

*Quality Improvement Center on the Representation of  
Children in the Child Welfare System*

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**Needs Assessment  
Literature Review**

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**Children's Bureau, US Department of Health and  
Human Services**

*University of Michigan Law School*



## ACADEMIC LITERATURE ON CHILD REPRESENTATION IN 2010<sup>1</sup>

### 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."<sup>2</sup> The Guidelines developed in response to the Presidential Initiative *Adoption 2002* urged individual states to establish practice standards for attorneys representing children.<sup>3</sup> CAPTA was again amended in 2003 in order "to ensure higher quality representation and to bar appointment of

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<sup>1</sup> Thanks to Julian Darwall, a second year law student at New York University Law School and the principal drafter of this literature review.

<sup>2</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (codified as amended in scattered sections of 42 U.S.C.). The complete text of U.S. Code title 42, chapter 67 is available at [www4.law.cornell.edu/uscode/42/ch67.html](http://www4.law.cornell.edu/uscode/42/ch67.html). See also Child Information Gateway, *About CAPTA: A Legislative History*, available at <http://www.childwelfare.gov/pubs/factsheets/about.cfm>; Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, at § 2-A (3rd ed. 2007) [hereinafter Peters, *Representing Children*].

<sup>3</sup> Donald Duquette & Mark Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. Health & Human Servs., ACF,ACYF, Children's Bureau (1999) [hereinafter *Adoption 2002 Guidelines*].

untrained or poorly trained court-appointed representatives for children.”<sup>4</sup> 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.<sup>5</sup> CAPTA is currently pending reauthorization in Congress.<sup>6</sup>

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.<sup>7</sup> Skepticism has been expressed about federal data, assessment of state compliance, and enforcement.<sup>8</sup> 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.<sup>9</sup> Glynn contends that CAPTA has neither a detailed monitoring system nor an effective enforcement mechanism.<sup>10</sup>

### Legal Variation Among the States

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

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<sup>4</sup> M. Carmela Welte, *GAL Training Mandated in CAPTA: HHS Issue Guidelines, National CASA Volunteer Curriculum Cited as Model for Volunteer Training*, July 2004.

<sup>5</sup> 42 U.S.C. § 5106a(b)(2)(A)(xiii).

<sup>6</sup> For additional information on the history of federal child welfare statutes, see Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42 Fam. L.Q. 481, 485-490.

<sup>7</sup> Emily Richardson, *Lawyers Were Children Once: An Ethical Approach to Strengthening Child Abuse and Neglect Legislation*, 31 J. Legal Prof. 357, 362 (2007); Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 Nova L. Rev. 769, 778 (2001).

<sup>8</sup> Gerard Glynn, *The Child’s Representation under CAPTA: It is Time for Enforcement*, 6 Nev. L.J. 1250, 1256-57 [hereinafter Glynn, *CAPTA*]; Marcia Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. Mich. J.L. Reform 199 (2007).

<sup>9</sup> Glynn, *supra* note 8 at 1257.

<sup>10</sup> Gerard Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & Fam. Stud. 53, 54 [hereinafter Glynn, *Unauthorized Practice*].

<sup>11</sup> Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 Rutgers L. Rev. 1 (2006); Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 Touro L. Rev. 745, 799-806 (2006); Aditi Kotheekar, Note, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 Wash. U. L. Rev. 481, 482 (2008); Michael Drews & Pamela Halprin, 40 Fam. Ct. Rev. 383, 383 (2002).

<sup>12</sup> National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, at Executive Summary (2001) [hereinafter 2001 NACC Recommendations]; Barbara Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism* (2008), 42 Fam. L. Q. 63, 74-75, 91-92 [hereinafter Atwood, *Uniform Representation*]; Barbara Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. Am. Acad. Matrim. Law. 183, 183 (2005) [hereinafter Atwood, *Representing Children*]; Kisthardt, *supra* note 11; Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 Cap. U. L. Rev. 411, 440-446 (2008); Barry Berenberg, *Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases*, 36 N.M. L. Rev. 533, 546-549 (2006); Beth Locker & Melissa Doris, *A Child’s Right to Legal Representation in Georgia Abuse and Neglect Proceedings*, 10 Ga. B.J. 12, 17 (2004); Sharon S. England & Robert E. Shepherd, *I Know the Child is My Client, but Who Am I?*, 64 Fordham L. Rev. 1917 (1996).

<sup>13</sup> See text and references, *supra*, note 3.

