ACADEMIC LITERATURE ON CHILD REPRESENTATION IN 2010

Introduction

In our needs assessment we sought to identify all the academic articles from 1994 on that address child representation. The articles are abstracted on our website with live links available to the full articles (http://www.improvechildrep.org/ChildRep2010/AcademicLiterature.aspx). Our intention is to develop a data base for scholars, policymakers and students who wish to study and improve upon existing practice. In the next year we intend to supplement this listing with the classic academic articles on the subject that date back to the original 1974 federal CAPTA legislation. Here is a summary.

The lawyers, judges, legislators, academics, and advocates that devote their careers to serving children and families are united by passion for the work. Their dedication is reflected not only in the time and emotion poured into direct service, but also in the countless hours invested in debating and developing principles to guide the field. As these professions approach forty years of federal legislation on child abuse and neglect prevention, the opportunity to negotiate consensus on guiding principles and cover new and crucial ground in legal practice is apparent.

This literature review is intended to frame discussion of the responsibilities, roles, and duties of child representatives. It provides: an overview of the law defining child representation; an examination of the question of whether a lawyer must be appointed for the child; a review of the commentary on the best role or roles of the child representatives; a description of the applicable recommendations and standards promulgated by authoritative bodies and significant conferences. Additionally, it considers, perhaps most critically, preferred practices for child representatives, and concludes with a discussion of systemic challenges and progress.

Federal and State Statutes: Content, Compliance, and Enforcement

In 1974, Congress passed the first comprehensive legislation on child abuse and prevention, the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA required states to provide a legal representative (Guardian ad litem) for children in protective proceedings, but did not describe qualifications, training, or responsibilities of the representative. Congress reauthorized CAPTA in 1996, amending it to state that a lawyer may be appointed as a GAL and that the GAL’s role is “to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child.” The Guidelines developed in response to the Presidential Initiative Adoption 2002 urged individual states to establish practice standards for attorneys representing children. CAPTA was again amended in 2003 in order “to ensure higher quality representation and to bar appointment of

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1 Thanks to Julian Darwall, a second year law student at New York University Law School and the principal drafter of this literature review.
untrained or poorly trained court-appointed representatives for children.\(^4\) CAPTA now requires appointment of “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),” to obtain first-hand, a clear understanding of the situation and needs of the child, and to make recommendations to the court concerning the best interests of the child.\(^5\) CAPTA is currently pending reauthorization in Congress.\(^6\)

Commentators have noted that while CAPTA guidelines have been adopted in whole or in part by each state, adherence to its GAL appointment mandates and adequate GAL training remains a problem.\(^7\) Skepticism has been expressed about federal data, assessment of state compliance, and enforcement.\(^8\) Gerard Glynn notes that, understandably, few advocate for enforcement remedies involving denial of federal funding, which would make the plight of foster children in offending states worse.\(^9\) Glynn contends that CAPTA has neither a detailed monitoring system nor an effective enforcement mechanism.\(^10\)

**Legal Variation Among the States**

Many commentators have noted that law defining child representation is unsettled.\(^11\) The variation across jurisdictions has been thought to decrease the quality of representation and create confusion.\(^12\) Prevailing opinion calls for increased clarity on the role in children’s legal representation.\(^13\) The “laboratory” provided by differing state law also provides valuable opportunities for comparison.\(^14\) A survey by Jean Koh Peters in 2005 indicated that there are at

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\(^9\) Glynn, supra note 8 at 1257.


\(^13\) See text and references, supra, note 3.

\(^14\) Atwood, Representing Children, supra note 12, at 220.
least 56 variations in child representation models among the 50 states. A variety of models are also present internationally.

The Scope of Field Activity: Previous Studies, Conferences, and Standards

Child advocacy is a growing field. Practitioners, advocates, and academics share the view that children deserve better quality representation. Relatively few comprehensive empirical studies of representation for children in protective proceedings exist. These studies are discussed in this Implementation Plan in Section 3. Influential standards and recommendations have been promulgated by the American Association of Matrimonial Lawyers (“AAML”), the American Bar Association (“ABA”), the National Association of Counsel for Children (“NACC”), the Uniform Law Committee (“ULC”), and attorneys gathered at conferences at Fordham (1996) and UNLV (2005). International norms such as the United National Convention on the Rights of the Child


Must the Child Representative be an Attorney?

It is widely accepted that children require attorney representation in dependency proceedings. This consensus is based on the practical necessity of attorneys in negotiating complex judicial proceedings, the state’s interest in or child’s right to empowerment through participation, constitutional arguments or analogy to other legal contexts, and the therapeutic nature of the attorney-client relationship.

The Practical Necessity of Attorney Representation

Even though some young people emerge from these proceedings successfully despite poor legal representation or legal representation in name only, the weight of academic and practitioner opinion suggests that without the legal representation, a child has little prospect of successfully navigating the complexities of dependency proceedings. Clients need to know their legal options, what will happen next in their case, and the likelihood of prevailing—services which non-attorneys are unable to provide. Attorneys’ legal capabilities and expertise in negotiating systems are often critical to advocating for children’s service needs. Lawyers also challenge the state to meet its legal burden when attempting to persuade the court to take measures such as removing the child from his home or terminating parental rights. Other parties—attorneys representing the state and parents’ attorneys—have interests and motivations other than what is in the child’s best interests, and cannot adequately represent the child in all cases.

Equal Dignity for Children in the Judicial Process

A number of commentators have argued that appointing attorneys for children is critical to respecting child’s right to participate in the judicial decisions affecting their lives. Katherine
Hunt Federle argues that children's right to participate arises as a remedy for powerlessness, situating children on equal footing to challenge subordination. As discussed below, empowering children to contribute to decisions about their future often contributes to children’s psychological well-being. Erik Pitchal notes that society has a broader interest in providing attorneys than the mere protection of children. Providing attorneys is critical to preserving the dignity of the parties that come before the governmental decision maker and preserving the dignity of the judicial process.  

Legal Arguments for Attorney Representation
A number of academics and practitioners have argued that children have a constitutional right to counsel in dependency proceedings. A few courts have held that procedural due process provides such a right. Children arguably have well-defined liberty interests at stake, face a high risk of erroneous deprivation in the absence of attorneys, and states' interests in access to justice may outweigh the financial burden required to provide attorneys. Children's constitutional right to representation cannot be met with a non-lawyer advocate, such as a Court Appointed Special Advocate (CASA). Erik Pitchal distinguishes the Supreme Court's decision in \textit{Lassiter}, which held that parents did not have a constitutional right to counsel in termination of parental rights proceedings, from the case of children, who cannot call witnesses, cannot cross-examine witnesses, or do anything that the Supreme Court considered Ms. Lassiter, an adult, competent to do in the absence of counsel.

