

STUDENT ARTICLE: DEFENSELESS CHILDREN: ACHIEVING COMPETENT REPRESENTATION FOR CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS THROUGH STATUTORY REFORM IN SOUTH DAKOTA

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LexisNexis Summary

... However, the training requirements for an attorney acting as a guardian ad litem in South Dakota are significantly less than what is required in South Dakota's sister states for attorneys in the same role. ... In order for children to receive adequate representation it is critical for the South Dakota Legislature to articulate the duties of the attorney representing children in abuse and neglect proceedings. ... Proponents of this model argue that children capable of relaying their wishes and interests to their attorneys are disempowered when their appointed advocates take positions contrary to their wishes. ... Children are included in this rule because it is intended to pertain to clients who cannot make decisions for themselves. ... As of February 1, 2010, "an attorney appointed to represent abused and neglected children, including those appointed as guardian ad litem, shall certify that they have viewed and completed the abuse and neglect attorney training developed by the South Dakota Unified Judicial System." ... In the event that the attorney has a conflict representing the child's legal interest and the interests of the guardian ad litem, the court may appoint a CASA representative as guardian ad litem.

Highlight

The appropriate role for the attorney representing children in abuse and neglect cases is the source of continuous debate nationwide. A range of views exists in South Dakota about the extent to which attorneys are adequately representing the child client. Child representation is governed on a state-by-state basis, and the South Dakota Legislature has yet to provide guidelines for attorneys representing children in abuse and neglect proceedings. The lack of guidance is causing confusion and frustration for attorneys working in this unique field of law, which ultimately reduces the quality of representation. In order for children to receive adequate representation it is critical for the South Dakota Legislature to articulate the duties of the attorney representing children in abuse and neglect proceedings. This comment discusses the ongoing debate about the appropriate role of attorneys representing children in abuse and neglect proceedings and explains other states' guidelines for attorneys working in these types of cases. The comment examines important areas of concern for attorneys working in this area of the law and compares South Dakota's current law with that of its sister states. Finally, it provides recommendations toward developing statutory standards for attorneys representing children in abuse and neglect cases in South Dakota.

Text

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I. INTRODUCTION

In order for children to have justice in abuse and neglect cases, ¹ children must be represented by "competent, independent, and zealous attorneys." ² The [*183] child's attorney plays an especially important role in abuse and neglect cases in South Dakota because the attorney is charged with representing the best interests of the child. ³ The attorney's role in a best interests capacity requires the attorney to step outside his or her traditional role and look at the situation from a bigger perspective to determine what is in the best interests of the child. ⁴ For this reason judges often rely heavily on the recommendations of the child's attorney, ⁵ which requires competency at every stage of the proceedings. ⁶ To ensure that attorneys are providing sufficient legal representation in South Dakota, the legislature must clearly define the attorney's role and duties. ⁷

To put the issues surrounding child representation in South Dakota into some context, it is important to understand the difference between the attorney's role and the attorney's duties. ⁸ The role of the attorney encompasses the type of representation the attorney provides, specifically whether the attorney is representing the child's best interests or whether the attorney is acting in a client-directed role. ⁹ The attorney's duties are the actions taken by the attorney when representing the child, namely meeting with the child, engaging in discovery, or calling certain

¹ This article specifically addresses the representation of children in abuse and neglect cases. Therefore any reference to child representation specifically refers to child representation in abuse and neglect proceedings.

² See National Association of Counsel for Children, NACC Recommendations for Representation of Children in Abuse and Neglect Cases 6 (2001), available at http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf. "The NACC Recommendations for Representation of Children in Abuse and Neglect Cases was produced as part of the NACC's objective to establish the practice of law for children as a legitimate profession and legal specialty." *Id.* at 2. Abuse and neglect cases are considered part of the child welfare system. See Child Welfare Information Gateway, How the Child Welfare System Work, <http://www.childwelfare.gov/pubs/factsheets/cpswork.cfm>. The child welfare system is comprised of several services designed to further the welfare of children. *Id.* This includes achieving permanent placement for the child, ensuring the child's safety, and helping families adequately care for their children. *Id.* The United States Department of Health and Human Services works with state governments to prevent the abuse of children in the home, to prevent child abuse, and to find safe permanent homes for children who cannot return to their guardian. *Id.*

³ [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010).

⁴ See Barbara Ann Atwood, Representing Children: The Ongoing Search for Clear and Workable Standards, 19 J. Am. Acad. Matrim. Law 183, 201 (2005) [hereinafter Atwood, Standards]. It is helpful to understand the difference between the attorney's role and the attorney's duties. NACC, *supra* note 2, at 7.

⁵ Bruce A Green & Bernardine Dohrn, Foreword: Children and the Ethical Practice of Law, [64 Fordham L. Rev. 1281, 1286 \(1996\)](#).

⁶ NACC, *supra* note 2, at 6. "The fundamental requirements of competency as defined in each jurisdiction, combined with the ability to function without constraint or obligation to any party other than the child client is of paramount importance." *Id.* at comment A. "Competent representation includes knowledge, skill, thoroughness, and preparation." *Id.* at comment B.

⁷ *Id.* at 7, Jennifer L. Renne, Legal Ethics in Child Welfare Cases - Quality Representation, 16 No. 1 Prof. Law 4, 7 (2005). See generally Randi Mandelbaum and Laura Cohen, Kids Will Be Kids: Creating a Framework For Interviewing and Counseling Adolescent Children, [79 Temp. L. Rev. 357, 380](#) (discussing the attorney's duties when dealing with the child client); Theresa Hughes, A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates, [40 Colum. J.L. & Soc. Probs. 551, 560 \(2007\)](#).

⁸ See NACC, *supra* note 2, at 7 (discussing the attorney's duties when dealing with the child client).

⁹ See *infra* Part II.B.

witnesses at trial. ¹⁰ Both the attorney's role and the duties required are fraught with ambiguity. ¹¹ In South Dakota, ambiguity stems from the lack of statutory guidance and a lack of sufficient training necessary to provide adequate representation to the child. ¹²

This is a crisis gaining recognition across the country as child advocates [*184] work to enhance representation nationwide. ¹³ The lack of ethical or statutory guidelines can lead to frustration for child attorneys, which in turn leads to apathetic and passive representation. ¹⁴ South Dakota is not alone in trying to resolve this crisis. ¹⁵ Nationally, child advocates are indicating that there is a significant concern with the competency and adequacy of child representation on both a national and state level. ¹⁶

While it is important to realize the need for effective representation of children, it is also important to note the debate over what that representation should specifically entail. ¹⁷ The American Bar Association has produced working standards for attorneys representing children in abuse and neglect cases; ¹⁸ but the standards are not binding legal authority on South Dakota attorneys. ¹⁹ The ambiguity of an attorney's role and duties in abuse and neglect proceedings has sparked serious debate amongst attorneys, judges, social workers, and other child advocates in South Dakota. ²⁰ Therefore, the lack of statutory law governing child representation in South Dakota a critical issue that specifically needs to be addressed by the legislature. ²¹

¹⁰ See *infra* Part III.B.

¹¹ See *infra* Part II.B.

¹² See *infra* Part III.

¹³ See generally American Bar Association, Report and Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, *42 Fam. L.Q. 145, 145-46 (2008)* [hereinafter ABA, Report and Working Draft] (discussing the differences in different states statutory language and resulting confusion). "Abuse and neglect cases literally affect the child's entire future in that they decide where a child lives, who the child will live with, and whether the child will have access to his or her family. *Id. at 145.*

¹⁴ See Atwood, Standards, *supra* note 4, at 185.

¹⁵ See Barbara Glesner Fines, Pressures Toward Mediocrity in the Representation of Children, *37 Cap. U. L. Rev. 411, 412 (2008)*; American Bar Association, Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings, *41 Fam. L.Q. 365, 381 (2007)* (stating "inadequately trained or poorly qualified counsel has been a problem in adoption and guardianship proceedings").

¹⁶ See Fines, *supra* note 15, at 412; see also Emily Buss, You're My What? The Problems of Children's Misperceptions of Their Lawyers' Roles, *64 Fordham L. Rev. 1699, 1700 (1996)*; Association of Family and Conciliation Courts, Burden of Proof Begone the Pernicious of Emergency Removal in Child Protective Proceedings, *41 Fam. Ct. Rev. 457 (2003)* [hereinafter AFCC, Emergency Removal].

¹⁷ 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, 992 (2006)*; see Donald N. Duquette, Special Issue On Legal Representation of Children: Responses to the Conference: Two Distinct Roles/Bright Line Test, *6 Nev. L.J. 1240 (2006)* [hereinafter Duquette, Bright Line Test].

¹⁸ See American Bar Association, American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases 1 (1996), available at <http://www.abanet.org/child/repstandwhole.pdf> [hereinafter ABA, Standards].

¹⁹ See ABA, Report and Working Draft, *supra* note 13, at 146.

²⁰ See *infra* Part III.

²¹ Interview with Elizabeth Rosenbaum, Attorney, Adjunct Professor of Children & the Law at the University of South Dakota School of Law, in Sioux City, Iowa (April 30, 2010); Interview with LaRae Oberloh, Sioux Falls Area Program Manager, CASA, in Sioux Falls, SD (July 23, 2010); Interview with the Honorable Patricia Riepel, South Dakota Second Judicial Circuit Court Judge, in Sioux Falls, SD (July 22, 2010); Interview with William Janklow, Partner, Janklow Law Firm, former South Dakota Governor,

This comment begins by explaining the history and development of child representation.²² It explains each type of representative involved with the child [*185] throughout the litigation process.²³ Further, it examines the statutory laws enacted by the states surrounding South Dakota, as well as the statutory laws currently in place in South Dakota.²⁴ It then examines the attorney's role in South Dakota and suggests that South Dakota enact a dual standard of representation for children in abuse and neglect cases.²⁵ Finally, it calls for the South Dakota Legislature to enact a statute solely dedicated to defining the duties of the best interests attorney in abuse and neglect cases.²⁶

II. BACKGROUND

A. History of Child Representation

Child representation originated after the Civil War in what is referred to as the "child savers" movement.²⁷ Child savers were advocates that actively sought legal protection for poor and neglected children.²⁸ The "child savers" movement led to the 1877 New York enactment of the Act for Protecting Children, which granted jurisdiction to courts "over any child under the age of fourteen who, inter alia, was found to be begging or receiving alms, was destitute or vagrant, whose parent was 'vicious,' or who lacked 'proper guardianship.'"²⁹ By 1900, other states followed suit and began enacting child protection statutes.³⁰

Under early child protection statutes, children were not afforded due process standards, nor were they afforded the right of appellate review.³¹ Children had no legal standing and the court would determine parental guilt, or innocence, after an informal inquiry.³² "Child savers" acts continued until 1967 when the United States Supreme Court decided the landmark case *In Re Gault*.³³ In *In Re Gault*, Gerald Francis Gault was committed as a juvenile

former South Dakota United States Representative, in Sioux Falls, SD (July 23, 2010); Telephone Interview with the Honorable Jeff Davis, South Dakota Fifth Circuit Presiding Court Judge, chair of the South Dakota Court Improvement Program Committee (July 21, 2010).