<sup>14</sup> Atwood, *Representing Children*, *supra* note 12, at 220.

least 56 variations in child representation models among the 50 states.<sup>15</sup> A variety of models are also present internationally.<sup>16</sup>

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

Child advocacy is a growing field.<sup>17</sup> Practitioners, advocates, and academics share the view that children deserve better quality representation.<sup>18</sup> Relatively few comprehensive empirical studies of representation for children in protective proceedings exist.<sup>19</sup> 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).<sup>20</sup> International norms such as the United Nations Convention on the Rights of the Child

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<sup>15</sup> Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the U.S. and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 Nev. L.J. 966, App. C. (2006) [hereinafter Peters, *How Children Are Heard*] (surveying state practice in appointing counsel for children in dependency cases). See also Jean Koh Peters, Yale Law School, *Representing Children Worldwide* (2005), available at [www.yale.edu/rcw](http://www.yale.edu/rcw).

<sup>16</sup> Koh Peters, *Representing Children*, *supra* note 2. See also Andy Bilson & Sue White, *Representing children's views and best interests in court: An international comparison*, 14 Child Abuse Rev. 220, 223 (2005); Jonathan Whybrow, *Children, Guardians and Rule 9.5*, 34 Fam. L. 504 (2004); Manuela Stötzel & Jörg Fegert, *The Representation of the Legal Interests of Children and Adolescents in Germany: a Study of the Children's Guardian from a Child's Perspective*, 20 Inter'l J. Law, Pol'y & Fam. 201 (2006); Patricia O'Kane, *The Developing Role of the Guardian Ad Litem under the Children*, 12 Child Care in Prac. 157 (2006); Drews & Halprin, *supra* note 11.

<sup>17</sup> Marvin Ventrell, *The Practice of Law for Children*, 28 Hamline J. Pub. L. & Pol'y (2006) (describing children's law as an emerging legal specialty).

<sup>18</sup> Atwood, *Representing Children*, *supra* note 12, at 222; Hearing on Child Protections Issues Before the House Committee on Ways and Means Subcommittee on Human Resources (Mar. 23, 2000) (statement of Mark Hardin, Director, Child Welfare, American Bar Association, Center on Children and the Law) (“Judges cannot serve families and children effectively without competent and well-prepared attorneys.”)

<sup>19</sup> See generally Davin Youngclarke, et al., *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. Center for Families, Child. & Cts. 109 (2004); Andrew Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008), available at <http://www.chapinhall.org/research/report/expediting-permanency>; Gail Goodman, *A Comparison of Types of Attorney Representation for Children in California Juvenile Court Dependency Cases*, 32 Child Abuse & Neglect 497, 500-01 (2008); U.S. Dept. of Health & Human Services, *Final Report on The Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem* 11 (1994); U.S. Dept. of Health & Hum. Services, *Nat'l Study of Guardian ad Litem Representation* (1990); U.S. Dept. of Health & Human Services, CSR, Inc., *Nat'l Evaluation of The Impact of Guardians ad Litem in Child Abuse or Neglect Judicial Proceedings* (1988); Robert Kelly & Sarah Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 Rutgers L. Rev. 1217, 1219 (1988); Jane Knitzer & Merrill Sobie, *Law Guardians in New York State: A Study of the Legal Representation of Children* (1984). See also Davidson, *supra* note 5, at 509 (calling for improved representation based in social science evaluation).

<sup>20</sup> *American Academy of Matrimonial Lawyers, Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. Am. Acad. Matrim. Law. 1 (1995) [hereinafter, 1995 AAML Standards]; *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, Approved by the ABA House of Delegates, Feb. 5, 1996 [hereinafter 1996 ABA Standards]; NACC, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (NACC Revised Version) (1999) [hereinafter 1999 NACC Recommendations]; Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children's Law Manual Series (1999); 2001 NACC Recommendations, *supra* note 12; *ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases Approved by the ABA House of Delegates*, Aug. 2003; *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) [hereinafter 2003 ABA Custody Standards]; *Recommendations of the UNLV Conference on Representing Children in Families*, 6 Nev. L.J. 592 (2006) [hereinafter 2006 UNLV Recommendations]; National Conference of Commissioners on Uniform State Laws, *Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act* (2007), available at [http://www.law.upenn.edu/blj/archives/ulc/rarccda/2007\\_final.pdf](http://www.law.upenn.edu/blj/archives/ulc/rarccda/2007_final.pdf) [hereinafter 2007 ULC Model Act]; ABA Section of Litigation, *Model Act Governing the Representation of Children in Abuse, Neglect, and*

(“CRC”) Article 12 have been influential in the national debate.<sup>21</sup> These proposals are also discussed.

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.<sup>22</sup> Attorney’s legal capabilities and expertise in negotiating systems are often critical to advocating for children’s service needs.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

### **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.<sup>26</sup> Katherine

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*Dependency Proceedings* (2009) [hereinafter 2009 ABA Model Act], available at [http://www.abanet.org/litigation/standards/docs/child\\_modelact.pdf](http://www.abanet.org/litigation/standards/docs/child_modelact.pdf); AAML, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. Am. Acad. Matrimonial L. 227 (2009) [hereinafter 2009 AAML Revised Standards].

