

# **Child Representation in America: Progress Report from the National Quality Improvement Center**

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## **I. Introduction**

Few dispute that children in the child welfare system need effective representation. In October 2009, the U.S. Children's Bureau named the University of Michigan Law School the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep). The QIC-ChildRep is a five-year, multimillion dollar project, charged with gathering, developing, and communicating knowledge on child representation. In addition, the QIC-ChildRep is tasked with promoting a consensus on the role of the child's legal representative and providing one of the first random assignment experimental design research projects on the legal representation of children.

In its first year, the QIC-ChildRep assessed the state of child representation in child welfare cases nationwide and developed a Quality Improvement Center (QIC) Best Practice Model. The implementation of the QIC Best Practice Model in Georgia and Washington State will allow evaluation on whether the QIC approach will improve results for the children involved.<sup>1</sup> The complete results will not be available for over three years.

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1. The implementation included a random assignment experimental design to facilitate the evaluation. The research partner on this project is Chapin Hall at the University of Chicago.

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This article documents the QIC-ChildRep process of gathering and distilling information that provides the foundation of the QIC Best Practice Model. Information on research, policy, and practice was integrated from many sources, including law libraries, federal and state government reports, and in-person and phone discussions with a wide range of policy makers and practitioners. Hopefully, this compilation of information will itself be of value to academics, students, courts, legislators, and others in the ongoing efforts to improve justice for children in the child welfare process.

Part II sets out the legal context of child representation in America by identifying the central federal laws that have guided state law development in the past forty years. Part III summarizes the existing academic literature and significant conferences, standards, and model acts. Part IV reviews current state laws in ten sample states. It also summarizes findings from interviews with expert stakeholders in those states and presents some findings as to the “law in practice” regarding child representation duties. In Part V, the article reviews the few existing empirical studies of legal representation of children. Part VI presents the conclusions from the QIC first year needs assessment on the state of child representation in America. Finally, Part VII describes the QIC empirical research component, which is implementing the QIC Best Practice Model in Georgia and Washington State using random assignment experimental design. The full QIC Best Practice Model of Child Representation is presented in Appendix C.

## II. Legal Context of Child Representation

The modern era of legal representation of children in child welfare cases began in 1974 with the Child Abuse Prevention and Treatment Act (CAPTA).<sup>2</sup> In CAPTA, Congress passed the first comprehensive legislation on child abuse and prevention. It is the touchstone and source point for the evolution of representation of children, by lawyers and nonlawyer guardians ad litem alike. It required states to provide a guardian ad litem for children in child-protection court proceedings, but did not describe qualifications, training, or responsibilities of the representative. Congress reauthorized CAPTA in 1996, amending it to provide that a lawyer may

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2. 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 (3d ed. 2007) [hereinafter KOH PETERS, REPRESENTING CHILDREN].

be appointed as a guardian ad litem (GAL) and that the GAL's role is "to obtain first-hand a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the best interests of the child." The *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, 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 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> Congress reauthorized CAPTA again in 2010.<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> Some have expressed skepticism about federal data, assessment of state compliance, and enforcement.<sup>8</sup> One author 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> CAPTA, however, has neither a detailed monitoring system nor an effective enforcement mechanism.<sup>10</sup> CAPTA began the modern development of legal representation of children, but left many questions unresolved.

3. 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. Dep't Health & Human Servs: Children's Bureau 1999).

4. M. CARMELA WELTE, GAL TRAINING MANDATED IN CAPTA: HHS ISSUE GUIDELINES, NATIONAL CASA VOLUNTEER CURRICULUM CITED AS MODEL FOR VOLUNTEER TRAINING (July 2004).

5. 42 U.S.C. § 5106a(b)(2)(A)(xiii).

6. 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, 485–90 (2008).

7. 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).

8. Gerard Glynn, *The Child's Representation under CAPTA: It is Time for Enforcement*, 6 NEV. L.J. 1250, 1256–57 (1996); Marcia Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REFORM 199 (2007).

9. Glynn, *supra* note 8, at 1257.

10. Gerard Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 54 (2007).

### III. Brief Summary of Academic Literature

#### A. *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 that nonattorneys are unable to provide.<sup>11</sup> Attorneys' legal capabilities and expertise in negotiating systems are often critical to advocating for children's service needs.<sup>12</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>13</sup> Other parties—attorneys representing the state and parents' attorneys—have interests and motivations other than what is purely in the child's interests and cannot adequately represent the child in all cases.<sup>14</sup>

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. Volunteer Court Appointed Special Advocates (CASAs), who may or may not be lawyers, are valued, but are not seen as suitable substitutes for lawyers.

#### B. *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

11. *Id.* at 64–65 (noting that legal advice from nonattorney representatives constitutes unauthorized practice of law).

12. Lois Weinberg et al., *Advocacy's Role in Identifying Dysfunctions in Agencies Serving Abused and Neglected Children*, 2 CHILD MALTREATMENT, 212, 216–22 (1997).

13. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 614 (2009).

14. 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 (2006); Sarah Marx, Note, *Seen But Not Heard: Advocating for Children in New York State*, 25 Touro L. REV. 491, 526 (citing *Fargnoli v. Faber*, 481 N.Y.S.2d 784, 786 (App. Div. 1984)); Taylor, *supra* note 13, at 613–14 (“children in dependency proceedings have distinct interests that cannot be represented by their parents or the state”).

courts have held that procedural due process provides such a right.<sup>15</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>16</sup> One scholar 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 U.S. Supreme Court considered Ms. Lassiter, an adult, competent to do in the absence of counsel. Children's constitutional right to representation cannot be met with a nonlawyer advocate, such as a Court Appointed Special Advocate (CASA).<sup>17</sup>

Another scholar 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>18</sup> Others have found a basis for appointment of lawyers for children by analogy to existing victims' rights laws.<sup>19</sup>

### C. Equal Dignity for Children in the Judicial Process

A number of commentators have argued that appointing attorneys for children is critical to respecting a child's right to participate in the judicial decisions affecting their lives.<sup>20</sup> Katherine Hunt Federle argues that chil-

15. *Roe v. Conn*, 417 F. Supp. 769, 780 (D.C. Ala. 1976); *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005); *In re Jamie TT.*, 599 N.Y.S.2d 892 (App. Div. 1993); *In re Adoption/Guardianship No. T97036305*, 746 A.2d 379 (Md. 2000). See also Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. 663, 689 (2006); Taylor, *supra* note 13, at 611; Barbara Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 85–86 (2008) [hereinafter Atwood, *Uniform Representation*]; Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 759–61 (2006); Marx, *supra* note 14, at 498; Harris, *supra* note 14, 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).

16. Pitchal, *supra* note 15, at 664; Smiles, *supra* note 15.

17. Glynn, *Unauthorized Practice*, *supra* note 10.

18. Taylor, *supra* note 13, at 612. See also Pitchal, *supra* note 15, 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.”).

19. 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) (“[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 trial phase of a criminal case.”).

20. 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 *Looking*

dren's right to participate arises as a remedy for powerlessness, situating children on equal footing to challenge subordination. Empowering children to contribute to decisions about their future often contributes to children's psychological well-being. Another scholar 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>21</sup>

Many commentators have described the therapeutic nature of the attorney-client relationship for children involved in the child welfare system.<sup>22</sup> Through the counseling 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>23</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>24</sup> One scholar suggests 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>25</sup> One commentator has also argued that greater bar involvement in the cases of children in foster care would have a salutary effect on the legal culture generally.<sup>26</sup>

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for Rights]; Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1658 (1996) [hereinafter *Rethinking Role*]; Barbara Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 *J. AM. ACAD. MATRIM. LAW.* 183, 194–95 (2005) [hereinafter *Representing Children*]; Taylor, *supra* note 13, at 613–14.

21. Pitchal, *supra* note 15, at 689.

22. Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1746 (1996); Atwood, *Representing Children*, *supra* note 20, at 220; Glynn, *Unauthorized Practice*, *supra* note 10; 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 *INT'L J. LAW, POL'Y & FAM.* 201 (2006).

23. Glynn, *Unauthorized Practice*, *supra* note 10; see also Aditi Kothekar, Note, *Refocusing the Lens of Child Advocacy Reform on the Child*, 86 *WASH. U. L. REV.* 481, 510–12 (2008).

24. Taylor, *supra* note 13, at 619; Buss, *supra* note 22, 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).

25. Atwood, *Representing Children*, *supra* note 20, at 221.

26. Richardson, *supra* note 7, at 365.

### D. 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>27</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>28</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>29</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>30</sup> She 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>31</sup> Others have questioned the suitability of the adversarial legal system in matters addressing complex interpersonal relationships.<sup>32</sup> One survey of empir-

27. Guggenheim, *supra* note 19.

28. *Id.* at 805.