LaShanda Taylor has argued that the similarities between the court's function and role in delinquency and dependency cases suggest the Supreme Court's rationale in \textit{Gault} for requiring counsel for children in delinquency proceedings can also apply to dependency proceedings. Myrna Raeder has found a basis for appointment of lawyers for children by analogy to existing victims’ rights laws.

The Therapeutic Nature of Attorney-Client Relationship
Many commentators have described the therapeutic nature of the attorney-client relationship for children involved in the child welfare system. Gerard Glynn notes that through the counseling

\begin{itemize}
\item Pitchal, supra note 28, at 664.
\item Taylor, supra note 25, at 612. See also Pitchal, supra note 25 at 681 ("[T]he \textit{Gault} argument has power . . . because all children in state custody are at the whim of state officials to decide where they will live at any given moment.")
\item Emily Buss, \textit{You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles}, 64 Fordham L. Rev. 1699, 1746; Atwood, \textit{Representing Children} supra note 12, at 220; Gerard Glynn, \textit{Unauthorized Practice}, supra note 10; Stötzel & Fegert, supra note (presenting a survey of child client satisfaction with attorney representatives).  
\end{itemize}
and advice process of the attorney-client relationship, children are told what to expect, given a chance to talk confidentially with someone about their legal needs and desired outcome, given advice about the likelihood of their desired outcome, and often given options for expressing their desires to the decision-makers. Children who feel a sense of participation in the process may be more likely to abide by the court’s decision, often take an enhanced interest in the proceedings that affect their futures, and may more readily provide important information to their attorneys. Barbara Atwood notes that from the child’s perspective, a lawyer’s failure to advocate his views might be one more betrayal by the adult world or insult to dignity by the foster care system and courts charged with caring for the child. One commentator has also argued that greater bar involvement in the cases of children in foster care would have a salutary effect on the legal culture generally.

The Critique of Attorneys for Children

A few commentators argue against attorney representation for children in dependency proceedings. Martin Guggenheim has maintained that children’s lawyers commonly fail to accurately distinguish between serious safety cases and those in which the child faces no serious risk of suffering serious harm. For Guggenheim, allowing lawyers freedom to determine for themselves what position to advocate to a court threatens a balanced application of the rule of law. Commentators have argued that children’s attorneys may improperly insert their own worldview into individual client representation, may regard the child in isolation from his or her family and culture, and may primarily serve the state’s interest in exercising broad control over impoverished families. Annette Appell has suggested that the unimproved condition of children and the lack of research about the effectiveness of attorneys leave the value of attorney representation unclear.

One commentator has also argued that greater bar involvement in the cases of children in foster care would have a salutary effect on the legal culture generally.

34 Glynn, Unauthorized Practice, supra note 10; see also Kothehar, supra note 11 at 510-512.
36 Atwood, Representing Children, supra note 12, at 221.
37 Emily Richardson, supra note 7, at 365.
39 Id. at 805
40 Id. at 806 & 832; Appell, supra note 44, at 605. See also Naomi Cahn, State Representation of Children’s Interests, 40 Fam. L.Q. 109, 110.
a CASA volunteer in a case, compared to advocacy by an attorney alone, may improve key factors in child representation, such as face-to-face contact, and may improve services ordered and number of placement moves. Attorneys for children also constitute a financial burden on states.

Analysis of the Critique of Attorneys for Children
While the quality of legal representation of children could undoubtedly be improved, a better response to poor representation might be in better training and mandatory standards for the individuals who undertake this important role, rather than the denial of legal counsel altogether, accepting that effective representation is beyond our reach. Even a client-directed lay representative is not an adequate substitute for an attorney who is fully able to use the critical set of legal tools required for able advocacy.

The Role of the Child’s Attorney: Competing Models
While providing attorneys for children is recognized as necessary by the child welfare field, opinions differ as to the role attorneys should adopt. The traditional controversy pits “best interests” models—in which attorneys represent the child’s best interests—against “expressed wishes/client-directed” models, where the attorney advocates for the child client’s wishes in the traditional attorney-client role. Best interests models typically find greater favor with judges and lawmakers, while the preferred model among child advocates and child welfare academics is the expressed wishes model.

Jean Koh Peters has suggested that child competency is a “dimmer switch,” in that the client can shed light on some aspects of the representation, even though she cannot participate in all of it. Don Duquette notes that even a best interests model might charge the attorney to express and advocate the child’s preferences according to age and maturity since it may be in the best interests of the child to have his voice expressed and advocated for. Emily Buss has maintained that few attorneys adopt an absolutist position under either model.


See Harris, supra note 26, at 1294 (citing In re B.K., 833 N.E.2d 945 (Ill. App. Ct. 2005)). But see Taylor, supra note 25, at 614 (noting that the cost of counsel may be mitigated by the financial benefits of increased permanency).


See text and references, supra note 20.

Atwood, supra note 12, at 91-92

Koh Peters, Representing Children, supra note 2, at § 3-2(b)(2).

Donald N. Duquette, Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required, 34 Fam. L.Q. 441, 442 (2001) [hereinafter Two Roles Required].

Donald N. Duquette, Two Distinct Roles/Bright Line Test, 6 Nev. L.J. 1240 (2006) [hereinafter Bright Line Test]; Buss, supra note 34 at 1705. (“Those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rational decision-making process about the particular issue in question. Those advocating the guardian ad litem role for most children, generally still
also argued that the field might embrace both attorney models, with older youth receiving a
client-directed attorney and younger children receiving a best interests attorney. Some authors
consider the actual percentage of cases in which a child’s best interests and expressed wishes
conflict to be relatively small and many warn against a preoccupation with the subtleties of the
child’s voice in directing the attorney at the expense of exploring other dimensions of quality
attorney practice.  

The Child Representative as Advocate for the Child’s Best Interests
Those who advocate the best interests lawyer model argue that children lack the maturity or the
cognitive capacity for appropriate decision-making in their own interests. The best interests
model is characterized as flexibly allowing for individualized client advocacy. Young children
may appear more appropriately served by a best interests model than a client-directed model,
which offers little guidance in the case of the non-verbal child or the infant. Advocating for the
child’s legal interests may even defeat the major rationale of the client-directed approach,
because it provides no guarantee of attorney objectivity. A lawyer should not employ her skills
to advocate a position exposing the young child client to serious harm, nor should attorneys owe
“robotic allegiance” to each directive of minimally competent young children.