<sup>21</sup> See generally, Bilson, *supra* note 16, at 222. The 2006 UNLV Recommendations, *supra* note 20, at (5)(F)(1), note that Article 12 “grants children the right to be participate and express their views, and potentially to be represented, in a vast number of proceedings beyond child protective proceedings. Article 12 further clearly contemplates representation of the child’s subjective viewpoint and wishes and not of the child’s best interests.”

<sup>22</sup> Glynn, *supra* note 10, at 64-65 (noting that legal advice from non-attorney representatives constitutes unauthorized practice of law.)

<sup>23</sup> Lois Weinberg, et al., *Advocacy’s Role in Identifying Dysfunctions in Agencies Serving Abused and Neglected Children 2 Child Maltreatment*, 212, 216-222 (1997).

<sup>24</sup> LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 614 (2009).

<sup>25</sup> Robert Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian ad Litem Model*, 6 Nev. L.J. 1284, 1288; Sarah Marx, Note, *Seen But Not Heard: Advocating For Children in New York State*, 25 Touro L. Rev. 491, 526 (citing *Fagnoli v. Faber*, 481 N.Y.S.2d 784, 786 (App. Div. 1984)); LaShanda Taylor, *supra* note 25 at 613-14 (“children in dependency proceedings have distinct interests that cannot be represented by their parents or the state”).

<sup>26</sup> Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 Cardozo L. Rev. 1523, 1564 (1994) [hereinafter Federle, *Custody Disputes*]; Katherine Hunt Federle, *The Ethics of Empowerment, Rethinking the Role of Lawyers in Interviewing and Counseling the Child*

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.<sup>27</sup>

### **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.<sup>28</sup> 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.<sup>29</sup> Children's constitutional right to representation cannot be met with a non-lawyer advocate, such as a Court Appointed Special Advocate (CASA).<sup>30</sup> Erik Pitchal distinguishes the Supreme Court's decision in *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 *Gault* for requiring counsel for children in delinquency proceedings can also apply to dependency proceedings.<sup>31</sup> Myrna Raeder has found a basis for appointment of lawyers for children by analogy to existing victims' rights laws.<sup>32</sup>

### **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.<sup>33</sup> Gerard Glynn notes that through the counseling

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*Client*, 64 Fordham L. Rev. 1655, 1658 (1996) [hereinafter *Rights*]; Atwood, *supra* note 12 at 194-195; Taylor, *supra* note 25 at 613-14.

<sup>27</sup> Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts L. Rev. 663,689.

<sup>28</sup> *Id.*; Taylor, *supra* note 25 at 611; Atwood, *Uniform Representation*, at 85-86; Sobie, *supra* note 11 at 759-61; Marx, *supra* note 26 at 498; Harris, *supra* note 26 at 1287; Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 Fam. L.Q. 485, 493-94 (2003). See *Roe v. Conn*, 417 F. Supp. 769, 780 (D.C. Ala. 1976); *In re Jamie TT.*, 599 N.Y.S.2d 892 (App. Div. 1993), *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005). See also *In re Adoption/Guardianship Number T97036305*, 746 A.2d 379 (Md. 2000).

<sup>29</sup> Pitchal, *supra* note 28, at 664.

<sup>30</sup> Glynn, *Unauthorized Practice*, *supra* note 10; *Kenny A.*, 356 F. Supp. 2d at 1361.

<sup>31</sup> Taylor, *supra* note 25, at 612. See also Pitchal, *supra* note 25 at 681 ("[T]he *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.")

<sup>32</sup> Myrna Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 Crim. Just. 12 (2009). Cf. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 Nev. L.J. 805, 812 (2006) [hereinafter *State Interests*] ("[C]hildren are merely the subject of the inquiry in much the way the putative victim[s]. But putative victims [. . .] do not have the right to be represented at the trials phase of a criminal case.")

<sup>33</sup> Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 Fordham L. Rev. 1699, 1746; Atwood, *Representing Children* *supra* note 12, at 220; Gerard Glynn, *Unauthorized Practice*, *supra* note 10; Stötzel & Fegert, *supra* note (presenting a survey of child client satisfaction with attorney representatives).

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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> One commentator has also argued that greater bar involvement in the cases of children in foster care would have a salutary affect on the legal culture generally.<sup>37</sup>

### **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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> Appell argues that the increased number of children's attorneys arose from a series of policy decisions defining child welfare in individual rather than social and economic justice terms. For Appell, these individual legal solutions amount to "tinkering" with individual rights within existing frameworks, at the expense of broader community development remedies.<sup>42</sup> Susan Brooks, Mary Kay Kisthardt and others have questioned the suitability of the adversarial legal system in matters addressing complex interpersonal relationships.<sup>43</sup> One survey of empirical studies suggested that the involvement of

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<sup>34</sup> Glynn, *Unauthorized Practice*, *supra* note 10; *see also* Kotheekar, *supra* note 11 at 510-512.