29. *Id.* at 806, & 832; Annette Appell, *Representing Children Representing What? Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 623 (2008). See also Naomi Cahn, *State Representation of Children's Interests*, 40 FAM. L.Q. 109, 110 (2006).

30. Appell, *supra* note 29, at 605. See also Marvin Ventrell, *The Practice of Law for Children*, 28 HAMLINE J. PUB. L. & POL'Y 75, 94 (2006) ("lawyers [with a 'child-saving' mentality] are frequently seen as an impediment to producing good outcomes").

31. Appell, *supra* note 29, 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).

32. 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). 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 29, 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 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).

ical studies suggested that the involvement of 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>33</sup> Attorneys for children also constitute a financial burden on states.<sup>34</sup>

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>35</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>36</sup>

### *E. The Role of the Child's Attorney: Competing Models*

#### 1. BEST INTERESTS OR CLIENT DIRECTED

While providing attorneys for children is recognized as necessary by the child welfare field, opinions differ as to the role attorneys should adopt.<sup>37</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>38</sup>

33. Davin Youngclarke et al., *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 109 (2004). For history and structure of CASA program, see *id.*, at 109–12; 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 (2006).

34. See Harris, *supra* note 14, at 1294 (citing *In re B.K.*, 833 N.E.2d 945 (Ill. App. Ct. 2005)). But see Taylor, *supra* note 13, at 614 (noting that the cost of counsel may be mitigated by the financial benefits of increased permanency).

35. Atwood, *Uniform Representation*, *supra* note 15, 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).

36. National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, at Executive Summary 11 (2001) [hereinafter *NACC Recommendations*]. 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) [hereinafter *AAML's Revised Standards*].

37. See text and references, *supra* notes 12–20.

38. Atwood, *Representing Children*, *supra* note 20, at 91–92.



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>39</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>40</sup> Emily Buss has maintained that few attorneys adopt an absolutist position under either model.<sup>41</sup> Duquette has 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>42</sup>

## 2. 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>43</sup> The best-interests model is characterized as flexibly allowing for individualized client advocacy.<sup>44</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>45</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>46</sup> A lawyer should not

39. KOH PETERS, REPRESENTING CHILDREN, *supra* note 2, at § 3–2(b)(2).

40. 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*].

41. Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) [hereinafter *Bright Line Test*]; Buss, *supra* note 22, 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 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.”)

42. Adoption 2002 Guidelines, *supra* note 2, at 23; Glynn, *Unauthorized Practice*, *supra* note 10, at 62.

43. Buss, *supra* note 22, at 1702; Atwood, *supra* note 15, at 99–100.

44. Marx, *supra* note 14, at 514. *See also* Harris, *supra* note 14, at 1284.

45. Duquette, *Bright Line Test*, *supra* note 41.

46. Duquette, *Two Roles Required*, *supra* note 40, at 444 (2000); Duquette, *Bright Line Test*, *supra* note 41; Harris, *supra* note 14, at 1291.

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>47</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>48</sup> Children may face pressures from families, the court process, or other circumstances that lead them to misidentify their own interests.<sup>49</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>50</sup>

Requiring children to be responsible for taking difficult positions and decisions may constitute too heavy a psychological burden.<sup>51</sup> Society has a greater obligation to protect children from their own bad judgments.<sup>52</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>53</sup>

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>54</sup> Debra Lehmann 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>55</sup> Barbara Atwood contends that those who criticize best-interests lawyering because lawyers lack expertise to make such determinations unfairly envision

47. Duquette, *Bright Line Test*, *supra* note 41; Atwood, *Uniform Representation*, *supra* note 17, at 79; 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).

48. Atwood, *Representing Children*, *supra* note 20, at 194; Marx, *supra* note 14, at 514.

49. Buss, *supra* note 22, at 1702–03.

50. Jean 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).

51. Robert E. Emery, *Hearing Children’s Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 *ARIZ. L. REV.* 621, 622 (2003); Atwood, *supra* note 15, at 194; *cf.* Buss, *supra* note 22, at 1702–03.

52. *See* Buss, *supra* note 22, at 1702–03.

53. *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).

54. Duquette, *Bright Line Test*, *supra* note 41, at 1249; Duquette, *Two Roles Required*, *supra* note 40, at 441; Sobie, *supra* note 15, at 791–93; Haralambie, *supra* note 32, at 23; Marx, *supra* note 14, 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).

55. Debra H. Lehmann, *Who Are We Protecting?* 63 *TEX. B.J.* 122, 126 (2000). *See also* Atwood, *Representing Children*, *supra* note 15, at 193–94.

lawyers as litigating in a vacuum.<sup>56</sup> Further, Atwood argues that other standards emphasizing the client-directed model, nevertheless, allow considerable discretion under complex substituted judgment assessments.<sup>57</sup>

### 3. 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>58</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>59</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>60</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

56. Atwood, *Uniform Representation*, *supra* note 15, at 95.

57. *Id.* See also Haralambie, *supra* note 32, at 23.

58. 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 20; Taylor, *supra* note 13, at 618; Atwood, *Uniform Representation*, *supra* note 15, at 92–93; Glynn, *Unauthorized Practice*, *supra* note 10. 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 20, 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.").

59. *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].

60. See ABA MODEL RULES OF PROFESSIONAL CONDUCT. See Taylor, *supra* note 13, at 621–22; Introduction, *Recommendations of the UNLV Conference on Representing Children in Families*, 6 NEV. L.J. 592 (2006) [hereinafter 2006 UNLV Recommendations] ("[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 22, at 1715–45.

a person to make the nuanced judgments the determination requires.<sup>61</sup> Even specially trained attorneys may not be equipped to make these determinations.<sup>62</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>63</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>64</sup> These critiques will be discussed further as reasons to adopt client-directed models.

#### 4. CLIENT-DIRECTED CHILD REPRESENTATION

Most recent academic and practitioner commentary has favored a client-directed role for attorneys representing children in dependency proceedings.<sup>65</sup> Client-directed representation also finds support abroad.<sup>66</sup>

61. Atwood, *Uniform Representation*, *supra* note 15, at 92–93; Appell, *supra* note 29, at 599–600; 2006 *UNLV Recommendations*, *supra* note 60 (“[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.”); *ABA Model Act Report*, *supra* note 59, at 147–48 (“Children’s lawyers are not social workers or psychologists and should not be treated as such. To the 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.”).

62. Haralambie, *supra* note 32, at 24.

63. Duquette, *Two Roles Required*, *supra* 40.

64. Ventrell, *supra* note 30, at 96; Federle, *supra* note 20; Taylor, *supra* note 13; Buss, *supra* note 22, 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.”).

65. 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 15, at 794; Taylor, *supra* note 13, 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*, *supra* note 15, at 90–91 (“The literature evinces a significant distrust of any model of lawyering that authorizes the lawyer to make decisions for the child based on the lawyer’s independent assessment of the child’s welfare”); Kothekar, *supra* note 23, at 484 (“National conferences establish a growing consensus”). *See also* Appell, *supra* note 29, 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 32, at 24 (“There is consensus among commentators to move in the direction of child-directed representation . . .”).

66. Andy Bilson & Sue White, *Representing Children’s Views and Best-Interests in Court*:

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>67</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>68</sup> Proponents of the traditional attorney model also emphasize that lawyers' lack of psychology and social work expertise and training should disqualify them from making best-interest judgments.<sup>69</sup>

As discussed at III. C., *supra*, allowing children a voice in their own proceedings empowers children.<sup>70</sup> This is also justified as a restorative measure, given children's disempowered status under the circumstances that bring them into custody.<sup>71</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 own best interests often proves sound.<sup>72</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>73</sup>

##### 5. 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>74</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>75</sup>

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*An International Comparison*, 14 CHILD ABUSE REV. 220, 223, 236 (2005).

67. 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; Kothekar, *supra* note 23.

68. Buss, *supra* note 22, at 1703–05.

69. *Id.*; Appell, *supra* note 29, at 634–65. See also Guggenheim, *AAML's Revised Standards*, *supra* note 36, at 264.

70. Ventrell, *supra* note 30, at 96; Bilson & White, *supra* note 66, at 236.

71. Buss, *supra* note 22, at 1703–05.

72. *Id.*

73. *Id.*; Stötzel & Fegert, *supra* note 22.

74. Duquette, *Two Roles Required*, *supra* note 40.

75. 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 51.