Practical realities of representation are also argued to favor the best interests model. Lawyers
will often have to determine the goals and objectives of the representation with little input from
the child. Children may face pressures from families, the court process, or other
circumstances that lead them to misidentify their own interests. A lawyer emphasizing best
interests considerations may more ably communicate and forge agreement with state social
workers, therapists, teacher, or counselors in the child’s case.

Requiring children to be responsible for taking difficult positions and decisions may constitute
too heavy a psychological burden. Society has a greater obligation to protect children from
their own bad judgments. And because overworked caseworkers may be unable to provide
relevant information to the judge, unless the child’s attorney provides a full factual picture in
court, the judge will be not be positioned to make a determination of the child’s best interests.

concede that at some age—at least in the late teenage years—children should be able to direct their counsel, on
some, if not all, issues.”)

53 Adoption 2002 Guidelines, supra note 2, at 23; Glynn, Unauthorized Practice, supra note 10, at 62; see text and
references cited infra note 113.
54 Buss, supra note 34, at 1702; Atwood, supra note 12, at 99-100.
55 Marx, supra note 26, at 514. See also Harris, supra note 26, at 1284.
56 Duquette, Bright Line Test, supra note 53.
57 Duquette, Two Roles Required, supra note 52 at 444 (2000); Duquette, Bright Line Test, supra note 53; Harris,
supra note 26, at 1291.
58 Duquette, Bright Line Test, supra note 53; Atwood, Uniform Representation, supra note 12, at 79; Ventrell, Toward
a Better Model, supra note 20.
59 Atwood, Representing Children, supra note 12, at 194; Marxsupra note 26, at 514.
60 Buss, supra note 34, at 1702-03.
61 Koh Peters, The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective
621, 622 (2003); Atwood, supra note 12, at 194; cf. Buss, supra note 34, at 1702-03;
63 See Buss, supra note 34, at 1702-03.
64 Id.; Sarah H. Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-
As a practical matter, a statutory right of children to best interests attorneys is often considered more politically realistic because state legislators and judges have favored this model. Debra Lehrman has suggested that client-directed models may be rooted less in the needs of children than a desire of adults to understand themselves as respecting children. Barbara Atwood contends that those who criticize best interests lawyering because lawyers lack expertise to make such determinations unfairly envision lawyers as litigating in a vacuum. Further, Atwood argues that other standards emphasizing the client-directed model nevertheless allow considerable discretion under complex substituted judgment assessments.

**Problems With the Best Interests Model of Child Representation**

Critics of best interests models contend that the best interests role is outside the requirements of professional ethics. The drafters of the 2009 ABA Model Act argue that consistency with previous ABA Model Rules of ethics require that the child's lawyer form an attorney-client relationship which is “fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.” The Model Rules of Professional Conduct require attorneys to maintain confidential communications with the client (Rule 1.6); not use confidential information adverse to the client without informed consent (Rule 1.8); abide by the client’s determinations as to the objectives of the litigation (Rule 1.2); maintain client loyalty (Rule 1.2); refrain from intentionally or knowingly engaging in any activity which creates a conflict of interest (Rule 1.7); and refrain from testifying in cases in which they are also advocates (Rule 3.7). Best interests attorneys often break the Model Rules when disclosing to the court all relevant and necessary information provided by the child. Attorneys in the best interests role may not necessarily advocate for their child client’s desired litigation objectives.

Critics also contend that attorneys lack expertise required to adequately determine children’s interests, because legal training does not prepare a person to make the nuanced judgments the determination requires. Even specially trained attorneys may not be equipped to make these determinations unfairly envision lawyers as litigating in a vacuum. Further, Atwood argues that other standards emphasizing the client-directed model nevertheless allow considerable discretion under complex substituted judgment assessments.

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65 Duquette, Bright Line Test supra note 53, at 1249; Duquette, Two Roles Required, supra note 52, at 34 Fam.L.Q. 441 (2000); Sobie, supra note 11, at 791-93; Haralambie, supra note 44, at 23; Marx, supra note 26, at 514; Jane Spinak, When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate, 41 Fam. L. Q. 393, 409 (2007).


67 Atwood, Uniform Representation, supra note 12, at 95.

68 Id. at 95. See also Haralambie, supra note 44, at 23.

69 Jennifer L. Renne, Legal Ethics in Child Welfare Cases, Special Issues for Guardians ad Litem, ABA Center on Children and the Law, National Resource Center on Legal and Judicial Issues, and the Center for Professional Responsibility (2004); Federle, supra note 27; Taylor, supra note 25, at 618; Atwood, Uniform Representation, supra note 12, at 92-93; Glynn, Unauthorized Practice, supra note 12. See also Tania M. Culley, What Does It Mean to Represent Delaware’s Abused, Neglected, and Dependent Children?, 4 Del. L. Rev. 77, 87 (2001). Cf. Atwood, Representing Children, supra note 12, at 207 (“The lawyer for the impaired client is impliedly authorized under Model Rule 1.6(a) to reveal information about the client to the extent necessary to protect the client’s interests.”)


71 See Taylor, supra note 25, at 621-22; 2006 UNLV Recommendations, supra note 20, at Introduction (“The children's attorneys' community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation.”); Buss, supra note 34, at 1715-1745.

72 Atwood, Uniform Representation, supra note 12, at 92-93; Appell, supra note 12, at 599-600; 2006 UNLV Recommendations, supra note 20, at Introduction (“These well-known professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need.”); Model Act Report, supra not 71, at 147-48 (“Children's lawyers are not social workers or psychologists and should not be treated as such. To the
determinations. With an infant or young child, the pure best interests approach fails to set out principles to guide the advocate’s discretion in identifying the child’s best interests. Another objection is that the best interests role is a substituted judgment model that inappropriately substitutes the view of a lawyer for that of the child while at the same time usurping the role of the court to make such determinations. Additionally, critics contend that best interests representation does not respect children as rights-bearing individuals and that the paternalism involved in best interests approaches disempowers children. These critiques will be discussed further as reasons to adopt client-directed models.

**Client-Directed Child Representation**

Most recent academic and practitioner commentary has favored a client-directed role for attorneys representing children in dependency proceedings. Client-directed representation also finds support abroad. Those who advocate assuming the traditional attorney role, argue that best interests attorneys usurp the role of the judge in determining the child’s best interests. The judge should be able to base her decision on the evidence elicited through an adversarial process, and the child has the right to have his position zealously advocated. Proponents of the traditional attorney model also emphasize that lawyers’ lack of psychology and social work expertise and training that should disqualify them from making best interest judgments.