<sup>35</sup> Taylor, *supra* note 25 at 619; Buss, *supra* note 34 at 1760-61. *See also* Victoria Weisz et al., *Children and Procedural Justice*, 44 G. Rev. 36 (2007); Keri K. Gould & Michael L. Perlin, *Johnny's in the Basement/Mixing Up His Medicine: Therapeutic Jurisprudence and Clinical Teaching*, 24 Seattle U. L. Rev. 339, 359-71 (2000); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. Cinn. L. Rev. 89, 93-96, 103-11 (2002).

<sup>36</sup> Atwood, *Representing Children*, *supra* note 12, at 221.

<sup>37</sup> Emily Richardson, *supra* note 7, at 365.

<sup>38</sup> Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 Nev. L.J. 805 (2006).

<sup>39</sup> *Id.* at 805

<sup>40</sup> *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.

<sup>41</sup> Annette Appell, *Representing Children Representing What? Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573, 623. *See also* Marvin Ventrell, *supra* note 12, at 94 ("lawyers [with a 'child-saving' mentality] are frequently seen as an impediment to producing good outcomes").

<sup>42</sup> Appell, *supra* note 42, at 620 (citing Robin West, *Re-Imagining Justice*, 14 Yale J.L. & Feminism 333, 340 (2002) (noting how rights discourse may side-step systemic problems and reform); *Report of the Working Group on the Role of Race, Ethnicity, and Class*, 6 Nev. L.J. 634, 670-72 (2006).

<sup>43</sup> Kisthardt, *supra* note 11. *See also* Hollis Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 Geo. Mason L. Rev. 1083, 1110 (2006); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 138-139 (1997); Appell, *supra* note 42, at 620; Susan L. Brooks, *Therapeutic and Preventive Approaches to School Safety: Applications of a Family Systems Model*, 34 New Eng. L. Rev. 615, 618 (2000); Susan

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.<sup>44</sup> Attorneys for children also constitute a financial burden on states.<sup>45</sup>

### **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.<sup>46</sup> 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.<sup>47</sup>

### **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.<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> Emily Buss has maintained that few attorneys adopt an absolutist position under either model.<sup>52</sup> Duquette has

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L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 Cornell J.L. & Pub. Pol’y 1, 3-4 (1996). Cf. Ann Haralambie, *Representation of Children*, 47 Judges J. 23, 26 (2008) (emphasizing that children are necessarily involved in child welfare cases, and that denying them representation will not shield them from a dispute and its ramifications).

<sup>44</sup> Youngclarke, et al., *supra* note 19. For history and structure of CASA program, see *id.*, at 109-112; see also Rebecca Ellis, Comment, *The Heartbeat of Texas Children: The Role of Court-Appointed Special Advocates in the Wake of the 2005 Family Code Amendments*, 38 Tex. Tech. L. Rev. 1065.

<sup>45</sup> 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).

<sup>46</sup> Atwood, *Uniform Representation*, at 87-88; Howard Davidson, *Children’s Rights and American Law: A Response to What’s Wrong with Children’s Rights*, 20 Emory Int’l L. Rev. 69 (2006).

<sup>47</sup> 2001 NACC Recommendations, *supra* note 20, at 11. Cf. Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. Am. Acad. Matrimonial L. 251 (2009).

<sup>48</sup> See text and references, *supra* note 20.

<sup>49</sup> Atwood, *supra* note 12, at 91-92

<sup>50</sup> Koh Peters, *Representing Children*, *supra* note 2, at § 3-2(b)(2).

<sup>51</sup> 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*].

<sup>52</sup> 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.<sup>53</sup>

### **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.<sup>54</sup> The best interests model is characterized as flexibly allowing for individualized client advocacy.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> Children may face pressures from families, the court process, or other circumstances that lead them to misidentify their own interests.<sup>60</sup> 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.<sup>61</sup>

Requiring children to be responsible for taking difficult positions and decisions may constitute too heavy a psychological burden.<sup>62</sup> Society has a greater obligation to protect children from their own bad judgments.<sup>63</sup> 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.<sup>64</sup>

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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.”)

<sup>53</sup> Adoption 2002 Guidelines, *supra* note 2, at 23; Glynn, *Unauthorized Practice*, *supra* note 10, at 62; see text and references cited *infra* note 113.

<sup>54</sup> Buss, *supra* note 34, at 1702; Atwood, *supra* note 12, at 99-100.

<sup>55</sup> Marx, *supra* note 26, at 514. See also Harris, *supra* note 26, at 1284.

<sup>56</sup> Duquette, *Bright Line Test*, *supra* note 53.

<sup>57</sup> Duquette, *Two Roles Required*, *supra* note 52 at 444 (2000); Duquette, *Bright Line Test*, *supra* note 53; Harris, *supra* note 26, at 1291;

<sup>58</sup> Duquette, *Bright Line Test*, *supra* note 53; Atwood, *Uniform Representation*, *supra* note 12, at 79; Ventrell, *Toward a Better Model*, *supra* note 20..

