironic that legal systems such as dependency and family law, which center their policies on the goal of achieving the best

<sup>13</sup> Pamela C. Alexander, *The Differential Effects of Abuse Characteristics and Attachment in the Prediction of Long-Term Effects of Sexual Abuse*, 8 *J. Interpersonal Violence* 346, 359 (1993); Clarice J. Kestenbaum, *Childhood Trauma Revisited: Interruption of Development*, in 20 *Adolescent Psychiatry: The Annals of the American Society for Adolescent Psychiatry* 125, 135-37 (Richard C. Marohn & Sherman C. Feinstein eds., 1995); Jean M. Goodwin & Nandini Talwar, *Group Psychotherapy for Victims of Incest*, 12 *Psychiatric Clinics N. Am.* 279, 282 (1989).

<sup>14</sup> Ruth Miltenburg & Elly Singer, *Rethinking Moral Issues in Therapies of the Survivors of Child Abuse and Neglect*, 8 *Feminism & Psychol.* 387, 390 (1998) (quoting Emily Driver, *Through the Looking Glass: Children and Professionals Who Treat Them*, in *Child Sexual Abuse: Feminist Perspectives* 107, 109 (Emily Driver & Audrey Droisen eds., 1989)).

<sup>15</sup> The therapeutic regime for abused children involves both rebuilding the child's own self value and strengthening the child's trust in developing interpersonal relationships. Interventions focused on an individual's model of self may target building self-concept and feelings of worthiness and developing of confidence in relationships. In contrast, interventions focused on an individual's model of other may be oriented more on learning that others can be accepting and responsive and that one can feel secure within such relationships. Robert T. Muller et al., *Childhood Physical Abuse, Attachment, and Adult Social Support: Test of a Mediational Model*, 40 *Canadian J. Behav. Sci.* 80, 86 (2008).

<sup>16</sup> Victoria L. Banyard & Linda M. Williams, *Characteristics of Child Sexual Abuse as Correlates of Women's Adjustment: A Prospective Study*, 58 *J. Marriage & Fam.* 853, 862 (1996). Banyard and Williams found that the second most significant determinant of psychopathology was the abused child's sense of a loss of control, a sense of powerlessness. *Id.* at 861-62.

<sup>17</sup> Marylene Cloitre et al., *Therapeutic Alliance, Negative Mood Regulation, and Treatment Outcome in Child Abuse-Related Posttraumatic Stress Disorder*, 72 *J. Consulting & Clinical Psychol.* 411, 414 (2004). "Distrust" and "feelings of betrayal" are psychological conditions suffered by abused children that are often classified as symptoms in addition to PTSD. Mark Chaffin & Rochelle F. Hanson, *Treatment of Multiply Traumatized Abused Children*, in *Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Practitioners* 271, 272, 275 (Robert M. Reece ed., 2000).

<sup>18</sup> Peter M. Thomas, *Dissociation and Internal Models of Protection: Psychotherapy with Child Abuse Survivors*, 42 *Psychotherapy Theory Res. Prac. & Training* 20, 21-23 (2005).

<sup>19</sup> In the most extensive empirical study of child abuse witnesses ever completed, after studying ten years of longitudinal psychological data, the authors concluded: These findings suggest that testifying does not simply upset children, as was documented by Goodman et al. (1992), but may be associated with their adjustment at a deeper level. Overall then, our findings suggest that, under certain conditions, recounting sexual abuse repeatedly in open court may help solidify a trajectory of poor mental health functioning, as measured both via trauma-related symptomatology and general mental health problems. Jodi A.

interest of children, mandate and/or condone processes that needlessly contribute to children's emotional trauma. The process of testifying and of being cross-examined is obviously contraindicated with psychiatric procedures aimed at helping abused children regain emotional health. For instance, psychiatrists understand that the act of "disclosing a past abuse experience often results in acute shame and embarrassment, misdirected self-blame, and uncertainties about how others might respond to the disclosure."<sup>20</sup> Because "disclosure-related events may be even more strongly related to the long-term [\*376] consequences of childhood sexual abuse than are the characteristics of the abuse itself,"<sup>21</sup> mental health professionals attempt to provide child victims a safe environment for disclosure.<sup>22</sup> However, the trial process strips abused children of that therapeutic environment of safety and control.<sup>23</sup> In addition, the cross-examination process of questioning the child's capacity, competency, and credibility double the abused child's real and perceived sense of stigma<sup>24</sup> and social ostracism.<sup>25</sup> It is critical to note that from a psychological perspective, "[s]ubjective perceptions of stigmatization may be as important as objective exposure to discrimination in predicting adverse health- relevant outcomes among the stigmatized."<sup>26</sup> Equally important are the increased levels [\*377] of shame experienced by young abuse victims during their roles as victims and/or witnesses in the legal system.<sup>27</sup> Shame is one of the most intense and destructive reactions by

Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, Monographs Soc'y for Res. Child Dev., June 2005, at 1, 110.

<sup>20</sup> Bonanno et al., *supra* note 11, at 826.

<sup>21</sup> Lynn Sorsoli et al., "I Keep That Hush-Hush": Male Survivors of Sexual Abuse and the Challenges of Disclosure, 55 *J. Counseling Psychol.* 333, 334 (2008).

<sup>22</sup> This boundary-setting activity can frame a client's initial experience of establishing safety, which is an essential component of trauma treatment, as well as provide an emotionally corrective experience and counteract the client's previous vulnerability in relationships." *Id.* at 343.

<sup>23</sup> [E]xperiences of lack of control in the early environment [of abused children] lead to the perception of subsequent events as similarly uncontrollable, resulting in the development of anxiety problems." Kaplow & Widom, *supra* note 9, at 183-84.

<sup>24</sup> [S]tigma is an attribute that extensively discredits an individual, reducing him or her 'from a whole and usual person to a tainted, discounted one.'" Brenda Major & Laurie T. O'Brien, *The Social Psychology of Stigma*, 56 *Ann. Rev. Psychol.* 393, 394 (2005) (citation omitted). The level of social stigma regarding child witnesses varies with the context of the legal dispute. One study found that jurors in juvenile delinquency proceedings actually found the juvenile witness's credibility to be lower when evidence of their child abuse was presented because of a perception that "abused juveniles will re-offend and should therefore be treated more punitively than their nonabused counterparts." Cynthia J. Najdowski et al., *Jurors' Perceptions of Juvenile Defendants: The Influence of Intellectual Disability, Abuse History, and Confession Evidence*, 27 *Behav. Sci. & L.* 401, 410 (2009).

<sup>25</sup> [O]stracism increases sadness and anger and lowers levels of belonging, self-esteem, control, and meaningful existence." Williams, *supra* note 10, at 434. We are just beginning to understand the long-term effects of stress produced hyper secretions of cortisol and the defense mechanism of the amygdala in the brain. "Cortisol is a hormone that is secreted presumably to rally the organism's efforts to survive and deal effectively with danger" such as from peer rejection. *Id.* at 433-34. "The amygdala . . . has been identified as crucial for aversive-conditioning, for negative feelings such as fear, and for recognizing a situation as fearful and a face as showing fear." William D. Casebeer & Patricia S. Churchland, *The Neural Mechanisms of Moral Cognition: A Multi-Aspect Approach to Moral Judgment and Decision-Making*, 18 *Biology & Phil.* 169, 181 (2003). See also Monique Ernst & Sven C. Mueller, *The Adolescent Brain: Insights From Functional Neuroimaging Research*, 68 *Developmental Neurobiology* 729, 736 (2008) (noting "greater activation of the amygdala in adolescents compared to adults during passive viewing of fearful vs. neutral faces"); Oliver R. Goodenough & Kristen Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 *Phil. Transactions Royal Soc'y London B.* 1709, 1720 (2004) (noting "amygdala activity modulates other brain regions engaged in the judgment process"); Ute Habel et al., *Genetic Load on Amygdala Hypofunction During Sadness in Nonaffected Brothers of Schizophrenia Patients*, 161 *Am. J. Psychiatry* 1806, 1810-11 (2004); Adrian Raine & Yaling Yang, *Neural Foundations to Moral Reasoning and Antisocial Behavior*, 1 *Soc. Cognitive & Affective Neuroscience* 203, 205-09 (2006) (explaining antisocial individuals, including adolescents with conduct disorder, exhibit increased amygdala activation).

<sup>26</sup> Major & O'Brien, *supra* note 24, at 410.

<sup>27</sup> See Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, [3 \*Psychol. Pub. Pol'y & L.\* 645 \(1997\)](#).

abuse victims "because one's core self-not simply one's behavior-is at stake." <sup>28</sup> Shame is directly associated with "low self- esteem, depression, . . . anxiety, . . . eating disorder[s], . . . posttraumatic stress disorder, . . . suicidal ideation," <sup>29</sup> and an inability to empathize with others. <sup>30</sup>

Although for some children the jurogenic effects of testifying may be short- term, for others these results are long-term and often do not fully emerge until adulthood. <sup>31</sup> In addition, older children and those who have more exposure to the legal system suffer higher levels of distress. <sup>32</sup> Although the best interest of child witnesses may not be the central issue in proceedings where a criminal defendant's fundamental liberty interests are at stake, there is no excuse for the dependency system's failure to factor the competing psychological needs of child witnesses when drafting rules of trial procedure and rules of professional responsibility.

### **[\*378]**

#### A. Conflicts of Interest between Abused Children and their Attorneys Intensify Children's Psychological Condition by Increasing their Feelings of Betrayal

Imagine the mindset of a child, abused by a trusted adult, when that child is first introduced to an adult stranger: his or her appointed lawyer.

Establishing a relationship with severely traumatized children who are often filled with rage and sorrow, and sometimes violent, is a harrowing feat. It requires an empathic attunement that the children may not welcome because they have too frequently experienced betrayal, disillusionment, punitive measures, or attempts to control rather than genuine attempts to understand and to help them. <sup>33</sup>

Abused children have difficulty with trust since they have "low levels of attachment security," and therefore, much of the initial phase of psychological counseling involves establishing the therapist as a "secure base from which the client can discover self-worth and trust in others." <sup>34</sup> The initial contact between the abused child witness or client

<sup>28</sup> Tangney et al., *supra* note 11, at 349.

<sup>29</sup> *Id.* at 352.

<sup>30</sup> *Id.* at 350-52. Even though some abused children feel partially responsible for the abuse, guilt is a symptom that is much less complicated for psychiatrists to treat since, unlike shame, it can be reduced by "reparative actions including confessions, apologies, and undoing the consequences of the behavior," *id.* at 350, whereas shame "offers little opportunity for redemption." *Id.* at 353.

<sup>31</sup> Edelstein et al., *supra* note 7, at 262. "[I]t is important to understand long-term outcomes before evaluating innovations designed to assuage the potentially negative effects of legal participation." *Id.*

<sup>32</sup> Julie A. Lipovsky, *The Impact of Court on Children: Research Findings and Practical Recommendations*, 9 *J. Interpersonal Violence* 238, 241-44 (1994). Although most legislators and judges focus their attention on child witness accommodations for younger children, older children often are in even greater need of prophylactic protections since the effects of testifying on older children are often more long-term than the effects on young children. See William Wesley Patton, *When the Empirical Base Crumbles: The Myth that Open Dependency Proceedings do not Psychologically Damage Abused Children*, [33 \*Law & Psychol. Rev.\* 29, 51-52 \(2009\)](#). Neurobiologists are just beginning to understand the relationship between the evolution of a child's chemical and brain structure and the age differences in a child's capacity to make reasoned choices among alternatives. For instance, "[b]rain development during adolescence typically demonstrates significant decreases in cortical gray matter and increases in white matter. . . . It has been well established that increases in white matter reflect, in part, increased myelination, which might be associated with age-related improvements in cognitive processing." Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 *Current Opinion Neurobiology* 251, 252 (2007) (footnotes omitted).

<sup>33</sup> David A. Crenshaw & Kenneth V. Hardy, *The Crucial Role of Empathy in Breaking the Silence of Traumatized Children in Play Therapy*, 16 *Int'l J. Play Therapy* 160, 163 (2007).

<sup>34</sup> Muller et al., *supra* note 15, at 81, 87. Thus, it appears that a sense of interpersonal security may be a prerequisite for a willingness to address one's traumatic experiences. As such, a focus on developing a sense of interpersonal security may be beneficial in the early stages of therapy. It may be that the trust that is established in the therapeutic relationship generalizes to

and the attorney is an equally sensitive and problematic moment. Perhaps above all aspects of that relationship, the attorney must be honest with the child because "[a] child's betrayal may . . . be intensified if legal advocates or courts make promises that they cannot keep."<sup>35</sup> In addition, it is essential that the ethical role of the child's attorney be explicit and non-ambiguous<sup>36</sup> so that role confusion will not lead to actual violations of the duties of confidentiality and/or loyalty or to circumstances from which an abused child might reasonably perceive an attorney's actions as a betrayal even though they may not technically violate ethical mandates.

**[\*379]**

Betrayal describes the dynamic that accompanies a child's realization that someone she depends on is hurting her. She may realize that the trusted adult has misrepresented the activities they were engaging in. She may also feel betrayed by trusted adults that did not intervene to protect her, disbelieved her, or minimized her experience.<sup>37</sup>

Therefore, when the child's attorney fails to follow his child-client's stated preference or appears to disbelieve the child's narrative, the abused child's reaction can intensify the child's psychopathology.

Lack of trusting relationships with professionals leaves children particularly vulnerable because they are forced to undergo system stress without the security of an established relationship with an adult operating within the system. Personal isolation exacerbates fears of the unknown, suppression of feeling, and emotional withdrawal and further serves to undermine self-efficacy. Such intense psychological processes increase the probability of heightened trauma following disclosure for sexually abused children.<sup>38</sup>

Thus, the legal system itself, once again, can needlessly re-traumatize the abused child witness.

Children's mental health is not only seriously affected by the original abuse, subsequent trauma cumulates resulting in a loss of children's emotional resiliency. "'Kindling' denotes the phenomenon whereby exposure to stress at a critical time in development becomes encoded in the brain and sensitizes a person to react disproportionately when triggering experiences occur . . . ." <sup>39</sup> Persistent and cumulative stress suffered by abused children "increase[s] the risk of . . . physical and mental health problems" and "can in fact leave permanent imprints in the neural substrate of emotional and cognitive processes."<sup>40</sup>

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other relationships, increasing the client's general sense of trust in others and facilitating the working through of the trauma. Jacqueline N. Cohen, Using Feminist, Emotion-Focused, and Developmental Approaches to Enhance Cognitive-Behavioral Therapies for Posttraumatic Stress Disorder Related to Childhood Sexual Abuse, 45 *Psychotherapy Theory Res. Prac. & Training* 227, 239 (2008). "It is through the experience of being accepted even after sharing their most secret and shameful feelings and thoughts that these children come to accept themselves." Crenshaw & Hardy, *supra* note 33, at 164.