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## 6. 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>76</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>77</sup>

## 7. 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 task, however. The ABA Model Rules of Professional Responsibility, discussed above, especially the 2002 amendments, will provide some guidance.<sup>78</sup>

### *F. Authoritative Recommendations and Standards on the Role of the Representative*

#### 1. THE SCOPE OF FIELD ACTIVITY: PREVIOUS STUDIES, CONFERENCES, AND STANDARDS

Child advocacy is a growing field.<sup>79</sup> Practitioners, advocates, and academics share the view that children deserve better quality representation.<sup>80</sup>

76. Duquette, *Two Roles Required*, *supra* note 40.

77. Duquette, *Bright Line Test*, *supra* note 41.

78. Donald Duquette & Ann Haralambie, *Representing Children and Youth*, in *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES*, 2d ed. (Duquette & Haralambie eds., 2010).

79. Ventrell, *Law for Children*, *supra* note 30 (describing children's law as an emerging legal specialty).

80. Atwood, *Representing Children*, *supra* note 15, at 222; Hearing on Child Protections Issues Before the House Committee on Ways and Means Subcommittee on Human Resources

Relatively few comprehensive empirical studies of representation for children in protective proceedings exist.<sup>81</sup> These studies are discussed below in Part IV. 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 Commission (ULC), and attorneys gathered at conferences at Fordham (1996) and UNLV (2005).<sup>82</sup> International norms such as the United Nations Convention on the Rights of the Child (CRC) Article 12, have been influential in the national debate.<sup>83</sup> These proposals are also discussed.

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(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.”).

81. See generally Youngclarke, *A Systematic Review*, *supra* note 33; 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. Dep’t of Health & Human Services, *Final Report on The Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem* 11 (1994); U.S. Dep’t of Health & Human Services, *Nat’l Study of Guardian ad Litem Representation* (1990); U.S. Dep’t 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 6, at 509 (calling for improved representation based in social science evaluation).

82. American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings* [hereinafter *AAML Standards*], 13 J. AM. ACAD. MATRIM. LAW. 1 (1995); 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 Abuse and Neglect Standards*]; NACC, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* [hereinafter *NACC Revised Version*] (1999); Ventrell, *Toward a Better Model*, *supra* note 47; 2001 NACC *Recommendations*, *supra* note 36; 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*, [hereinafter 1996 *Fordham Recommendations*] 64 FORDHAM L. REV. 1301 (1996); 2006 *UNLV Recommendations*, *supra* note 60; National Conference of Commissioners on Uniform State Laws, *Uniform State Laws, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act* (2007), [hereinafter *ULA Model Act*] available at [http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf); *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (2011) [hereinafter 2011 *ABA MODEL ACT*], available at [http://apps.americanbar.org/litigation/committees/childrights/docs/aba\\_model\\_act\\_2011.pdf](http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf); AAML, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIMONIAL L. 227 (2009).

83. See generally Bilson & White, *supra* note 66, at 222. The 2006 *UNLV Recommendations*, *supra* note 60, at (5)(F)(1), note that Article 12 “grants children the right to participate and express their views, and potentially to be represented, in a vast number of

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## 2. 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>84</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>85</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>86</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>87</sup>

## 3. ABA STANDARDS (1996 AND 2003)

In 1996, the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings.<sup>88</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 a “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

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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.”

84. *1995 AAML Standards*, *supra* note 82.

85. *Id.* at Standard 2.7 cmt.; see also Guggenheim, *AAML’s Revised Standards*, *supra* note 36.

86. Guggenheim, *AAML’s Revised Standards*, *supra* note 36, at 254.

87. Haralambie, *supra* note 32, at 24; Atwood, *Uniform Representation*, *supra* note 15, at 77–78.

88. Linda Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 *FORDHAM L. REV.* 1999 (1996).



attorney/guardian ad litem “to protect the child’s interests without being bound by the child’s expressed preferences.”<sup>89</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>90</sup> The 2003 ABA Custody 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>91</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>92</sup>

#### 4. NACC-ABA 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>93</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 NACC Standards allow, but do not require, the attorney to request a GAL.

#### 5. FORDHAM (1996) AND UNLV (2006) RECOMMENDATIONS

In 1995, Fordham University Law School held the Conference on Ethical Issues in the Legal Representation of Children during which atten-

89. *ABA Abuse and Neglect Standards* at 1-A & 1-B.

90. 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).

91. 1996 *ABA Abuse and Neglect Standards*, at B-5 cmt.

92. Duquette, *Bright Line Test*, *supra* note 41, at 1242; Guggenheim, *AAML’s Revised Standards*, *supra* note 36.

93. Ventrell, *Toward a Better Model*, *supra* note 47.

dees developed a set of recommendations.<sup>94</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>95</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>96</sup>

#### 6. 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>97</sup> The proposed ULC Act created three categories of court-appointed children’s representatives, providing for discretionary appointment 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>98</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>99</sup> Under the Act, the court determines the role of the attorney at the time of the

94. 1996 *Fordham Recommendations*, *supra* note 82; 2006 *UNLV Recommendations*, *supra* note 60.

95. 2006 *UNLV Recommendations*, *supra* note 60, at 592.

96. 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&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

97. 2007 *ULC Model Act*, *supra* note 82.

98. *Id.* at §§ 14 1(B), 6.

99. *Id.* at § 8 cmt.

appointment, based on available information. The court may revise the designation in light of new information or changed circumstances.<sup>100</sup>

The ULC Model Act faced criticism and did not gain ABA approval; it was opposed by the ABA's Litigation Section and its Standing Committee on Ethics and Professional Responsibility because of "perceived conflicts between various ABA policies."<sup>101</sup>

#### 7. REVISED AAML STANDARDS (2009)

The 2009 Revised AAML Standards would not mandate that a court appoint a lawyer for the child, but 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 of an attorney assignment is to seek the litigation's objectives as established by the child client. These Standards also allow for appointment of a "Court-Appointed Professional Other than Counsel for the Child," who is appointed to assist the court in deciding the case.<sup>102</sup>

#### 8. ABA MODEL ACT GOVERNING REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY PROCEEDINGS (2011)

Through many years of debate, development, and consensus building, the ABA Section of Litigation Children's Rights Litigation Committee drafted the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, which the ABA House of Delegates adopted in August 2011.<sup>103</sup> The Model Act mandates that a "child's lawyer" who owes essentially the same duties to the child as to an adult client, be appointed for every child in abuse or neglect proceedings. The Model Act provides for a client-directed model of representation, but makes careful provision for a client with diminished capacity, and provides guidance to attorneys in making the diminished capacity decisions and deciding on protective action to protect the client. The lawyer for the child is expected to be qualified through training and experience with reasonable caseloads. The child's lawyer is required to com-

100. *Id.* at § 8.

101. Guggenheim, *AAML's Revised Standards*, *supra* note 36, 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); Spinak, *supra* note 67; *Cf.* Guggenheim, *AAML's Revised Standards*, *supra* note 36, 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.").

102. 2009 *AAML Revised Standards*, *supra* note 82, at 247; Guggenheim, *AAML's Revised Standards*, *supra* note 36, at 265.

103. 2011 ABA MODEL ACT, *supra* note 82.

plete a thorough and independent investigation, consult with the child, and otherwise participate fully in all stages of the litigation.<sup>104</sup>

The child's lawyer may request authority from the court to pursue ancillary issues, even those that do not arise in the child protection action, when necessary to ensure the child's needs are met. The Act also provides for the appointment of a "best interest advocate" who may serve in addition to the lawyer.

### *G. Implementing the Role: Promising Practices for Child's Attorneys*

The intense debate on who directs the child's lawyer and how has often detracted from consideration of what that child representative should actually do. That is, what are the duties and practices that create successful representation?<sup>105</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.

#### 1. 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>106</sup> The 1996 ABA Standards provide the foundation for the QIC Best Practice Model of Child Representation and seem to reflect a considerable national consen-

104. *Id.* at § 7.

105. Buss, *supra* note 22, 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 (2006) (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 41, 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.").

106. 1996 ABA *Abuse and Neglect Standards*, at B-1.

sus on the duties of the child's representative, i.e., what it is that the advocate for the child should actually do.<sup>107</sup>

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>108</sup>

## 2. UNDERSTANDING THE CHILD CLIENT

Attorney-client meetings are critical to successful representation, because children must understand the role of the representative<sup>109</sup> and because attorneys must understand the needs of the client.<sup>110</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>111</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>112</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>113</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>114</sup>

Ann Haralambie and Lauren Adams discuss the importance of planning for relationship building.<sup>115</sup> Building client relationships is crucial not only to understand the individual client, but also because the attorney

107. *Id.*

108. *Id.* at (1)(A)(2)(a)(ii). See also 2007 ULC Model Act, *supra* note 82, at § 7 cmt.