<sup>59</sup> Atwood, *Representing Children*, *supra* note 12, at 194; Marx *supra* note 26, at 514.

<sup>60</sup> Buss, *supra* note 34, at 1702-03.

<sup>61</sup> Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *Fordham L. Rev.* 1505, 1514 (1996).

<sup>62</sup> Robert E. Emery, *Hearing Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 *Ariz. L. Rev.* 621, 622 (2003); Atwood, *supra* note 12, at 194; cf. Buss, *supra* note 34, at 1702-03;

<sup>63</sup> See Buss, *supra* note 34, at 1702-03.

<sup>64</sup> *Id.*; Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 *Fam. L. Q.* 287, 304-05 (1983).

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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> Further, Atwood argues that other standards emphasizing the client-directed model nevertheless allow considerable discretion under complex substituted judgment assessments.<sup>68</sup>

### **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.<sup>69</sup> 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."<sup>70</sup> 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).<sup>71</sup> 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.<sup>72</sup> Even specially trained attorneys may not be equipped to make these

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<sup>65</sup> 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).

<sup>66</sup> Debra H. Lehrmann, *Who Are We Protecting?* 63 Tex. B.J. 122, 126 (2000). *See also* Atwood, *Representing Children* *supra* note 12, at 193-94.

<sup>67</sup> Atwood, *Uniform Representation*, *supra* note 12, at 95.

<sup>68</sup> *Id.* at 95. *See also* Haralambie, *supra* note 44, at 23.

<sup>69</sup> 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.")

<sup>70</sup> *Report and Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 42 Fam. L.Q. 145, 147-48 (2008) [hereinafter 2009 ABA Model Act Report].

<sup>71</sup> *See* Taylor, *supra* note 25, at 621-22; 2006 UNLV Recommendations, *supra* note 20, at Introduction ("[T]he 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.

<sup>72</sup> Atwood, *Uniform Representation*, *supra* note 12, at 92-93; Appell, *supra* note 12, at 599-600; 2006 UNLV Recommendations, *supra* note 20, at Introduction ("[T]hese often well-meaning 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* note 71, at 147-48 ("Children's lawyers are not social workers or psychologists and should not be treated as such. To the

determinations.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> Client-directed representation also finds support abroad.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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extent that courts need information about what is in the child's best interest, the court should use a court appointed advisor or an expert, subject to the rules governing all court experts.")

<sup>73</sup> Haralambie, *supra* note 44, at 24.

<sup>74</sup> Duquette, *Two Roles Required*, *supra* 52; see text and references, *infra* note 79.

<sup>75</sup> 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.")

<sup>76</sup> Koh Peters, *Representing Children*, *supra* note 2, at § 2(a)-3(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 children need, 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"); Kotheke, *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 . . .")

<sup>77</sup> Bilson & White, *supra* note 16, at 236.

<sup>78</sup> Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. Rev.* 76, 81 (1984); 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, 1390; Kotheke, *supra* note 11.

<sup>79</sup> Buss, *supra* note 34, at 1703-05.

<sup>80</sup> *Id.*; Appell, *supra* note 44, at 634-65. See also Guggenheim, *AAML's Revised Standards*, *supra* note 48, at 264.

As discussed at II.B, *supra*, allowing children a voice in their own proceedings empowers children.<sup>81</sup> This is also justified as a restorative measure, given children’s status disempowered status under the circumstances that bring them into custody.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

### **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.<sup>85</sup> 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.<sup>86</sup>

### **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.<sup>87</sup> 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.<sup>88</sup>

### **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

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<sup>81</sup> Ventrell, *supra* note 42, at 96; Bilson & White, *supra* note 16, at 236.

<sup>82</sup> Buss, *supra* note 34, at 1703-05.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; Stötzel & Fegert, *supra* note 16.

<sup>85</sup> Duquette, *Two Roles Required*, *supra* note 53.

<sup>86</sup> John Anzelc, Melissa Cohen, & Sarah Taylor, *Comment on the Committee’s Model Act Governing Representation of Children in Abuse and Neglect Proceedings*, 12 Mich. Child Welfare L. Bar. J. 4; Emery, *supra* note 63.

<sup>87</sup> Duquette, *Two Roles Required*, *supra* note 52.

<sup>88</sup> Duquette, *Bright Line Test*, *supra* note 53.

ABA Model Rules of Professional Responsibility, discussed above, especially the 2002 amendments, will provide some guidance.<sup>89</sup>

## **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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup>

### **ABA Standards (1996 and 2003)**

In 1996, the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings.<sup>94</sup> 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.”<sup>95</sup> 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.<sup>96</sup> The 2003 ABA Custody

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<sup>89</sup> Don Duquette & Ann Haralambie, *Representing Children and Youth*, Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases, (Duquette & Haralambie, eds., 2nd ed. 2010).