<sup>35</sup> Hamblen & Levine, *supra* note 4, at 158.

<sup>36</sup> Abused children already suffer internalized confusion regarding the actions by trusted adults. See Miltenburg & Singer, *supra* note 14, at 390.

<sup>37</sup> Cohen, *supra* note 34, at 231.

<sup>38</sup> Jim Henry, System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure, 12 *J. Interpersonal Violence* 499, 501-02 (1997).

<sup>39</sup> Lester et al., *supra* note 10, at 264. Neurobiological studies now have determined that the stress that child abuse victims suffer causes troubling changes in their brain chemistry. The traumatic events cause brain cell damage from "high levels of glucocorticoids secreted in response to stress." *Id.* at 265. "The stress sensitization (or 'kindling') hypothesis proposes that individuals become sensitized to the life events that precipitate depression, and to the depressive episodes themselves, such that less stress is required to precipitate recurrences of depression than was required to precipitate the first onset." Kate L. Harkness et al., The Role of Childhood Abuse and Neglect in the Sensitization to Stressful Life Events in Adolescent Depression, 115 *J. Abnormal Psychol.* 730, 730 (2006).

<sup>40</sup> Gunnar & Quevedo, *supra* note 10, at 146, 162. [A]dolescents reporting childhood abuse and/or neglect had a lower threat level of independent life events prior to the first depressive episode onset than did those with no history of early trauma. We suggest from these findings that the prior history of trauma may have sensitized these adolescents to the effects of independent

[\*380]

Not only must children's attorneys in cases involving child witnesses understand child development literature, but it is critically important that they be aware of research concerning the psychological characteristics of child victims. Evidence is mounting to support a requirement that attorneys involved in representing children be educated in child development and in the empirical psychological data regarding child witnesses.<sup>41</sup> For instance, in California, attorneys seeking appointment to represent children in child abuse proceedings must first meet the statutory requirements of being found competent.<sup>42</sup> The California Rules of Court not only require that children's attorneys complete "a minimum of eight hours of applicable education or training" in areas of juvenile dependency and related statutes and cases, but they also require attorneys to have specialized training in information on child development.<sup>43</sup> In addition, the nation's first Child Welfare Law Specialty Certificate Program, accredited by the American Bar Association (ABA), supported by the U.S. Department of Health and Human Services Children's Bureau, and administered by the National Association of Counsel for Children (NACC), requires that children's attorneys pass an examination which includes, among many other subjects, child development, and family dynamics and relationships.<sup>44</sup>

[\*381]

There is no universal consensus on the appropriate role of children's counsel in child protection proceedings. Experts for years have debated whether a traditional zealous advocacy model, a best interest model, or some hybrid representation furthers a balance between children's autonomy and privacy rights and society's need to protect children from physical and emotional abuse.<sup>45</sup> Some critics argue that a best interest model not only subverts children's autonomy, but it permits the attorney's and/or the child's family's values to trump the competent child's wishes.<sup>46</sup> Further, since most attorneys are non-minority, upper middle class individuals, the imposition of

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events, such that a lower level of threat of these events was required to precipitate their very first depression onset than was required for those with no trauma history. Harkness et al., *supra* note 39, at 737-38.

<sup>41</sup> As Lucy S. McGough has noted, concerning the recognition of child testimony: [During the 1980's and 1990's,] the American legal system [was] jolted out of its complacency toward child witnesses at least, child witness victims of sexual assault. With gathering momentum, the reform movement challenged the courtroom environment and trial procedures, the legitimacy of the criminal investigation process, and the rules of evidence as each applied to child witnesses. One by one, like towering oaks in a forest, centuries-old doctrines were toppled to clear a path easing the receipt of children's testimony. Lucy S. McGough, *Child Witnesses: Fragile Voices in the American Legal System* 8 (1994).

<sup>42</sup> See [Cal. Welf. & Inst. Code § 317.6](#) (West 2008) (providing for the screening of competent children's counsel and for the promulgation of rules of court defining competent counsel).

<sup>43</sup> Cal. Rules of Court, Family and Juvenile Rules § 5.242 (c)-(d) (State Bar of Cal. 2009).

<sup>44</sup> NACC Standards for Child Welfare Law Attorney Specialty Certification § 2.3 (Nat'l Ass'n of Counsel for Children 2008), <http://www.naccchildlaw.org/resource/resmgr/certification/standardscurrent12-2008.pdf>; Nat'l Ass'n of Counsel for Children, *Child Welfare Law Attorney Specialty Certification: Program Summary*, at 1, 2, 5 (Feb. 2009), [http://www.naccchildlaw.org/resource/resmgr/certification/program\\_summary\\_02-09.pdf](http://www.naccchildlaw.org/resource/resmgr/certification/program_summary_02-09.pdf).

<sup>45</sup> Hundreds of dedicated juvenile experts, law professors, judges, the California Judicial Council, and bar associations have attempted, but failed" to satisfactorily define the attorney/abused child relationship. William Wesley Patton, *Searching for the Proper Role of Children's Counsel in California Dependency Cases: Or the Answer to the Riddle of the Dependency Sphinx*, 1 J. Ctr. for Families Child. & Cts. 21, 21 (1999); see also Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical And Practical Dimensions* § 2-3(a) (3d ed. 2007); Gary C. Seiser & Kurt Kumli, *California Juvenile Courts Practice and Procedure* § 2.62(3)(c), at 2-135 to -141 (2006); Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, [27 Pace L. Rev. 869, 872 \(2007\)](#).

<sup>46</sup> See Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, [39 Colum. Hum. Rts. L. Rev. 573, 604 \(2008\)](#).

their value systems may further class, economic, and racial status quos at the expense of their child-clients. <sup>47</sup> "A best interest inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry." <sup>48</sup> The subjective ethos of a child's attorney is even more likely to define that attorney's view of the child's best interest when the child-client is either pre-verbal or verbal, but not sufficiently competent to make a reasoned choice. <sup>49</sup>

Therefore, the ABA, many juvenile law experts, and two national juvenile law symposia have rejected the best interest model in favor of a zealous advocate model. For instance, the ABA Model Rules of Professional Conduct state that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." <sup>50</sup> And, if the attorney determines that the minor client lacks legal capacity to make reasoned choices among alternatives, the attorney should not [\*382] merely substitute his or her view of the child's best interest, but rather, should consider the appointment of a guardian ad litem. <sup>51</sup>

Both the 1996 Fordham Law School Symposium on the Ethical Issues in the Legal Representation of Children <sup>52</sup> [hereinafter Fordham Recommendations], and the 2006 University of Nevada, Las Vegas Conference <sup>53</sup> [hereinafter UNLV Recommendations] urged a zealous advocacy rather than a guardian ad litem child advocacy model. The Fordham Recommendations specifically rejected a dual role for children's counsel: "The lawyer should assume the obligations of a lawyer, regardless of how the lawyer's role is labeled, be it as a guardian ad litem, attorney ad litem . . . or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child." <sup>54</sup> The Fordham Recommendations stated that "[a] lawyer should not serve as both a child's lawyer and guardian ad litem, . . ." and also called for the elimination of all "[l]aws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child . . ." <sup>55</sup> The UNLV Recommendations zealous advocacy model is more nuanced and seeks "[c]ontextualized representation" in which the child's attorney attempts to understand the child's total "family, race, ethnicity, language, culture, gender, sexuality, schooling, and home" context together with the child's developmental status before helping the child fashion the most effective case plan. <sup>56</sup> The UNLV Recommendations also call for the rejection of judicial or legislative definitions of the attorney/child-client relationship as non-client directed. <sup>57</sup>

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<sup>47</sup> See [id. at 577](#).

<sup>48</sup> Martin Guggenheim, What's Wrong with Children's Rights 38-39 (2005). See also Martin Guggenheim, How Children's Lawyers Serve State Interests, [6 Nev. L.J. 805, 829-34 \(2006\)](#).

<sup>49</sup> See Donald N. Duquette, Two Distinct Roles/Bright Line Test, [6 Nev. L.J. 1240, 1241-43 \(2005\)](#) (identifying gaps in the client-directed approach, susceptible to injections of the attorney's values).

<sup>50</sup> Model Rules of Prof'l Conduct R. 1.14(a) (2009).

<sup>51</sup> *Id.* at cmts. 1-7.

<sup>52</sup> Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, [64 Fordham L. Rev. 1301, 1301 \(1996\)](#) [hereinafter Fordham Recommendations].

<sup>53</sup> Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, [6 Nev. L.J. 592 \(2006\)](#) [hereinafter UNLV Recommendations].

<sup>54</sup> Fordham Recommendations, *supra* note 52, at 1301.

<sup>55</sup> *Id.* at 1302.

<sup>56</sup> UNLV Recommendations, *supra* note 53, at 593-94. The UNLV Recommendations recognize exceptions to the zealous advocacy model where the child has such a diminished capacity that the child cannot make reasoned choices among alternatives or where the child's stated preference "would be seriously injurious." *Id.* at 609.

The largest children's attorney organization in the United States, the NACC, has adopted a modified ABA definition of the role of children's counsel.<sup>58</sup> The NACC model calls for a zealous advocate model unless one of two exceptions exists.<sup>59</sup> First, if the child lacks the capacity to make a reasoned choice among alternatives, it "calls for a [guardian ad litem] type judgment [\*383] using objective [rather than subjective] criteria."<sup>60</sup> Second, if the competent child's stated preference is "considered to be seriously injurious to the child," the attorney must request the appointment of an independent guardian ad litem for the child, while the attorney continues his or her adherence to the zealous advocacy model.<sup>61</sup>

Recently, the New York State Bar Association rejected a dual role for children's attorneys in child dependency proceedings.<sup>62</sup> The New York zealous advocacy model forbids an attorney's "substitute judgment" in lieu of seeking a competent child's stated preference, or, "even if the attorney for the child believes that what the child wants is not in the child's best interests."<sup>63</sup> However, the New York standards adopted an "imminent danger of grave physical harm" exception.<sup>64</sup> The New York standards make clear that the child's attorney is the child's advocate, not a best interest guardian ad litem who acts as "an arm of the court."<sup>65</sup> In addition, the New York standards make it clear that one of the basic duties of children's counsel is to protect their clients from the jurogenic effects of having to testify.<sup>66</sup>

Although the majority of child abuse experts support a child-centered zealous advocacy model of representation,<sup>67</sup> it is not the purpose of this Article to articulate all of the variables that must be considered in determining whether a best interest or zealous advocacy model is more effective for children's representation.<sup>68</sup> Rather, this Article will

<sup>57</sup> Id. at 611.

<sup>58</sup> See NACC Recommendations for Representation of Children in Abuse and Neglect Cases § IV(B)(3) (Nat'l Ass'n of Counsel for Children 2001).

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> See Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (N.Y. State Bar Ass'n Comm. on Children & the Law 2007).

<sup>63</sup> Id. § A-1.

<sup>64</sup> Id. § A-3.

<sup>65</sup> See id. § B-1, commentary.

<sup>66</sup> Id. § D-6, commentary. The New York standards further provide that the child's attorney should assure that the child has an opportunity to testify if that is the child's desire. See id. § D-6, commentary. They also call for the attorney to protect the reluctant child witness by either seeking a stipulation to the child's testimony or "seeking any appropriate accommodations permitted by local law" to protect the child witness's mental health. Id.

<sup>67</sup> See, e.g., Peters, *supra* note 45; Appell, *supra* note 46; Emily Buss, Confronting Developmental Barriers to the Empowerment of Child Clients, [84 Cornell L. Rev. 895 \(1999\)](#); Katherine Hunt Federle, Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, [42 Fam. L.Q. 103 \(2008\)](#); see *supra* text accompanying notes 57-61.

<sup>68</sup> However, ironically, most legislation and judicial opinions support a best interest model of lawyering rather than a client-centered model. See, e.g., Barbara Ann Atwood, The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, [42 Fam. L.Q. 63, 74-75 \(2008\)](#). In addition, in 2007 the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act which was roundly criticized for its best interest lawyer model, and that act was withdrawn in summer 2008. See Linda Elrod, Child Custody Practice & Procedure § 12:3 (2008); Atwood, *supra*, at 70 n.29; Linda D. Elrod & Milfred D. Dale, Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance, [42 Fam. L.Q. 381, 405-06, n.137 \(2008\)](#); Federle, *supra* note 67, at 103-04.

show that a dual-role [\*384] model in which children's attorneys function as a hybrid, combining both the zealous advocacy and guardian ad litem best interest roles, is harmful to abused children's psychopathology and that such a dual role may seriously complicate the mental health of abused children.<sup>69</sup> Since "the relationship between a child and an attorney is extremely important in minimizing the child's discomfort with the court process,"<sup>70</sup> rules of professional responsibility should avoid mandating attorney conduct that will force attorneys into choices that will increase the trauma to abused children.

#### B. In re Kristen B.: The Duty of Loyalty and Its Psychiatric Implications

Imagine an adult criminal defendant's attorney calls his client to the stand, asks his client whether or not he had a conversation with his mother, and, the defendant answers "no." Defense counsel then begins to say, "[s]o how can we believe that you didn't talk about . . ." only to be cut off by the court, then states, "[s]ustain my own objection. Argumentative."<sup>71</sup> Further, imagine that during closing argument, the defendant's attorney argues against his client's desire to have the criminal case dismissed.<sup>72</sup> There is no doubt that an appellate court would find that the defense attorney provided incompetent representation, and that a state bar association disciplinary board would likely find that the attorney had violated the ethical duty to provide zealous, confidential, and loyal representation.