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74 Duquette, *Two Roles Required, supra* 52; see text and references, *infra* note 79.
75 Ventrell, *supra* note 17, at 96; Federle, *supra* note 27; Taylor, *supra* note 25; Buss, *supra* note 34, at 1703-05. *See also* Special Populations: Mobilization for Change, 25 Touro L. Rev. 467 (2009) (breakout session transcript) (“There is no real right [to counsel for children in New York] at this point because the law guardian can substitute his or her judgment as an attorney for that of the young person.”)
76 Koh Peters, *Representing Children, supra* note 2, at § 2(a)-(c)(2) (“[F]rom Guggenheim on, the vast majority of literature has resoundingly embraced the traditional lawyering role for children above a certain age.”); Sobie, *supra* note 11, at 794; Taylor, *supra* note 25, at 615 (arguing that the legal profession supports providing attorneys for children in dependency proceedings.); Glynn, *supra* note 10, at 63-64 (“There is a growing scholarly consensus that the child needs, at a minimum, a lawyer in these proceedings. . . .”); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings, 29 Loy. U. Chi. L. J. 200, 301 (1998) (“[A] growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.”); Atwood, *Uniform Representation*, at 90-91 (“The literature evinces a significant distrust of any model of lawyering that authorizes the lawyer to make decisions for the child based on the lawyer’s independent assessment of the child’s welfare.”); Kothekar, *supra* note 11, at 484 (“National conferences establish a growing consensus”). *See also* Appell, *supra* note 44, at 634-65 (“Despite the broad-based and growing critique of lawyers’ and the law’s use of children as vehicles to advance dominant norms, many attorneys persist in using a model of representation focusing on the best interests of the child . . .”). Haralambie, *supra* note 44, at 24 (“There is consensus among commentators to move in the direction of child-directed representation . . .”)
77 Bilson & White, *supra* note 16, at 236.
79 Buss, *supra* note 34, at 1703-05.
As discussed at II.B, supra, allowing children a voice in their own proceedings empowers children.\textsuperscript{81} This is also justified as a restorative measure, given children’s status disempowered status under the circumstances that bring them into custody.\textsuperscript{82}

Two practical considerations are also important to note in evaluating client-directed advocacy. Attorneys are often influenced and inspired by the wisdom of children, whose judgment about their best interests often proves sound.\textsuperscript{83} Children may effectively prevent decisions the children oppose from being effectively implemented, and the child’s sense of inclusion in the court process may be critical to the success of placements and services.\textsuperscript{84}

**Problems With Client-Directed Representation**

It is difficult to understand just what client-directed representation means for young children who cannot speak or express a point of view or whose ability to make considered judgments is lacking.\textsuperscript{85} Client-directed representation might also under-protect children who lack sufficient foresight or understanding of the future or may leave them with a burdensome psychological responsibility in the context of complicated relationships.\textsuperscript{86}

**An Alternative Model: The Bright Line Test**

Duquette has expressed the concern that neither a best interests model nor client-directed lawyer can meet the needs of all children, given their differing levels of development.\textsuperscript{87} The older child needs a traditional attorney; the youngest child is incapable of directing counsel and requires a representative to define and advocate for his or her best interests. Under a “Two Distinct Lawyer Roles” model the court must appoint either a best interest lawyer or a traditional attorney under certain conditions defined in the law. Duquette has proposed that a bright line age standard should determine which sort of representative a child is provided. Above a certain age, e.g. seven, the youth would receive a client-directed advocate, and below that age a child would receive a best interests advocate.\textsuperscript{88}

**Analysis**

The vast majority of legal scholars and authorities who have addressed this issue recommend that a lawyer should take direction from his or her child client if the child is determined to have developed the cognitive capacity to engage in reasoned decision making. The national trend is in the direction of a more traditional lawyer role, giving more deference to the child’s wishes and preferences, and turning to a more objective process for determining the child’s position when that is required. Determining the decision-making capacity of any particular child and the weight to be given to that child’s preferences remains a difficult and elusive question, however. The

\textsuperscript{81} Ventrell, supra note 42, at 96; Bilson & White, supra note 16, at 236.
\textsuperscript{82} Buss, supra note 34, at 1703-05.
\textsuperscript{83} Id.
\textsuperscript{84} Id.; Stötzel & Fegert, supra note 16.
\textsuperscript{85} Duquette, Two Roles Required, supra note 53.
\textsuperscript{87} Duquette, Two Roles Required, supra note 52.
\textsuperscript{88} Duquette, Bright Line Test, supra note 53.
ABA Model Rules of Professional Responsibility, discussed above, especially the 2002 amendments, will provide some guidance.  

Authoritative Recommendations and Standards on the Role of the Representative

The Original AAML Standards (1995)

According to the original American Academy of Matrimonial Lawyers (AAML) Standards, children should not necessarily be appointed attorneys in private custody cases, i.e. where the government is not a party, such as child custody disputes after divorce.  

Where appointed, the role of a lawyer under the 1995 AAML Standards should depend on whether the child is “impaired” or “unimpaired,” based largely on a presumptive age demarcation of twelve. For “unimpaired children,” the 1995 AAML standards favor client-directed lawyering. For “impaired children,” the function of lawyers for children is limited—the attorney should only present evidence to the court, but not advocate a position. The AAML Standards note that a “serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child’s best interests,” reflecting the influence of their reporter, Martin Guggenheim.  

Guggenheim notes that, in the 1995 Standards, the AAML was not taking sides in the debate over whether the appointment of counsel for children is a good thing, but rather wished only to define the role and functions of a lawyer, if appointed by the court. 

The 1995 AAML Standards have been criticized for leaving young children without an effective advocate and for creating an artificial distinction between “unimpaired” and “impaired” children and were disfavored at UNLV and Fordham symposia. 

ABA Standards (1996 and 2003)

In 1996, the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings. The ABA Abuse and Neglect Standards reject the notion of a presumptive demarcation to determine capacity and regard child’s disability as incremental. The ABA Standards would require appointment of either “child’s attorney,” owing the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client, or appointment of an attorney/guardian ad litem “to protect the child’s interests without being bound by the child’s expressed preferences.” The Standards express a preference for the appointment of a child’s attorney, acknowledging the problems with the best interests lawyer representation, and recognizing a child’s right to confidentiality. 

In 2003, the Council of the American Bar Association’s Family Law Section approved Standards of Practice for Lawyers Representing Children in Custody Cases. The 2003 ABA Custody

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91 Id. at Standard 2.7 cmt.; see also Guggenheim, AAML’s Revised Standards, supra note 48.
92 Guggenheim, AAML’s Revised Standards, supra note 48, at 254.
93 Haralambie, supra note 44, at 24; Atwood, Uniform Representation, supra note 12, at 77-78.
95 ABA Standards at 1-A & 1-B.
Standards also describe two roles for a required lawyer for children: the “child’s attorney,” a traditional client-directed attorney, and the “best interests attorney,” who is appointed to protect the child's interests without being bound by the child’s expressed preferences. The ABA standards instruct a lawyer to advocate a child's “legal interests” if the child cannot or does not express a position as to a particular issue. Under the standards, the court should appoint counsel even for preverbal children. The ABA’s approach to the concern of expansive lawyer discretion is to attempt to constrain lawyers by limiting their advocacy role for younger children, but not by eliminating representation for these children. The ABA Custody Standards have been criticized for allowing too much attorney discretion in the concept of advocating “legal interests,” which offers only an illusion of objectivity.