109. 1996 ABA Abuse and Neglect Standards, at C-1. Elrod, *supra* note 88, at 2003 n. 21. This was a major part of ABA Abuse & Neglect Standards. Buss, *supra* note 22, at 1706, 1749; Barry Berenberg, 36 N.M. L. REV. 533; Stötzel & Fegert, *supra* note 22, at 220.

110. KOH PETERS, REPRESENTING CHILDREN, *supra* note 2, at § 1-1; Atwood, *supra* note 15, at 208; Appell, *supra* note 29, at 625.

111. Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN'S L. REV. 601, 617 & 630 (2007); Taylor, *supra* note 13, at 615; Kisthardt, *supra* note 32; Stötzel & Fegert, *supra* note 22, at 220; 2007 ULC Model Act § 11.

112. KOH PETERS, REPRESENTING CHILDREN, *supra* note 2.

113. 2006 UNLV Recommendations, *supra* note 60, at (1)(B)(1).

114. *Id.*

115. 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).

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 case-workers, 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>116</sup> Emily Buss has examined the importance of understanding children's development in their representation.<sup>117</sup> The 2011 ABA Model Act expects attorneys to be able to gauge the developmental capacity of their child clients.

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>118</sup> Children's attorneys should engage the entire family, and help the family understand how they can participate in the proceedings.<sup>119</sup> Children's attorneys should recognize the importance for most clients of maintaining connections to their families and communities. Attorneys should solicit feedback from clients and families as to their representation.<sup>120</sup>

### 3. OTHER STRUCTURAL AND POLICY ISSUES

The UNLV Recommendations provide that administrative bodies charged with providing and overseeing child representation should track data on representation provisions and outcomes.<sup>121</sup> The Recommendations

116. 2006 UNLV Recommendations, *supra* note 60, at (1)(C)(2)(b), 1996 ABA Abuse and Neglect Standards A-3; 2007 ULC Model Act § 7.

117. Buss, *supra* note 22.

118. 2006 UNLV Recommendations, *supra* note 60, at (1)(A)(2)(a).

119. *Id.* at (1)(A)(2)(i).

120. *Id.* at (1)(B)(2)(g).

121. Buss, *supra* note 22, at 1753–57.

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>122</sup>

#### 4. 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>123</sup> 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>124</sup> 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>125</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>126</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 Convention on the Rights of the Child Article 12, allowing a child 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>127</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>128</sup>

Emily Buss has described her own experience of involving clients

122. 2006 UNLV Recommendations, *supra* note 60, at (3)(C)(2)(d).

123. Sobie, *supra* note 15, at 747; Kothekar, *supra* note 23, at 481.

124. Sobie, *supra* note 15, 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 Whybrow, *Children, Guardians and Rule 9.5*, 34 FAM. L.Q. 504 (2004) (describing English law on party status.) On a child's right to choose counsel, *see* Sobie, *supra* note 15, at 769–71; *see also* Berenberg, *supra* note 109, at 561–64.

125. Glynn, *supra* note 10.

126. 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>.

127. 2006 UNLV Recommendations, *supra* note 60, at (3)(A)(2)(b).

128. *Id.* at (3)(B)(2).

directly in proceedings, which increased the quality of attorney-client interaction. She argues that there is value in children seeing precisely what happens in court, because understanding how the court functions is 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>129</sup>

##### 5. SYSTEMIC PRESSURES FOR CHILD REPRESENTATIVES

A variety of systemic pressures that significantly impede the quality of representation are acknowledged in the literature.<sup>130</sup> Commentators have emphasized the difficulty of providing quality representation in states with overburdened foster-care systems.<sup>131</sup> Inadequate representation and adjudication often result from unreasonably high caseloads and crowded dockets.<sup>132</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>133</sup> Overwhelmed judicial caseloads result in delays.<sup>134</sup> In many jurisdictions, attorney compensation is limited and is sometimes inadequate to compensate attorneys for basic statutory duties.<sup>135</sup> Inadequate compensation is also cited as an issue internationally.<sup>136</sup>

Attorney training and competence are recognized as a shortcoming in

129. Buss, *supra* note 22, at 1760–61.

130. Glynn, *Unauthorized Practice*, *supra* note 10, at 58; Adoption 2002 Guidelines, at 1–5.

131. Katherine Kruse, *supra* note 105, at 1316; Buss, *supra* note 22, at 1761; Weinberg et al., *supra* note 12, at 212.

132. Taylor, *supra* note 13, 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 14, 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 1,000 and 1,250 children).

133. Buss, *supra* note 22, at 1759–61; Margulies, *supra* note 111, at 621; Sobie, *supra* note 15, at 825; Kisthardt, *supra* note 32, at 11; Lowry & Bartosz, *supra* note 8; Marx, *supra* note 14, at 531.

134. 2006 UNLV Recommendations, *supra* note 60, at (5)(D)(2)(d).

135. *See* Charlotte A. Carter-Yamauchi, Hawaii Legislative Reference Bureau, *Issues Relating to Guardians ad Litem* (2003); Marx, *supra* note 14, at 531; Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U. L. REV. 411, 440–446 (2008); Kisthardt, *supra* note 32; 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* 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) (surveying state practice in appointing counsel for children in dependency cases).

136. Stötzel & Fegert, *supra* note 22, at 222.



many jurisdictions.<sup>137</sup> Children's lawyers are not social workers or psychologists, and commentators emphasize the benefit of multidisciplinary decision making.<sup>138</sup> Children's legal representatives often lack funding for important support personnel, for example, social workers and paralegals.<sup>139</sup>

## 6. 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 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>140</sup> Howard Davidson notes that advocates must constantly be wary of the "rubber stamp" of judicial approval of agency actions. Overextended courts systems do not often have sufficient or qualified staff to understand the needs of children placed with foster agencies.<sup>141</sup> Courts are often not provided substantial statements as to why the child must continue in state placement.<sup>142</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>143</sup>

137. Fines, *supra* note 135, 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, *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 30, at 609–11.

138. 2009 *ABA Model Act Report*, *supra* note 59, at 147–48; Kisthardt, *supra* note 32; Haralambie, *supra* note 32, at 24.

139. Fines, *supra* note 135, at 413–14; Davidson & Pitchal, *Caseloads Must Be Controlled*, *supra* note 132.

140. Guggenheim, *State Interests*, *supra* note 19, at 830–31; Margulies, *supra* note 111, 620 (describing the asymmetry of penalty and reward facing attorneys for children).

141. Davidson, *supra* note 6, at 482.

142. *Id.*

143. *Id.*

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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>144</sup> and that relationships and communication between attorneys and social workers may be strained because of their different languages and training.<sup>145</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>146</sup>

## 7. 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>147</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>148</sup> Local and national group advocacy also occurs through class action litigation and legislative advocacy seeking to effect systemic change.<sup>149</sup>

## 8. 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 emphasizing a service function, team decision making, and a focus on ultimate outcomes benefiting the litigants and community.<sup>150</sup> These courts may raise due-process concerns, such as the blending of criminal and civil proceedings and the potential for judicial bias, but may be structured

144. Fines, *supra* note 135, at 440–46.

145. Kisthardt, *supra* note 32.

146. Pitchal, *supra* note 15, at 686–87; Buss, *supra* note 22, 1760–61; Kothekar, *supra* note 23, at 504–05.

147. 2006 UNLV Recommendations, *supra* note 60, at (3)(D)(2)(a)–(e).

148. *Id.* at 5.

149. Lowry & Bartosz, *supra* note 8, at 207; Appell, *supra* note 29, 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 105, at 1321 (describing the positive result of *R.C.*, an Alabama child welfare reform class action); Sobie, *supra* note 15, at 759–61.

150. Sarah Ramsey, *Child Well-Being: A Beneficial Advocacy Framework for Improving the Child Welfare System?*, 41 U. MICH. J.L. REFORM 9, 19–20 (Fall 2007).

to incorporate due-process protections.<sup>151</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>152</sup> Ramsey also describes how lawyers may participate in programs such as medical-legal partnerships that seek to improve children's health.<sup>153</sup> Additional models have been thought to strengthen the relationship between representation in court and service delivery.<sup>154</sup> Foster-care-review panels may also provide oversight of children's cases.<sup>155</sup>

#### 9. ADDRESSING CASELOADS, COMPENSATION, AND DELAY

The 2005 ABA resolution and Pew Commission on Children in Foster Care recommendations also included standards for reasonable attorney caseloads.<sup>156</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 ninety children per attorney in DeKalb County.<sup>157</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>158</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>159</sup>

151. *Id.*

152. 2006 UNLV Recommendations, *supra* note 60, at (5)(D)(2)(a).

153. Ramsey, *supra* note 150, at 21.

154. Shelly L. Jackson, A U.S.A. National Survey of Program Services Provided by Child Advocacy Centers, 28 CHILD ABUSE & 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).