#### [\*385]

In contrast, in *In re Kristen B.* a California appellate court found that identical conduct by an abused child's attorney in a child dependency case was not only ethically proper, but was statutorily required. In that case, the county filed a child dependency petition alleging that the minor's stepfather had sexually abused her.<sup>73</sup> The fourteen year old minor informed others about the abuse, but her mother did not believe her.<sup>74</sup> Shortly before the court proceedings, the minor visited her mother, in violation of a court order, and a week later the child prepared a written recantation of her allegations stating that she had lied about the abuse allegation so that she would not have to move away from her boyfriend.<sup>75</sup> At the hearing, the social worker testified that she had discussed the recantation with the minor and that the recantation appeared to have been prompted by the minor's mother.<sup>76</sup> Further, the social worker believed that the minor was at risk of further emotional and/or sexual abuse.<sup>77</sup> On direct examination, the

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<sup>69</sup> Recent psychological research has demonstrated the depths of ignorance about the legal system shared by child witnesses and victims. Children's ignorance of the system can further their trauma and the anxiety that they already suffer over their ambiguous role in the family and in the court process. To the extent that children lack an adequate understanding, not only of their situation, but also of the court process generally, their presence may not serve the intended function. Moreover, any confusion or misunderstanding experienced by children may inhibit their ability to participate effectively in the process that is designed, in theory, with their best interests as a primary focus. Jodi A. Quas et al., *Maltreated Children's Understanding of and Emotional Reactions to Dependency Court Involvement*, 27 *Behav. Sci. & L.* 97, 98 (2009). Empirical data now clearly demonstrates that "greater contact with the legal system does not translate into more accurate knowledge. . . . [And] even when children are generally knowledgeable about the legal system, they may not be similarly knowledgeable with regard to case-specific information." *Id.* at 99 (internal citations omitted).

<sup>70</sup> Lipovsky & Stern, *supra* note 4, at 154.

<sup>71</sup> *In re Kristen B.*, [78 Cal. Rptr. 3d 495, 498 \(Ct. App. 2008\)](#).

<sup>72</sup> [Id. at 498-99](#).

<sup>73</sup> [Id. at 497](#).

<sup>74</sup> [Id. at 497-98](#).

<sup>75</sup> [Id. at 498](#).

<sup>76</sup> *Id.*

<sup>77</sup> *In re Kristen B.*, [78 Cal Rptr. 3d at 498](#).

minor's attorney impeached her client's recantation, and then during closing summation, argued against the minor's stated preference of returning home.<sup>78</sup> The appellate court found that the child's attorney followed the dictates of section 317 of the California Welfare and Institutions Code,<sup>79</sup> which provides that a minor's counsel act as an advocate for the protection, safety, and physical and emotional well-being of the child. . . . [,] make recommendations to the court concerning the child's welfare . . . . [, and] shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child.<sup>80</sup>

The appellate court further found that the minor's counsel did not violate the duty of loyalty since the minor had a right to testify and since the attorney's question, "[s]o how can we believe that you didn't talk about [the recantation with your mother]" may have been "part of a litigation strategy" in aiding the "court in its factfinding role as well as protect[ing]" the child's best interests.<sup>81</sup>

Because the *In re Kristen B.* opinion is so poorly crafted and so ambiguous regarding the court's reasoning for upholding the trial court's verdict, children's counsel must be extremely careful in generalizing from that opinion regarding the acceptable role of children's counsel. It is difficult to determine whether one or a combination of the following determinations supported the affirmance: 1) incompetence of counsel did not occur because the minor's [\*386] counsel acted reasonably;<sup>82</sup> 2) even if the attorney's conduct was improper, it was not sufficiently incompetent to have prejudiced the minor;<sup>83</sup> and/or (3) the attorney's decision to impeach her client might have been tactical, and the trial record was insufficient to support a determination that the representation amounted to incompetence on the part of the attorney.<sup>84</sup>

For a number of reasons, the court of appeal's opinion in *In re Kristen B.* is incorrectly decided, permits attorneys to violate several rules of professional conduct, and creates an attorney/child relationship that will increase the psychological problems experienced by child abuse victims/witnesses whom the legal system attempts to protect. California has not adopted separate rules of professional conduct regarding the representation of minors.<sup>85</sup> Therefore, the same ethical requirements regarding adult client confidentiality,<sup>86</sup> loyalty,<sup>87</sup> zealotry<sup>88</sup> and competence<sup>89</sup> apply to the representation of children.

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<sup>78</sup> [Id. at 498-99.](#)

<sup>79</sup> [Id. at 499-500.](#)

<sup>80</sup> [Cal. Welf. & Inst. Code § 317\(c\)](#), (e) (West 2008).

<sup>81</sup> *In re Kristen B.*, [78 Cal. Rptr. 3d at 500-01.](#)

<sup>82</sup> See [id. at 499.](#)

<sup>83</sup> See *id.*

<sup>84</sup> See [id. at 500-01.](#) The court found the record insufficient to determine whether the attorney was incompetent in asking her a question that attempted to "impeach her or for any other improper purpose." [Id. at 500.](#)

<sup>85</sup> For example, California has not adopted the ABA Model Rules that provides a special category of client disability based upon "minority." Model Rules of Prof'l Conduct R. 1.14(a) (2009).

<sup>86</sup> See [Cal. Bus. & Prof. Code § 6068\(e\)](#) (West 2003) (providing that an attorney must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").

<sup>87</sup> See [Santa Clara County Counsel Att'ys Ass'n v. Woodside](#), [869 P.2d 1142, 1154-55 \(Cal. 1994\)](#), superseded by statute, [Cal. Gov't Code §§ 3500- 11](#) (West 2009). It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies

## 1. Potential Violations of the Abused Child's Confidential Statements

California has adopted a hybrid child-attorney relationship in which the attorney acts simultaneously as a traditional attorney and a guardian ad litem<sup>90</sup> (hereinafter "attorney-guardian ad litem"). As was stated, *supra*, the California [\*387] legislature defines the child's attorney as a "best interest" advocate rather than as a "child's stated preference" advocate.<sup>91</sup> The California Rules of Court further provide that a Child Abuse Prevention and Treatment Act (CAPTA) "guardian ad litem must be appointed for every child who is the subject of a juvenile dependency petition . . . [and] [a]n attorney appointed under rule 5.660 will serve as the child's CAPTA guardian ad litem . . . ." <sup>92</sup> Since providing each child a separate attorney and a separate guardian ad litem substantially increases the cost of representation, California, instead, opted to define the child's court-appointed attorney also as the child's guardian ad litem. The problem, of course, is that traditionally guardians ad litem and attorneys have very different ethical responsibilities. Guardians ad litem usually do not owe clients a duty of loyalty or confidentiality.<sup>93</sup> The role confusion of the attorney-guardian ad litem led to the following in the Fordham Recommendations:

A lawyer should not serve as both a child's lawyer and guardian ad litem. When a lawyer has been appointed to serve in both roles, the lawyer should elect to represent the child as a lawyer and not to serve as guardian ad litem. If that is not permissible, the lawyer should elect to decline the appointment where feasible.<sup>94</sup>

The role confusion of the California attorney-guardian ad litem appointment is further muddled by the permission granted to the attorney to "make recommendations to the court concerning the child's welfare" and to the guardian ad litem to make recommendations to the court concerning the best interest of the child as appropriate under California law.<sup>95</sup> California thus mandates that the guardian ad litem's role be consistent with the role as defined by the legislature in section 317(e) of the Welfare and Institutions Code. However, since the section 317(e) attorney owes duties of confidentiality and loyalty to the abused child-client, the California scheme violates CAPTA's definition of guardian ad litem.<sup>96</sup> As the following [\*388] [\*389] hypothetical demonstrates, the role of the hybrid

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to his client's interests. [Santa Clara County Counsel Attorneys Ass'n, 869 P.2d at 1142](#) (quoting [Anderson v. Eaton, 293 P. 788, 789-90 \(Cal. 1930\)](#)).

<sup>88</sup> See [Silberg v. Anderson, 786 P.2d 365, 370 \(Cal. 1990\)](#) (discussing the importance of zealous representation).

<sup>89</sup> [Cal. Welf. & Inst. Code § 317.5\(a\)](#) (West 2008) ("All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.").

<sup>90</sup> See William Wesley Patton, S.B. 1516, California's New Hybrid: Children's Counsel as Advocates and Guardians Ad Litem, 2 U.C. Davis J. Juv. L. & Pol'y 16 (1997).

<sup>91</sup> See [Cal. Welf. & Inst. Code § 317\(e\)](#) (West 2003).

<sup>92</sup> Cal. Rules of Court, Family and Juvenile Rules § 5.662(c) (State Bar of Cal. 2009).

<sup>93</sup> For instance, Arizona has determined that a lawyer who is appointed as a guardian ad litem for a minor who already has legal representation does not have the duties of confidentiality and loyalty. State Bar of Arizona, Ethics Op. 00-06 (2000), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=263>. However, if an attorney is appointed in a dual role as zealous advocate and guardian ad litem, then the attorney must zealously argue the child-client's desired goals and must withdraw as the guardian ad litem if a role conflict develops. *Id.*

<sup>94</sup> Fordham Recommendations, *supra* note 52, at 1302.

<sup>95</sup> Compare [Cal. Welf. & Inst. Code § 317\(e\)](#) (West 2008), with Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, [88 Stat. 4, 7 \(1974\)](#) (codified as amended at [42 U.S.C. § 5106a\(a\)](#) (2006)).

<sup>96</sup> On January 31, 1974 Congress mandated that for states to receive CAPTA funds, they must "provide . . . in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem . . . to represent the child in such proceedings." Child Abuse Prevention and Treatment Act § 4(b)(2)(G). On June 1, 1998, the United States Department of Health & Human Services (DHHS) notified California that it was out of compliance with the CAPTA guardian ad litem requirement because California "incorrectly allows social workers to serve as the guardians ad litem and that corrective action is

attorney-guardian ad litem leads to several possible violations of the duty of confidentiality owed to the abused child by the attorney.<sup>97</sup>

required." Letter from Sharon M. Fujii, Reg'l Adm'r, Admin. of Children & Families, U.S. Dep't of Health & Human Servs., to Marjorie Kelly, Deputy Dir., Children & Family Servs. Div., Cal. Dep't of Soc. Servs. (June 1, 1998). Further, on November 4, 1998, John Kersey, Acting Associate Director, Self-Sufficiency Unit, DHHS wrote to Eloise Anderson, Director, California Department of Social Services, informing her that California did not meet the CAPTA guardian ad litem requirements and that CAPTA funding of \$ 37,296,000 for Child Welfare Services, \$ 36,198,000 for Promoting Safe and Stable Families, \$ 2,343,855 for Basic State Grant, and \$ 8,023,999 for the Independent Living Program were being provided based upon California's assurance that the guardian ad litem provision would be brought into CAPTA compliance. Letter from John Kersey, Acting Assoc. Dir., Self-Sufficiency Unit, U.S. Dep't of Health & Human Servs., to Eloise Anderson, Dir., Cal. Dep't of Soc. Servs. (Nov. 4, 1998). As late as January 12, 2000, DHHS continued to notify California of its non-compliance with the CAPTA guardian ad litem requirement and that tens of millions of dollars of federal funding were in jeopardy. Letter from Sharon M. Fujii, Reg'l Hub Dir., Admin. of Children & Families, U.S. Dep't of Health & Human Servs., to Rita Saenz, Dir., Cal. Dep't of Soc. Servs. (Jan. 12, 2000). Alarmed at the prospective loss of millions of dollars in federal funding, the California legislature responded by passing Senate Bill 2160 that created section 326.5 of the Welfare and Institutions Code that provides that "[t]he Judicial Council shall adopt a rule of court . . . that complies with the . . . [CAPTA] . . . appointment of a guardian ad litem, who may be an attorney or a court-appointed special advocate, for a child in cases in which a petition is filed based upon neglect or abuse . . . ." [Cal. Welf. & Inst. Code § 326.5](#). Of course, at the heart of any conflict of interest issue that might involve the appointment of more than one attorney is the issue of fiscal impact. "Disqualifications of public counsel can result in increased public expenditures for legal representation, and 'there is the potential for a substantially increased call upon an already severely strained tax base.'" [In re Lee G., 1 Cal. Rptr. 2d 375, 381 \(Ct. App. 1991\)](#) (quoting [People v. Mun. Ct. \(Byars\), 143 Cal. Rptr. 491, 496 \(Ct. App. 1978\)](#)). The next day the Governor of California, Grey Davis, wrote to DHHS informing them of the legislation, but noting that the details of the guardian ad litem legislation would not be decided by the Judicial Council until sometime before July 1, 2001. Letter from Del Sayles-Owen, Chief, Children's Servs. Branch, Cal. Dep't of Soc. Servs., to Sharon M. Fujii, Reg'l Adm'r, Admin. for Child & Families, U.S. Dep't of Health & Human Servs. (Sept. 14, 2000) (including an attachment from Governor Grey Davis). On September 14, 2000, Sharon M. Fujii, wrote to Rita Saenz, California Director, Department of Social Services, that they had approved the grant of federal CAPTA funds to California "based on the recently enacted State Senate Bill 2160 that will implement court rules to require guardians ad litem at all judicial proceedings in compliance with CAPTA." Letter from Sharon M. Fujii, Reg'l Adm'r, Admin. for Children & Families, U.S. Dep't of Health & Human Servs., to Rita Saenz, Dir., Cal. Dep't of Soc. Servs. (Sept. 14, 2000). On September 28, 2000, John Kersey, Associate Director, Self-Sufficiency Unit of DHHS wrote to Rita Saenz that CAPTA funding would proceed based upon passage of SB 2160, but that DHHS wanted to be notified when the Judicial Council actually promulgated the court rules defining the CAPTA guardian ad litem requirements. Letter from John Kersey, Assoc. Dir., Self-Sufficiency Unit, Dep't of Human & Health Servs., to Rita Saenz, Dir., Cal. Dep't of Soc. Servs. (Sept. 28, 2000). In 2003, the CAPTA guardian ad litem provision was amended to delineate the specific duties of the guardian ad litem: [A] guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings-: (I) to obtain fist-hand, a clear understanding of the situation an needs of the child; and (II) to make recommendations to the court concerning the best interests of the child. [42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (2006). Since the attorney's duties of confidentiality and loyalty prevent the attorney from disclosing the child-client's confidential attorney-client information in making "recommendations to the court concerning the best interests of the child," id., the role of the Cal. Welf. & Inst. § 317(e) attorney is inconsistent with the role of the guardian ad litem mandated by CAPTA.