ABA-NACC Revised Standards (1999)
National Association of Counsel for Children (NACC) drafted a revised version of ABA Standard B-4, directing the attorney to substitute his or her own judgment based on objective criteria when the child cannot meaningfully participate. Under the NACC Revision, the child's attorney does not owe “robotic allegiance” to each directive of the child. The NACC Revision requires the attorney to request appointment of a guardian ad litem if the child’s wishes are seriously injurious to the child. The ABA Standards allow, but do not require, the attorney to request a GAL.

In 1995, Fordham University Law School held the Conference on Ethical Issues in the Legal Representation of Child during which attendees developed a set of recommendations. The conference examined principles outlined in proposed ABA abuse and neglect standards and attendees recommended that lawyers for children should act in a traditional lawyer role. The UNLV conference in 2005 endorsed the Fordham recommendations and promulgated its own recommendations, aimed at empowering child participation. The Working Group on the Best Interests of the Child and the Role of the Attorney “unanimously reaffirmed the Fordham commitment to client-directed representation,” stating that a client-directed approach is the preferred approach even in best interests representation and that “the children's attorneys’ community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation.” The UNLV Conference recommends strengthening the role of the child’s voice in CAPTA by mandating that CAPTA comply with the Convention on the Rights of the Child (“CRC”). The CRC requires a child be given the opportunity to be heard in any judicial proceeding affecting the child.

ULC Standards (2006)
Unlike both the AAML and the ABA, the Uniform Law Commission’s standards apply to both custody and protective or dependency proceedings. The proposed ULC Act created three categories of court-appointed children’s representatives, providing for discretionary appointment

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97 1996 ABA Standards, at B-5 cmt.
98 Duquette, Bright Line Test, supra note 53, at 1242; Guggenheim, AAML’s Revised Standards, supra note 48.
99 Ventrell, Toward a Better Model, supra note 20.
101 2006 UNLV Recommendations, supra note 20, at 592
103 2007 ULC Model Act, supra note 20.
of a “child’s attorney,” a “best interests attorney,” and a layperson “best interests advocate.” While the child’s attorney and best interests attorney are defined similarly to previous standards, the “best interests advocate” is an individual not functioning as an attorney appointed to assist the court in determining the best interests of the child. The best interests advocate’s main responsibilities are to “investigate the child’s circumstances” and “sometimes testify in the case about the child’s best interests.” Whenever the advocate testifies or submits a report, all parties would be able to cross-examine the advocate. Because a “best interest advocate” is “not appointed to provide legal representation,” communication between the advocate and the child would not be privileged. Under the Act, the court determines the role of the attorney at the time of the appointment, based on available information. The court may revise the designation in light of new information or changed circumstances.

The ULC Model Act faced criticism and did not gain ABA approval; it was opposed by the ABA’s Litigation Law Section and its Standing Committee on Ethics and Professional Responsibility because of “perceived conflicts between various ABA policies.”

### Ongoing Efforts: The ABA Model Act (2009) and the Revised AAML Standards (2009)

In 2009, the ABA Section on Litigation completed the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings. The Model Act mandates that a traditional attorney should be appointed for every child in abuse or neglect proceedings. Attorneys are required to complete a thorough and independent investigation and participate fully in all stages of the litigation, and may identify legal issues, use legal capabilities to ensure the protection of their clients’ rights and needs, and advocate for their clients.

When children do not have the capacity to direct counsel, the Model Act directs lawyers to request a trained best interest advocate to advise the court on a child’s best interest. Unlike lawyers, these advocates may serve as witnesses. If the court is unable to appoint a best interest advocate, the Model Act allows the lawyer to advocate for a position that is in the best interest of the child, but only after consulting individuals able to provide sufficient assistance in determining the child’s best interests.

While the 2009 Revised AAML Standards would not require a lawyer for the child, unlike the ABA Model Act, the Revised AAML Standards also would not allow a lawyer, if appointed, to adopt any other role than a traditional client-directed one. Under the AAML Revised Standards, the principal purpose an attorney assignment is to seek the litigation’s objectives as established by the child client, though these Standards do allow for appointment of a “Court-Appointed

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104 id. at §§ 14 1(B), 6.
105 id. at § 8 cmt.
106 id. at §8.
107 Guggenheim, AAML’s Revised Standards, supra note 48, at 271. See also 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, 115 (2008); Mark Henaghan, What Does A Child’s Right to be Heard in Legal Proceedings Really Mean?, 42 Fam. L.Q. 117, 127 (2008); Jane M. Spinak, Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation, 6 Nev. L.J. 1385 (2006). Cf. Guggenheim, AAML’s Revised Standards, supra note 48, at 273. (“One can commiserate with the Uniform Law Commission if it felt blindsided by the harsh criticism its 2006 work engendered from the ABA when all it did was borrow from the ABA the very concept for which it was being criticized.”)
109 id., at § 7.
110 id. at § 2(C).
Professional Other than Counsel for the Child,” who is appointed to assist the court in deciding the case.\textsuperscript{111}

**Implementing the Role: Promising Practices for Child’s Attorneys**

It is sometimes pointed out that the debate on the proper characteristics of the child representative, particularly the questions of who directs the child’s lawyer and how, may detract from consideration of what that child representative should do—the duties and practices that create successful representation.\textsuperscript{112} In addition to their contribution in defining a child representative’s role, the recommendations and standards above are instructive as to many important elements of attorney practice.

**Basic Duties and Characteristics**

The 1996 ABA Standards maintain that attorneys for children should obtain copies of all pleadings and relevant notices; participate in depositions, negotiations, discovery, pretrial conferences, and hearings; inform other parties and their representatives that they are representing the child and expect reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family; attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child; counsel the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process; develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and identify appropriate family and professional resources for the child.\textsuperscript{113} The 1996 ABA Standards provide the foundation for the QIC Best Practice Model of Child Representation and seem to reflect a considerable national consensus on the duties of the child’s representative, i.e., what it is that the advocate for the child should actually do.