²² See *infra* Part II.

²³ See *infra* Parts II.B, II.C.

²⁴ See *infra* Parts II.D, II.E.

²⁵ See *infra* Part III.A.

²⁶ See *infra* Part III.B.

²⁷ Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, [22 *Touro L. Rev.* 745, 748 \(2006\)](#).

²⁸ *Id.*

²⁹ *Id.*

³⁰ [Id. at 748-49](#). In 1899, Illinois was the first state to create a juvenile court. Jean Koh Peters, *Representing Children In Child Protective Proceedings: Ethical and Practical Dimensions* 27 (1997). Approximately thirty years later, all but three states had enacted legislation creating a juvenile court. *Id.* Juvenile courts had broad jurisdiction over all child "dependency" cases, which included both protective and juvenile delinquency cases. *Id.* Delinquency cases encompassed ungovernable children, truancy, and runaway cases. *Id.* Dependency proceedings consisted of poverty cases dealing with neglect. *Id.*

³¹ Sobie, *supra* note 27, at 749.

³² *Id.* at 750.

³³ [In Re Gault](#), [387 U.S. 1 \(1967\)](#) (holding that a child has a constitutional right to counsel). Before *In Re Gault*, judges didn't see a place for attorneys in the juvenile court system and thought of them as making the process more difficult. Jean Koh Peters, *supra* note 30, at 27. "As late as 1964, children had lawyers in fewer than five percent of juvenile court hearings." *Id.*

delinquent to a state industrial school without the protection of counsel.³⁴ Gault's parents filed [*186] a writ of habeas corpus with the Arizona Superior Court.³⁵ The Superior Court dismissed the writ, and Gault's parent's appealed to the Arizona Supreme Court.³⁶ The Arizona Supreme Court stated that it considered the Juvenile Code unconstitutional and a denial of the due process of law because it did not require that parents and children be "apprised of the specific charges, [did] not require proper notice of a hearing, and [did] not provide for an appeal."³⁷ The court further held that the "order relating to Gerald constituted a denial of due process of law because of the absence of adequate notice of the charge and the hearing; failure to notify appellants of certain constitutional rights including the rights to counsel and to confrontation, and the privilege against self-incrimination; the use of unsworn hearsay testimony; and the failure to make a record of the proceedings."³⁸ The Arizona Supreme Court however affirmed the Superior Court's dismissal of the writ.³⁹ The boy's parents appealed to the United States Supreme Court.⁴⁰ The United States Supreme Court reversed the lower court's dismissal of the writ, finding that state standards regarding juvenile delinquency proceedings must comply with "due process and fair treatment."⁴¹ Although the Supreme Court specifically addressed child delinquency proceedings in its decision, almost identical procedures have been incorporated into state legislation regarding abuse and neglect cases nationwide.⁴²

The years following the *In Re Gault* decision became significant in the litigation, assertion, and legislation of children's legal rights.⁴³ The federal government responded to the spread of child rights awareness by passing the Child Abuse Prevention and Treatment Act (CAPTA) of 1974.⁴⁴ "CAPTA provided federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities" ⁴⁵ CAPTA also supplied the first definition of child abuse and neglect, as well as requiring that a guardian ad litem be appointed in every case involving abuse and neglect proceedings.⁴⁶ In 1996, the American Bar Association specifically defined the [*187] child's attorney as "a lawyer who provides legal services for a child and who owes the same duties of

³⁴ [In Re Gault, 387 U.S. at 4.](#)

³⁵ [Id. at 3-4.](#)

³⁶ [Id. at 9.](#)

³⁷ *Id.*

³⁸ [Id. at 10.](#)

³⁹ [Id. at 10.](#)

⁴⁰ [Id. at 3-4.](#)

⁴¹ [Id. at 30.](#)

⁴² Sobie, *supra* note 27, at 749; see The Honorable Jim Cooper, Representative Tennessee, Address to the Members of the Coalition on Adoption Institute in Washington, D.C. address, available at <http://www.ccaainstitute.org/who-we-are/mission-in-action/> (discussing the laws governing child protective services).

⁴³ *Id.* at 751.

⁴⁴ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 1191, [88 Stat. 4 \(1974\)](#) (partially repealed in 1996) (Codified as amended at [42 U.S.C. §§5101-5206, 5116 \(2006\)](#)). This act has been amended several times most recently in 2003, to make improvements and reauthorize programs under the act, which is now called the Keeping Children and Family Safe Act of 2003. Pub. L. No. 108-36, § 342, [117 Stat. 800 \(2003\)](#).

⁴⁵ Child Welfare Information Gateway, About CAPTA: A Legislative History, <http://www.childwelfare.gov/pubs/factsheets/about.cfm> (last visited October 11, 2010).

⁴⁶ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 1191, [88 Stat. 4 \(1974\)](#).

undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." ⁴⁷ Beyond the decision in *In Re Gault*, CAPTA legislation, and the definitions provided by the American Bar Association, child representation has subsequently developed nationally on a state-by-state basis. ⁴⁸

B. Models of Representation

Attorneys representing children often play several roles that can be contradictory, and thus, confusing to the attorney. ⁴⁹ Many attorneys struggle to balance the concept of representing the child and the child's best interests, ⁵⁰ which is complicated even more when a young child cannot articulate his or her wishes. ⁵¹ Two main models have made their way into statutory law to try to resolve this ethical dilemma. ⁵² Both models have sparked disagreement nationwide as to whether the attorney should represent the child's wishes or the child's best interests. ⁵³

1. Child's Best Interests

Many states have enacted the "child's best interests model" (best interests model), where the attorney functions in a nontraditional role by representing the child's best interests rather than the child's express wishes. ⁵⁴ In this role, the attorney must balance the needs and interests of the child independent of the attorney's own personal beliefs, values, and experiences. ⁵⁵ The attorney may request advice from other experts when seeking to balance conflicts between the child's needs and wishes. ⁵⁶

Proponents of this model desire to protect children from emotionally- [*188] charged decision making. ⁵⁷ Many times children lack the maturity that is needed to make complex decisions, and the traditional attorney cannot

⁴⁷ ABA, Standards, supra note 18, at 1. The American Bar Association states that the child "is a separate individual with potentially discrete and independent views." *Id.* at 2.

⁴⁸ See Emily Gleiss, The Due Process Rights of Parents to Cross-Examine Guardians Ad litem In Custody Disputes: The Reality and The Ideal, [94 Minn. L. Rev. 2103, 2106-07 \(2010\)](#).

⁴⁹ Albert E. Hartmann, Crafting an Advocate For a Child: In Support of Legislation Redefining the Role of the Guardian Ad litem in Michigan Child Abuse and Neglect Cases, [31 U. Mich. J.L. Reform 237, 238 \(1997\)](#); Linda D. Elrod, An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases, [64 Fordham L. Rev. 1999, 2001 \(1996\)](#) [hereinafter Elrod, Analysis].

⁵⁰ Elrod, Analysis, supra note 49, at 2001.

⁵¹ Debra Alsaker-Burke, Representing the Child in a Child Protection Case: An Ethical Conundrum, 52-Jan. *Advoc.* 18 (2009).

⁵² See Donald N. Duquette, Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required, [34 Fam. L. Q. 441 \(2000\)](#) [hereinafter Duquette, Roles].

⁵³ Barbra A. Atwood, The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform, [45 Ariz. L. Rev. 629, 641 \(2003\)](#) [hereinafter Atwood, Child's Voice].

⁵⁴ ABA, Standards, supra note 18, at 6.

⁵⁵ *Id.*; see 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, 36 \(2000\)](#); Kim Brooks Tandy and Teresa Heffernan, Representing Children with Disabilities: Legal and Ethical Considerations, [6 Nev. L. J. 1396, 1407 \(2006\)](#).

⁵⁶ *Id.*

⁵⁷ See Melissa J. Maguire, Depriving Children Of a Voice Is Not Harmless Error: An Argument For Improving Children's Representation in Massachusetts Through Statutory Reform, [38 Suffolk U. L. Rev. 661, 666 \(2005\)](#).

properly meet the child's unique needs.⁵⁸ The best interests attorney takes an objective view of the evidence surrounding the case to determine the needs and circumstances of the child.⁵⁹ The child is also protected from shouldering adult decision-making and influence from the child's guardians and other parties in the proceedings.⁶⁰

Opponents find that this model creates serious ethical problems for the attorney.⁶¹ Many times the attorney only acts in the role of the guardian ad litem, and the attorney may not be trained to act in that role.⁶² Further, it assumes the attorney actually knows the correct interests of the child.⁶³ When the attorney acts in the role of the guardian ad litem, the attorney must report back to the court, which infringes on the code of ethics.⁶⁴ Therefore, opponents find that this model inherently conflict's with the attorney's code of ethics.⁶⁵

2. Client-directed Model

In the client-directed model, the attorney functions in a traditional attorney-client relationship advocating for the child's expressed wishes irrespective of the attorney's feelings about the child's choices.⁶⁶ In this approach, the attorney remains in a traditional role and is thereby still bound by the same ethical constraints.⁶⁷ By allowing the child client to participate in the decision-making process, this model assumes that children are capable of making reasoned choices about significant aspects of their lives.⁶⁸

[*189] The benefit of a traditional client-attorney relationship is the child is given a voice in the proceeding to express wishes from his or her perspective.⁶⁹ Proponents of this model argue that children capable of relaying their wishes and interests to their attorneys are disempowered when their appointed advocates take positions contrary to their wishes.⁷⁰ Further, the child has a right to have his or her views represented whether or not the

⁵⁸ See Leigh Goodmark, From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases, [102 W. Va. L. Rev. 237, 325 \(1999\)](#).

⁵⁹ American Bar Association, Uniform Representation of Children in Abuse and Neglect Proceedings Act, [42 Fam. L.Q. 1, 11 \(2008\)](#) [hereinafter ABA, Uniform Representation]; see Annette R. Appell, Decontextualizing the Child Client: The Efficiency of the Attorney-Client Model For Very Young Children, [64 Fordham L. Rev. 1955, 1957 \(1996\)](#).

⁶⁰ See generally Fines, supra note 15, at 446 (discussing the differing influential factors in abuse and neglect proceedings).

⁶¹ David R. Katner, Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, [14 Geo. J. Legal Ethics 103, 108 \(2000\)](#).

⁶² Id.; see 1 Juliette Hall, Child Welfare Practices in Massachusetts § 3.7.4 (2009) (reprinted at CHWPI MA-CLE 3-1 (2009)) (discussing the child attorney's duties).

⁶³ Goodmark, supra note 58, at 327.

⁶⁴ Katner, supra note 61, at 108. The code of ethics requires the attorney to abide by the client's determination, maintain confidentiality, and not intentionally or knowingly engage in conduct against the client's wishes. Id. at 109.

⁶⁵ Id.

⁶⁶ ABA, Uniform Representation, supra note 59, at 10.

⁶⁷ Goodmark, supra note 58, at 323-24.

⁶⁸ Id. at 324; Meridith Sopher, Giving the Children a Meaningful Voice: The Role of the Children's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings, 223 PLI/Crim 63, 90 (2010).