<sup>97</sup> The abused child's immaturity does not give the child's section 317(e) attorney the authority to violate the attorney-client relationship and inform the court of confidential data in making recommendations to the court concerning the child's best interest. For instance, in an analogous legal area, probate conservatorship, one California county bar association distinguished between attorney roles in contested and non-contested proceedings. Orange County Bar Ass'n Professionalism and Ethics Comm., Formal Op. 95-002 (1995), available at <http://www.ocbar.org/pdf/OCBA95002.pdf>. After analyzing both the American Bar Association and California Rules of Professional Conduct, the bar committee determined that the role of an attorney in a contested versus a non-contested probate conservatorship proceeding differed in several ways. Id. Although California has not adopted the ABA Model Rules of Professional Conduct, "[her] courts and ethics committees do turn to the ABA Model Code on questions about which [her] own Rules of Professional Conduct are silent or obscure." Id. In an uncontested conservatorship "there is no 'opposing' viewpoint which needs to be represented. Under these circumstances the attorney may inform the court as to her own opinions regarding the best interest of the client" even if those opinions include confidential attorney-client information. Id. However, when the court appoints an attorney to represent a client who opposes the conservatorship, "it would be improper for the court-appointed attorney to divulge any 'secrets' (i.e., any information which may be embarrassing or detrimental to the client), including the attorney's own observations and opinions, to the court without the client's consent." Id.

[\*390]

For illustrative purposes, assume that a stepfather is alleged to have used excessive corporal punishment, spanking his stepson with his hand leaving a bruise on the buttocks. The fourteen year old stepson has refused to speak with the social worker regarding the possible abuse. However, the stepson informs his court-appointed attorney-guardian ad litem that not only did the stepfather spank him hard, the stepfather threatened to do it again if the boy testifies against him. The stepson further informs the attorney-guardian ad litem that he wants to return home, even though the step father might spank him again, because he wants to be with his nineteen year old brother who lives in that house with whom he is extremely close and who helps him with his school work.

Under the traditional zealous advocacy model, not only would the attorney be forbidden to disclose his child-client's statements, but he would be required to zealously argue against state intervention, and, if wardship were declared, he would have to follow his competent child-client's desire and argue for his [\*391] return home. The American Bar Association Standards for the Child's Attorney (ABASCA) provide that a lawyer who represents a child "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."<sup>98</sup> In addition, the child's attorney might not be permitted under the ABA Model Rules to inform the court of the potential harm to the child since the potential injury from excessive spanking does not rise to the level of "death or

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And "[i]f the court insists court- appointed counsel provide[] information to the court which would force counsel to violate her duty of loyalty or confidentiality under the Rules of Professional Conduct, then counsel must withdraw from employment with permission from the court." *Id.* In a different opinion, the California State Bar Association explained that an attorney may not institute conservatorship proceedings against a client's expressed wishes since the attorney would be required to disclose confidential client information in order to justify the need for a conservator. State Bar of Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-112 (1989) (citing *Stockton Theatres v. Palermo*, 264 P.2d 74 (Cal. Ct. App. 1953)), available at <http://www.calbar.ca.gov/calbar/html/unclassified/ca89-112.html>. "An attorney is absolutely prohibited from divulging the client's secrets gained during the attorney- client relationship, and from acting in any manner whereby the attorney is forced to use such secrets to the client's disadvantage." *Id.* The rules of ethics are no different in a dependency case in which the attorney determines that the child is competent, but disagrees with the child's conclusion regarding the child's best interest. The attorney must provide the child with a duty of loyalty and confidentiality and cannot disclose confidential client data to the court in making recommendations to the court. The dual role of the section 317(e) attorney as advocate and guardian ad litem does not relieve the attorney from the obligations imposed by the rules of professional responsibility. "In general, when a lawyer is providing both legal and non-legal services to a client, all of the services are considered to be legal services for purposes of determining whether a lawyer must comply with the rules [of professional conduct]." State of Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1999-154 (1999), available at <http://www.calbar.ca.gov/calbar/html/unclassified/ca99-154.html>. See also *Layton v. State Bar*, 789 P.2d 1026, 1034 (Cal. 1990) (in banc). [W]here an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them. *Id.* Additionally, "[n]o[n]-legal services' are services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." State Bar of Cal. Comm. on Prof'l Responsibility and Conduct, F o r m a l O p . 1 9 9 5 - 1 4 1 ( 1 9 9 5 ) , a v a i l a b l e a t <http://www.calbar.ca.gov/calbar/html/unclassified/ca95-141.html>. For instance, in Arizona, although an attorney may accept court appointment as both the child's lawyer and the child's guardian ad litem, the attorney's "first obligation is to the 'minor client' rather than the child ward. Additionally, if the roles [begin] to conflict, the attorney could withdraw as guardian ad litem and continue as counsel." Ariz. Ethics Opinion No. 00-06 (2000) (citing Ariz. Ethics Opinion No. 86-13 (1986)). In addition, if an attorney is appointed solely as a ward's guardian ad litem, that attorney does not owe the child a duty of loyalty and confidentiality. *Id.* However, the attorney appointed as a guardian ad litem should inform the child that the role of guardian ad litem does not involve a duty of confidentiality and that the guardian ad litem is appointed to represent the child's best interests, not the child's stated preferences because the child may not understand the distinction between attorney's and guardian ad litem's ethical duties. *Id.* In Connecticut, even though an attorney may be initially appointed in the dual role as the child's attorney and guardian ad litem, when the attorney discovers a conflict between the child's stated preference and the attorney's view of the child's best interest, the attorney shall inform the court and the court shall appoint a different guardian ad litem for the child. The original attorney-guardian ad litem shall continue solely as the child's attorney, zealous advocate, and the newly appointed guardian ad litem shall not serve as a second attorney for the child. *In re Christina M.*, 908 A.2d 1073, 1077 n.1, 1085-86 (Conn. 2006); see also *Conn. Gen. Stat. § 46b-129a* (2009) (regarding conflicts arising under a dual-role attorney appointment).

<sup>98</sup> ABA Standards for the Child's Attorney § A-1 (1996) [hereinafter ABASCA].

substantial bodily harm." <sup>99</sup> Of course, in our hypothetical, under a dual role attorney appointment, the child's attorney also serves as the child's guardian ad litem. However, ABASCA makes it clear that if a conflict arises between the roles of attorney and guardian ad litem, "the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request." <sup>100</sup>

What options does *In re Kristen B.* provide to the child's attorney, in this hypothetical, who determines that it is not in the child's best interest to return home? First, in that case, the appellate court approved calling the child-client on direct examination, <sup>101</sup> and further condoned the minor's attorney questioning the child regarding the credibility of her testimony. <sup>102</sup> Second, the court did not condemn the attorney's closing argument wherein she asked the court to consider her client's testimony, but also argued against the child's stated preference of returning home. <sup>103</sup> However, as was discussed, *supra*, the consequences of the attorney's behavior may include a perception on the part of the child that she has been betrayed, which could detrimentally affect the child's mental health and make treatment more difficult and more protracted. <sup>104</sup>

**[\*392]**

What other options does the attorney in this hypothetical have pursuant to section 317(e) and *In re Kristen B.*? In Option One, the attorney informs the court that the child wishes to return home and then sits down. This strategy satisfies section 317(e) because the attorney must inform the court of the child's position, and it does not violate the prohibition in section 317(e) against arguing "for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child." <sup>105</sup> However, the silence option raises other ethical problems. First, by not arguing for the child's stated preference, returning home, the attorney may have violated the duty of competent and zealous advocacy. <sup>106</sup> In addition, since the attorney determined that returning home was

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<sup>99</sup> Model Rules of Prof'l Conduct R. 1.6(b)(1) (2009) provides: "A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm." In addition, Cal. Rules of Prof'l Conduct R. 3-100 cmt. 6 (2009) requires the attorney to "make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm" before reporting the possible harm, and in determining the exigency of disclosing the confidential data the attorney may factor "whether the prospective harm to the victim or victims is imminent." In our hypothetical the child's attorney did neither.

<sup>100</sup> ABASCA, *supra* note 98, § B-2(1). In adult client representation the attorney can often seek the client's informed consent to continue with the representation even in the face of a conflict of interest. However, most children lack the capacity to make a knowing choice among the alternatives related to the conflict of interest. See [In re Mary C.](#), 48 Cal. Rptr. 2d 346, 349-50 (Ct. App. 1995).

<sup>101</sup> *In re Kristen B.*, 78 Cal. Rptr. 3d 495, 498 (Ct. App. 2008).

<sup>102</sup> *Id.*

<sup>103</sup> [Id. at 498-99.](#)

<sup>104</sup> It is important to remember that the confidentiality protection in the attorney-client relationship does not just prohibit disclosure of facts relevant to litigation, but "from disclosing facts and even allegations that might cause a client or former client public embarrassment." *In re Johnson*, No. 96-O-05705, 2000 WL 1682427, at \*10 (Cal. Bar Ct. Oct. 26, 2000) (citing [Dixon v. State Bar](#), 32 Cal. 3d 728, 735, 739 (1982)).

<sup>105</sup> [Cal. Welf. & Inst. Code § 317\(e\)](#) (West 2008).

<sup>106</sup> See, e.g., [In re Morse](#), 900 P.2d 1170, 1176 (Cal. 1995) (in banc). "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Model Rules of Prof'l Conduct pmb1. 2 (2009).

not in the child's best interest, the attorney's failure to inform the court of that danger violated counsel's dual role as the child's guardian ad litem who represents the child's best interest rather than stated placement preference.<sup>107</sup>

In Option Two the attorney informs the court that the minor wants to return home, and then he informs the court, without marshaling any of the facts presented in the case or referring to any confidential attorney-client data, that he disagrees and states that the child should be removed from his home. This option minimally meets the obligations of the guardian ad litem since the attorney, at least, expresses the attorney's view of the child's best interest. However, since the attorney's determination of the child's best interest was formed, at least in part, by the use of the child's confidential statements regarding the threat of future corporal punishment, the attorney not only violated the duty of loyalty in arguing against his client's stated preference, he may also have violated the duty of confidentiality by using privileged data [\*393] against the child-client even though he did not actually disclose the client's statements.<sup>108</sup>

In Option Three the child's attorney informs the court of the child's desire to return home, but also informs the court of the child's confidential information that the step-father has threatened to spank him if the boy testifies against him,<sup>109</sup> and further informs the court that the child should be removed from the home. This tactic fully meets the obligations of the dual attorney-guardian ad litem since he/she not only argues for what the attorney-guardian ad litem thinks is in the child's best interest, but he/she also provides the court with the factual basis for that conclusion. However, unless a "death or great bodily injury" exception applies, the attorney has clearly violated both the duties of confidentiality and loyalty.<sup>110</sup>

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<sup>107</sup> See William Wesley Patton, Legislative Regulation of Dependency Court Attorneys: Public Relations and Separation of Powers, [24 J. Legis. 3 \(1998\)](#) (discussing the effects of the silence of the attorney in Option One). For example: [T]he silence imposed upon the minor's counsel is outcome-determinative. . . . What must the judge now know? What is the effect of the attorney's silence? It clearly informs the court that the attorney knows facts, perhaps outside the record, which have led her to conclude that returning the child home will create an unreasonable risk of danger. What judge is going to follow the child's wishes and send such a child home? In effect, the child's attorney, by remaining silent, becomes the strongest witness against his own client. [Id. at 8.](#)

<sup>108</sup> Model Rules of Prof'l Conduct R. 1.6 cmt. 16 (2009), states that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer . . . ." The attorney's good motives in disclosing confidential client information do not provide a justification for disclosure unless that justification is expressly recognized as an exception to the duty of confidentiality. See, e.g., [Earl Scheib, Inc. v. Superior Court, 61 Cal. Rptr. 386 \(Ct. App. 1967\).](#)

<sup>109</sup> One serious difficulty with applying a "death or great bodily injury" exception to the duty of confidentiality involves the question of what constitutes an attorney's "reasonable belief" that the threatened act will actually take place. In tort jurisprudence "conditional threats" pose real problems. For example, in [Brooker v. Silverthorne, 99 S.E. 350, 351-52 \(S.C. 1919\)](#), the court found the statement, "If I were there, I would break your God damned neck" insufficient to support an action for assault.. See also [Cal. Penal Code § 422](#) (West 1999) (defining terrorist threats as "unequivocal, unconditional, immediate, and specific"). But see [People v. Stanfield, 38 Cal. Rptr. 2d 328, 332 \(Ct. App. 1995\)](#) (holding that a "seemingly conditional threat contingent on an act highly likely to occur" is sufficient); see also [In re Ricky T., 105 Cal. Rptr. 2d 165, 170 \(Ct. App. 2001\)](#) (holding that one should look to the totality of the circumstances in determining the conditional nature of a threat). In the instant hypothetical the threat is not only conditional, but in order for it to take place the following events must transpire: 1) the case must proceed to a formal hearing where the child could testify; 2) since this is a dependency case, court must have personal jurisdiction over the stepparent; and 3) the child must testify and that testimony must be "against" the stepparent. Therefore, it is not easily apparent whether the conditional nature of the stepparent's threat is sufficient for the attorney to rely upon as reasonably likely to lead to further corporal punishment.

<sup>110</sup> Although California law permits the child's attorney to "make recommendations to the court concerning the child's welfare," [Cal. Welf. & Inst. Code § 317\(e\)](#) (West 2008), nothing in section 317(e) or in the California Rules of Professional Conduct provide the attorney with the authority to disclose confidential client information to the court.

This hypothetical not only highlights the problems created by *In re Kristen B.*, it also demonstrates that a child's dual-role attorney is caught in a Catch-22 between violating the responsibilities as a guardian ad litem or violating legal ethical precepts.<sup>111</sup> As was demonstrated earlier, if the attorney-guardian ad litem chooses the role of guardian ad litem by arguing a best interest approach, which may be diametrically in opposition to the child's stated preference, the child will be placed at greater psychological harm.<sup>112</sup>

## 2. Do the California Rules of Professional Conduct Permit the Child's Attorney to Impeach the Child-Client's Credibility?