<sup>90</sup> 1995 AAML Standards, *supra* note 20.

<sup>91</sup> *Id.* at Standard 2.7 cmt.; see also Guggenheim, *AAML’s Revised Standards*, *supra* note 48.

<sup>92</sup> Guggenheim, *AAML’s Revised Standards*, *supra* note 48, at 254.

<sup>93</sup> Haralambie, *supra* note 44, at 24; Atwood, *Uniform Representation*, *supra* note 12, at 77-78.

<sup>94</sup> Linda Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 *Fordham L. Rev.* (1999).

<sup>95</sup> ABA Standards at 1-A & 1-B.

<sup>96</sup> Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 *Fam. L.Q.* 105, 105 (2003).

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.<sup>97</sup> 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.<sup>98</sup>

### **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.<sup>99</sup> 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.

### **Fordham (1996) and UNLV (2006) Recommendations**

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.<sup>100</sup> 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.”<sup>101</sup> 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.<sup>102</sup>

### **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.<sup>103</sup> The proposed ULC Act created three categories of court-appointed children’s representatives, providing for discretionary appointment

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<sup>97</sup> 1996 ABA Standards, at B-5 cmt.

<sup>98</sup> Duquette, *Bright Line Test*, *supra* note 53, at 1242; Guggenheim, *AAML’s Revised Standards*, *supra* note 48.

<sup>99</sup> Ventrell, *Toward a Better Model*, *supra* note 20.

<sup>100</sup> 1996 Fordham Recommendations, *supra* note 20; 2006 UNLV Recommendations, *supra* note 20.

<sup>101</sup> 2006 UNLV Recommendations, *supra* note 20, at 592

<sup>102</sup> U.N. Office of the High Commissioner for Human Rights, Convention on the Rights of the Child, Art. XII, Sept. 2, 1990, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en).

<sup>103</sup> 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.”<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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.”<sup>107</sup>

### **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.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup>

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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<sup>104</sup> *Id.* at §§ 14 1(B), 6.

<sup>105</sup> *Id.* at § 8 cmt.

<sup>106</sup> *Id.* at §8.

<sup>107</sup> 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.”)

<sup>108</sup> 2009 ABA Model Act, *supra* note 20.

<sup>109</sup> *Id.*, at § 7.

<sup>110</sup> *Id.* at § 2(C).

Professional Other than Counsel for the Child,” who is appointed to assist the court in deciding the case.<sup>111</sup>

## **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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

### **Client Contact**

Attorney-client meetings are critical to successful representation, because children must understand the role of the representative<sup>115</sup> and because attorneys must understand the needs

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<sup>111</sup> 2009 AAML Revised Standards, *supra* note 20, at 247; Guggenheim, *AAML’s Revised Standards*, *supra* note 48, at 265.

<sup>112</sup> 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”).

<sup>113</sup> 1996 ABA Standards, at B-1.

<sup>114</sup> (1)(A)(2)(a)(ii). See also 2007 ULC Model Act, at § 7 cmt.

<sup>115</sup> 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.

of the client.<sup>116</sup> Commentators note that awareness of the client's individual context is necessary to reducing the role of race, culture, or class biases in representation.<sup>117</sup> 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."<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup>

Ann Haralambie and Lauren Adams discuss the importance of planning for relationship building.<sup>121</sup> 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.<sup>122</sup> Emily Buss has examined the importance of understanding children's development in their representation.<sup>123</sup>

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.<sup>124</sup> Children's attorneys should engage the entire family, and help the family understand how they can participate in the proceedings.<sup>125</sup> Children's attorneys should recognize the importance for most clients of maintaining connections to their families and

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<sup>116</sup> Koh Peters, *Representing Children*, *supra* note 2, at § 1-1; Atwood, *supra* note 12, at 208; Appell, *supra* note 44, at 625.

<sup>117</sup> See text and references cited *supra* note 117; Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 St. John's L. Rev. 601, 617 & 630 (2007); Taylor, *supra* note 25, at 615; Kisthardt, *supra* note 11; 20 Stötzl & Fegert, *supra* note 16, at 220; 2007 ULC Model Act § 11

<sup>118</sup> Koh Peters, *Representing Children*, *supra* note 2.

<sup>119</sup> 2006 UNLV Recommendations, *supra* note 20, at (1)(B)(1).

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

<sup>121</sup> 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).

<sup>122</sup> 2006 UNLV Recommendations, *supra* note 20, at (1)(C)(2)(b), 1996 ABA Standards A-3; 2007 ULC Model Act § 7.

<sup>123</sup> Buss, *supra* note 34.

<sup>124</sup> 2006 UNLV Recommendations, *supra* note 20, at (1)(A)(2)(a).