⁶⁹ Goodmark, supra note 58, at 323-24; Jaclyn Jean Jenks, Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings, [46 Fam. Ct. Rev. 163, 173 \(2008\)](#).

⁷⁰ Id. at 325.

attorney feels it is in the child's best interests.⁷¹ The child that is capable of relaying their interests to their attorney is as deserving of zealous representation as that of an adult.⁷² Proponents also fear that without active participation from the client, the attorney may portray their own personal views as the child's.⁷³

Opponents to this model argue that it is difficult to tell whether the child will be capable of making competent decisions when directing their attorney.⁷⁴ "The client-directed model runs the risk of re-victimizing the child when we ask him or her to shoulder the adult-like burden of decision making and directing the lawyer."⁷⁵ Further, pressure from other parties in the litigation may cause the child to "misidentify and/or misarticulate their own interests."⁷⁶ Opponents also find that this mode of representation is deficient when dealing with children of all ages because the child may lack the maturity to direct the attorney or to make complex decisions.⁷⁷

3. Ethical Considerations

The differing models of child representation make this area of the law unique.⁷⁸ Attorneys must balance their duties of confidentiality and loyalty against required disclosure of the child's confidential information.⁷⁹ These are not questions that arise when representing adult clients as attorneys are obligated to follow the adult client's wishes.⁸⁰ Today, most states, including South Dakota, have adopted a variation of the American Bar Association's Rules of Professional Conduct also known as the Model Rules.⁸¹

[*190] There is no model rule specifically designed to pertain to children, so children have been included in Model Rule 1.14.⁸² Model Rule 1.14 specifically addresses the representation of mentally disabled or elderly clients.⁸³ Children are included in this rule because it is intended to pertain to clients who cannot make decisions for

⁷¹ Duquette, Roles, *supra* note 52, at 447; see Linda D. Elrod, Client-Directed Lawyers For Children: It is the "Right" Thing To Do, *27 Pace L. Rev.* 869, 879 (2007) [hereinafter Elrod, Client-Directed Lawyers].

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Maguire, *supra* note 57, at 667-68.

⁷⁵ Duquette, Roles, *supra* note 52, at 448.

⁷⁶ *Id.*

⁷⁷ *Id.* See *Colo. Rev. Stat. § 13-91-102* (2000 & Supp. 2010).

⁷⁸ See National Juvenile Defender Center, Juvenile Legal Defense: A Report On Access to Counsel and Quality Representation For Children In Nebraska 3 (2009), available at http://throughtheeyes.org/files/Yellow_Box_NJDC_Final_Report.pdf [hereinafter NJDC]. "The role of the juvenile defender is multifaceted, challenging, and requires extraordinary sensitivity." *Id.*

⁷⁹ Katner, *supra* note 61, at 106-07.

⁸⁰ Duquette, Roles, *supra* note 52, at 447.

⁸¹ Katner, *supra* note 61, at 110; see S.D.C.L. § 16-18, app. at 617 (2004). The first ethical standards were called the 1908 Canons of Professional Conduct and were last amended in 1963. American Bar Association, About the Model Rules, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited October 11, 2010). The 1908 Canons of Professional Conduct were replaced by the 1969 Model Code of Professional Responsibility. *Id.* In 1983 the American Bar Association drafted the Model Rules, which were subsequently adopted by the Bar Association's House of Delegates. *Id.*

⁸² See Elizabeth Laffitte, Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered, *17 Geo. J. Legal Ethics* 313, 327 (2004).

⁸³ *Id.* at 329.

themselves.⁸⁴ However, the only mention of children in this rule, and its legislative history, is to explain that children constitute minors.⁸⁵

Model Rule 1.6 governs the confidentiality of information, specifically the "disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client."⁸⁶ This rule embodies the fundamental principle that the attorney cannot reveal information relating to the client's representation without informed consent.⁸⁷ Except when specifically prohibited from revealing information, the attorney may disclose certain information when appropriate in furthering the client's representation.⁸⁸

C. The Advocates

Child advocates appear in a variety of roles and settings in abuse and neglect cases.⁸⁹ Two additional advocates apart from the child's attorney are the guardian ad litem and the CASA representative.⁹⁰ Each state has different requirements for the mandatory or discretionary appointment of child advocates.⁹¹ The national lack of uniformity has resulted in a "mixture of legal and lay representation, with children's attorneys acting as guardians ad litem or as counsel to the [child] ... or blending the two seemingly inconsistent roles."⁹² Therefore, it is important to have a clear understanding of the different representatives involved in abuse and neglect cases.⁹³

1. The Guardian Ad Litem

The guardian ad litem is an independent, objective adult with the sole purpose of advocating the best interests of the child in abuse and neglect [*191] proceedings.⁹⁴ Although the name contains the word guardian, the guardian ad litem is not a legal guardian.⁹⁵ This means the guardian ad litem does not control the child, the child's property, or where the child lives.⁹⁶ The guardian ad litem is not an attorney and does not provide the child with services, but is instead appointed to advocate for the child's best interests continuously throughout the entire abuse and neglect proceedings.⁹⁷ Throughout the proceedings, the guardian ad litem conducts an independent investigation into the child's environment, relationships, and specific needs.⁹⁸ When the guardian ad litem has completed a

⁸⁴ See [id. at 328](#).

⁸⁵ [Id. at 329](#).

⁸⁶ American Bar Association, Annotated Model Rules of Prof'l Conduct Fifth Edition R. 1.6 cmt. 1 (2003) [hereinafter ABA, Model Rules].

⁸⁷ *Id.* at cmt. 2.

⁸⁸ *Id.* at cmt. 5.

⁸⁹ See Atwood, Standards, *supra* note 4, at 192.

⁹⁰ See *infra* Parts II.C.1, II.C.2.

⁹¹ Sobie, *supra* note 27, at 755.

⁹² *Id.*

⁹³ See generally *id.* (discussing the differing roles in child representation).

⁹⁴ Minnesota Judicial Branch, Volunteer as an Advocate for Abused & Neglected Children in Our Community! (2010), http://www.mncourts.gov/Documents/4/Public/Guardian_Ad_Litem/AA_Brochuren_with_Dakota_Fall_10.pdf.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Florida Guardian Ad litem Program, Frequently Asked Questions, http://www.guardianadlitem.org/vol_faq.asp (last visited October 11, 2010).

thorough investigation, he or she submits a signed written report to the court describing what placement and plan is in the best interests of the child.⁹⁹ In addition to conducting and submitting their research, guardians ad litem attend each hearing and maintain complete records for each case.¹⁰⁰

The term guardian ad litem, in a legal sense, means "guardian for the lawsuit."¹⁰¹ Guardians ad litem date back to English common law and the belief that some parents were unfit to make choices for their children.¹⁰² When necessary the court would appoint a guardian ad litem to make decisions for the child.¹⁰³ Before 1974, only a few delinquency cases had mandated child representation,¹⁰⁴ however after 1974 guardians ad litem became national requirements.¹⁰⁵ Many states require the court to appoint a traditional attorney [*192] to represent the child in juvenile proceedings and a guardian ad litem, usually a lay volunteer or attorney, to represent the child's best interests.¹⁰⁶ The guardian ad litem specifically represents the child's best interests by making recommendations to the court regarding the child's needs as a result of abuse and neglect.¹⁰⁷

2. Court Appointed Special Advocates

Court Appointed Special Advocates (CASA) are community volunteers appointed to help the court make decisions in child abuse and neglect cases.¹⁰⁸ The decision to appoint a CASA volunteer is within the sole discretion of the judge.¹⁰⁹ Each CASA volunteer spends approximately thirty to forty hours of training before they are appointed to

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Minnesota Judicial Branch, Guardian Ad litem Program, <http://www.mncourts.gov/district/4/?page=109> (last visited October 11, 2010).

¹⁰² David M. Johnson, The Role of the Guardian Ad litem: Changes in the Wind, 27 Colo. Law. 73 (Nov. 1998).

¹⁰³ Id.

¹⁰⁴ Peters, *supra* note 30, at 28.

¹⁰⁵ Id. This eventually led to the CASA movement. Id. The CASA program is designed as follows:

Court Appointed Special Advocates (CASA) originated in King County, Seattle, Washington, in January 1977. Based on an idea originated by Superior Court Judge David Soukup, this pilot program trained 10 volunteers from the community to appear on behalf of 498 children and 376 dependency cases in Seattle.

Within one year the program was recognized as the best national example of citizens participation in the juvenile justice system. Programs like CASA spread to other states, partly through funding from private foundations which sought to replicate the Seattle program in courts across the nation. A national CASA organization was formed in 1982, receiving funding from the National Council of Juvenile and Family Court Judges in a grant directed by the Department of Justice, from the Department of Health and Human Services, and from additional private grants. In 1989, the American Bar Association officially endorsed the use of CASA volunteers in work with attorneys for representing abused and neglected children.

Id. at 28-29.

¹⁰⁶ Id. at 29.

¹⁰⁷ See Florida Guardian Ad litem Program, *supra* note 98.

¹⁰⁸ See Court Appointed Special Advocates for Children, Nashville, Volunteer Faq, <http://www.casa-nashville.org/faq.htm> [hereinafter CASA Nashville] (last visited October 11, 2010). The program was designed to increase awareness and provide child advocates for children in abuse and neglect cases. See Court Appointed Special Advocates for Children, About Us, http://www.casaforchildren.org/site/c.mtJSJ7MPISe/b.5301303/k.6FB1/About_Us_CASA_for_Children.htm (last visited October 11, 2010).

¹⁰⁹ CASA Nashville, Volunteer Faq, <http://www.casa-nashville.org/faq.htm> (last visited October 11, 2010).

abuse and neglect cases. ¹¹⁰ Through their training, the volunteers learn how to interact with each party involved in the case and how to research and effectively communicate their findings to the judge. ¹¹¹ A CASA volunteer conducts a carefully researched background of the child to assist the judge in making decisions regarding the child's placement. ¹¹² When gathering research, the "CASA volunteer talks with the child, parents, family members, social workers, school officials, health providers, and others who are knowledgeable about the child's history." ¹¹³ Representatives are trained to examine each situation by looking at the history, environment, relationships, and the child's needs. ¹¹⁴ The CASA volunteer also reviews important records regarding the case. ¹¹⁵

As separate appointees, CASA volunteers differ from the other representatives in abuse and neglect proceedings. ¹¹⁶ The state appoints social workers to represent the best interests of the child. ¹¹⁷ However, many times social workers have a heavy caseload and cannot devote the time and attention [*193] necessary to adequately help the child. ¹¹⁸ A CASA volunteer is appointed to only one case at a time and stays with the case until it is closed. ¹¹⁹ This allows volunteers to conduct in-depth research and provide thorough recommendations to the judge. ¹²⁰ The child's attorney provides legal representation, while the CASA volunteer does not. ¹²¹ The guardian ad litem also differs from the CASA volunteer, as the guardian's sole purpose is to keep the best interests of the child in mind, whereas the CASA volunteer takes an objective view of the entire situation acting as the eyes and ears of the court. ¹²²

D. Current Child Representation in South Dakota

By statute, an attorney must be appointed for any child alleged to be abused or neglected in any judicial proceeding. ¹²³ The court may also appoint a guardian ad litem or a CASA volunteer to assist the attorney. ¹²⁴ South Dakota statute allows the court to appoint the attorney in a dual role as both attorney providing legal representation and as guardian ad litem. ¹²⁵

¹¹⁰ Id.; see generally The National CASA Association Volunteer Training Curriculum Volunteer Manual, Facilitator Addition (2007) [hereinafter CASA Training Manual] (providing training guidelines).