The *In re Kristen B.* court carefully avoided answering the question whether or not the child's attorney-guardian ad litem has the ethical latitude to impeach his own child-client while she testifies on the stand.<sup>113</sup> Instead, the court [\*395] merely talked around the issue.<sup>114</sup> The court first noted that it was not an error to call the child as a witness because the child has a right to testify; since "a minor's wishes are always relevant and must be communicated to the court, [a] minor's counsel must have the ability to present those wishes directly by calling the minor to testify."<sup>115</sup> The court then analyzed the attorney's motive for calling the child and concluded that "[t]he record here is devoid of any indication minor's counsel called Kristen as a witness to impeach her or for any other improper purpose."<sup>116</sup> The court, thus, sanctioned an attorney's impeachment of a child witness client as long as it was

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<sup>111</sup> Even if the California legislature refuses to modify section 317(e) to bring it into conformity with the California Rules of Professional Conduct that have been approved by the California Supreme Court, "a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform it to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable." *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1251 (Cal. 1995) (in banc). Since section 317(e) violates separation of powers because it involves the legislature's promulgation of an attorney regulation inconsistent with California Supreme Court authority, William Wesley Patton, *Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers* 156-59 (2006), a reviewing court could bring that section into constitutional conformity with the following amendments: The counsel for the child shall be charged in general with the representation of the child's interests [to the extent consistent with the California Rules of Professional Conduct]. . . . He or she may . . . make recommendations to the court concerning the child's welfare [to the extent consistent with the California Rules of Professional Conduct] . . . Counsel for the child shall not advocate for the return of the child [to the extent consistent with the California Rules of Professional Conduct] if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child.

<sup>112</sup> *Cal. Welf. & Inst. Code § 317(e)* (West 2008). . If the child's attorney is permitted to zealously advocate against the competent child's testimony and stated preferences, it may, in effect, strip from the child's testimony any weight that the court may have given the child's wishes. In effect, such zealous argument against the child by her attorney may violate Article 12 of the UN Convention on the Rights of the Child that provides that "States [p]arties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." United Nations Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3; see, e.g., Kristin Skjorten & Rolf Barlandhaug, *The Involvement of Children in Decisions about Shared Residence*, 21 Int'l J.L. Pol'y & Fam. 373, 373-75 (2007). "[M]ost children also want to be consulted and have their views taken into account." *Id.* at 383. In addition, some child-clients are dissatisfied with adults' reports to judges regarding the child's preferences. Patrick Parkinson et al., *Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia*, 21 Int'l J.L. & Pol'y & Fam. 84, 103 (2007). Of course, judges' willingness to listen to child witnesses, especially in chambers for forensic purposes of decision-making is not certain. For instance, in one study of judges' attitudes in Australian family law disputes, "three quarters of the judges interviewed (15/20) indicated either that they would never talk with children for a forensic purpose before reaching a final decision in a case, or were extremely reluctant to do so." Patrick Parkinson & Judy Cashmore, *Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges*, 21 Int'l J.L. Pol'y & Fam. 160, 162 (2007).

<sup>113</sup> See *In re Kristen B.*, [78 Cal. Rptr. 3d 495, 500-01 \(Ct. App. 2008\)](#).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 500 (internal citation omitted).

<sup>116</sup> *Id.*

done for a proper purpose without defining proper purposes in order to provide guidance to other children's lawyers. The court further found that the single question that impeached the child's credibility regarding her recantation of the abuse allegation did not destroy her credibility and did not prejudice the child. <sup>117</sup>

Had the court stopped there, children's attorneys would have a somewhat clear explication of their duty. Children's attorneys could call their child-client to the stand and permit the child to express herself regarding the case, including the reasons for recanting earlier claims of abuse; but the attorney could not then turn that direct examination into a cross-examination of the child in order to impeach the child's credibility and prejudice the child's stated custody preference unless it were done for a proper purpose. However, the court proceeded by conflating the traditionally mutually exclusive goals of the zealous advocate and the best interest guardian ad litem:

A review of the entire transcript shows minor's counsel sought to elicit testimony from Kristen that would properly assist the court in ascertaining the truth of either the sexual abuse allegations or Kristen's recantation. In this regard, minor's counsel tried to develop facts concerning whether Kristen's recantation was the result of pressure or coaching from [her mother]. <sup>118</sup>

The court further found that the attorney may have used the argumentative impeachment question as a tactical decision to soften the blow by other parties before they cross-examined the minor regarding her recantation. <sup>119</sup> The court then inexplicably stated that "[c]ounsel cannot be faulted for questioning Kristen in a way that was meant to aid the court in its fact-finding role as well as protect Kristen's best interests." <sup>120</sup>

The *In re Kristen B.* court jumps back and forth between the acceptable and prohibited conduct of children's attorneys but never comes to grip with the [\*396] critical issues of whether the attorney-guardian ad litem's responsibilities to define and protect the attorney's view of the child's best interest violates his or her ethical duties of client loyalty and confidentiality as defined by the California Rules of Professional Conduct and by California Supreme Court decisions. <sup>121</sup> For instance, in our hypothetical, could the child's attorney put the abused child on the stand and ask him, "Isn't it true that you told me that your father said that if you came back home that he would spank you again?" This impeachment by the child's own attorney differs from the question in *In re Kristen B.* in two ways: 1) it is based upon the child's confidential attorney-client statement; and 2) it is prejudicial, if not determinate, to whether or not the court will grant the child's stated preference of returning home.

Since the child attorney-guardian ad litem is not exempt from the mandates of the California Rules of Professional Conduct, the only arguable exception to the duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client" <sup>122</sup> is Rule 3-100(B) that provides that "[a] member may . . . reveal confidential information . . . to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm

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<sup>117</sup> [Id. at 501.](#)

<sup>118</sup> *Id.*

<sup>119</sup> *In re Kristen B.*, [78 Cal. Rptr. 3d at 501.](#)

<sup>120</sup> *Id.*

<sup>121</sup> First, the California Supreme Court has never ratified a rule of professional responsibility similar to ABA Model Rules of Prof'l Conduct R. 1.14(a) that provides for a different type of representation based upon the age of the client. In addition, neither the court nor the California Rules of Professional Conduct set a different level of zealotness, competency, or client loyalty based upon minority. See, e.g., [Drociak v. State Bar, 804 P.2d 711, 714 \(Cal. 1991\)](#); [Anderson v. Eaton, 293 P. 788, 789-90 \(Cal. 1930\)](#); *In re Katz*, No. 91-O-04707, 1995 WL 646807, at \*7 (Cal. Bar Ct. Mar. 2, 1994).

<sup>122</sup> [Cal. Bus. & Prof. Code § 6068\(e\)](#) (West 2003).

to, an individual." <sup>123</sup> However, that [\*397] exception is inapplicable in our hypothetical in which serious physical harm is absent, and since some states, like California, sanction age-appropriate corporal punishment. <sup>124</sup>

#### a. Ethical Rules Permitting "Best Interest" Attorneys to Make Recommendations to the Court Inconsistent with their Child-Client's Stated Preferences Strips Children of their Right to Cross-Examination and Enhances their Psychopathologies

The issue of whether an abused child's hybrid attorney-guardian ad litem may present the court with facts and arguments inconsistent with the child- client's testimony follows two paths of analysis. First, one could frame the issue as whether an attorney may argue facts outside the record in closing argument. Many appellate courts have reversed trial court verdicts where counsel has either argued material facts from outside the record or has inserted the attorney's personal opinions, as opposed to reasonable inferences from the evidence, into closing argument. <sup>125</sup> "It is improper to argue or allude [\*398] to facts not in the record . . . [or] to insinuate the existence of unproved

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<sup>123</sup> Cal. Rules of Prof'l Conduct R. 3-100(B) (2009). However, the "death or great bodily injury" exception in Rule 3-100 has many limitations. Before disclosure the attorney must attempt to persuade the client to abstain from the conduct or to prevent the conduct. *Id.* at R. 3-100(C). If the attorney discloses the danger the information "must be no more than is necessary to prevent the criminal act." *Id.* at R. 3-100(D). However, if disclosure takes place, unless the client provides informed consent for continued representation, the attorney "is required to seek to withdraw from the representation." *Id.* at R. 3-100 cmt. 11; see also Caitlin Whitwell, Ethics Year in Review, [45 Santa Clara L. Rev. 1055, 1057-59 \(2005\)](#) (providing a history of California's reluctance to adopt a death or serious bodily injury exception to the attorney-client confidential relationship). In some jurisdictions attorneys are mandated reporters of child abuse; even if that jurisdiction did not have a "death or serious bodily injury" confidentiality exception, and even if that child abuse did not rise to the necessary level of injury necessary to trigger that exception, the attorney would be both permitted and mandated to report the child abuse. For instance, in one advisory opinion, the Utah State Bar Ethics Advisory Opinion Committee said: Utah law provides that any person having reason to believe that a child has been abused or neglected 'shall immediately notify' certain officials. Thus, if an attorney believes a child has been abused or neglected, the attorney may notify certain officials of the attorney's belief without violating the Utah Rules of Professional Conduct. Utah State Bar Ethics Advisory Opinion Comm., Formal Op. 95-06 (1995) (citation omitted); see also Utah State Bar Ethics Advisory Opinion Comm., Formal Op. 97-12 (1998) (noting possible conflicts of attorney duties among the state mandatory child abuse reporting statute, state bar ethics rules, and the state constitution); District of Columbia Bar Legal Ethics Comm., Formal Op. 282 (1998) (discussing the dilemma created when attorneys utilize other professionals, such as social workers, who have a duty to report under a mandatory reporting law in a system where that reporting duty does not apply to attorneys); Robin A. Rosencrantz, Note, Rejecting "Hear No Evil, Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting, 8 *Geo. J. Legal Ethics* 327 (1995).

<sup>124</sup> For instance, California law provides that "age-appropriate spanking to the buttocks" is insufficient evidence to support court intervention in a child dependency proceeding. [Cal. Welf. & Inst. Code § 300\(a\)](#) (West 2008). Another possible exception that would permit a child's attorney to report suspected child abuse, even if it did not rise to the level of death or serious bodily injury, is if the state includes attorneys as mandated child abuse reporters. Although California does not, a number of states do include attorneys as mandated reporters. In Mississippi, Ohio, and Nevada, the general category of 'attorney' is specifically included in the list of mandatory reporters. . . . Ohio attorneys are listed among the professionals that must report child abuse, but they are statutorily exempted from reporting if the information is obtained in the course of the attorney- client relationship. Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 *Whittier J. Child. & Fam. Advoc.* 191, 193-94 (2005). In addition, in some states such as Indiana and New Hampshire, attorneys are mandated to report because they are included in "catch-all" phrases like "any other person," and in Texas the attorney-client privilege is abrogated under the reporting statute. *Id.* at 193.

<sup>125</sup> One of the earliest cases in which the United States Supreme Court reversed a trial court judgment based upon an improper closing argument involved a prosecutor who used "improper suggestions, insinuations, and especially, assertions of personal knowledge." [Berger v. United States, 295 U.S. 78, 85-88 \(1935\)](#) (emphasis added); see also [United States v. Garza, 608 F.2d 659, 664 \(5th Cir. 1979\)](#) (noting counsel "sought personally to bolster the credibility of . . . key witnesses . . . by reference to matters which were outside the record in the case"); [Russell, Inc. v. Trento, 445 So. 2d 390, 391 \(Fla. Dist. Ct. App. 1984\)](#) (noting counsel's personal facts injected into the closing argument). See generally Tucker Ronzetti & Janet L. Humphreys, *Avoiding Pitfalls in Closing Arguments*, Fla. B.J., Dec. 2003, at 36, 36- 38.

facts." <sup>126</sup> Therefore, if the attorney-guardian ad litem's recommendations to the court include reference to facts not presented in the dependency proceeding, the attorney not only commits error, but strips the child of the ability to rebut those facts and/or personal opinions. The child's attorney, thus, may become the strongest witness against the abused child witness, and the child is left with no means of rebutting the attorney's views that may be based upon evidence not even presented in the hearing. <sup>127</sup>

**[\*399]**

Second, the child's attorney's recommendations to the court can be analyzed as an alternative equivalent to unsworn testimony. Although an attorney's statements in closing argument are not "testimony," <sup>128</sup> if the attorney

<sup>126</sup> J. Alexander Tanford, *The Trial Process: Law, Tactics & Ethics* 382-83 (3d ed. 2002). "An attorney may not introduce or argue new matters during closing argument beyond the scope of admitted evidence." Roger Haydock & John Sonsteng, *Trial: Theories, Tactics, Techniques* 656 (1991). In closing argument an attorney cannot "express her own belief as to any issue" and may not "express a personal belief in the credibility of any witness." Peter L. Murray, *Basic Trial Advocacy* 374- 375 (1995). "Trial counsel should discuss only the admitted evidence. . . . To step beyond this boundary is to become an unsworn witness . . ." Marilyn J. Berger et al., *Trial Advocacy: Planning, Analysis, And Strategy* 570 (2d ed. 2008).

<sup>127</sup> In a system like the one in California that provides no guidance to children's attorneys on the quantum or extent of potential danger to children if they are returned home, the child, if represented by another attorney, could not only present affirmative rebuttal evidence against the child's attorney's conclusions regarding "best interest," but the new advocate could also attack the other attorney's basis for the conclusions that the child would be harmed if returned home. See [Cal. Welf. & Inst. Code § 317\(e\)](#). Consider, for instance, the following hypothetical: In a dependency case in which a single mother is alleged to have neglected her son based upon observations that there was no food in the refrigerator and that the mother left the boy unattended when she went to the apartment laundry room for an hour, the child during the initial attorney interview says that his mother sometimes yells at him. Also assume that the child's attorney believes that if the court takes jurisdiction in the case and orders the mother to attend parenting classes, it will be safe for the child to return home. But what about the mother's yelling at the boy? Does the language in section 317(e) that states "[c]ounsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child," id., prevent the attorney from arguing that the mother and child should be together? Some attorneys might conclude that the answer is obvious since it does not appear that merely "yelling" at the child is sufficient harm to separate the mother and child. However, [Cal. Welf. & Inst. Code § 300\(c\)](#) states that child abuse includes "serious emotional damage, or . . . substantial risk of suffering serious emotional damage." How is the child's attorney to determine whether "yelling" at the child-client is sufficient to cause serious emotional damage? Must the child's attorney consult a child and adolescent psychiatrist, or is the attorney just supposed to use the gut instinct of the reasonable person? In this hypothetical, if the attorney decides that the "yelling" is sufficient to place his child-client in danger of emotional damage, that attorney could conclude that section 317(e) forbids him from arguing for his child-client's desire to return home. If that occurs, since the "yelling" was not alleged and there was no evidence presented at trial regarding the "yelling," then the court will either conclude that the child's attorney believes the State's case regarding danger to the child, or that the attorney has some undisclosed misgivings about returning the child to his mother. Either way, the child will have no advocate and no procedural mechanism for arguing against his attorney's decision to not argue for the return of the boy. The child's attorney, by deciding not only that "yelling" takes place, but that the degree of "yelling" is so dangerous that the child should not return home becomes both the fact-finder and judge in the case. See Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use- dependent" Development of the Brain: How "States" Become "Traits"*, 16 *Infant Mental Health J.* 271, 273 (1995) (discussing the effects of yelling and other forms of emotional abuse on children and indicating that the effects of trauma such as yelling are dependent upon several variables, including "severity, frequency, nature, and pattern of traumatic events"); Daphne Simeon et al., *The Role of Childhood Interpersonal Trauma in Depersonalization Disorder*, 158 *Am. J. Psychiatry* 1027 (2001); Murray A. Straus & Carolyn J. Field, *Psychological Aggression by American Parents: National Data on Prevalence, Chronicity, and Severity*, 65 *J. Marriage & Fam.* 795 (2003).