The UNLV Conference attendees recommended that children’s attorneys should be able to recognize issues that require the services of other professionals and know how to access those services. Children’s attorneys should have sufficient knowledge of other disciplines to formulate requests for evaluations and services from other professionals and to evaluate and use professional opinions.\textsuperscript{114}

**Client Contact**

Attorney-client meetings are critical to successful representation, because children must understand the role of the representative\textsuperscript{115} and because attorneys must understand the needs

\begin{itemize}
  \item \textsuperscript{111} 2009 AAML Revised Standards, supra note 20, at 247; Guggenheim, AAML’s Revised Standards, supra note 48, at 265.
  \item \textsuperscript{112} Buss, supra note 34 at 1749 (“I am convinced, however, that it matters far less which role is assumed than that the role is communicated to the child”); Katherine Kruse, Standing in Babylon, Looking Toward Zion, 6 Nev. L.J. 1315, 1316 (suggesting that the UNLV conference was an ultimately practical endeavor that can inform a lawyer’s day-to-day ethical choices); Glynn, Unauthorized Practice, supra note 10 (“In the debate about best interests versus articulated wishes, the value of legal counseling and advice is often lost”). See also Duquette, Bright Line Test, supra note 53, at 1249 (“how to determine the best interests of a child [] is among the least developed part of our jurisprudence and should be a central focus of our discussion as a field”).
  \item \textsuperscript{113} 1996 ABA Standards, at B-1.
  \item \textsuperscript{114} \textsuperscript{(1)}(A)(2)(a)(ii). See also 2007 ULC Model Act, at § 7 cmt.
  \item \textsuperscript{115} Buss, supra note 34 1706 & 1749; Barry Berenberg, 36 N.M. L. Rev. 533, 36 N.M. L. Rev. 533; Stötzel & Fegert, supra note 16, at 220.
\end{itemize}
of the client. Commentators note that awareness of the client’s individual context is necessary to reducing the role of race, culture, or class biases in representation. According to Jean Koh Peters, the child’s attorney “whether assigned to represent a child’s wishes or her best interests, must ground her representation in a thickly textured understanding of the child’s world and the child’s point of view.” The UNLV Recommendations emphasize that attorneys should continually reflect on and assess the extent to which their personal opinions, values, and biases may affect the representation of their child clients, and attempt to understand their individual client’s needs and interests, resisting boilerplate responses. A child’s age, legal status, and social attributes can mask the child’s individuality, leading to decisions and processes that marginalize the child’s identities, needs and interests.

Ann Haralambie and Lauren Adams discuss the importance of planning for relationship building. Building client relationships is crucial not only to understand the individual client, because the attorney must establish rapport with the child before the child is likely to provide much useful information. The attorney should learn as much background information as possible before speaking with a child client from caseworkers, social workers, teachers, coaches, family members, friends, school records, case reports, medical records, police reports, or other historical documents. Meeting with a child client in the child’s environment provides the attorney with important information for representation and may allow the client to feel more at ease in developing a relationship. Important elements of relationship include building trust by keeping promises, maintaining honesty, and by managing client expectations about what the attorney is able to provide. Attorneys may strengthen rapport by not rushing children during interviews, actively listening during meetings, being aware of how their own responses may be perceived, and arranging for a trusted adult to emphasize that the attorney may be trusted.

The UNLV recommendations note that attorneys should have competency in child cognitive development, effective child interviewing skills, and should structure all communications to account for the individual child’s age, level of education, cultural context, and degree of language acquisition. Emily Buss has examined the importance of understanding children’s development in their representation.

The UNLV conferees also maintained that children’s attorneys should become familiar with the child’s family, community and culture, and should take precautions to not impose the lawyer’s own standards and cultural values. Children’s attorneys should engage the entire family, and help the family understand how they can participate in the proceedings. Children’s attorneys should recognize the importance for most clients of maintaining connections to their families and

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116 Koh Peters, Representing Children, supra note 2, at § 1-1; Atwood, supra note 12, at 208; Appell, supra note 44, at 625.
118 Koh Peters, Representing Children, supra note 2.
120 Id.
121 Ann Haralambie & Lauren Adams, NACC Guide, Lawyering—Child Client Interviewing and Counseling (2010), see also Koh Peters, Representing Children, supra note 2, at § 4-3(a)(3).
123 Buss, supra note 34.
125 Id. at (1)(A)(2)(i).
communities. Attorneys should solicit feedback from clients and families as to their representation.\textsuperscript{126}

\textbf{Additional Important Practices}

The UNLV Recommendations recommended that administrative bodies charged with providing and overseeing child representation should track data on representation provision and outcomes.\textsuperscript{127} The Recommendations also maintain that attorneys should challenge policies and practices that purport to protect the safety of lesbian, gay, bisexual or transgender children solely by isolating them from other children, and that children’s attorneys should challenge policies and practices that criminalize or pathologize adolescent sexual behavior that is typical or common from a developmental perspective.\textsuperscript{128}

\textbf{The Role of Children in Dependency Proceedings}

Other commentators argue that a focus on the child’s role in the hearings has been obscured by discussion of the representative’s role in advocating for the child.\textsuperscript{129} Merrill Sobie maintains that renewed emphasis should rest on the child’s status as a full party to the proceedings, the appropriate level of the child’s presence, participation, and involvement, and the child’s legal interests, family integrity, and protection.\textsuperscript{130} Gerard Glynn maintains that children, as parties, should be represented throughout the proceedings, receive all papers and communications with the court, attend all hearings, participate in formal discovery, including depositions, participate in settlement agreements, present evidence, including the calling of witnesses, and make arguments to the court.\textsuperscript{131}

In 2007, the ABA resolved to provide “all youth with the ability and right to attend and fully participate in all hearings related to their cases.”\textsuperscript{132} Along these lines, the UNLV Conference recommends strengthening the role of the child’s voice in CAPTA by mandating compliance with the United Nations CRC Article 12, allowing that a child be given the opportunity to be heard in any judicial proceeding affecting the child. The UNLV Recommendations also maintain that children’s attorneys should promote the development of organizations that support the engagement of youth in child welfare processes.\textsuperscript{133} On a broader level, attorneys should advocate that youth, including youth representing diverse experiences and perspectives, participate in developing policies and practices affecting children and their families.\textsuperscript{134}

Emily Buss has described her own experience of involving clients directly in proceedings, which increased the quality of attorney-client interaction. Buss argues that there is value in children seeing precisely what happens in court, because understanding how the court functions is