¹¹¹ Court Appointed Special Advocates, Family Court of the State of Delaware, Frequently Asked Questions, <http://courts.delaware.gov/Family/CASA/faqs.stm>.

¹¹² CASA Nashville, supra note 109.

¹¹³ Id.

¹¹⁴ Interview with LaRae Oberloh, supra note 21.

¹¹⁵ CASA Nashville, supra note 109.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ See id.

¹²¹ Id.

¹²² Id.

¹²³ [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010).

¹²⁴ Id.

¹²⁵ [S.D.C.L. § 26-8A-20](#) (2004 & Supp. 2010).

The only duty defined in South Dakota statute for the best interests representative is the duty to represent the child's best interests.¹²⁶ Most recently, the South Dakota Supreme Court defined the attorney's duties in *In the Interest of T.A., Child, and concerning A.L. Mother, and J.L. Stepfather*, a 2003 case where the court stated that [S.D.C.L. section 26-8A-18](#) was clear that the attorney would work zealously to protect the best interests of the child.¹²⁷ The court did not define the meaning of zealously, nor did it attempt to specifically explain the duties of the child's attorney.¹²⁸

The South Dakota Unified Judicial System has noticed the need for improvement in child representation.¹²⁹ "The South Dakota Unified Judicial System, through Court Improvement Program funding, has produced a new video training for attorneys representing children in abuse and neglect cases."¹³⁰ As of February 1, 2010, "an attorney appointed to represent abused and [*194] neglected children, including those appointed as guardian ad litem, shall certify that they have viewed and completed the abuse and neglect attorney training developed by the South Dakota Unified Judicial System."¹³¹ After watching the videos, attorney must enter their state bar identification number to be added to the list of attorneys receiving certification.¹³²

E. Current Child Representation in Neighboring States

1. Minnesota

Minnesota has enacted an extensive statute that addresses the child's right to counsel.¹³³ A guardian ad litem is automatically appointed to all child abuse and neglect cases and is required to represent the child's best interests.

¹²⁶ Id.

¹²⁷ In the Interest of T.A., Child, and concerning [A.L. Mother, and J.L. Stepfather, 2003 SD 56, P 18, 663 N.W.2d 225, 232](#). Through a diligent search this was the only case the author could find where the South Dakota Supreme Court defined the child attorney's duties.

¹²⁸ See generally In the [Interest of T.A., 2003 SD 56, 663 N.W.2d 225](#).

¹²⁹ See letter from the Honorable Jeff Davis, South Dakota Presiding Seventh Circuit Court Judge, Chair of the South Dakota Court Improvement Program Committee, to members of the South Dakota State Bar (March 1, 2010) (on file with author).

¹³⁰ Id. The current video replaces the previous video called "Representing the Most Vulnerable Clients," which was produced in 2005. Id. The training video is available at <http://ujstsd.sd.gov>. When an attorney finishes the video, their name is added to the list of verified child abuse and neglect trained attorneys. Id. The list is maintained by the State Court Administrator's office. Id.

¹³¹ Id.

¹³² Id. Attorneys must register their bar identification number at <http://ujstsd.sd.gov>. Jeff Davis letter, supra note 129.

¹³³ See [Minn. Stat. § 260C.163\(3\)\(a\)-\(e\)](#) (West 2007 & Supp. 2010). The statute provides as follows:

(a) The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court.

(b) Except in proceedings where the sole basis for the petition is habitual truancy, if the child, parent, guardian, or custodian desires counsel but is unable to employ it, the court shall appoint counsel to represent the child who is ten years of age or older or the parents or guardian in any case in which is feels that such an appointment is appropriate.

(c) In any proceeding where the sole basis for the petition is habitual truancy, the child, parent, guardian, and custodian do not have the right to appointment of a public defender or other counsel at public expense. However, before any out-of-home placement, including foster care or inpatient treatment, can be ordered, the court must appoint a public defender or other counsel at public expense in accordance with paragraph (b).

(d) Counsel for the child shall not also act as the child's guardian ad litem.

¹³⁴ The [*195] child's attorney is prohibited from serving as both attorney and guardian ad litem. ¹³⁵ The child is specifically given the right to participate in the proceedings, even though the guardian ad litem is required to communicate the child's best interests to the court. ¹³⁶ The statute lists the duties and responsibilities of the

(e) In any proceeding where the subject of a petition for a child in need of protection or services is not represented by an attorney, the court shall determine the child's preferences regarding the proceedings, if the child is of suitable age to express a preference.

Id.

¹³⁴ [Minn. Stat. § 260C.163\(5\)\(a\)](#)-(f) (West 2007 & Supp. 2010). The statute provides as follows:

(a) The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that the minor's parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor's interests, and every proceeding alleging a child's need for protection or services under section 260C.007, subdivision 6, except proceedings where the sole allegation is that the child is a runaway or habitual truant. In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such an appointment is desirable. The court shall appoint the guardian ad litem on its own motion or in the manner provided for the appointment of a guardian ad litem in the district court. The court may appoint separate counsel for the guardian ad litem if necessary.

(b) A guardian ad litem shall carry out the following responsibilities:

(1) conduct an independent investigation to determine the facts relevant to the situation of the child and the family, which must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case;

(2) advocate for the child's best interests by participating in appropriate aspects of the case and advocating for appropriate community services when necessary;

(3) maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law to promote cooperative solutions that are in the best interests of the child;

(4) monitor the child's best interests throughout the judicial proceeding; and

(5) present written reports on the child's best interests that include conclusions and recommendations and the facts upon which they are based.

(c) Except in cases where the child is alleged to have been abused or neglected, the court may waive the appointment of a guardian ad litem pursuant to paragraph (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interest of the minor are protected.

(d) In appointing a guardian ad litem pursuant to paragraph (a), the court shall not appoint the party, or any agent or employee thereof, filing a petition pursuant to section 260C.141.

(e) The following factors shall be considered when appointing a guardian ad litem in a case involving an Indian or minority child:

(1) whether a person is available who is the same racial or ethnic heritage as the child or, if that is not possible;

(2) whether a person is available who knows and appreciates the child's racial or ethnic heritage.

(f) The court shall require a background study for each guardian ad litem as provided under section 518.165. The court shall have access to data collected pursuant to section 245C.32 for purposes of the background study.

Id.

¹³⁵ [Minn. Stat. § 260C.163\(3\)\(d\)](#) (West 2007 & Supp. 2010).

¹³⁶ [Minn. Stat. § 260C.163\(2\)](#) (West 2007 & Supp. 2010). The statute provides as follows:

A child who is the subject of a petition, and the parents, guardian, or legal custodian of the child have the right to participate in all proceedings on a petition. Official tribal representatives have the right to participate in any proceeding that is subject to the Indian Child Welfare Act of 1978, United States Code, Title 25, sections 1901 to 1963.

guardian ad litem, but not of the child's attorney. ¹³⁷ In Minnesota, the guardian ad litem must conduct an independent investigation, review relevant documents, meet with the child in a home setting, and interview all relevant parties to the case. ¹³⁸

Minnesota's statutory reform was a direct result of the Minnesota Supreme Court Task Force on Foster Care and Adoption (Task Force). ¹³⁹ To clarify the laws governing child representation, the Task Force recommended reorganizing [*196] the statutes governing child protection proceedings in 1997. ¹⁴⁰ The Omnibus Criminal Justice Funding Bill followed the Task Force's recommendation to reorganize Minnesota's juvenile code. ¹⁴¹ Reorganization provided for a separate, comprehensible area of the law that pertains specifically to child protection and delinquency. ¹⁴²

2. Iowa

In Iowa, statutory law requires that a guardian ad litem and an attorney be appointed by the court in all child abuse and protective proceedings. ¹⁴³ The [*197] attorney is permitted to serve the dual role of legal advocate and

Any grandparent of the child has a right to participate in the proceedings to the same extent as a parent, if the child has lived with the grandparents within two years preceding the filing of the petition. At the first hearing following the filing of a petition, the court shall ask whether the child has lived with a grandparent within the last two years, except that the court need not make this inquiry if the petition states that the child did not live with a grandparent during this time period. Failure to notify a grandparent of the proceedings is not a jurisdictional defect.

If, in a proceeding involving a child in need of protection or services, the responsible social services agency recommends transfer of permanent legal and physical custody to a relative, the relative has a right to participate as a party, and thereafter shall receive notice of any hearing in the proceedings.

Id.

¹³⁷ See [Minn. Stat. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007 & Supp. 2010).

¹³⁸ [Minn. Stat. § 260C.163\(5\)\(b\)](#) (West 2007 & Supp. 2010).

¹³⁹ See Minnesota Supreme Court Advisory Committee on Open Hearings in Juvenile Protection Matters, Introduction to Final Report of Nation Center for State Courts 5 (2001), available at http://www.mncourts.gov/documents/0/Public/Court_Information_Office/Volume_1_-_Introduction_to_NCSC_Report.doc.

¹⁴⁰ Act of August 1, 1999, ch. 139, 1999 Minn. Laws (S.B. 184), available at https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Sentate&f=sf184&ssn=0&y=1999.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ [Iowa Code Ann. § 232.89](#) (West 2006). The statute provides as follows:

1. Upon the filing of a petition the parents, guardian, or custodian identified in the petition shall have the right to counsel in connection with all subsequent hearings and proceedings. If that person desires but is financially unable to employ counsel, the court shall appoint counsel.

2. Upon the filing of a petition, the court shall appoint counsel and a guardian ad litem for the child identified in the petition as a party to the proceedings. If a guardian ad litem has previously been appointed for the child in a proceeding under division II of this chapter or a proceeding in which the court has waived jurisdiction under section 232.45, the court shall appoint the same guardian ad litem upon the filing of the petition under this part. Counsel shall be appointed as follows:

a. If the child is represented by counsel and the court determines there is a conflict of interest between the child and the child's parent, guardian or custodian and that the retained counsel could not properly represent the child as a result of the conflict, the court shall appoint other counsel to represent the child, who shall be compensated pursuant to the provisions of subsection 3.

b. If the child is not represented by counsel, the court shall either order the parent, guardian or custodian to retain counsel for the child or shall appoint counsel for the child, who shall be compensated pursuant to the provisions of subsection 3.

guardian ad litem. ¹⁴⁴ In the event that the attorney has a conflict representing the child's legal interest and the interests of the guardian ad litem, the court may appoint a CASA representative as guardian ad litem. ¹⁴⁵ The CASA representative cannot introduce evidence at trial or cross-examine witnesses, but the advocate must file reports with the court as required. ¹⁴⁶ Iowa has enacted a comprehensive statute defining the duties of the guardian ad litem when working with a child. ¹⁴⁷ The guardian ad litem is required to conduct in-person interviews

3. The court shall determine, after giving the parent, guardian, or custodian an opportunity to be heard, whether the person has the ability to pay in whole or in part for counsel appointed for the child. If the court determines that the person possess sufficient financial ability, the court shall then consult with the department of human services, the juvenile probation office, or other authorized agency or individual regarding the likelihood of impairment of the relationship between the child and the child's parent, guardian or custodian as a result of ordering the parent, guardian, or custodian to pay for the child's counsel. If impairment is deemed unlikely, the court shall order that person to pay an amount the court finds appropriate in the manner and to whom the court directs. If the person fails to comply with the order without good reason, the court shall enter judgment against the person. If impairment is deemed likely or if the court determines that the parent, guardian, or custodian cannot pay any part of the expenses of counsel appointed to represent the child, counsel shall be reimbursed pursuant to section 232.141, subsection 2, paragraph "b".