<sup>128</sup> Although advocates and courts often interchange the terms "evidence" and "testimony," "testimony is only 'that evidence which comes from living witnesses who testify orally.'" [In re Jessica B.](#), 254 *Cal. Rptr.* 883, 891 (*Ct. App.* 1989) (citation omitted); William Wesley Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self- Incrimination in California Child Dependency and Parental Severance Cases*, 27 *Santa Clara L. Rev.* 299, 332-36 (1987). The term "evidence" is broader than the term "testimony" since out-of-court statements can be evidence, but cannot be testimony. [In re Jessica B.](#), 254 *Cal. Rptr.* at 891; see also [Belshe v. Dave Leese Concrete Pumping & Finishing, No. G029016, 2002 WL 1980736](#), at \*2 (Cal. Ct. App. Aug. 28, 2002) ("But closing argument is not evidence . . .").

presents new evidence outside the trial record in closing argument or during the attorney's recommendations to the court against his child-client's testimony and/or stated preferences, the effect of that new evidence is the same as if a witness were permitted to testify without the adverse party having an opportunity for confrontation. If the child's hybrid attorney-guardian ad litem's recommendations are based upon facts outside the record or based upon the attorney's personal knowledge, then the introduction of that new evidence should implicate the advocate-witness rule.<sup>129</sup> One of the main dangers of attorneys being permitted to present "unsworn" facts to the court [\*400] based upon the attorney's personal knowledge during closing argument is that it strips the client's ability to cross-examine the attorney.<sup>130</sup>

Some have argued that when an attorney acts in a way that has a prejudicial effect on the client, such as testifying against a client, informally presenting prejudicial information to the fact-finder, or otherwise creating a conflict of interest with the client,<sup>131</sup> that each action should be treated identically since each action has the same prejudicial effect on the client and upon the public's perception of the legal system. For instance, one court noted that "[t]he requirement of loyalty can be no less compelling when an attorney acts as a witness against a client rather than undertaking representation adverse to the client."<sup>132</sup> And as the court in *Estate of Waters* noted,

[c]ombining the roles of advocate and witness can [cause] prejudice . . . [because] [a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.<sup>133</sup>

The prohibition against attorneys testifying for their client, the advocate-witness rule, is "over 150 years old."<sup>134</sup> The advocate-witness rule is predicated upon a number of policies:

1) it eliminates the possibility that the attorney will not be a fully objective witness; 2) it reduces the risk that the trier of fact will confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's

<sup>129</sup> For instance, in *R.D. ex rel. Kareem v. District of Columbia*, the court noted that the attorney erred by narrating facts about a prior hearing to the court rather than either testifying as a witness or merely acting as an advocate. [R.D. ex rel. Kareem v. District of Columbia, 374 F. Supp. 2d 84, 91 \(D.D.C. 2005\)](#). Finally, it should be noted that plaintiffs' counsel put herself and her clients in a very uncomfortable position in this case. She sought both to represent her clients as litigating counsel both before the Hearing Officer and before this Court, while at the same time effectively "testifying" as to what did and did not occur at the relevant meetings. In the future, she must choose between testifying under oath or serving as counsel; she will not be permitted to do both. *Id.*

<sup>130</sup> [Estate of Waters, 647 A.2d 1091, 1097-98 \(Del. 1994\)](#); [People v. Schottl, No. H030237, 2007 WL 2219332](#) (Cal. Ct. App. Aug. 3, 2007). In California, the abused child in dependency proceedings is not only a formal party to the proceedings, but as a party the child has a right to confront and cross-examine witnesses, present evidence, make a closing statement, and is entitled to competent counsel. Compare [Cal. Welf. & Inst. Code § 317.5\(a\)](#) ("[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."), and § 317.5(b) ("[e]ach minor who is the subject of a dependency proceeding is a party to that proceeding."), with § 317(e) (providing that a child's counsel shall present evidence and shall examine or cross-examine witnesses), and Cal. Rules of Court, Family and Juvenile Rules § 5.530(b) (allowing an allegedly abused child to be present at the hearing), with § 5.534(k) (providing that parties have a right to confront and cross-examine witnesses and the right to present evidence).

<sup>131</sup> An actual conflict of interest exists when the attorney has independent information about facts in controversy relating to his client and would, therefore, be faced with the possibility of testifying." [United States v. Dyess, 231 F. Supp. 2d 493, 495 \(S.D. W. Va. 2002\)](#).

<sup>132</sup> [Bethlehem Steel Corp. v. Sercon Corp., 654 N.E.2d 1163, 1169 \(Ind. Ct. App. 1995\)](#).

<sup>133</sup> [Estate of Waters, 647 A.2d at 1097](#) (quoting Model Rules of Prof'l Conduct R. 3.7 cmt.).

<sup>134</sup> Jeffrey A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*, 94 Dick. L. Rev. 821, 821 (1990).

[\*401] arguments; <sup>135</sup> and 3) it reflects a broad concern that the administration of justice not only be fair, but also appear fair. <sup>136</sup>

The notion of attorneys testifying against their client is so inconsistent with the duty of loyalty and other fiduciary duties owed by attorneys that the American Bar Association did not even address the issue in its original 1908 Canons of Professional Ethics. <sup>137</sup> However, the ABA in the Model Code of Professional Responsibility provided that:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony may be prejudicial to his client. <sup>138</sup>

Whether an attorney may accept an appointment or whether the attorney during the representation of a client must withdraw based upon the attorney's prejudicial testimony against his client depends on the materiality of the counsel's testimony, and upon the degree of prejudice likely to be suffered by the client. <sup>139</sup>

#### [\*402]

Whether or not the advocate-witness rule applies to dependency proceedings in which the child's dual-role advocate makes recommendations against his child-client's express preferences, or in which the attorney questions the reliability of his child-client's testimony, involves two central questions: 1) what does "prejudicial to his client" mean?; and 2) are child abuse witness' due process and/or statutory rights to confrontation denied by not being able to cross-examine the attorney-witness?

b. Even in a Best Interest of the Child Statutory Scheme the Child's Attorney's Arguments against the Child are Prejudicial to the Abused Child-Client/Witness

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<sup>135</sup> One court has noted that the impact of attorneys presenting evidence against their clients is sufficiently impactful to cause prejudice whether or not the trial is before a jury or a judge as in the case of child dependency proceedings. "While the danger is greater when matters are tried to a jury, it does not disappear when the lawyer testifies in matters tried to the bench." [Dyess, 231 F. Supp. 2d at 496.](#)

<sup>136</sup> *Landmark Graphics Corp. v. Seismic Micro Tech., Inc.*, Nos. H-05-2618, H-06-1790, 2007 WL 735007, at \*4 (S.D. Tex. Jan. 31, 2007). "At the root of the rule lie three fundamental concerns: preventing injury to the client, preventing unfair prejudice to the opposing party and counsel, and preventing damage to the legal system." Linda Jegermanis, Note, *Danger at the Crossroads: Ethical Considerations for the Lawyer Seeking to Testify on Behalf of a Contingency Client After Anderson Producing Inc. v. Koch Oil Co.*, [59 Baylor L. Rev. 857, 865 \(2007\).](#)

<sup>137</sup> Stonerock, *supra* note 134, at 825-26. "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." [United States v. Abbell, 939 F. Supp. 860, 864 \(S.D. Fla. 1996\)](#); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 339 (1975) (noting that an attorney should not accept employment in a case where the attorney may have to testify on a material issue, and in such circumstances "[o]rdinarily a lawyer should withdraw from" representing the client).

<sup>138</sup> Model Code of Prof'l Responsibility DR 5-102(B) (1980) (emphasis added).

<sup>139</sup> Stonerock, *supra* note 134, at 828. Some argue that withdrawal under the advocate-witness rule is discretionary if the attorney's testimony is beneficial to the client, but withdrawal is mandatory if the testimony is harmful. Erik G. Luna, *Avoiding a "Carnival Atmosphere": Trial Court Discretion and the Advocate-Witness Rule*, [18 Whittier L. Rev. 447, 467 \(1997\)](#). See generally Barbara J. Moss, *Ethical Prohibitions Against a Lawyer's Serving as Both Advocate and Witness*, 23 *Memphis St. U. L. Rev.* 555 (1993). And Draft Rule 5-102(B) of the Model Code of Professional Responsibility provides that when "it is apparent that his testimony is or may be prejudicial to his client," the advocate-witness must withdraw." Luna, *supra*, at 467 (quoting the Model Code of Prof'l Responsibility).

Interpretations of "prejudicial to his client" have consistently defined the term in relation to the effect on the fact-finder of the attorney's inclusion of rebuttal facts against the client and/or the effect of the attorney's facts on the fact-finder's evaluation of the client's credibility.<sup>140</sup> For instance, Professor Wydick's definition requires the harm to be "sufficiently adverse to the factual assertions or accounts of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."<sup>141</sup> Clearly, if the child testifies that she wants to return home, or if the child's attorney informs the court of the child's wishes, but then the attorney either cross-examines the child or argues against the return to a potentially harmful home, the attorney's assertions to the court are adverse and prejudicial to the child's goal of returning home. "[N]o skilled advocate can accurately predict the extent to which the trier of fact may be influenced by a piece of damaging evidence extracted [or volunteered] from the client's own trial counsel."<sup>142</sup>

### [\*403]

The hybrid attorney-guardian ad litem model sanctioned in *In re Kristen B.* not only strips abused children of zealous, competent, confidential, and loyal representation, but perhaps of equal importance, it provides a court-sanctioned set of attorney ethical responsibilities that will often cumulate and magnify the emotional problems suffered by the very abused children that the court is attempting to protect.

### II. *In re Charlissee C.*: How Attorneys' Rules of Professional Conduct Concerning Concurrent and Successive Conflicts of Interest Increase Child-Client/Witnesses' Psychological Harm

*In re Charlissee C.* is unique because it involved an alleged conflict of interest involving a law firm, Children's Legal Counsel (CLC), which had previously represented a party when that party had been a child, but who was, at the time of the controversy giving rise to this case, an adult against whom CLC took a diametrically opposed legal position.<sup>143</sup> *In re Charlissee C.* not only involves a question of a conflict of interest, but also highlights the potential effects of ethical violations on abused children and upon those children as they mature. Although a perceived violation of the duty of loyalty owed to an adult client may lead that adult to distrust the legal system or to be angry with the attorney, a breach of the duty of loyalty owed to a young abused child or an abused child who had since grown into early adulthood, like the mother in *In re Charlissee C.*, can cause lasting psychological harm and heighten the child's psychopathology initially precipitated by the child abuse itself.<sup>144</sup> The effects of ethical violations often have a greater psychological impact on those who have suffered child abuse than on non-abused adult clients:

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<sup>140</sup> For instance, in one case during plea negotiations a criminal defendant's attorney informed the district attorney of a conversation that he and the defendant had regarding the effect of police seized drugs being destroyed before trial. The Board of Professional Responsibility of the Supreme Court of Tennessee held that if the attorney's statements to the district attorney were not privileged, and if the district attorney called the public defender to testify, the public defender is "prohibited from continuing to represent the client as it appears that the testimony may be prejudicial to the client." Formal Op. 84-F-66 (1984). In *People v. Rodriguez*, the court held that a criminal defendant was denied effective counsel when the prosecutor examined the defendant's attorney who presented testimony that "nullified" the defendant's sole defense theory. [People v. Rodriguez, 171 Cal. Rptr. 789, 800 \(Ct. App. 1981\)](#). The Rodriguez court further noted that "[t]o require a criminal defendant's attorney to testify against his client on a material issue so diminishes the attorney's effectiveness on behalf of his client that it infringes on the right to counsel." *Id.*

<sup>141</sup> Richard C. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 U.C. Davis L. Rev. 651, 689 n.198 (1982).

<sup>142</sup> Wydick, *supra* note 141, at 700; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 339 (1975) ("The most skilled advocate cannot always accurately assess the impact of any testimony upon the trier of facts and the prejudice likely to result from the prospect of unfavorable testimony being elicited from a party's trial advocate must be carefully considered with the client."); Stonerock, *supra* note 134, at 856 ("This situation [of the attorney providing facts against the client] presents the greatest threat to the client of all the situations in which the advocate-witness rule exists to protect him.").

<sup>143</sup> [In re Charlissee C., 194 P.3d 330, 332-33 \(Cal. 2008\)](#).

<sup>144</sup> Child abuse victims have "rates of PTSD of greater than 30%" and "children in foster care are some [sixteen] times more likely to have psychiatric diagnoses, eight times more likely to be taking psychotropic medications and utilize psychiatric services

The abused child, already betrayed by a trusted adult, has finally taken a substantial emotional risk by having faith in her attorney. She has relied upon the attorney to protect and argue her case. What must she think when yet another trusted adult abandons her? The jurogenic effects of the legal system re-victimize the child. <sup>145</sup>

**[\*404]**

It is critical for attorneys, judges, and legislators to understand that the single greatest determinant of the length and seriousness of an abused child's psychopathology is the degree of betrayal by a trusted adult that is experienced by the child. "[B]etrayal in abuse dynamics" has proven to be the most "significant abuse characteristic" related to long-term levels of serious emotional distress in survivors, and "[b]etrayal can lead to depression, anger, dependency, and problems in relationships with others." <sup>146</sup> Further, "[p]hysical and/or sexual abuse at the hands of trusted caregivers is strongly associated with feelings of distrust of others, disconnection, and isolation in adulthood." <sup>147</sup>

The psychological vulnerability of abused children does not magically end when they turn eighteen years old. <sup>148</sup> Although much legislation has a "young-child bias," empirical evidence demonstrates that older child witnesses are equally vulnerable to being re-traumatized by the legal system. <sup>149</sup> Not only do "older youths in the foster care system have a disproportionately high rate of psychiatric disorders," <sup>150</sup> older abused children often suffer trauma induced by the legal system for a longer period than do young children. <sup>151</sup>

Thus, when courts consider conflicts of interest regarding abused children and young adults, like the mother in *In re Charlissee C.*, who was abused and spent years in the dependency system, <sup>152</sup> they must focus not only on the duties of confidentiality, zealousness, and competence, but must also closely inspect the duty of loyalty from the mindset of the abused child. For example, [\*405] consider the following hypothetical dependency proceedings that involve possible conflicts of interest.