155. See Youngclarke et al., *supra* note 33, at 112.

156. 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 be closer to that for attorneys handling matters of similar demand and complexity.)

157. *Kenny A v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

158. Fines, *supra* note 135, 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 (1984); *State v. Peart*, 621 So. 2d 780 (1993); and *Lynch*, 796 P.2d 1150 (1990). Unsuccessful suits include *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988); *Wallace*, 392 F. Supp. 834 (1973); *Kennedy*, 544 N.W.2d 1 (1996); and *Madden*, 601 A.2d 211 (N.J. 1992).

159. Children's Advocacy Institute, *CAI Litigation Challenges the Crushing Caseloads of*

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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>160</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 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>161</sup>

## 10. IMPLEMENTING TRAINING PROGRAMS

Both the 1996 and 2011 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>162</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>163</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>164</sup>

The UNLV Recommendations note that bar associations and other legal organizations should provide continuing legal education so attorneys can stay current in related subject areas and the operations of other systems affecting children and families.<sup>165</sup> The 2009 First Star state survey found that thirty-four jurisdictions require attorneys for children to have training prior to appointment or CLE after appointment.<sup>166</sup> The NACC

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*Sacramento Dependency Lawyers* (2010), available at <http://www.cachildlaw.org/caseload.htm>.

160. Davidson & Pitchal, *Caseloads Must Be Controlled*, *supra* note 132.

161. 2006 UNLV Recommendations, *supra* note 60, at (1)(B)(2).

162. 1996 ABA Standards I-1; 2011 ABA Standards, § 4; *see also* Fines, *supra* note 135; Marx, *supra* note 14, at 507; Taylor, *supra* note 13; Harris, *supra* note 14, at 1294.

163. 1996 ABA Standards, at I-2.

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

165. 2006 UNLV Recommendations, *supra* note 60, at (2)(F)(3)(a).

166. 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>.

developed a Child Welfare Law Specialist certification program in 2006, currently available in thirty jurisdictions.<sup>167</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>168</sup>

Certain commentators examined the increasing role of child advocacy education in law schools, including clinical programs.<sup>169</sup> Like the UNLV Recommendations, these writers emphasize the importance of multidisciplinary education, practice-oriented modeling, and collaboration with related fields, such as a social work.<sup>170</sup> Child law education must also support law students and graduates in pursuing “pediatric,” i.e., child-welfare-law careers.<sup>171</sup>

#### H. Academic Literature Conclusion

The recent literature on child representation has analyzed 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 commentators are fully satisfied that current child representation is adequate. Few are satisfied with America’s child-welfare system in general, 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 the essential context for framing the QIC Best Practice Model of Representation and for the research and

167. NACC Certification is currently available in thirty 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.

168. P.L. 110-351; Taylor, *supra* note 13, at 620.

169. Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1 (1997); Ventrell, *The Practice of Law for Children*, *supra* note 30; 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 135; Kisthardt, *supra* note 32; Breger et al., *supra* note 135, at 532–33.

170. See also 2006 UNLV Recommendations, *supra* note 60, 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 169, at 631.

171. Breger et al., *supra* note 135, at 532–33.

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demonstration projects to gather empirical evidence as to child representation. The empirical data flowing from the QIC project will 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 more immediate improvements to the local child-welfare system.

#### IV. Needs Assessment: State Law and Practice

##### A. Law on the Books

A major source of information for developing the QIC Best-Practice Model is the law on the books in the various states. We selected ten states as samples for the survey of state law and for our systematic phone survey of stakeholders.<sup>172</sup> We researched the state laws governing child representation from primary authorities. Then we presented the information in a common template to facilitate cross-state assessment of current laws. The organizing template is the same as that for the QIC Best-Practice Model of Child Representation. Our website now includes state legal authority governing child representation with links to the authoritative electronic compilation of each state's laws governing child representation. It also includes a state-to-state comparison of the ten sample states.<sup>173</sup>

Our findings are consistent with other commentators who have noted that law defining child representation is quite unsettled.<sup>174</sup> The variation across jurisdictions may decrease the quality of representation and create confusion.<sup>175</sup> Prevailing opinion calls for increased clarity on the role of children's legal representation.<sup>176</sup> However, the "laboratory" provided by differing state law also provides valuable opportunities for comparison.<sup>177</sup> A 2005 survey indicated that there are at least fifty-six variations in child

172. The ten sample states are California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, New York, Texas, and Washington State. We will add more states until all fifty states are included. Information available at [www.ImproveChildRep.org](http://www.ImproveChildRep.org).

173. See <http://www.improvechildrep.org/ChildRep2010/StateLaws.aspx>.

174. Kisthardt, *supra* note 32; Sobie, *supra* note 15; Kothekar, *supra* note 23; Michael Drews & Pamela Halprin, *Determining the Effective Representation of a Child in Our Legal System*, 40 FAM. CT. REV. 383, 383 (2002).

175. NACC Recommendations, *supra* note 36; Atwood, *Uniform Representation*, *supra* note 15; Atwood, *Representing Children*, *supra* note 20; Kisthardt, *supra* note 32; Fines, *supra* note 135; Berenberg, *supra* note 109; 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).

176. See text and references, *supra*, note 15.

177. Atwood, *Representing Children*, *supra* note 20, at 220.

representation models among the fifty states.<sup>178</sup> A variety of models are also present internationally.<sup>179</sup>

### *B. Law in Practice*

Recognizing that the “law on the books” tells only part of the story of child representation in any given state, we sought to assess the “law in practice,” or at least *perceptions* of the “law in practice,” through several additional means. Using the same ten sample states, we gathered additional data as follows:

1. Surveyed and analyzed existing reports that the states themselves prepared for the federal government regarding child welfare practices;
2. Developed and implemented structured interviews for stakeholders;
3. Conducted focus groups of professional organizations and former foster children; and
4. Visited notable child-welfare-law offices in the nation with reputations for excellence.

The details of the state surveys, structured interviews, focus group results, and notable law-office visits along with state-to-state comparisons are available on our website.

## **V. Review of Existing Empirical Research on Child Legal Representation<sup>180</sup>**

### *A. Approach*

One of the major goals of the QIC-ChildRep Project is to conduct empirical research on child representation to determine what approaches to child legal representation result in more desirable outcomes and what behaviors of the representative are likely to be most beneficial. This research will use the gold standard random-assignment experimental design. To inform development of a QIC research design, we searched for research articles and evaluations specific to topics of child representation. In addition to traditional searches in law and social science literature, and

178. Koh Peters, *supra* note 135. See also Jean Koh Peters, *Representing Children Worldwide* (2005), available at [www.yale.edu/rcw](http://www.yale.edu/rcw).

179. KOH PETERS, REPRESENTING CHILDREN, *supra* note 2. See also Bilson & White, *supra* note 66; Whybrow, *supra* note 123; Stötzel & Fegert, *supra* note 22; 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 174.

180. Karl Ensign, Cynthia Samples, Robyn Ristau, and Cecilia Fiermonte (Planning and Learning Technologies, Inc., in Alexandria Virginia) contributed substantially to this section. The full reports of these research studies are available on our QIC-ChildRep website at: <http://www.improvechildrep.org/ChildRep2010/EvaluationsofChildRepresentation.aspx>.

the secondary literature identified by Internet searches and the U.S. Children's Bureau Child Welfare Information Gateway, we asked members of the project's Advisory Committee and Study Team to suggest or provide any articles or evaluations they thought would be helpful. This process identified fourteen evaluations of child representation. Nine of these evaluations involved lawyer representation. Another five involved CASA representation. Only one of the evaluations was an experimental design.

Each of these articles and evaluations were reviewed to address the following questions:

- What topics within the field of child representation have been subject to empirical research?
- What types of research designs were utilized?
- What were the general findings from the previous empirical research?

Information was reviewed and synthesized to address each of the three main questions. The table in Appendix A, lists all of the evaluations that were included in this review.

Several studies, including those identified as quasi-experimental, collected quantitative data on general process components. This included a range of measures pertaining to the child representative, such as actions or activities in and out of the courtroom, the time related to certain activities, the number and types of trainings that were attended, the number of caseloads, cost effectiveness, rate of compensation, and the time to appointment. The data collected often served to track program implementation or the work of the child representative. In the Judicial Council of California caseload study, attorneys used self-report to track their hours and activities to prove data for developing a proposed caseload number.

The most common outcome measures include: recidivism (new petitions after dismissal of a case); services for children; placement stability; rate of reunification; court process timeframes; overall timeliness (time to permanency, length of stay in foster care, length of time under court jurisdiction); and stakeholder perceptions.