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at (1)(B)(2)(g).
  \item \textsuperscript{127} Buss, \textit{supra} note 1753-57.
  \item \textsuperscript{128} 2006 UNLV Recommendations, \textit{supra} note 20, at (3)(C)(2)(d).
  \item \textsuperscript{129} Sobie, \textit{supra} note 11, at 747; Kothekar, \textit{supra} note 11, at 481.
  \item \textsuperscript{130} Sobie, \textit{supra} note 11, at 747. See also Glynn, \textit{Unauthorized Practice}, \textit{supra} note 10 at 70 (enumerating state statutes on child’s status as a party to the litigation); 2007 ULC Model Act, at II cmt (describing state law on party status); Jonathan Wybrow, \textit{supra} note 16 (describing English law on party status.) On a child’s right to choose counsel, see Merrill Sobie, 22 Touro L. Rev. 745, 769-71; see also Barry Berenberg 36 N.M. L. Rev. 539, 561-564.
  \item \textsuperscript{131} Glynn, \textit{supra} note 10.
  \item \textsuperscript{132} ABA Resolution 104a, adopted August 2007. Youth Transitioning from Foster Care (Youth at Risk), \textit{available at} http://www.abanet.org/child/parentrepresentation/PDFs/060.pdf.
  \item \textsuperscript{133} 2006 UNLV Recommendations, \textit{supra} note 20, at (3)(A)(2)(b).
  \item \textsuperscript{134} \textit{Id.}, at (3)(B)(2).
\end{itemize}
essential to a child’s understanding of how the lawyer functions in that system, and how the system makes decisions on the child’s behalf.¹³⁵

Systemic Pressures for Child Representatives

A variety of systemic pressures are acknowledged in the literature to significantly impede the quality of representation.¹³⁶ Commentators have emphasized the difficulty of providing quality representation in states with overburdened foster care systems.¹³⁷ Inadequate representation and adjudication often result from unreasonably high caseloads and crowded dockets.¹³⁸ Attorneys with high caseloads are unable to carry out the most basic tasks required for legitimate representation according to any model, including client meetings.¹³⁹ Overwhelmed judicial caseloads result in delays.¹⁴⁰ In many jurisdictions, attorney compensation is limited, and is sometimes inadequate to compensate attorneys for basic statutory duties.¹⁴¹ Inadequate compensation is also cited as an issue internationally.¹⁴²

Attorney training and competence are recognized as a shortcoming in many jurisdictions.¹⁴³ Children's lawyers are not social workers or psychologists, and commentators emphasize the benefit of multidisciplinary decision-making.¹⁴⁴ Children’s legal representatives often lack funding for important support personnel, for example, social workers and paralegals.¹⁴⁵

Additional Contextual Challenges in Child Representation

Commentators have described additional pressures arising from the context of child welfare proceedings. Martin Guggenheim argues that too few children’s advocates are guided by a presumption in favor of family unification because insisting upon a child’s prompt reunification poses a risk to their professional reputations. Judges, as well, are rarely criticized in public for

¹³⁵ Buss, supra note 34, at 1760-61.
¹³⁶ Glynn, Unauthorized Practice, supra note 10, at 58; Adoption 2002 Guidelines, at 1-5.
¹³⁷ Katherine Kruse, supra note 113, at 1316; Buss, supra note 34, at 17661; Weinberg, et al., supra note 24, at 212.
¹³⁸ Taylor, supra note 25, at 621-22 (describing state statistics and guidelines); Howard Davidson & Erik S. Pitchal, Caseloads Must Be Controlled So All Child Clients Can Receive Competent Lawyering, in The Specialized Practice of Juvenile Law: Model Practice in Model Offers (National Association of Counsel for Children, 2006); Glynn, Unauthorized Practice, supra note 10, at 58; Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, 32 Loy. U. Chi. L.J. 1 (2000); Marx, supra note 26, at 531. See also Nolan Clay & Randy Ellis, National Panel Faults Oklahoma County System, The Oklahoman, Apr. 27, 2008 (assistant public defenders in Oklahoma County had caseloads between 1000 and 1250 children).
¹³⁹ Buss, supra note 34, at 1759-61; Margulies, supra note 118, at 621; Sobie, supra note 11, at 825; Kisthardt, supra note 26, at 11; Lowry & Bartosz, supra note 8; Marx, supra note 531.
¹⁴² Stötzel & Fegert, supra note 16, at 222.
¹⁴⁴ 2009 ABA Model Act, supra note 71, at 147-48; Kisthardt, supra note 11; Haralambie, supra note 44, at 24.
¹⁴⁵ Fines, supra note 12, at 413-14; Davidson & Pitchal, Caseloads Must Be Controlled, supra note 139.
wrongfully ordering the removal of a child. The media focuses its attention on the notorious “false negative” cases, where children are not removed but later suffer serious harm or even death. This skewed media attention creates intense pressure to “err on the side of safety”, and the prevailing culture offers emotional rewards for children’s lawyers to play a “heroic” role in rescuing children from risk, without a similar reward for minimizing disruption of their lives by providing in-home safety plans and the like.146

Howard Davidson notes that advocates must constantly be wary of the “rubber stamp” of judicial approval of agency actions, because overextended courts systems do not often have sufficient or qualified staff to understand the needs of children placed with foster agencies.147 Courts are often not provided substantial statements as to why the child must continue in state placement.148 Courts go unaware of sibling separation, failures to work effectively with biological parents and failures to institute legal action freeing children for adoption when necessary.149

Commentators have also noted that ambiguity of the representative’s role and the lingering notion of the attorney as an agent of the court creates pressure toward general passivity in representation,150 and that relationships and communication between attorneys and social workers may be strained because of their different languages and training.151 The informality of proceedings is also noted to be an issue, contributing to attorney-driven outcomes, an insufficient focus on children, limitations on appellate review, and weakened child confidence in judicial proceedings.152

Systemic Progress for Child Representatives

Individuals and groups employ a range of methods in attempts to improve child representation. The UNLV Recommendations provide recommendations for attorney advocacy, including community organizing, coalition building, research, policy advocacy, and media campaigns.153 Children’s attorneys can, and often do, advocate in legislatures, state agencies, and courts in order to effectuate meaningful changes in justice for children.154 Local and national group advocacy also occurs through class action litigation and legislative advocacy seeking to effect systemic change.155

Alternative Court Systems and Holistic Representation of Children

Alternative or problem-solving court systems such as unified courts, family drug courts, and domestic violence courts are discussed in the academic literature. According to Sarah Ramsey, these courts tend to downplay the role of the court as decision-maker and enforcer, instead