<sup>125</sup> *Id.* at (1)(A)(2)(i).

communities. Attorneys should solicit feedback from clients and families as to their representation.<sup>126</sup>

### **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.<sup>127</sup> 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.<sup>128</sup>

### **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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

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."<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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

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<sup>126</sup> *Id.* at (1)(B)(2)(g).

<sup>127</sup> Buss, *supra* note 1753-57.

<sup>128</sup> 2006 UNLV Recommendations, *supra* note 20, at (3)(C)(2)(d).

<sup>129</sup> Sobie, *supra* note 11, at 747; Kotheke, *supra* note 11, at 481.

<sup>130</sup> Sobie, *supra* note 11, at 747. *See also* Glynn, *Unauthorized Practice*, *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, *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.* 533, 561-564.

<sup>131</sup> Glynn, *supra* note 10.

<sup>132</sup> ABA Resolution 104a, adopted August 2007. Youth Transitioning from Foster Care (Youth at Risk), *available at* <http://www.abanet.org/child/parentrepresentation/PDFs/060.pdf>.

<sup>133</sup> 2006 UNLV Recommendations, *supra* note 20, at (3)(A)(2)(b).

<sup>134</sup> *Id.*, at (3)(B)(2).

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.<sup>135</sup>

## Systemic Pressures for Child Representatives

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

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

## 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

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<sup>135</sup> Buss, *supra* note 34, at 1760-61.

<sup>136</sup> Glynn, *Unauthorized Practice*, *supra* note 10, at 58; Adoption 2002 Guidelines, at 1-5.

<sup>137</sup> Katherine Kruse, *supra* note 113, at 1316; Buss, *supra* note 34, at 17661; Weinberg, et al., *supra* note 24, at 212.

<sup>138</sup> 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).

<sup>139</sup> 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.

<sup>140</sup> 2006 UNLV Recommendations, *supra* note 20, at (5)(D)(2)(d).

<sup>141</sup> See Charlotte A. Carter-Yamauchi, Hawaii Legislative Reference Bureau, *Issues Relating to Guardians Ad Litem* (2003); Marx, *supra* note 26, at 531; Fines, *supra* note 12, at 413, 416-417; Kisthardt, *supra* note 11; Melissa Breger et al., *Building Pediatric Law Careers: The University of Michigan Law School Experience*, 34 Fam. L. Q. 531, 532-33 (2000); Richardson, *supra* note 7. See also Koh Peters, *How Children Are Heard*, *supra* note 15, at 1082-83 (2006).

<sup>142</sup> Stötzel & Fegert, *supra* note 16, at 222.

<sup>143</sup> Fines, *supra* note 12, at 412; *Pew Commission on Children in Foster Care, Fostering the Future: Safety, Permanence, and Well-Being for Children in Foster Care*, 43 (2004); *ABA Child Custody & Adoption Pro Bono Project, Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, 41 Fam. L.Q. 365, 381 (2007); *ABA Resolutions on Foster Care and Adoption: Foster Care Reform*, Aug. 2005 (urging development and implementation of national protocols and standards for reasonable attorney caseloads); Lowry & Bartosz, 41 U. Mich. J.L. Reform *supra* note 8, at 207; Susan A. Snyder, *Juvenile Law Center, Promises Kept, Promises Broken: An Analysis of Children's Right to Counsel in Dependency Proceedings in Pennsylvania* 38 (2001), available at <http://www.jlc.org/File/publications/pkpd.pdf>; Appell, *supra* note 44, at 609-611.

<sup>144</sup> 2009 ABA Model Act, *supra* note 71, at 147-48; Kisthardt, *supra* note 11; Haralambie, *supra* note 44, at 24.

<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup> Courts are often not provided substantial statements as to why the child must continue in state placement.<sup>148</sup> 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.<sup>149</sup>

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,<sup>150</sup> and that relationships and communication between attorneys and social workers may be strained because of their different languages and training.<sup>151</sup> 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.<sup>152</sup>

## **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.<sup>153</sup> Children’s attorneys can, and often do, advocate in legislatures, state agencies, and courts in order to effectuate meaningful changes in justice for children.<sup>154</sup> Local and national group advocacy also occurs through class action litigation and legislative advocacy seeking to effect systemic change.<sup>155</sup>

## **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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<sup>146</sup> Guggenheim, *State Interests*, *supra* note 830-31; Margulies, *supra* note 118, 620 (describing the asymmetry of penalty and reward facing attorneys for children).

<sup>147</sup> Davidson, *supra* note 5, at 482.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Fines, *supra* note 12, at 440–46 .

<sup>151</sup> Kisthardt, *supra* note 11.

<sup>152</sup> Pitchal, *supra* note 28, at 686-687; Buss, *supra* note 34, 1760-61; Kothekar, *supra* note 11, at 504-05.