4. The same person may serve both as the child's counsel and as guardian ad litem. However, the court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interests of the child as guardian ad litem, or a separate guardian ad litem is required to fulfill the requirements of subsection 2.

5. The court may appoint a court appointed special advocate to act as guardian ad litem. The court appointed special advocate shall receive notice of and may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child. The court appointed special advocate shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. The court appointed special advocate shall submit a written report to the court and to each of the parties to the proceedings containing results of the court appointed special advocate's initial investigation of the child's case, including but not limited to recommendations regarding placement of the child and other recommendations based on the best interests of the child. The court appointed special advocate shall submit subsequent reports to the court and parties, as needed, detailing the continuing situation of the child's case as long as the child remains under the jurisdiction of the court. In addition, the court appointed special advocate shall file other reports to the court as required by the court.

Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ See [Iowa Code Ann. § 232.2\(22\)](#) (West 2006 & Supp. 2010). The statute provides as follows:

22. a. "Guardian ad litem" means a person appointed by the court to represent the interests of a child in any judicial proceeding to which the child is a party, and includes a court appointed special advocate, except that a court appointed special advocate shall not file motions or petition pursuant to section 232.54, subsection 1, paragraphs "a" and "d", section 232.103, subsection 2, paragraph "c". and section 232.111.

b. Unless otherwise enlarged or circumscribed by a court or juvenile court having jurisdiction over the child or by operation of law, the duties of a guardian ad litem with respect to a child shall include the following:

(1) Conducting in-person interviews with the child, if the child's age is appropriate for the interview, and interviewing each parent, guardian, or other person having custody of the child, if authorized by counsel.

(2) Conducting interviews with the child, if the child's age is appropriate for the interview, prior to any court-ordered hearing.

(3) Visiting the home, residence, or both home and residence of the child and any prospective home or residence of the child, including each time placement is changed.

(4) Interviewing any person providing medical, mental health, social, educational, or other services to the child, before any hearing referred to in subparagraph (2).

with the child and [*198] the child's guardians, visit the residence or prospective residences of the child, interview all service providers dealing with the child, obtain first-hand knowledge of the case circumstances, and attend any hearings.¹⁴⁸

The Iowa Supreme Court has held that "if the court-appointed attorney [for the child] concludes that the child's expressed wishes are not in his best interests the attorney must disclose this to the court."¹⁴⁹ The court must be clearly informed of the child's wishes and why the attorney believes following the child's wishes is not in the child's best interests.¹⁵⁰ The Iowa Court of Appeals has offered some direction to the attorney assuming both the role of attorney and guardian ad litem.¹⁵¹ The court stated, "investigation has to be the cornerstone of the guardian ad litem's representation of the child's best interests."¹⁵² The court found that the guardian ad litem was not just meant to review records and arguments, nor were they to serve as a "handmaiden" to one of the parties.¹⁵³

3. Nebraska

Nebraska law requires that a guardian ad litem be appointed in all abuse and neglect proceedings.¹⁵⁴ An attorney is appointed in the role of the guardian ad [*199] litem, unless there is a showing that the juvenile should have

(5) Obtaining firsthand knowledge, if possible, of the facts, circumstances, and parties involved in the matter in which the person is appointed guardian ad litem.

(6) Attending any hearings in the matter in which the person is appointed as the guardian ad litem.

(7) If the child is required to have a transition plan developed in accordance with the child's case permanency plan and subject to review and approval of a transition committee under section 235.7, assisting the transition committee in development of the transition plan.

c. The order appointing the guardian ad litem shall grant authorization to the guardian ad litem to interview any relevant person and inspect and copy any records relevant to the proceedings, if not prohibited by federal law. The order shall specify that the guardian ad litem may interview any person providing medical, mental health, social, educational, or other services to the child, may attend any departmental staff meeting, case conference, or meeting with medical or mental health providers, service providers, organizations, or educational institutions regarding the child, if deemed necessary by the guardian ad litem, and may inspect and copy any records relevant to the proceedings.

d. If authorized by the court, a guardian ad litem may continue a relationship with and provide advice to a child for a period of time beyond the child's eighteenth birthday.

Id.

¹⁴⁸ Id.

¹⁴⁹ In the [Interest of J.P.B. and C.R.B., 419 N.W.2d 387, 392 \(Iowa 1988\)](#). The court held that an attorney did not have a conflict of interest when representing siblings who wanted different outcomes in terminating their mother's parental rights. Id. The attorney had a responsibility to inform the court that one child's wishes were in conflict with the attorney's view of the child's best interests. Id. The court did not find it necessary to appoint another attorney. Id.

¹⁵⁰ Id.

¹⁵¹ See In the [Interest of J.V. and C.W., 464 N.W.2d 887, 893 \(Iowa Ct. App. 1990\)](#).

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ [Neb. Rev. Stat. § 43-272](#) (2000). The statute provides:

(1) When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile and his or her parent or guardian of their right to retain counsel and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel. The court shall inform such juvenile and his or her parent or guardian of such juvenile's right to counsel at county expense if none of them is able to afford counsel. If the juvenile or his or her parent or guardian desires to have counsel appointed for such juvenile, or the parent or guardian of such juvenile cannot be located, and the court

independent counsel. ¹⁵⁵ When the attorney is appointed in a dual role, he or she is required to defend the legal and social interest of the child. ¹⁵⁶ In asserting this protective [*200] measure, the attorney must "make every

ascertains that none of such persons are able to afford an attorney, the court shall forthwith appoint an attorney to represent such juvenile for all proceedings before the juvenile court, except that if an attorney is appointed to represent such juvenile and the court later determines that a parent of such juvenile is able to afford an attorney, the court shall order such parent or juvenile to pay for services of the attorney to be collected in the same manner as provided by section 43-290. If the parent willfully refuses to pay any such sum, the court may commit him or her for contempt, and execution may issue at the request of the appointed attorney or the county attorney or by the court without a request.

(2) The court, on its own motion or upon application of a party to the proceedings, shall appoint a guardian ad litem for the juvenile: (a) If the juvenile has no parent or guardian of his or her person or if the parent or guardian of the juvenile cannot be located or cannot be brought before the court; (b) if the parent or guardian of the juvenile is excused from participation in all or any part of the proceedings; (c) if the parent is a juvenile or incompetent; (d) if the parent is indifferent to the interest of the juvenile; or (e) in any proceeding pursuant to the provisions of subdivision (3)(a) of section 43-247.

A guardian ad litem shall have the duty to protect the interests of the juvenile for whom he or she has been appointed guardian, and shall be deemed a parent of the juvenile as to those proceedings with respect to which his or her guardianship extends.

(3) The court shall appoint an attorney as guardian ad litem. A guardian ad litem shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have separate counsel. In such cases the guardian ad litem shall have the right to counsel, except that the guardian ad litem shall be entitled to appointed counsel without regard to his or her financial ability to retain counsel. Whether such appointed counsel shall be provided at the cost of the county shall be determined as provided in subsection (1) of this section.

Id.

¹⁵⁵ [Neb. Rev. Stat. Ann. § 43-272\(3\)](#) (LexisNexis 2005).

¹⁵⁶ [Neb. Rev. Stat. Ann. § 43-272.01](#) (LexisNexis 2005 & Supp. 2010). The statute provides:

43-272.01. Guardian ad litem; appointment; powers and duties; consultation; payment of costs.

(1) A guardian ad litem as provided for in subsections (2) and (3) of section 43-272 shall be appointed when a child removed from his or her surrounding pursuant to subdivision (2) or (3) of section 43-248, subsection (2) of section 43-250, or section 43-251. If removal has not occurred, a guardian ad litem shall be appointed at the commencement of all cases brought under subdivision (3)(a) or (8) of section 43-247 and section 28-707.

(2) In the course of discharging duties as guardian ad litem, the person so appointed shall consider, but not be limited to the criteria provided in this subsection. The guardian ad litem:

(a) Is appointed to stand in lieu of a parent for a protected juvenile who is the subject of a juvenile court petition, shall be present at all hearings before the court in such matter unless expressly excused by the court, and may enter into such stipulations and agreements concerning adjudication and disposition deemed by him or her to be in the juvenile's best interests;

9b) Is not appointed to defend the parents or other custodian of the protected juvenile but shall defend the legal and social interests of such juvenile. Social interest shall be defined generally as the usual and reasonable expectations of society for the appropriate parental custody and protection and quality of life for juveniles without regard to the socioeconomic status of the parents or other custodians of the juvenile;

(c) May at any time after the filing of the petition move the court of jurisdiction to provide medical or psychological treatment or evaluation as set out in section 43-258. The guardian ad litem shall have access to all reports resulting from any examination ordered under section 43-258, and such reports shall be used for evaluating the status of the protected juvenile;

(d) Shall make every reasonable effort to become familiar with the needs of the protected juvenile which (i) shall include consultation with the juvenile within two weeks after the appointment and once every six months thereafter and inquiry of the most current caseworker, foster parent, or other custodian and (ii) may include inquiry of others directly involved with the juvenile or who may have information or knowledge about the circumstances which brought the juvenile court action or related cases and the development of the juvenile, including biological parents, physicians, psychologists, teachers, and clergy members;

(e) May present evidence and witnesses and cross-examine witnesses at all evidentiary hearings. In any proceeding under this section relating to a child of school age, certified copies of school records relating to attendance and academic progress of such child are admissible in evidence;

reasonable effort to become familiar with the needs of the protected juvenile." ¹⁵⁷ When acting as a guardian ad litem the attorney is afforded the right to "present evidence and witnesses and cross examine witnesses at all evidentiary hearings." ¹⁵⁸

The Nebraska Court Improvement Project was formed in 1995 to improve "the functioning of the state court system in responding to cases involving children who have been abused or neglected." ¹⁵⁹ Through this project, the Nebraska Judicial System ensures that attorneys are provided proper training and the juvenile court system keeps up with evolving case law. ¹⁶⁰ The Nebraska Court Rules require attorneys to complete six hours of specialized training. ¹⁶¹ After completing the initial six hours of training, in order for the attorney to continue to be involved in child representation, the attorney must complete three hours of additional training each year. ¹⁶² Due to limited resources in several counties in Nebraska, if no attorney is available who has completed training the judge may appoint an untrained attorney to represent the child. ¹⁶³ The training is provided at no cost to the attorney and

(f) Shall be responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile and shall submit a written report to the court at every dispositional or review hearing, or in the alternative, the court may provide the guardian ad litem with a check list that shall be completed and presented to the court at every dispositional or review hearing;

(g) Shall consider such other information as is warranted by the nature and circumstances of a particular case; and

(h) May file a petition in the juvenile court on behalf of the juvenile, including a supplemental petition as provided in section 43-291.