### *B. Summary of Stakeholder Perceptions*

Most of the descriptive studies collected data from multiple stakeholders to capture several different points of view. This approach allowed researchers to triangulate their data and gather multiple perspectives in specific areas of interest. The data was collected through different methods including: focus groups, interviews, and surveys. The table in Appendix B includes a summary of stakeholders and a general summary of major findings. It should be noted that one quasi-experimental design study (Zinn &



Slowriver) also included data from stakeholder perceptions and is included in the table in Appendix B on page 128.

### *C. Existing Research Designs Are Seriously Flawed*

There are not many studies focused on child legal representation. Clearly, there is a need for further empirical research in this area. Of these fourteen studies, only the 1991 Abramson study of CASA used the gold standard experimental research design with random assignment. Abramson did not study lawyers, but studied minority CASA volunteers who were trained and matched with minority children. The study assigned cases that met certain criteria to either the treatment group, which received a volunteer or to the control group who did not receive a volunteer.

There is a serious need for rigorous social science research on representation of children, representation of parents, and the child welfare agency, too. Although random-assignment experimental design is the gold standard of social science research, there are no such research design experiments of lawyer representation of children. That is, there seems to be no reliable empirical evidence as to whether legal representation of children actually makes a difference in case outcome. Similarly, there is no reliable answer as to what activities of the child's lawyer are most likely to benefit the child. There are a number of quasi-experimental designs and some descriptive studies that cast light on these questions, but some social scientists warn that these non-randomized studies are not worthy of credence and may, in fact, be dangerous.<sup>181</sup>

Child legal representation is no different from other areas of law practice when it comes to a lack of empirical social-science data as to what constitutes a good lawyer or good legal representation. A critical review of the available social science studies of lawyering and legal services generally, by Greiner and Pattanayak, concludes that despite dozens of articles purporting to measure quantitatively the effect of legal representation in civil disputes, we know almost nothing as a result of these studies. They place the blame clearly on the lack of rigorous scientific method.

One might think that after decades of research . . . a substantial body of objective, qualitatively based knowledge would be available. . . . We suggest the opposite is true. . . . [W]e know almost nothing as a result of these studies. . . and all but two provide no "information" that would not already have been available from instinct and conjecture.<sup>182</sup>

We claim the results in these studies are unworthy of credence. We also believe

181. Greiner & Pattanayak, *Randomized Evaluation in Legal Assistance: Report of a First Study, A Critical Review of the Literature, and Prospects for the Future*, Draft of 31 March, 2011; Electronic copy available at <http://ssrn.com/abstract=1708664>.

182. *Id.* at 45–46.

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that the failure to address these methodological concerns may cause, and probably has caused in many instances, the following easy-to-understand consequence: the wrong answer.<sup>183</sup>

Lawyer representation of children is no further in the dark than legal representation in other contexts. There seems to be little or no empirical data on the question of what makes a good lawyer anyway? Nor do we have empirical evidence of optimum approaches to legal representation in any field? The medical profession relies heavily on random assignment longitudinal studies and modifies physician practice in response to such studies, but not so in the law. Our friends in social work and psychology stress the importance of “evidence-based practice.”<sup>184</sup> Not so in the law.

Thus the challenge to develop some evidence-based practice in the representation of children is a challenge shared by all lawyers in all aspects of the profession. The U.S. Children’s Bureau funding for the QIC-ChildRep provides the resources and the opportunity to develop some long-overdue rigorous data about our practice.

## VI. Conclusions from First-Year Needs Assessment

### A. Similar Issues Identified by Many Sources

During the first year needs assessment, the QIC-ChildRep team talked with judges, attorneys, caseworkers, CASAs, state regional office directors, tribes, and children themselves. Given the varied viewpoints, as well as the geographic and population diversity, it is striking that the participants raised such similar issues and concerns. In addition to the concerns, a shared positive vision also came to light, an idealized view of practice that includes highly skilled, well-qualified, well-informed attorneys, held accountable to a high standard that includes engaged client interaction and a problem-solving ethic. The following picture emerged:

- **Attorneys must develop a bond with their client.** Attorneys should be actively engaged with their clients in order to understand their needs and advocate effectively. Attorneys must engage more with children by having frequent and more meaningful contact. Attorneys should understand the child’s living situation, school, and home life.
- **Effective representation includes a thorough investigation in order to develop a clear theory of the case and effectively advocate in court.** Attorneys must gain a thorough understanding of their cases in order to develop effective strategies and advocate zealously for their clients.

183. *Id.* at 47.

184. See generally Richard Grinnell & Yvonne A. Unrau, *Social Work Research and Evaluation: Foundation of Evidence-based Practice* (2011).

- **Attorneys effectively solve problems for their clients by engaging in active out-of-court advocacy.** Negotiating solutions and settlements is an important function of the attorney's role. By actively seeking solutions on behalf of the child, attorneys can resolve problems quickly and cooperatively.
- **Attorneys should take a holistic view of the child's needs.** A child in the dependency system often has needs that cannot be met by the dependency system alone. Often, an attorney must monitor a vast array of services, as well as coordinate other legal issues, such as financial assistance or educational programs.
- **Practice in this area requires comprehensive training, which includes child and family issues.** Attorneys need to understand child and family issues, as well as agency policies and procedures. They should also have solid courtroom skills and a grounding in children's law. Current training of attorneys is ad hoc, lacking a standard curriculum or protocol.
- **Attorneys must meet initial and ongoing qualification standards.** Children's law is a highly specialized and complex area. Attorneys should meet basic qualifications as well as ongoing requirements, which are monitored and overseen.
- **Additional support can help attorneys accomplish the multiple tasks that allow them to be successful advocates.** Attorneys need administrative assistance, investigators, social workers, and strong supervising skills to accomplish all the duties with which they are tasked.
- **Caseloads must be reasonable so that attorneys can accomplish their essential duties.** Quality practice requires that the system support adequate time and resources for attorneys.

*B. Moving Forward: Knowledge Development to  
Learn What Works for Children*

Our needs assessment discussions raised reoccurring themes that resonated throughout the conversations and identified deficiencies in current practice. The QIC-ChildRep also identified promising practices and approaches. The field sorely needs rigorous study and empirical evaluation. We need to get beyond abstract debates and learn what promising approaches actually work for the child client. Measuring quality and effectiveness of child representation will also help focus the field on evidence-based methods that will help close the gaps between abstract written standards and actual practice and move the field forward.

## VII. The Empirical Research Component

### A. QIC Best Practice Model of Child Representation

Based on the foundation of the QIC First Year Needs Assessment, we devised the QIC Best Practice Model of Child Representation, which is found in Appendix C. Our articulation of the QIC Best Practice Model uses the 1996 ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA Standards) as its foundation and attempts to integrate the developments since 1996 as reported in this article from academic literature, existing state law, government reports, stakeholder interviews, other research and descriptive studies, and our own study group discussions. The 2011 ABA Model Act,<sup>185</sup> was adopted in August 2011, after the QIC-ChildRep needs assessment and framing of the QIC Best Practice Model was complete. The QIC-ChildRep is consistent with the recommendations of the Model Act and, in many respects, could serve as a companion piece to the ABA effort. While the ABA Model Act lays out the legal framework for child representation that might appear in state statutes or court rules, the QIC-ChildRep focuses on clinical knowledge and practice skills necessary to implement such a law. The QIC training delivered in Georgia and Washington State, emphasizes six core skills necessary to put into action the QIC Best Practice Model: (1) Enter the child's world and engage with the child; (2) Assess child safety; (3) Assertively identify the needs of the child and family/diagnose the case; (4) Advance a cogent case plan; (5) Develop a theory of the case that is active and forward-looking and that will give force and direction to the advocacy; and (6) Identify the advocacy corollaries to each need or goal.

## VIII. Conclusion and Next Steps: QIC Research and Demonstration Projects in Georgia and Washington State

The empirical component of the QIC-ChildRep is currently underway with the states of Georgia and Washington as our project partners. Each state has identified over 125 lawyers who are randomly assigned to two groups. The comparison group will continue to represent children as they have in the past. The experimental QIC group will receive two days of training and ongoing coaching to represent children according to the QIC Best Practice Model. Both groups will be randomly assigned child representation cases. We will gather data directly from the lawyers and from administrative data from the courts and the state agency for a three-year period. We expect to have a large number of cases for comparison, which

185. 2011 ABA MODEL ACT, *supra* note 82.

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should allow us to gather credible data about legal representation of children in child welfare cases. Chapin Hall at the University of Chicago is the QIC research partner and is managing the research design, data collection, and analysis. The QIC-ChildRep research and demonstration projects will generate new knowledge about lawyer representation of children and could form the basis for expanded dialogue and continued improvements in child representation.