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146 Guggenheim, State Interests, supra note 830-31; Margulies, supra note 118, 620 (describing the asymmetry of penalty and reward facing attorneys for children).
147 Davidson, supra note 5, at 482.
148 Id.
149 Id.
150 Fines, supra note 12, at 440–46.
151 Kishhardt, supra note 11.
152 Pitchal, supra note 28, at 686-687; Buss, supra note 34, 1760-61; Kothekar, supra note 11, at 504-05.
153 2006 UNLV Recommendations, at (3)(D)(2)(a)-(e)
154 2006 UNLV Recommendations, at 5
155 Lowry & Bartosz, supra note 8, 207; Appell, supra note 44, at 593 (describing how National Center for Youth Law, the Youth Law Center, Children's Rights, and the Bazelon Mental Health Center for Mental Health Law litigate class actions to provide better services and representation for children); Kruse, supra note 1321, at 1321 (describing the positive result of R.C., an Alabama child welfare reform class action); Sobie, supra note 11, at 759-61.
emphasizing a service function, team decision-making, and a focus on ultimate outcomes benefiting the litigants and community. These courts are noted to raise due process concerns, such as the blending of criminal and civil proceedings and the potential for judicial bias, but may be structured to incorporate due process protections. The UNLV Recommendations maintain that jurisdictions should permit lawyers to represent youth in more than one system, engaging in concurrent or dual representation.

Ramsey also describes how lawyers may participate in programs such as medical-legal partnerships that seek to improve children's health. Additional models have been thought to strengthen the relationship between representation in court and service delivery. Foster care review panels may offer provide oversight of children’s cases.

Addressing Caseloads, Compensation, and Delay

The 2005 ABA resolution and Pew Commission recommendations also included standards for reasonable attorney caseloads. In 2005, the finding in Kenny A. that children have a constitutional right to adequate legal representation resulted in a settlement agreement limiting caseloads to 90 children per attorney in DeKalb County. In Connecticut, child advocate attorneys themselves filed suit against the state alleging that systematic inadequate representation by court-appointed counsel was violating the rights of the children and families involved in child protection cases. In 2009, the Children’s Advocacy Institute filed a class action in the Eastern District of California alleging that the constitutional and statutory rights of Sacramento County’s foster children were violated by the excessively high caseloads of their attorneys. In January 2010, the District Court granted the Defendant’s motion to dismiss for lack of jurisdiction and in June 2010 the matter was appealed to the Ninth Circuit Court of Appeals.

In addition to litigation, Howard Davidson and Erik Pitchal have discussed strategies of judicial leadership, collective action, protest, statutory caseload standards, and even refusal to take on new cases. The UNLV Recommendations note that children’s attorneys should object to destructive delays in court and administrative proceedings and the provision of benefits, make a


\[157\] Id.


\[159\] Ramsey, *supra* note 157, at 21.


\[161\] See Youngclarke, et al., *supra* note 19, at 112

\[162\] ABA Resolutions on Foster Care and Adoption: Foster Care Reform, Aug. 2005, http://www.abanet.org/child/foster-adopt.shtml. See also Adoption 2002 Guidelines (urging that compensation of children’s attorneys should closer to that for attorneys handling matters of similar demand and complexity.)


\[164\] Fines, *supra* note 12, at 413 (citing *Juvenile Matters Trial Lawyers Ass’n v. Judicial Dept.*, No. 3:04CV773(CFD) (D. Conn. Mar. 28, 2005)). Fines also cites other workload suits: Successful suits include *Smith*, 681 P.2d 1374; *Pearl*, 621 So. 2d 780; and *Lynch*, 796 P.2d 1150. Unsuccessful suits include *Luckey*, 860 F.2d 1012; *Wallace*, 392 F. Supp. 834; *Kennedy*, 544 N.W.2d 1; and *Madden*, 601 A.2d 211.


\[166\] Davidson & Pitchal, *Caseloads Must Be Controlled*, *supra* note 139.
Implementing Training Programs

The 1996 and 2003 ABA Standards recommend training content for lawyers representing children. Trial judges who are regularly involved in child-related matters should participate in training for the child’s attorney conducted by the courts, the bar, or any other group. Attorneys must understand applicable state and federal statutes, case law on applicable legal standards; agency and court rules; authoritative representation guidelines and standards; the family court process, service implementation, and key personnel in child-related litigation, including custody evaluations and mediation; child development, family dynamics, and communicating with children. In 2005, the ABA passed a resolution that included an exhortation to Congress, states, and territories to enact policies consistent with the recommendations of the May 2004 Pew Commission on Children in Foster Care. The Pew recommendations included federal and state support for attorney training; and development, implementation of, and funding for, qualification and training standards.

The UNLV Recommendations note that bar associations and other legal organizations should provide continuing legal education (“CLE”) so attorneys can stay current in related subject areas and the operations of other systems affecting children and families. The 2009 First Star state survey found that 34 jurisdictions require attorneys for children to have either training prior to appointment or CLE after appointment. The NACC developed a Child Welfare Law Specialist certification program in 2006, currently available in 16 jurisdictions. The 2008 Fostering Connections to Success and Increasing Adoptions Act expanded the availability of federal funds to train attorneys representing children in child protection proceedings.

Certain commentators examined the increasing role of child advocacy education in law schools, including clinical programs. Like the UNLV Recommendations, these writers emphasize the importance of multidisciplinary education, practice-oriented modeling, and collaboration with

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167 2006 UNLV Recommendations, supra note 20, at (1)(B)(2)
168 1996 ABA Standards I-1; see also Fines, supra note 12; Marx, supra note 26 507; Taylor, supra note 25; Harris, supra note 26, at 1294.
174 P.L. 110-351; Taylor, supra note 25, at 620.

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related fields such as a social work. Child law education must also support law students and graduates in pursuing pediatric careers.

Conclusion

The recent literature on child representation has surveyed the law defining child representation and state compliance; assessed whether a lawyer must be appointed for the child; debated the roles of the child representative; examined the recommendations and standards contributed by authoritative bodies and conferences; illustrated preferred practices for child representatives; and emphasized systemic challenges and progress.

A national consensus seems to have emerged that children require legal representation in child welfare cases. Yet very few are fully satisfied that current child representation is adequate. Few are satisfied with America’s child welfare system, and more and more stakeholders are recognizing the value of individual child advocacy in getting each individual child the specific and unique supports necessary for safety and well-being. The current literature provides an essential context for framing the QIC research and demonstration projects. The empirical data flowing from those projects will further add to our store of knowledge and insight about representing children. Even while the empirical projects are underway, we hope that this collection of articles and studies helps state governments and others make immediate improvements to the local child welfare system.

176 See also 2006 UNLV Recommendations, supra note 20, at (2)(A)–(F) & (3)(E) (“Bar associations and other legal organizations should promote collaborative approaches to learning and provide cross-disciplinary education . . .”); Zawisza, supra note 176, at 631.

177 Breger et al., supra note, at 532-33.