(3) Nothing in this section shall operate to limit the discretion of the juvenile court in protecting the best interests of a juvenile who is the subject of a juvenile court petition.

(4) For purposes of subdivision (2)(d) of this section, the court may order the expense of such consultation, if any, to be paid by the county in which the juvenile court action is brought or the court may, after notice and hearing, assess the cost of such consultation, if any, in whole or in part to the parents of the juvenile. The ability of the parents to pay and the amount of the payment shall be determined by the court by appropriate examination.

Id.

¹⁵⁷ Id. at (2)(d).

¹⁵⁸ Id. at (2)(e).

¹⁵⁹ The University of Nebraska Lincoln Center on Children, Family, and the Law, Projects & Outreach: Nebraska Court Improvement Project, http://ccfl.unl.edu/projects_outreach/projects/current/cip.php (last visited October 11, 2010). The project was recently reauthorized by Congress and is expected to continue indefinitely. Id.

¹⁶⁰ See Through the Eyes of the Child, News and Updates, <http://throughtheeyes.org/> (last visited October 4, 2010).

¹⁶¹ NEB. CT R. § 4-401, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>. The pertinent court rule reads as follows:

Commencing January 1, 2008, an attorney to be appointed by the courts as a guardian ad litem for a juvenile in a proceeding brought under [Neb. Rev. Stat. \[section\] 43-247\(3\)\(a\)](#) of the Nebraska Juvenile Code shall have completed six (6) hours of specialized training provided by the Administrative Office of the Court (see Appendix A). Thereafter, in order to maintain eligibility to be appointed and to serve as a guardian ad litem, an attorney shall complete three (3) hours of specialized training per year as provided by the Administrative Office of the Court. Courts shall appoint attorneys trained under this rule in all [section] 43-247(3)(a) cases when available; provided, however, that if the judge determines that an attorney with the training required herein is unavailable within the county, he or she may appoint an attorney without such training.

Id.

¹⁶² Id.

¹⁶³ Id.

takes place at various times and locations each year. ¹⁶⁴ The sessions include both the initial six-hour training [*201] and the follow-up three-hour training. ¹⁶⁵

Nebraska has taken additional steps to ensure children in abuse and neglect cases are receiving adequate representation. ¹⁶⁶ In 2008, the Nebraska Legislature recognized the representation of children in Nebraska courts

¹⁶⁴ Id. at app. A.

¹⁶⁵ NEB. CT R. § 4-401 app. A, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>. The training covers the following:

- (A) An overview of the Juvenile Court System
- (B) Statutory duties and authority of a guardian ad litem, including any performance standards adopted by the Nebraska Supreme Court;
 - (1) Requirements of guardian ad litem report.
 - (2) Instructions for preparing a guardian ad litem report.
 - (3) Ethical issues and the role of a guardian ad litem.
- (C) Issues which impact or impair the functioning of families, including but not limited to:
 - (1) Dynamics of child abuse and neglect;
 - (2) Substance abuse and mental health issues;
 - (3) Poverty, employment, and housing;
 - (4) Domestic violence;
 - (5) Physical, psychological, and psychiatric health issues;
 - (6) Education;
 - (7) Visitation and demonstration of parental skills.
- (D) Training in the techniques of gathering relevant information and resources:
 - (1) Interviewing skills, regarding both children and adults;
 - (2) How to obtain and interpret reports from other professionals and providers;
 - (3) Inquiry into appropriateness and stability of juvenile's placement.
- (E) Psychological aspects of children, including child development issues;
- (F) Permanency Planning: Family preservation, reunification, adoption, guardianship, another permanent planned living arrangement;
 - (1) Appropriate parental-child relationship, bonding, attachment, and effects of separation and loss;
 - (2) Developmental considerations: age appropriate visitation, with particular emphasis on the needs and vulnerabilities of children age 0-5.
- (G) Cultural, ethnic diversity, and gender issues;
- (H) Relevant state and federal statutes and case law;
- (I) Indian Child Welfare Act;
- (J) Legal advocacy, mediation, and negotiation skills.

Id.

¹⁶⁶ NJDC, *supra* note 78, at vi. "The fact that Nebraska's legislature has undertaken to fund this in-depth assessment of Nebraska's juvenile defense delivery system reveals a political environment eager for thoughtful change." Id.

as a critical issue. ¹⁶⁷ In order to properly improve the system, the legislature passed Legislative Bill 961 authorizing, in detail, a study outlining the areas of the system needing examination. ¹⁶⁸ The study found that Nebraska needed to revise [*202] its juvenile code, increase the child's access to counsel, address ethical and role confusion, and establish ongoing oversight and monitoring. ¹⁶⁹

Nebraska has also formed a Supreme Court Commission on Children in the Courts. ¹⁷⁰ Nebraska Supreme Court Chief Justice John V. Hendry announced the formation of the 2005 Commission, which had an initial goal "to begin a study of appropriate steps for the judicial system to undertake to insure that the court system is as responsive as possible for children who interact with, or are directly affected by the courts." ¹⁷¹ The Commission meets quarterly

¹⁶⁷ Id. at 1.

¹⁶⁸ Id. The areas to be examined are as follows:

Gathering of general data and information about the structure and funding mechanisms for juvenile legal defense; a review of caseloads; the examination of issues related to the timing of appointment of counsel; supervision of attorneys; charging and trying juveniles as adults; frequency with which juveniles waive their right to counsel and under what conditions they do so; allocation of resources; adequacy of juvenile court facilities; compensation of attorneys; supervising and training of attorneys; access to investigators, experts, social workers, and support staff; access to educational officers, teachers, educational staff and truancy officers; examining issues relating to truancy and the relationship between the school districts and the juvenile court system; and recidivism. The Legislature expressly stated that the assessment "shall also highlight promising approaches and innovative practices within the state and offer recommendations to improve weak areas."

Id.

Legislative Bill 961 is now Neb. Rev. St. Ann. § 29-3921 (LexisNexis 2009 Supp. 2010), which provides:

The Commission on Public Advocacy Operations Cash fund is created. The fund shall be used for the operations of the commission, except that transfers may be made from the fund to the General Fund at the direction of the Legislature through June 30, **2011**. The Commission on Public Advocacy Operations Cash Fund shall consist of money remitted pursuant to section 33-156. It is the intent of the Legislature that the commission shall be funded solely from the fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

The State Treasurer shall transfer two hundred fifty thousand dollars from the Commission on Public Advocacy Operations Cash Fund to the University Cash Fund within fifteen days after May 1, 2008. Such funds shall be used for a study of the juvenile legal defense and guardian ad litem systems utilizing the University of Nebraska Public Policy Center to create, administer, and review a Request for Proposals to select from a national search a research consultant that is qualified to provide a methodologically sound and objective assessment of Nebraska's juvenile justice system. The assessment shall include: (1) gathering of general data and information about the structure and funding mechanisms for juvenile legal defense and guardian ad litem representation; (2) a review of caseloads; (3) examining issues related to the timing of appointment of counsel and guardians ad litem; (4) supervision of attorneys; (5) charging and trying juveniles as adults; (6) frequency with which juveniles waive their right to counsel and under what conditions they do so; (7) allocation of resources; (8) adequacy of juvenile court facilities; (9) compensation of attorneys; (10) supervising and training of attorneys; (11) access to investigators, experts, social workers, and support staff; (12) access to educational officers, teachers, educational staff, and truancy officers; (13) the relationship between a guardian ad litem, a juvenile's legal counsel, and the judicial system with identified educational staff regarding a juvenile's educational status; (14) examining issues related to truancy and the relationship between the school districts and the juvenile court system; (15) recidivism; (16) time to permanency and time in court, especially when a guardian ad litem is appointed; and (17) coordination of representation for those juveniles that may have been appointed an attorney in a juvenile delinquency matter and a guardian ad litem because of abuse and neglect. The assessment shall also highlight promising approaches and innovative practices within the state and offer recommendations to improve weak areas.

Id.

¹⁶⁹ NJDC, supra note 78, at 85. The study goes on to identify how Nebraska should implement the recommendations. Id.

¹⁷⁰ Center on Children, Families, and the Law, http://ccfl.unl.edu/projects_outreach/outreach/judicial_commission/index.php.

¹⁷¹ Id. "The Commission will also explore the possibility of specialized family courts, ways in which welfare agencies and volunteers can work together, and the effectiveness of drug courts." Id.

to review the statewide receptiveness of courts to children, review system concerns, to research new approaches, and to make recommendations to the Nebraska Supreme Court.¹⁷²

4. North Dakota

North Dakota statutory law requires a guardian ad litem to be appointed in [*203] every case involving an abused or neglected child that results in judicial proceedings.¹⁷³ North Dakota Court Rule 8.7 defines the guardian ad litem's qualifications and duties in abuse and neglect cases.¹⁷⁴ "To qualify as a guardian ad litem under N.D.C.C. section 14-09-06.4, a person must be an attorney licensed in the state of North Dakota."¹⁷⁵ The guardian ad litem is required to act in the best interests of the child, and "in the same manner as an attorney for a party to the action, and consistent with the Rules of Professional Conduct, shall consider, but not be bound by, the wishes of the child or others as to the best interests of the child."¹⁷⁶

Adoption of North Dakota Court Rule 8.7 was proposed by the Family Law Task Force to define the "responsibilities, qualifications, and ethical considerations" of the law-trained guardian ad litem.¹⁷⁷ The guardian ad litem's general responsibilities include investigating, visiting the child, providing legal representation, monitoring the case, and making recommendations and reports to the court.¹⁷⁸ Further, to qualify for appointment as a guardian ad litem the "attorney must have completed 18 hours of guardian ad litem training."¹⁷⁹ Attorneys are subsequently required to complete an additional eighteen hours of training every three years to remain eligible for appointments.¹⁸⁰

III. ANALYSIS

There is a significant amount of confusion surrounding the role and duties of the child's attorney in abuse and neglect cases in South Dakota.¹⁸¹ This confusion makes enacting statutory guidelines important for providing abused and neglected children with adequate representation.¹⁸² The laws governing abuse and neglect cases are "failing," and that failure is having a significant impact on the lives of children in foster care.¹⁸³ This has become one of the foremost challenges facing policy makers because so much needs fixing that it is hard to know where to start.¹⁸⁴ Although South Dakota judges and attorneys see abuse and neglect cases as some of the most important

¹⁷² Id.

¹⁷³ [N.D. Cent. Code § 50-25.1-08](#) (2007). The statute provides, "The court, in every case involving an abused or neglected child which results in a judicial proceeding, shall appoint a guardian ad litem for the child in those proceedings." Id.

¹⁷⁴ See N.D. R. Ct. 8.7 (2009), available at <http://www.ndcourts.com/court/rules/ndroc/rule8.7.htm>.

¹⁷⁵ Id. at (a).

¹⁷⁶ Id. at (d)(1).