## APPENDIX A

### Evaluations of Child Representation

Evaluation/Research Article	Topic/Focus	Research Design
S. Abramson, <i>Use of Court-Appointed Advocates to Assist in Permanency Planning for Minority Children</i> , 70 CHILD WELFARE (July-August 1991).	CASA (court-appointed special advocates)	Experimental Design
L. Berliner, M. Fitzgerald & M. Alving, <i>Court-Appointed Special Advocates for Children in Washington State: A Review of Effectiveness</i> (Washington State Institute for Public Policy Nov. 1998)	CASA	Descriptive
CALIBER ASSOC., EVALUATION OF CASA REPRESENTATION: FINAL REPORT (2004).	CASA	Quasi-experimental
C. Calkins & M. Millar, <i>The Effectiveness of Court-Appointed Special Advocates to Assist in Permanency Planning</i> , 16 CHILD & ADOLESC. SOC. WORK (Feb. 1999)	CASA	Quasi-experimental
CSR, Inc., Final Report on the Validation and Effectiveness Study of Legal Representation through Guardian ad Litem (NCCAN, DHHS 1995).	Guardian ad litem	Descriptive
Don N. Duquette & Sarah H. Ramsey, <i>Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation</i> (U. Mich. 1987).	Type of representation and training	Quasi-experimental
G.S. Goodman, R.S. Edelstein et al., <i>A Comparison of Types of Attorney Representation for Children in California Juvenile Court Dependency Cases</i> , 32 CHILD ABUSE & NEGLECT 497-501 (2008).	Type of representation	Quasi-experimental
C. Hess, S. Swanke, & A. Batson, <i>An Evaluation of the North Dakota Guardian ad Litem Project</i> (HB Consult. & Eval. Assoc., N.D. 2007).	GAL in North Dakota	Descriptive
Judicial Council of California, Dependency Counsel Caseload Study and Service Delivery Model Analysis (Admin. Office of the Cts. 2004).	Caseloads	Descriptive
P. Litzelfelner, <i>The Effectiveness of CASAs in Achieving Positive Outcomes for Children</i> , 79 CHILD WELFARE 2 (Mar./Apr. 2000).	CASA	Quasi-experimental
G.A. Lukowski & H.J. Davies, <i>A Challenge for Change: Implementation of the Michigan Lawyer-Guardian ad Litem Statute</i> , ABA Center on Children and the Law for the Governor's Task Force on Children's Justice (2002).	GAL statute in Michigan	Descriptive

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<b>Evaluation/Research Article</b>	<b>Topic/Focus</b>	<b>Research Design</b>
E.S. Pitchal, M.D. Freundlich & C. Kendrick, <i>Evaluation of the Guardian ad Litem System</i> (Nebraska National Association of Counsel for Children 2009).	GAL system in Nebraska	Descriptive
M. Stotzel & J.M. Fegert, <i>The Representation of the Legal Interests of Children and Adolescents in Germany: A Study of the Children's Guardian from a Child's Perspective</i> , 20 INT'L J. LAW, POL'Y & FAMILY 201-24 (2006).	GAL	Descriptive
A.E. Zinn & J. Slowriver, <i>Expediting Permanency: Legal Representation for Foster Children in Palm Beach County</i> (Chapin Hall Center for Children at the University of Chicago 2008).	Legal Aid Foster Children's Project	Quasi-experimental

126 *Family Law Quarterly*, Volume 46, Number 1, Spring 2012**APPENDIX B: Child Representation Evaluations**

Study	Stakeholders from Which Information Was Collected								Findings
	Attorneys/GALS	CASA/volunteers	Project/Program Admin/Staff	Judges	Child Welfare Staff	Other Professionals	Youth	Parents/Foster Parents	
Berliner, Fitzgerald, & Alving (1998)		X	X	X	X			X	Professionals who work with volunteers felt that the volunteers contribute an independent and valuable perspective during the investigation phase.
CSR, Inc (1995).	X	X			X				CASAs visited clients more than GALs and had the most contacts with clients CASAs and in court were more likely to submit a written report. GALs were successful in negotiating an agreement 66% of the time.  Caseworkers were contact- ed most frequently by CASAs as opposed to staff or private attorneys.
Hess, Swanke & Batson (2007)	X		X	X	X				Across stakeholder groups there was agreement that the NDGAL Project was use- ful in meeting the needs it was designed to address and that children and fam- ilies are better served because of the GAL.  One specific finding across stakeholders was the com- mon perception that the personal knowledge that GALs have about children and the quality of informa- tion they provide are help- ful to the court-related decision making.



**Child Representation Evaluations** *continued*

Study	Stakeholders from Which Information Was Collected								Findings
	Attorneys/GALS	CASA/volunteers	Project/Program Admin/Staff	Judges	Child Welfare Staff	Other Professionals	Youth	Parents/Foster Parents	
Lukowski, & Davies (2002)					X			X	Approximately half of the judges indicated that since the new legislation, there has been no change in the quality of information attorneys provide to the court. A third to one-half of the foster parents did not feel that the attorneys had enough information. It appeared that GALs were not routinely requesting school, health and delinquency records. Although attorneys reported that they do conduct an investigation, more than half of caseworkers felt that they rely on them for information. Forty percent said that the attorney never visited the child in his home. Foster parents reported inconsistent perceptions on whether attorneys advocate appropriate visitation. Trainings appeared to be inconsistent and unstructured.
Pitchal, Freundlich, & Kendrick (2009)		X			X		X	X	Attorneys and judges felt that caseloads were adequate. Although most agreed that GALs are promptly appointed, youth reported not meeting their GALs for a long time.

128 *Family Law Quarterly*, Volume 46, Number 1, Spring 2012**Child Representation Evaluations** *continued*

Study	Stakeholders from Which Information Was Collected								Findings
	Attorneys/GALS	CASA/volunteers	Project/Program Admin/Staff	Judges	Child Welfare Staff	Other Professionals	Youth	Parents/Foster Parents	
Pitchal ( <i>continued</i> )									GALs felt that training did not provide everything they needed to know. Most reported that they only “sometimes” have direct communication with teachers, and knew very little about grades, school transfers or class attendance. Youth did not feel that they met with their GAL frequently or for very long when they did meet.
Stötzel & Fegert (2006)	X					X			A majority of the children had an appropriate understanding of their guardian’s role and felt satisfied with their guardian. A smaller portion felt either mixed or negative feelings.
Zinn & Slowriver (2008)		X		X	X	X	X	X	Most youth felt that they had little control over the events and outcomes, but felt that having an advocate in court helped to alleviate the anxiety of the court process.

## APPENDIX C

### QIC Best Practice Model of Child Representation

The QIC Best Practice Model sets out the *duties* of the individual child representative and the important *organizational and administrative supports* required for the child's representative to adequately perform those duties. Language that differs from the 1996 ABA Standards is underlined.

#### A. Definition

Child's Representative (CR) means the individual or office charged with providing legal services for a child who is the subject of judicial child welfare proceedings. The CR is to ensure that the child's interests are identified and presented to the court. The duties of the CR are as presented below. Although the CR will be providing legal representation to the child, the CR functions may be fulfilled by a team of multidisciplinary professionals, including a lawyer plus social workers, paralegals and/or lay advocates.

#### 1. GENERAL DUTIES OF THE CHILD'S LEGAL REPRESENTATIVE

1. Appointment: The CR should be appointed and begin service prior to the first judicial proceeding. The ideal arrangement would be for the CR to be appointed sufficiently in advance of the first hearing so as to provide time for some preliminary investigation and exploration of options to protect the child with minimum disruption of the child's world. The CR should serve until the court's child welfare authority over the child ends, including through appeals.
2. Child's Interests: The CR shall serve as the independent representative for the child as determined by state law. Whether the lawyer takes his or her direction from the child or makes a best interest judgment as to what the goals of the litigation should be, once the goals are determined the lawyer is expected to aggressively fulfill the duties and obligations set forth here.

Although the majority of state laws adopt a "best interests" or dual role for their CR, some states have moved to a client-directed representation for older children and best interests or substituted judgment for younger children. The QIC-ChildRep is interested in studying what difference, if any, different ways of accommodating the child's wishes makes as to case processing or case outcomes.