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at a rate eight times greater compared with children from similar socio-economic backgrounds and living with their families." Racusin et al., *supra* note 7, at 202-03.

<sup>145</sup> William Wesley Patton, *The Interrelationship Between Sibling Custody and Visitation and Conflicts of Interest in the Representation of Multiple Siblings in Dependency Proceedings*, 23 *Child. Legal Rts. J.*, Summer 2003, at 18, 29 [hereinafter Patton, *Sibling Custody and Visitation*]; see also William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement*, 38 *Suffolk U. L. Rev.* 303 (2005) [hereinafter Patton, *Revictimizing*] (providing an extended discussion of the pediatric psychiatric literature concerning the effects of the legal system on abused and/or neglected children).

<sup>146</sup> Banyard & Williams, *supra* note 16, at 862. See text accompanying note 16.

<sup>147</sup> Cloitre et al., *supra* note 17, at 414. See text accompanying note 17.

<sup>148</sup> See Alexander, *supra* note 13, at 346; Mary Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 *Crim. Just. J.* 1, 3 (1983); John N. Briere & Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, *Sexual Abuse Child.*, Summer/Fall 1994, at 54, 63; Steven J. Collings, *The Long-Term Effects of Contact and Noncontact Forms of Child Sexual Abuse in a Sample of University Men*, 19 *Child Abuse & Neglect* 1, 5 (1995). The mother in *In re Charlissee C.* was only nineteen years old and was a former juvenile dependency court ward. *In re Charlissee C.*, 194 P.3d 330, 332-33 (Cal. 2008).

<sup>149</sup> An example of a "young-child bias" is contained in legislation that was proposed in California. "That bill would [have] provide[d] that in child dependency proceedings: 'If a child under the age of [fourteen] will be testifying at the hearing, the juvenile court shall exclude members of the public from that portion of the hearing . . .'" Patton, *supra* note 32, at 51 (quoting Proposed Cal. Welf. & Inst. Code § 346.1)).

<sup>150</sup> J. Curtis McMillen et al., *Prevalence of Psychiatric Disorders Among Older Youths in the Foster Care System*, 44 *J. Am. Acad. Child. & Adolescent Psychiatry* 88, 92 (2005).

<sup>151</sup> Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, *Monographs Soc'y for Res. Child Dev.*, July 1992, at 1, 13-14, 45-47.

<sup>152</sup> *In re Charlissee C.*, 194 P.3d at 332.

In Hypothetical One, assume that a law firm, Children First, has three separate law offices partitioned by ethical walls. An attorney in Office #1 had represented a child client, Amber, when she was seven years old in a proceeding in which it is alleged that her mother abused her. The attorney in Office #1 argued that in spite of Amber's medical condition, severe diabetes, she should be placed with her aunt, not with a medically trained foster family. Although Amber initially did not trust her Office #1 attorney, over time they developed a good relationship. Amber lived with her aunt for twelve months before being reunited with her mother. Eight years later when Amber turned fifteen years old, Amber's mother was alleged to have neglected Amber's three year old sister, Samantha, by not preventing Amber from physically abusing her younger sister. The attorney in Office #1, who had represented Amber in the earlier proceeding, had since left the firm and the court appointed a dependency attorney from another law firm to represent Amber. The trial court appointed an attorney in Office #3 from Children First to represent Samantha. The Office #3 attorney called Amber to the stand as a hostile witness and zealously cross-examined her regarding her alleged abuse of her younger sister, Samantha.

Hypothetical One shares many salient characteristics with *In re Charlissee C.* For instance, both cases involve conflicts of interest in successive representation contexts since the law firm previously represented Amber, but subsequently represented her sister Samantha in a new proceeding based upon different facts.<sup>153</sup> In this hypothetical assume that unlike the facts in *In re Charlissee C.*, no facts indicate that the attorney in Office #3 has any knowledge of or access to any confidential data regarding Amber gleaned by the attorney in Office #1 during Children First's earlier representation. According to *In re Charlissee C.*, Hypothetical One does not present any facts that support a finding that there is a conflict of interest in the attorney in Office #3 representing Amber's sister, Samantha, because there is no possibility that that attorney had access to confidential information derived from the previous representation of Amber by the attorney in Office #1 of Children First.<sup>154</sup>

However, in light of the pediatric psychiatric data discussed, *supra*, courts should also consider whether the representation of Samantha by Office # 3 creates a situation in which an abused child, like Amber, could reasonably conclude that the representation was a violation of the duty of loyalty. For a moment, place yourself in Amber's shoes. She learned to depend upon the law firm in her earlier representation, and she developed a trust relationship with [\*406] her attorney in Office #1. Unlike adult clients, it is unreasonable to believe that an abused child has the sophistication to understand that each of the three law offices within the same firm are controlled by ethical walls and that no data supplied by Amber can or will be shared with attorneys in the other two offices. In addition, try to imagine what is going through Amber's mind while she is being zealously cross-examined by an attorney from the firm that previously represented her. From Amber's perspective, the attorney is a turn-coat who is trying to prove that she violated the law and harmed her sister. Amber could reasonably conclude that other adults with whom she has developed a trust relationship have violated that trust and loyalty and are now trying to do her harm. Thus, as the psychiatric data demonstrates, Amber's psychological equipoise will again become unbalanced and she will be reluctant to form new bonds and trust relationships.

In Hypothetical Two, assume that the original attorney in Office #1 who represented Amber in the prior dependency proceeding transfers to Office #3 and is appointed to represent her sister, Samantha. Assume also that in this successive representation, no facts gleaned by the attorney in his prior representation of Amber are relevant and/or admissible in this subsequent dependency proceeding. Therefore, under *In re Charlissee C.*, since no confidential data is at stake or can be admitted against the prior client, the court would likely find no conflict of interest requiring the removal of the attorney from representing Samantha in the subsequent case.<sup>155</sup>

However, again, what must Amber be feeling as her previously trusted attorney now cross-examines her in the subsequent dependency proceeding? In light of the pediatric psychiatric literature, and in light of the legislative

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<sup>153</sup> [Id. at 332.](#)

<sup>154</sup> See [id. at 342](#) ("[I]n deciding whether to disqualify CLC. . . the juvenile court should have determined whether CLC has adequately protected, and will continue to adequately protect, Shadonna's confidences. . .").

<sup>155</sup> *Id.*

public policy of perfecting the best interest of children, how can courts approve a conflict of interest rule that will elevate our abused children's emotional disquietude and lead them further down a lifelong path of an inability to trust others and develop social bonds?

The court in *In re Charlissee C.* seemed to support a very narrowly crafted conflict of interest rule for successive representation cases in child dependency proceedings because "[m]otions to disqualify counsel are especially prone to tactical abuse" and "disqualification imposes heavy burdens on both the clients and courts . . . [as] clients are deprived of their chosen counsel, litigation costs inevitably increase and delays inevitably occur."<sup>156</sup>

None of the policies articulated by *In re Charlissee C.* justify forcing abused children to suffer conflicts of interest that may substantially enhance pre-existing psychopathology based upon their reasonably perceived violations of the duty of loyalty. First, unlike in ordinary adult criminal and civil cases, there [\*407] is simply no proof that there has been a pattern or history of attorney disqualification cases in child dependency actions brought solely for tactical advantage. In almost every case, parties in dependency proceedings are represented by court-appointed attorneys,<sup>157</sup> not privately retained counsel, and there is rarely a tactical advantage to be derived by requesting a substitution of counsel.

Second, unlike many adult criminal actions and most general civil litigation, parties in dependency proceedings usually do not have a right to choose their own attorneys. Thus, in *In re Charlissee C.*, the disqualification of CLC from representing the mother's child would not have stripped that child of the right to choose a particular attorney to represent her since she does not have a right to a specific attorney of her choice. For instance, in an ordinary civil case there is a policy basis for not substantially reducing a former client's burden of proving that a conflict of interest is sufficient to have her former attorney removed from the successive representation.<sup>158</sup> In the ordinary case we balance "the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation" with "the freedom of the subsequent client to counsel of choice."<sup>159</sup> However, in most dependency cases that involve very young or pre-verbal children, the policy of allowing a client liberal choice among counsel who will represent them is not implicated. Instead, young children in the dependency system are merely appointed an attorney rather than being given the opportunity to select from a list of attorneys.<sup>160</sup> Thus, in most dependency cases, a liberal definition of conflicts of interest in successive representation cases will not diminish the policy of providing clients free reign in selecting their own attorney. That is why in dependency cases we can further the central goal of the system of protecting the physical and emotional [\*408] health of abused children by considering the psychological impact on the child of her attorney's potential ethical breach. That is also why in dependency cases involving successive representation we can afford to focus on all the ramifications of the attorney's ethical breach, not merely on a potential breach of confidentiality.

Third, the court's concern with litigation costs, without a consideration of the costs associated with not disqualifying attorneys, is very misleading. For instance, assume that the court in *In re Charlissee C.* had disqualified CLC and

<sup>156</sup> *City of Santa Barbara v. Superior Court*, [18 Cal. Rptr. 3d 403, 406 \(Ct. App. 2004\)](#).

<sup>157</sup> See, e.g., Ctr. for Families, Children & the Courts, Admin. Office of the Courts, California Juvenile Dependency Court Improvement Program Reassessment 2-2, 2-3 (2005). The court must appoint counsel for a child unless it finds that the child would not benefit from legal representation. . . . In the statewide survey of judicial officers hearing dependency matters, all the respondents who preside over detention hearings indicate that they assign an attorney for the child almost 100 percent of the time. . . . The court must appoint counsel for any parent or guardian unable to afford counsel if the child has been removed or the child welfare agency is requesting removal from the family home, unless the court finds that the parent or guardian has knowingly and intelligently waived the right to counsel. *Id.*

<sup>158</sup> See *Derivi Constr. & Architecture, Inc. v. Wong*, [14 Cal. Rptr. 3d 329, 332 \(Ct. App. 2004\)](#).

<sup>159</sup> *Id.* (quoting [Flatt v. Superior Court](#), [885 P.2d 950, 954 \(Cal. 1994\)](#)).

<sup>160</sup> See, e.g., [Cal. Welf. & Inst. Code § 317\(c\)](#) (West 2008) (requiring that "[i]f a child is not represented by counsel, the court shall appoint counsel for the child").

appointed a dependency panel attorney from a different law firm to represent the mother's child. Unlike privately retained counsel in civil and criminal cases, appointed counsel in dependency cases are often paid a very minimal flat fee of just a few hundred dollars for multiple years of representation.<sup>161</sup> In addition, a conflict of interest rule that also considers the duty of loyalty in successive representation cases will not open the floodgates to attorney disqualification since the moving party will still have to demonstrate: 1) either that the cases are substantially related and that the attorney or firm has confidential data regarding the prior client; 2) demonstrate that the successive representation will adversely affect the prior client's right to loyal representation; or 3) prove that waiving the conflict is not in the abused child's mental health best interests. Therefore, the fiscal impact will only involve a few instances in which disqualification is ordered in proceedings involving minimal flat fee attorney costs.

However, that minimal increase in attorney fees must be balanced against the cost of additional psychiatric services for abused children whose psychopathology is aggravated by the perceived breach of loyalty. The cost of the psychological effects of violations of loyalty goes well beyond the dollars necessary to provide treatment for abused children. The reality is that these children may not get any timely psychological treatment at all because the mental health services system is already overtaxed. For instance, "[i]n California, unmet need for mental health services is estimated to be 80.6%, significantly exceeding the national average of 64.7%."<sup>162</sup> Therefore, these children may linger without being provided appropriate state-funded mental health treatment.

Finally, the court's concerns in *In re Charlisse C.* about delays in litigation are simply misplaced. Conflicts of interest in successive child dependency proceedings will be obvious at the earliest phases of the proceedings and will rarely develop during the future representation. For instance, in *In re Charlisse C.* the law firm and its attorney in Office #3 could have checked the firm's computer client database after the detention hearing and found that a potential conflict [\*409] of interest existed because the firm had previously represented the mother. Just so, in *Hypotheticals One and Two* it would have been extremely simple to determine whether the law firm had previously represented Amber before deciding whether or not to represent her sister, Samantha.<sup>163</sup> If courts factor abused children's reasonable conceptions of trust and loyalty in determinations of conflicts of interest in successive dependency proceedings, courts and attorneys will be more vigilant in determining early in the dependency proceedings whether conflicts exist or whether they probably will arise during the successive representation.

Courts must consider the policies underlying the application of the rules of professional responsibility to both sides of a case in resolving conflicts of interest. Although successive representation may be viewed, as it was in *In re Charlisse C.*, as mainly a risk of violating the duty of confidentiality,<sup>164</sup> an abused child may well see the risk as a breach of loyalty to her as a former client in a prior relationship built on trust and on loyalty.

The central policy of state child protection statutory schemes is to protect children's best interests.<sup>165</sup> For example, the California dependency system has been tailored to protect and to minimize the jurogenic effects on abused children. The hearings are confidential;<sup>166</sup> the minor's testimony can be taken in chambers outside the

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<sup>161</sup> See, e.g., Patton, *supra* note 45, at 32.

<sup>162</sup> Bonnie T. Zima et al., Quality of Public-Funded Outpatient Specialty Mental Health Care for Common Childhood Psychiatric Disorders in California, 44 *J. Am. Acad. Child & Adolescent Psychiatry* 130, 131 (2005).

<sup>163</sup> See Patton, *Sibling Custody and Visitation*, *supra* note 145, at 18-34 (discussing the method of determining conflicts of interest among multiple siblings in dependency proceedings in a way that minimizes court delays and permanency for abused children).

<sup>164</sup> See *In re Charlisse C.*, 194 P.3d 330, 332 (Cal. 2008).

<sup>165</sup> See *Cal. Welf. & Inst. Code § 300.2* (West 2008) ("[T]he purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection . . . and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.").