¹⁷⁷ Joint Procedure Committee Minutes, September 24-25, 1998, available at <http://www.ndcourts.com/court/jp/minutes/Sept1998.htm#p8>.

¹⁷⁸ See generally [Paulson v. Paulson, 694 N.W.2d 681, 685](#) (referencing N.D. R. Ct. 8.7 (2009)).

¹⁷⁹ N.D. R. Ct. 8.7(b) (2009), available at <http://www.ndcourts.com/court/rules/ndroc/rule8.7.htm>.

¹⁸⁰ Id.

¹⁸¹ ABA, Report and Working Draft, *supra* note 13, at 145; see *supra* Part II.

¹⁸² Id.

¹⁸³ The Honorable Jim Cooper, *supra* note 42.

¹⁸⁴ Id.

cases to pass through the legal system,¹⁸⁵ the South Dakota Legislature has not taken the initiative to [*204] determine what is required of the best interests attorney.¹⁸⁶

To ensure that children in abuse and neglect cases are receiving adequate representation in South Dakota, the legislature must address both the role and the duties governing attorneys in this area of the law.¹⁸⁷ Currently, the only duty imposed on attorneys representing children in abuse and neglect cases is to represent the child's best interests.¹⁸⁸ Although this is a start, attorneys are still confused as to what role they are supposed to play in the best interests capacity.¹⁸⁹ Further, if the attorney does understand the role he or she is to play there is no guidance for adequately representing the child's best interests.¹⁹⁰ Therefore, South Dakota must reexamine the attorney's role and provide an explanation of the attorney's duties.¹⁹¹

A. What Role is "Best" For South Dakota

Presently, South Dakota requires the attorney to act in the best interests role where the attorney is not directed by the child's wishes, but instead, by what the attorney believes to be in the child's best interests.¹⁹² The best interests role protects a child who lacks the age or maturity to make difficult decisions that will significantly impact the child's life.¹⁹³ There are times when the attorney rightfully needs to represent the best interests of the child; however, there are times when the child needs an advocate to argue his or her wishes.¹⁹⁴ The client-directed model benefits a child who is able to understand the impact of his or her decisions, and make the best decision for him or herself.¹⁹⁵ If the child is given a chance to direct his or her representation, there is the difficult task of determining whether the child is mature enough to partake in the adult decision-making process.¹⁹⁶ The dilemma of providing adequate representation for children of different capacities would be remedied by adopting a dual standard of representation, which would provide invaluable guidance for the child's attorney.¹⁹⁷

1. Why the "Best Interests" Role is Not the Best Choice in Every Case

Although the best interests model uses terminology signifying that the attorney is representing what is best for the child, there are several flaws to this [*205] model.¹⁹⁸ First, the attorney has no specific training to act in the role of a guardian ad litem when determining the best interests of the child, making the attorney's role unclear.¹⁹⁹ Because the role is unclear, the child's attorney is often confused as to the duties owed to the child client and the

¹⁸⁵ Interview with the Honorable Patricia Riepel, *supra* note 21.

¹⁸⁶ Interview with William Janklow, *supra* note 21.

¹⁸⁷ See *supra* Part II.

¹⁸⁸ [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010).

¹⁸⁹ See *supra* Parts II.B., II.C.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010); see *supra* Part II.B.1.

¹⁹³ See *supra* Part II.B.1.

¹⁹⁴ See Duquette, *Roles*, *supra* note 52, at 441.

¹⁹⁵ *Id.* at 442.

¹⁹⁶ Elrod, *Client-Directed Lawyers*, *supra* note 71, at 879.

¹⁹⁷ See Duquette, *Bright Line Test*, *supra* note 17, at 1240.

¹⁹⁸ See *id.* at 1243-44.

¹⁹⁹ Elrod, *Analysis*, *supra* note 49, at 2001.

duties owed to the court.²⁰⁰ Further, the ambiguity of the best interests role creates ethical conflicts between the Model Rules and the duties of the guardian ad litem.²⁰¹

Under Model Rule 1.14(a) the attorney is required to maintain a normal client-lawyer relationship with the child, meaning the attorney is to treat the child like any other client.²⁰² In the normal attorney-client relationship, the attorney does not determine what is in the client's best interests, but instead functions as an advisor and an advocate, providing the client with information about the client's legal rights and zealously asserting the client's position throughout the judicial process.²⁰³ When the attorney acts as a guardian ad litem, the attorney is an "agent of the court, and therefore has no duty of loyalty to the child."²⁰⁴ Courts have held that it is a duty under Model Rule 1.14 for the attorney to maintain as normal of a relationship as possible with the client, and it is a breach of that duty to act "solely as the arm of the court."²⁰⁵ The two roles inherently conflict, creating substantial confusion and raising the question as to when the attorney must abide by the Model Rules.²⁰⁶ Courts have held that attorneys failing to uphold their ethical duties when acting as a guardian ad litem are subject to discipline.²⁰⁷ Without clear ethical guidelines, the attorney is likely to provide passive representation and be persuaded by the views of others.²⁰⁸

Confidentiality is another significant ethical issue for an attorney in the guardian ad litem role.²⁰⁹ In a traditional attorney-client relationship the attorney is guided by Model Rule 1.6, "which contains an injunction against the disclosure of confidential information without the informed consent of the client, a violation that is compounded by the use of confidential information adverse to the client without informed consent" ²¹⁰ Therefore, if an attorney is to abide by Model Rule 1.6, he or she will be in direct conflict with the duties of the guardian ad litem and the ethical codes governing the practice of law.²¹¹

Another serious issue posed by the best interests approach is the issue of [*206] due process of law when the mature, older child deserves to have his or her wishes heard, whether or not it fits the attorney's view of what is in the child's best interests.²¹² A child deserves the same zealous representation as an adult and adults are presumed to have the ability to make choices and assert their rights.²¹³ While children differ significantly from adults, it is ignorant to believe that all children cannot express their views and wishes.²¹⁴ As children age and gain maturity they are fully capable of making meaningful decisions that significantly impact their lives.²¹⁵

²⁰⁰ Id.

²⁰¹ Katner, supra note 61, at 109.

²⁰² Peters, supra note 30, at 35.

²⁰³ S.D.C.L. § 16-18, app. Preamble: A Lawyer's Responsibilities [2] (2004).

²⁰⁴ Maguire, supra note 57, at 666.

²⁰⁵ ABA, Model Rules, supra note 86, at R. 1.14 annot. at 235 (citing [In Re Lee, 754 A.2d 426 \(Md. Ct. Spec. App. 2000\)](#)).

²⁰⁶ Fines, supra note 15, at 443.

²⁰⁷ Id. at 444 (citing [In re Huddleston, 974 P.2d 325, 334 \(Wash. 1999\)](#) (en banc)).

²⁰⁸ Id. at 445-46.

²⁰⁹ See Katner, supra note 61, at 109.

²¹⁰ ABA, Report and Working Draft, supra note 13, at 152.

²¹¹ See Katner, supra note 61, at 109.

²¹² See Duquette, Roles, supra note 52, at 447.

²¹³ See Elrod, Client-Directed Lawyers, supra note 71, at 879.

²¹⁴ Id.

An additional concern is how the child's attorney comes to the conclusion of what is in the child's best interests.²¹⁶ Many times, the attorney will arrive at conclusions and advocate positions that are based upon the attorney's personal values and beliefs, which may differ significantly from the child's ethnicity or social class, and are therefore not in the best interests of the child.²¹⁷ This leads to an inconsistent system of representation based entirely upon which attorney is appointed to represent the child.²¹⁸

2. The Client-Directed Model Fails When Applied To All Children

The purely client-directed model mirrors many of the issues in the best interests model, and it fails when applied to a broad category of children.²¹⁹ This failure is particularly evident when a child is too young to communicate with the attorney.²²⁰ The child may also be too immature to make decisions or may not be capable of directing the objections of representation.²²¹ In this situation, it does not make sense to appoint an attorney for a child incapable of directing the representation.²²²

The client-directed model of representation can present confusing ethical situations for the child's attorney.²²³ Under the client-directed model, the attorney attempts to represent the child in the same way that the attorney would represent an adult,²²⁴ however, the child is a unique client and very different from an adult.²²⁵ If the child lacks the maturity to guide the attorney, a guardian ad litem would be able to weigh the wishes of the child against the interests in the case and help guide the court to make the best decision for that child.²²⁶ **[*207]** This solves the attorney's ethical dilemma, as the guardian ad litem is allowed to keep some of the child's information confidential, but disclose some information when the guardian ad litem feels that it is in the best interests of the child.²²⁷

3. Finding the Right Role for South Dakota

Children in abuse and neglect proceedings differ significantly in age, cognitive ability, and judgment.²²⁸ A single best interests standard oversimplifies the difficult and complex task of representing children in abuse and neglect proceedings.²²⁹ To solve the dilemma of when and how to give children a voice in these life changing proceedings, South Dakota should enact a dual standard of representation.²³⁰ Under the dual standard of

²¹⁵ Duquette, Roles, supra note 52, at 447.

²¹⁶ Mandelbaum, supra note 55, at 36.

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ Duquette, Roles, supra note 52, at 448.

²²⁰ Id.

²²¹ Mandelbaum, supra note 55, at 33-34.

²²² Appell, supra note 59, at 1957.

²²³ See Duquette, Bright Line Test, supra note 17, at 1244-45.

²²⁴ Id.

²²⁵ Buss, supra note 16, 1700-03.

²²⁶ Hartmann, supra note 49, at 252.

²²⁷ Id. at 252-53.

²²⁸ Duquette, Bright Line Test, supra note 17, at 1240.

²²⁹ Sobie, supra note 27, at 745.

²³⁰ Duquette, Bright Line Test, supra note 17, at 1240.

representation the court would appoint either a best interests attorney or a traditional attorney based upon certain criteria as set out by statute.²³¹

There are benefits for children under the best interests role, and in certain situations the attorney should act in the best interests of the child.²³² However, children are capable of having opinions and are entitled to have their voice heard in legal proceedings.²³³ Even though the child may make decisions that are not what the attorney considers to be in the child's best interests, this does not mean that the child is incapable of making decisions in his or her own interest.²³⁴ There is support that children as young as age seven are capable of making decisions about where the child wants to live because children of this age have developed social, language, and cognitive abilities.²³⁵ For foster children who are forced to grow up more quickly than their peers, a child as young as six is able to explain what has happened in the past and what the child would like to see happen in the future.²³⁶ At the 2006 University of Nevada, Las Vegas Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, it was recommended that lawyers function as traditional attorneys for children over the age of seven and give consideration to the wishes of the child younger than seven.²³⁷

In recognizing that federal law requires the court to appoint a guardian ad litem in every abuse and neglect case, South Dakota still must determine when to add the child's voice to the debate.²³⁸ One possibility would be for the court to [*208] determine that the child is of an age and maturity to be heard in the proceedings, and the court would appoint a traditional attorney for the child.²³⁹ As the ability of children to actively participate in their representation differs, this scheme allows the court considerable discretion.²⁴⁰ An alternative and better approach would be to set a legal standard for the child that must be met before a separate attorney is appointed.²⁴¹ This approach would adopt a bright-line test stating that when a child reaches a certain age, such as age seven and above, the child would receive a traditional attorney and children below that age determination would receive a best interests attorney.²⁴²

B. Defining the Duties of the Best Interests Attorney

If the South Dakota Legislature decides to forgo enacting a dual standard of representation, the need for defined statutory duties becomes critical.²⁴³ Appointment of the best interests attorney carries risks for the child that can be reduced by guiding the attorney through statutory law.²⁴⁴ Child representation is a unique area of the law because children do not necessarily have the ability to effectively communicate with their attorney or the ability to

²³¹ Id.