<sup>153</sup> 2006 UNLV Recommendations, at (3)(D)(2)(a)-(e)

<sup>154</sup> 2006 UNLV Recommendations, at 5.

<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup> The UNLV Recommendations maintain that jurisdictions should permit lawyers to represent youth in more than one system, engaging in concurrent or dual representation.<sup>158</sup>

Ramsey also describes how lawyers may participate in programs such as medical-legal partnerships that seek to improve children's health.<sup>159</sup> Additional models have been thought to strengthen the relationship between representation in court and service delivery.<sup>160</sup> Foster care review panels may offer provide oversight of children's cases.<sup>161</sup>

### **Addressing Caseloads, Compensation, and Delay**

The 2005 ABA resolution and Pew Commission recommendations also included standards for reasonable attorney caseloads.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup>

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.<sup>166</sup> 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

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<sup>156</sup> Sarah Ramsey, *Child Well-Being: A Beneficial Advocacy Framework for Improving the Child Welfare System?*, 41 U. Mich. J.L. Reform 9, 19-20.

<sup>157</sup> *Id.*

<sup>158</sup> 2006 UNLV Recommendations, *supra* note 20, at (5)(D)(2)(a).

<sup>159</sup> Ramsey, *supra* note 157, at 21.

<sup>160</sup> Shelly L. Jackson, A USA National Survey of Program Services Provided by Child Advocacy Centers, 28 Child Abuse and Neglect 411, 412 (2004); Gail Chang Bohr, *Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings*, 32 Wm. Mitchell L. Rev. 989 (2006); Gail Hornor, *Child Advocacy Centers: Providing Support to Primary Care Providers*, 22 J. Pediatric Health Care 35 (2008).

<sup>161</sup> See Youngclarke, et al., *supra* note 19, at 112

<sup>162</sup> 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.)

<sup>163</sup> *Kenny A.*, 356 F. Supp. 2d 1353.

<sup>164</sup> Fines, *supra* note 12, at 413 (citing *Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, No. 3:04CV773(CFD) (D. Conn. Mar. 28, 2005)). Fines also cites other workload suits: Successful suits include *Smith*, 681 P.2d 1374; *Peart*, 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.

<sup>165</sup> *CAI Litigation Challenges the Crushing Caseloads of Sacramento Dependency Lawyers*, Children's Advocacy Institute (2010), available at <http://www.caichildlaw.org/caseload.htm>.

<sup>166</sup> Davidson & Pitchal, *Caseloads Must Be Controlled*, *supra* note 139.

record of the harm to the child and family caused by delays, and take further affirmative action as needed to hold parties accountable for their delays.<sup>167</sup>

### 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.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup>

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.<sup>171</sup> 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.<sup>172</sup> The NACC developed a Child Welfare Law Specialist certification program in 2006, currently available in 16 jurisdictions.<sup>173</sup> 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.<sup>174</sup>

Certain commentators examined the increasing role of child advocacy education in law schools, including clinical programs.<sup>175</sup> Like the UNLV Recommendations, these writers emphasize the importance of multidisciplinary education, practice-oriented modeling, and collaboration with

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<sup>167</sup> 2006 UNLV Recommendations, *supra* note 20, at (1)(B)(2)

<sup>168</sup> 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.

<sup>169</sup> 1996 ABA Standards, at I-2.

<sup>170</sup> ABA Resolutions on Foster Care and Adoption: Foster Care Reform, Aug. 2005, *available at* <http://www.abanet.org/child/foster-adopt.shtml>.

<sup>171</sup> 2006 UNLV Recommendations, *supra* note 20, at (2)(F)(3)(a).

<sup>172</sup> First Star, *A Child's Right to Counsel: A National Report Card On Legal Representation for Abused & Neglected Children* (2009), *available at* <http://www.firststar.org/library/report-cards.aspx>.

<sup>173</sup> NACC Certification is currently available in 16 states. *See* NACC Certification, NACC Website, *available at* <http://www.naccchildlaw.org/?page=Certification>. *See also* Marvin Ventrell & Amanda George Donnelly, *NACC Certifies Nation's First Child Welfare Law Specialists*, *Children's Voice Magazine*, Apr. 1, 2007.

<sup>174</sup> P.L. 110-351; Taylor, *supra* note 25, at 620.

<sup>175</sup> Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. Mich. J.L. Reform 1 (1997); Marvin Ventrell, *The Practice of Law for Children*, *supra* note 17; Christina A. Zawisza, *Two Heads Are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 Fla. Coastal L. Rev. 631, 631 (2006); Fines, *supra* note 12; Kisthardt, *supra* note 11, at V.B; Breger et al., *supra* note 142, at 532-33.

related fields such as a social work.<sup>176</sup> Child law education must also support law students and graduates in pursuing pediatric careers.<sup>177</sup>

## 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.

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<sup>176</sup> 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.

<sup>177</sup> Breger et al., *supra* note, at 532-33.