<sup>166</sup> § 346.

presence of the alleged abuser; <sup>167</sup> evidentiary presumptions of abuse have been crafted to reduce the need for the young abused child's testimony; <sup>168</sup> the juvenile case file is confidential; <sup>169</sup> the central goal and purpose of the dependency system is to provide abused children with "maximum safety and protection" for both "physical and emotional well-being;" <sup>170</sup> a child's appointed attorney is "charged in general with the representation of the child's interests" and the child's protection and safety; <sup>171</sup> and, unlike many adults who receive court-appointed attorneys, children's attorneys are appointed for the duration of the abused child's dependency court proceedings in order to reduce additional trauma to the child from [\*410] having a succession of attorneys represent the child. <sup>172</sup> Since legislators have already determined that cases involving victims and witnesses of child abuse require specialized court and evidentiary procedures, it is time for those institutions to also realize that conflict of interest rules must be tailored to meet children's best mental health interests as well. Thus, the protective policies of the dependency system require conflicts of interest to be analyzed slightly different than those issues might be analyzed in cases not involving abused children.

#### A. There was Sufficient Evidence in *In re Charlissee C.* to Support the Trial Court's Determination that the Ethical Walls did not Shield the Mother's Confidential Data from Other CLC Attorneys or from the CLC Director

In a case alleging a conflict of interest based upon successive representation of clients with potentially adverse interests, the former client has two means of demonstrating sufficient evidence to support removal of her former attorney from the subsequent case. First, the former client can demonstrate that the "former attorney possesses confidential information adverse to the former client." <sup>173</sup> In *In re Charlissee C.*, the trial court found that sufficient ethical walls did not exist in CLC's three-firm structure. <sup>174</sup> Therefore, it was quite possible that many confidential and intimate facts discovered through the previous attorney-client relationship were accessible to attorneys in each of CLC's three offices. The former client need not show "actual possession of confidential information" in order to support a conflict of interest claim. <sup>175</sup> Rather, all that the former client needs to demonstrate is a substantial relationship between the prior and current representation to create a presumption of disclosure of confidential data:

When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been

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<sup>167</sup> § 350(b).

<sup>168</sup> § 355.1.

<sup>169</sup> § 827(a)(1).

<sup>170</sup> § 300.2.

<sup>171</sup> § 317(e).

<sup>172</sup> See § 317(d) (providing that "[t]he counsel appointed by the court shall represent the . . . child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the . . . child unless relieved by the court upon the substitution of other counsel or for cause.").

<sup>173</sup> *Derivi Constr. & Architecture, Inc. v. Wong*, [14 Cal. Rptr. 3d 329, 332 \(Ct. App. 2004\)](#).

<sup>174</sup> *In re Charlissee C.*, [194 P.3d 330, 334 \(Cal. 2008\)](#). Furthermore, Justice Turner's dissent in the lower court of appeals summarizes the evidence presented at trial regarding the opportunities for attorneys in each of CLC's three different offices and for the CLC director to gain access to confidential data regarding cases being handled in the different law firms. *In re Charlissee C.*, [58 Cal. Rptr. 3d 173, 197 \(Ct. App. 2007\)](#) (Turner, J., dissenting).

<sup>175</sup> *Derivi Constr. & Architecture, Inc.*, [14 Cal. Rptr. 3d at 332](#).

imparted to the attorney or to subordinates for whose legal [\*411] work he was responsible, the attorney's knowledge of confidential information is presumed.<sup>176</sup>

Courts have identified a number of variables to consider when deciding whether there is a substantial relationship between representation of a former client and the successive representation of a new client. Courts should "focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the case."<sup>177</sup> In addition, any presumptive confidential information about the former client will be imputed to all attorneys in the firm, whether partners or associates.<sup>178</sup> Finally, "[a]s part of its review, the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy."<sup>179</sup>

CLC's role, in *In re Charlissee C.*, in arguing for the best interest of the mother's child is almost identical to the role CLC played earlier while representing the mother when she was an abused child. The cases involve the same dependency law, the same juvenile rules of court, the same legal issues of abuse and/or neglect, and the same burdens of proof and evidentiary standards.<sup>180</sup> The CLC lawyers' roles were identical in both cases since that role is specifically defined by the same statute, section 317(e) of the California Welfare and Institutions Code. The attorneys' duties of confidentiality, loyalty, competence, and zealousness were identical toward both the mother as a former child client and the successive representation of her daughter in *In re Charlissee C.* The nature and extent of CLC's involvement in the two cases is almost identical, not merely similar. And the type of work performed was also almost identical in representing the mother and then her daughter.

There is also a fourth policy implicated when a law firm that previously represented an abused child in dependency court represents that former client's child.

The paramount concern . . . must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. The recognized [\*412] and important right to counsel of one's choosing must yield to considerations of ethics that run to the very integrity of our judicial process.<sup>181</sup>

Not only will permitting such successive representation, as in *In re Charlissee C.*, lower the public's trust of the legal system and the integrity of the bar, it may very well serve as a grand disincentive for abused children to trust their dependency court attorneys for fear that their confidential data might be released in subsequent cases. If the word spreads among dependent children that their confidential conversations with their attorneys might be at risk of disclosure in subsequent cases, that knowledge might dissuade those children from proffering critically important material to their dependency court attorney, thus hampering that attorney's ability to provide zealous and competent representation. The best policy in determining whether successive dependency clients can be represented by the same attorney or law firm is to very broadly define the term substantial relationship and to place a heavy burden upon the attorney and/or law firm arguing that the successive representation will not only not involve a potential

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<sup>176</sup> *Rosenfeld Constr. Co. v. Superior Court*, 286 Cal. Rptr. 609, 613 (Ct. App. 1991) (quoting *Global Van Lines, Inc. v. Superior Court*, 192 Cal. Rptr. 609, 613 (Ct. App. 1983)).

<sup>177</sup> *H. F. Ahmanson & Co. v. Salomon Bros.*, 280 Cal. Rptr. 614, 620 (Ct. App. 1991) (quoting *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 760 (2d Cir. 1975)).

<sup>178</sup> *Rosenfeld Constr. Co.*, 286 Cal. Rptr. at 612; *People ex rel. Dept. of Corps. v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 383 (Cal. 1999).

<sup>179</sup> *Huston v. Imperial Credit Commercial Mortgage. Inv. Corp.*, 179 F. Supp. 2d 1157, 1167 (C.D. Cal 2001) (discussing California rules of professional responsibility pursuant to conflicts of interest under Rule 3-310).

<sup>180</sup> *In re Charlissee C.*, 194 P.3d 330, 332-44 (Cal. 2008).

<sup>181</sup> *In re Complex Asbestos Litig.*, 283 Cal. Rptr. 732, 740 (Ct. App. 1991).

breach of confidentiality and/or loyalty, but also that it will not affect the abused child's mental health or lower the public's confidence in the legal system.

#### B. The Successive Representation in In re Charlisce C. Also Created a Conflict of Interest with their Current Child-Client

When CLC accepted representation of the mother's child, it owed that child not only the duties of confidentiality and loyalty, but also the duties of zealousness and competence. Since CLC had possession of confidential data relating to the mother from its previous representation, and since CLC was arguing a position for the child adverse to their former client's current expressed interests, CLC was caught in an ethical quagmire. In terms of CLC's duty of loyalty to their existing client, they had to consider the child's best interest unfettered by the desire to protect the prior confidential data gleaned during the representation of the mother. CLC could not explain to its new pre-verbal child-client that they had material data that could possibly assist that child-client, but that because of their prior legal relationship with the mother, they could not use it.<sup>182</sup> CLC could not explain to the new child-client that the [\*413] zealousness and competence of their representation could be hampered by their former representation of the mother.<sup>183</sup> For instance, assume that CLC gained confidential data from the mother during the former representation. Assume also that that same data is now acquired from an independent source in the successive representation of the current child-client outside of the previous attorney-client relationship with the mother. Any other attorney not associated with the former representation of the mother could easily marshal that non-confidential data; however, CLC, at best, would have to demonstrate that the information that was first discovered confidentially was subsequently discovered from an independent source, and that use of the data would not indirectly violate the duty of confidentiality and loyalty to the mother as a former client. That burden of proving independent discovery places an unacceptable burden on CLC in its current representation of the mother's child. It is important to realize that although it was the mother who raised the conflicts of interest issue, that issue may substantially affect and/or impair the legal rights of both the mother and her daughter, CLC's new child-client.

#### C. The Attorney's Representation of the Mother's Child Violated California Rules of Professional Responsibility, Rule 3-310(e), Because Informed Written Consent for the Successive Representation was not Obtained

The California Rules of Professional Responsibility provide: "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."<sup>184</sup>

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<sup>182</sup> Since the mother directly raised the conflicts of interest issue, and if CLC determined that their child-client did not have the capacity to consider the conflicts issue and make a reasoned choice between getting a new lawyer or continuing with CLC's representation, it would have been wiser for CLC to have requested the appointment of a guardian ad litem who could make a substitute consent decision for the child. CLC, embroiled in the politics of the conflicts issue, may not have been sufficiently neutral to make such an important decision for the child. The conflicts issue further demonstrates the ethical problems created by the appointment of a hybrid attorney-guardian ad litem because the attorney, while acting as the guardian ad litem, can hardly be found sufficiently neutral to determine his or her ethical conflict in the role as attorney. Thus, at the very least, a new guardian ad litem should be appointed to help decide the conflicts issue.

<sup>183</sup> Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 504 (2000), available at <http://www.lacba.org/showpage.cfm?pageid=429> (suggesting that if a dependent child lacks capacity to make some informed decisions, such as those regarding disclosure of confidential statements, the dependency attorney may seek appointment of a guardian ad litem to assist in the decision-making); see also Patton, *supra* note 111, at 72 (discussing the implications of appointing a guardian ad litem in such context).

<sup>184</sup> Cal. Rules of Prof'l Conduct R. 3-310(E) (2009).

It was not disputed in *In re Charlisse C.* that CLC obtained confidential information regarding the mother during its representation of her as a younger abused child.<sup>185</sup> Much of that prior information could be material in the [\*414] subsequent case.<sup>186</sup> For instance, CLC could marshal the mother's background to demonstrate that she lacks the appropriate skills or character to remain a custodial parent. Any confidential information that the mother provided CLC during the prior representation might be material to the issue in *In re Charlisse C.* regarding whether the mother should maintain custody of her child. However, mandatory withdrawal from a case in which there is a conflict of interest based upon the acquisition of confidential data during prior representation is not limited to cases in which an attorney actually might use that confidential data.<sup>187</sup> Rather, the duty to withdraw arises when the attorney has acquired confidential data that could be used since the former client has no way of knowing what the attorney intends to do with that confidential data.<sup>188</sup> The former client does not have the power to prove what is in the mind of the attorney.<sup>189</sup> Withdrawal, even without the former client's consent, is mandatory under such circumstances because even if the confidential data is not used in the subsequent litigation, the possibility of its use against the former client threatens the duty of confidentiality and/or loyalty.<sup>190</sup> Rule 3-310 of the California Rules of Professional Conduct "defines specific situations in which an attorney's loyalty to an individual client or former client may be impaired and requires the attorney to take specific steps to address each specific situation."<sup>191</sup>

Pursuant to Rule 3-310, CLC had only two options. It could have refused the initial appointment to represent the mother's child based upon the obvious conflict of interest, or obtained the mother's written consent to the conflict of interest. Unfortunately, CLC did not exercise either of those options, but instead accepted representation of the mother's child without obtaining the mother's and her daughter's<sup>192</sup> written consent.<sup>193</sup>

**[\*415]**

Conclusion

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<sup>185</sup> Compare *In re Charlisse C.*, 194 P.3d at 340 ("CLC does not dispute that a substantial relationship exists between the subjects of the former and current representations . . . ."), with *Flatt v. Superior Court*, 885 P.2d 950, 954 (Cal. 1994) ("Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation . . . is presumed . . . .").

<sup>186</sup> See *In re Charlisse C.*, 194 P.3d at 340 ("CLC does not dispute that a substantial relationship exists between the subjects of the former and current representations . . . .").

<sup>187</sup> See *Flatt*, 885 P.2d at 950 (indicating that the test for disqualification in cases of successive representation is whether the two representations are substantially related).

<sup>188</sup> See *id.* (noting that when a "substantial relationship [exists] between the [two representations] . . . disqualification of the attorney's representation of the second client is mandatory").

<sup>189</sup> *Rosenfeld Constr. Co. v. Superior Court*, 286 Cal. Rptr. 609, 613 (Ct. App. 1991).

<sup>190</sup> See *Flatt*, 885 P.2d at 953.

<sup>191</sup> Richard A. Zitrin & Carol M. Langford, *Legal Ethics In The Practice Of Law: Rules, Statutes And Comparisons* 1999, at 276 (1999).

<sup>192</sup> See *In re Mary C.*, 48 Cal. Rptr. 2d 346, 349-50 (Ct. App. 1995) (discussing the difficulty in securing informed consent for conflicts of interest from young children).

<sup>193</sup> Thus, CLC not only violated the express dictates of Rule 3-310(E), it also violated Rule 3-700(B)(2) that provides that an attorney shall withdraw from employment if "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act." Cal. Rules of Prof'l Conduct R. 3-700(B)(2) (2009).

Legislators and courts must avoid legal decisions that will needlessly exacerbate abused children's destabilized emotional health. <sup>194</sup> This Article has demonstrated that rules of evidence and rules of professional responsibility often do not adequately consider the effects of those procedures and ethical mandates upon abused children's psychopathology. Obviously, before child and adolescent psychiatric empirical data can affect legal rules and standards of ethics, they must be introduced into the legal process dialogue. In order to ensure accurate and informed consideration of psychological literature, not only should judges and attorneys who frequently litigate child abuse and/or neglect allegations be mandated to attend continuing education courses on child psychology and maturation, experts from the mental health profession should be appointed on legislative and judicial committees which are drafting juvenile procedures and rules of professional ethics. Finally, children's attorneys in jurisdictions that define their role not as zealous advocates for the child's stated preferences but rather as best interest protectors, need to broaden their definition of best interest to include the additional emotional trauma suffered by abused children whose trusted adult counsel is considering an act which may reasonably be perceived by that abused child as just another in a series of breaches of loyalty and/or confidentiality. If the central mission of the child dependency system is promoting the best interest of children, then the system must take into consideration not only alleged past and prospective harms, but it must also calculate the complete jurogenic effects of the legal machinery upon the child victim.

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<sup>194</sup> Children abused by trusted adults have feelings of "mistrust," "betrayal," and a "fear of intimacy," but they also lack a "template for developing self-defense behaviors," and are thus at risk of further psychological trauma. Thomas, *supra* note 18, at 21-22.