3. Basic Obligations: The CR should:
  - a) Obtain copies of all pleadings and relevant notices;
  - b) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;

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- c) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
  - d) Participate fully in all placement decisions; seek to disrupt the child's world as little as possible; "remove the danger, not the child"; assure that all placement decisions are made with care and deliberation; when placement is necessary, help identify placement alternatives;
  - e) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
  - f) 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;
  - g) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
  - h) Identify appropriate family and professional resources for the child.
4. Conflict Situations: The court may appoint one lawyer to represent siblings so long as there is no conflict of interest.
  5. Determining Decision-making Capacity: The CR should be vigilant and thoughtful about maximizing the child client's participation in determining the positions to be taken in the case. Even a lawyer acting in the role of a best interest attorney or guardian ad litem should allow the child to participate in the decision-making process to the extent that the child is able to do so. The functional capacity to direct representation or contribute to positions taken exists on a continuum, even for adults. ("... [T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." ABA Model Rules of Prof. Resp. 1.14) The CR should consider whether the child client has sufficient capacity to make a decision or to have significant input with respect to a particular issue at a particular time.
  6. Client Preferences: When it comes to accommodating a child's wishes<sup>1</sup> and preferences, perhaps the best an attorney can do is to really listen to the child, understand what is important from the child's perspective and how decisions will impact on the child's experience of his or her life, and act with humility when considering taking a position which significantly differs from the child's

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1. See Donald Duquette & Ann Haralambie, *Representing Children and Youth*, in *CHILD WELFARE LAW AND PRACTICE*, 2d ed. (Duquette & Haralambie eds., 2010).

expressed wishes. The CR must understand “how this client speaks, how this client sees the world, what this client values, and what shows this client respect.”<sup>2</sup>

## 2. OUT OF COURT: ACTIONS TO BE TAKEN

1. *Meet with Child.* Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child’s age, the child’s representative should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child. Building a trusting relationship with the child is essential to successful representation. The CR can establish an appropriate tone with questions like, “How can I help you? How can I be of service to you?” The child is the client, and the lawyer should aggressively seek to meet the needs and interests of the child, just as the lawyer would for an adult or corporate client.
2. *Investigate.* To support the client’s position, the child’s representative should conduct thorough, continuing, and independent investigations and discovery that may include, but should not be limited to:
  - a) Reviewing the child’s social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;
  - b) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;
  - c) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;
  - d) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;
  - e) Assist in identifying relatives from maternal and paternal sides of the family who might provide emotional and other support to the child and family or become a caretaker for the child.
  - f) Obtaining necessary authorizations for the release of information
  - g) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.
  - h) Reviewing relevant photographs, video or audio tapes and other evidence; and

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2. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS, 258 (1997).

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- i) Attending treatment, placement administrative hearings, and other proceedings involving legal issues, and school case conferences or staffing concerning the child, as needed.
3. *Advice and Counseling:* The CR and child client should work together to set the goals of the representation. Representing children involves more than investigation and advocacy. All attorneys have the duty to help clients understand their legal rights and obligations and identify the practical options. This is no less true for a child client. State law and the child's age and maturity will govern to what extent the CR accommodates the child's wishes in setting the goals of the advocacy. But, in any event, and consistent with the child's level of maturity and understanding, the CR will discuss the total circumstances with the child, strive to understand the child's world and perspective, assist the child in understanding the situation and the options available to him/her, and counsel the child as to the positions to be taken. The CR should advise the client as to the jurisdiction's rules—and limitations, if any—governing attorney-client privilege and confidentiality.
4. *File Pleadings.* The CR should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:
  - a) A mental or physical examination of a party or the child;
  - b) A parenting, custody or visitation evaluation;
  - c) An increase, decrease, or termination of contact or visitation;
  - d) Restraining or enjoining a change of placement;
  - e) Contempt for non-compliance with a court order;
  - f) Termination of the parent-child relationship;
  - g) Child support;
  - h) A protective order concerning the child's privileged communications or tangible or intangible property;
  - i) Requesting services for child or family; and
  - j) Dismissal of petitions or motions.
5. *Request Services.* The CR should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:
  - a) Family preservation-related prevention or reunification services;
  - b) Sibling and family visitation;
  - c) Child support;
  - d) Domestic violence prevention, intervention, and treatment;

- e) Medical and mental health care;
  - f) Drug and alcohol treatment;
  - g) Parenting education;
  - h) Semi-independent and independent living services;
  - i) Long-term foster care;
  - j) Termination-of-parental-rights action;
  - k) Adoption services;
  - l) Education;
  - m) Recreation or social services;
  - n) Housing;
  - o) Appropriate discharge plan, including services to assist the youth aging out of foster care.
6. *Child with Special Needs.* Consistent with the child's wishes, the CR should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:
- a) Special education and related services;
  - b) Supplemental security income (SSI) to help support needed services;
  - c) Therapeutic foster or group home care; and
  - d) Residential in-patient and out-patient psychiatric treatment.
7. Adopt a Problem-solving Approach. The CR should continually search for appropriate non-adversarial resolution of the case that protects the child and meets the child's needs. The CR should adopt a problem-solving attitude and seek cooperative resolution of the case whenever possible. The CR should also initiate and participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's representative should use suitable mediation and family conferencing resources.
3. IN-COURT: ACTIVE PARTICIPATION IN HEARINGS
- 1. *Court Appearances.* The child's representative should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.
  - 2. *Client Explanation.* The child's representative should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.
  - 3. *Motions and Objections.* The child's representative should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other

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hearings. If necessary, the child's representative should file briefs in support of evidentiary issues. Further, during all hearings, the child's representative should preserve legal issues for appeal, as appropriate.

4. *Presentation of Evidence.* The child's representative should present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary.
5. *Child at Hearing.* In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.
6. *Expanded Scope of Representation.* The child's representative may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:
  - a) Child support;
  - b) Delinquency or status offender matters;
  - c) SSI and other public benefits;
  - d) Custody;
  - e) Guardianship;
  - f) Paternity;
  - g) Personal injury;
  - h) School/education issues, especially for a child with disabilities;
  - i) Mental health proceedings;
  - j) Termination of parental rights; and
  - k) Adoption.
7. *Obligations After Disposition:* The child's representative should seek to ensure continued representation of the child during the pendency of the court's jurisdiction over the child.

## 4. POSTHEARING

1. *Review of Court's Order.* The CR should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.
2. *Communicate Order to Child.* The CR should discuss the order and its consequences with the child.
3. *Implementation.* The CR should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

## 5. APPELLATE ADVOCACY

1. *Decision to Appeal.* The CR should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If



after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child while the appeal is pending.

2. *Withdrawal.* If the CR determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.
3. *Participation in Appeal.* The CR should participate in an appeal filed by another party unless discharged.
4. *Conclusion of Appeal.* When the decision is received, the CR should explain the outcome of the case to the child.

#### 6. CESSATION OF REPRESENTATION

The CR should represent the child to the end of the court's jurisdiction and then discuss the ending of the legal representation and determine what contacts, if any, the CR and the child will continue to have.

### **Organizational and Administrative Supports for the CR**

#### *A. General Representation Rules*

1. Administrative structure is clear for appointment, support and accountability of the CR.
2. The CR should be independent from the court, court services, the parties and the state. The CR should retain full authority for independent action.

#### *B. Lawyer Training*

1. The court or administrative agency providing child representation should assure that each CR, whether a private practitioner or a part of a child welfare law office, be qualified by training or experience to fulfill the duties of the role.
2. The court or administrative agency providing child representation should provide ongoing training programs on the role of a child's representative. Training programs should prepare the lawyer just beginning work in child welfare, provide continuing training, and encourage certification of experienced lawyers as specialists in the child welfare field.
3. Training should include:
  - a) Information about relevant federal and state laws and agency regulations;

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- b) Information about relevant court decisions and court rules;
  - c) Overview of the court process and key personnel in child-related litigation;
  - d) Description of applicable guidelines and standards for representation;
  - e) Focus on child development, needs, and abilities;
  - f) Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
  - g) Information concerning family dynamics and dysfunction, including substance abuse and the use of kinship care;
  - h) Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and
  - i) Provision of written material (e.g., representation manuals, checklists, sample forms), including listings of useful material available from other sources.
4. The court or administrative agency providing child representation, should provide individual court-appointed attorneys who are new to child representation the opportunity to practice under the guidance of a senior lawyer mentor.

*C. Lawyer Compensation*

1. The court or administrative agency providing child representation, should assure that child's representatives receive adequate and timely compensation throughout the term of the appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and post-dispositional hearings, and appeals. The rate of payment for these legal services should be commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.
2. The court or administrative agency providing child representation should assure that the child's representative has access to or is provided with reimbursement for experts, investigative services, paralegals, research costs, and other services, such as copying of medical records, long distance phone calls, service of process, and transcripts of hear-

ings as a fundamental part of providing competent representation.

*D. Caseload Levels*

The court or administrative agency providing child representation, should assure that caseloads of the child representatives are of manageable size so that the CR can adequately discharge the duties to the child client.