²³² See supra Part II.B.1.

²³³ ABA, Model Rules, supra note 86, R. 1.14 annot. at 238.

²³⁴ Id. at 235.

²³⁵ Sopher, supra note 68, at 85, 88.

²³⁶ Jenks, supra note 69, at 173.

²³⁷ Sopher, supra note 68, at 86.

²³⁸ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 1191, [88 Stat. 4 \(1974\)](#) (partially repealed in 1996) (Codified as amended at [42 U.S.C. §§5101-5206, 5116 \(2006\)](#)); see Elrod, Client-Directed Lawyers, supra note 72, at 891.

²³⁹ Duquette, Roles, supra note 52, at 462.

²⁴⁰ Id.

²⁴¹ Id. at 463.

²⁴² Duquette, Bright Line Test, supra note 17, at 1240.

²⁴³ See generally Buss, supra note 16, at 1700-06 (discussing the arguments underlying the child attorney's role).

²⁴⁴ Duquette, Roles, supra note 52, at 463.

evaluate or complain about the quality of legal representation they receive.²⁴⁵ The uniqueness of child representation paired with an inexperienced attorney creates a serious issue for children in need of quality representation.²⁴⁶

Improvement of child representation in abuse and neglect cases through enacting standards specifically governing the attorney's duties is an issue that the South Dakota Legislature has not defined beyond the term best interests.²⁴⁷ Currently, the only guidance for attorneys practicing in this area of the law is through a set of training videos provided by the South Dakota Unified Judicial System.²⁴⁸ By enacting a comprehensive statute, the South Dakota Legislature could improve child representation in abuse and neglect cases by guiding attorneys through their role as child representatives, making the process more efficient.²⁴⁹

Since no case law in South Dakota provides guidance to attorneys representing children in abuse and neglect cases, one way for South Dakota to [*209] resolve this issue is to enact a comprehensive statute mirroring those of Iowa, Minnesota, and Nebraska.²⁵⁰ To do this, the South Dakota Legislature should incorporate into the law important areas where attorneys are being put in unique or difficult positions.²⁵¹ The first area includes meeting and communicating with the child.²⁵² "Inaccessibility, unanswered phone calls, lawyers meeting clients for the first time in courtroom hallways, and the lack of contact between lawyers and children are all examples of insufficient client contact causing problems."²⁵³ Children, unlike adults, may not be able to effectively communicate their wishes to the attorney.²⁵⁴ The second area to be addressed is collecting records and engaging in discovery.²⁵⁵ Time is a constant battle in abuse and neglect cases and attorneys need assistance to obtain all discovery and records as quickly as possible.²⁵⁶ The third area encompasses the hearing itself.²⁵⁷ Although abuse and neglect cases are civil proceedings, many attorneys are unsure of how to specifically handle abuse and neglect proceedings.²⁵⁸ The final area to be addressed is the training requirements.²⁵⁹ Although attorneys are trained professionals, abuse and neglect cases require extra training in order to effectively practice in this area.²⁶⁰

²⁴⁵ [Colo. Rev. Stat. Ann. § 13-91-102](#) (West 2005 & Supp. 2010).

²⁴⁶ See Fines, *supra* note 15, at 423-24.

²⁴⁷ Interview with Elizabeth Rosenbaum, *supra* note 21; see [S.D.C.L. § 26-8A-9](#) (1991 & Supp. 2010); see also [S.D.C.L. § 26-8A-18](#) (2004); see also [S.D.C.L. § 26-8A-20](#) (2004).

²⁴⁸ See South Dakota Unified Judicial System, About the Program, <http://ujosatv.sd.gov/Default.aspx>. "The content of the video training series are intended to satisfy the training requirement of UJS Presiding Judge Policy (3-PJ-05), revised and effective February 1, 2010." *Id.*

²⁴⁹ Maguire, *supra* note 57, at 681.

²⁵⁰ [Iowa Code Ann. § 232.89](#) (West 2006); [Minn. Stat. Ann. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007 & Supp. 2010); [Neb. Rev. Stat. Ann. § 43-272](#) (LexisNexis 2005).

²⁵¹ See *infra* Parts III.B.1, III.B.2, III.B.3.

²⁵² See *infra* Part III.B.1.

²⁵³ Renne, *supra* note 7, at 7.

²⁵⁴ See *infra* Part III.B.1.

²⁵⁵ See *infra* Part III.B.2.

²⁵⁶ *Id.*

²⁵⁷ See *infra* Part III.B.3.

²⁵⁸ *Id.*

²⁵⁹ See *infra* Part III.B.4.

1. Meeting and Communicating With the Child

South Dakota's requirement that the attorney represent the child's best interests does not impose a duty on the attorney to meet with the child.²⁶¹ For an attorney to make reasoned decisions about the child's best interests, "there must be a dynamic lawyer-client counseling process, in which the lawyer, among other things, describes the nature of the proceedings, sets out and discusses the various options, educates the child about the advantages and risks involved in different courses of action, and works together with the child in developing her litigation goals and the steps designed to achieve them."²⁶² The American Bar Association Standards state that the attorney should meet with the child before every court hearing or other event.²⁶³ This makes the attorney's contact with the child discretionary, creating the possibility that the attorney could represent, but never meet with the child.²⁶⁴

[*210] To adequately communicate with a child client, the attorney must be able to understand the child's development and how the child's competency will affect the proceedings.²⁶⁵ The attorney must also have a thorough understanding of the community-based programs, the ability to communicate with the child's parents or guardian ad litem without breaching ethical responsibilities to the child, and must be aware of mental health complexities pertaining to the child and the child's parents.²⁶⁶ One of the most complex issues about child representation is learning to handle each one of these categories simultaneously.²⁶⁷

When the attorney first meets with the child it will likely be at the child's first placement.²⁶⁸ Many times the first placement will be an unfamiliar environment for the child.²⁶⁹ The first meeting with the child is a crucial point for the attorney to explain to the child what is going to happen in the judicial proceedings, what the hearings are going to consist of, and the role the attorney is going to play.²⁷⁰ Abuse and neglect proceedings are very traumatic for a child, and the attorney must play a role in helping to alleviate the child's anxiety and fear.²⁷¹ The initial meeting between the child and the attorney will further allow the attorney to see the condition of the child when he or she is first taken from the home.²⁷² Additional meetings throughout the proceeding will allow the attorney to see how the child is thriving out of the home, providing the best interests attorney an opportunity to see whether or not the child is improving.²⁷³

Although children communicate differently from adults, it is a mistake to believe that all children are incapable of effectively communicating with their attorneys.²⁷⁴ When meeting with the child, the attorney must actively help the

²⁶⁰ *Id.*

²⁶¹ See [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010).

²⁶² Sopher, *supra* note 68, at 67-68.

²⁶³ ABA, Standards, *supra* note 18, at 7.

²⁶⁴ See Fines, *supra* note 15, at 429.

²⁶⁵ NJDC, *supra* note 78, at 3.

²⁶⁶ *Id.*

²⁶⁷ See *id.*

²⁶⁸ Hall, *supra* note 62.

²⁶⁹ AFCC, Emergency Removal, *supra* note 16, at 457.

²⁷⁰ See generally *id.* at 458 (explaining the child's anxiety and fear due to placement into protective services).

²⁷¹ *Id.*

²⁷² *Id.* at 457-58.

²⁷³ Interview with LaRae Oberloh, *supra* note 21.

²⁷⁴ Elrod, Client-Directed Lawyers, *supra* note 71, at 879.

child understand "the factual and legal context in which decisions are being made" ²⁷⁵ Numerous hearings, which substantially impact the child, require heightened communication. ²⁷⁶ The judicial system is intimidating, often causing the child to feel confused and powerless throughout the process. ²⁷⁷ Attorneys must be aware that this imbalance can cause the child to withhold information and fail to communicate with the attorney. ²⁷⁸

The child's age is another important factor when determining how often an attorney should meet with the child. ²⁷⁹ If the child can communicate effectively, [*211] it is important for the attorney to understand the child's wishes. ²⁸⁰ The child's wishes will provide the attorney with an understanding of how the child is feeling. ²⁸¹ Even if the child cannot communicate with the attorney, it is still beneficial for the attorney to monitor the child's progress throughout the proceeding. ²⁸² Requiring attorney-client meetings before court hearings and case reviews allow the attorney to alleviate some of the child's stress by communicating what is happening now, what will happen next, and what the alternatives are. ²⁸³

If the child is able to communicate verbally, an interview with the child can provide the attorney with vital information. ²⁸⁴ Children interpret communication differently than adults. ²⁸⁵ Specifically, children are more sensitive to word usage and actions employed when speaking. ²⁸⁶ When working with a child from another culture, the meanings of certain actions may have different connotations for the child than they do for the attorney. ²⁸⁷ Cultural issues may also significantly impact the child's ability to communicate, ²⁸⁸ meaning the attorney must be familiar with the child's culture. ²⁸⁹

²⁷⁵ Mandelbaum & Cohen, *supra* note 7, at 380.

²⁷⁶ Hughes, *supra* note 7, at 560.

²⁷⁷ *Id.* at 561.

²⁷⁸ *Id.*

²⁷⁹ Telephone Interview with the Honorable Jeff Davis, *supra* note 21.

²⁸⁰ Interview with the Honorable Patricia Riepel, *supra* note 21. "The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance." ABA, Standards, *supra* note 18, at 4.

²⁸¹ Interview with the Honorable Patricia Riepel, *supra* note 21; NACC, *supra* note 2, at 7. The NACC makes the following recommendation:

Children have an independent perspective and may have information and positions to present to the court on a wide range of issues including but extending beyond the issue of placement. Other parties and the court may otherwise be unaware of the child's perspective or of how certain decisions subjectively affect the child.

NACC, *supra* note 2, at 7.

²⁸² See NACC, *supra* note 2, at 7.

²⁸³ ABA, Standards, *supra* note 18, at 7. "That this will also allow the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest." *Id.* "A lawyer can learn a great deal from meeting with child clients, including a preverbal child." *Id.*

²⁸⁴ See CASA Training Manual, *supra* note 110, at V8-12. The child can give an attorney information regarding family history, relationship information, the child's wishes, challenges or areas in need of help, and information about visits with the child's parents. *Id.*

²⁸⁵ See *id.* at V7-4.

²⁸⁶ See *id.*

²⁸⁷ See *id.* at V7-5.

²⁸⁸ See *id.*

²⁸⁹ See Atwood, *Child's Voice*, *supra* note 53, at 654-55.

Children are unlikely to understand legal terminology, imposing an obligation on the attorney to "explain clearly, precisely, and in terms the client can understand the meaning and consequences of action."²⁹⁰ The attorney must be able to communicate on the child's level.²⁹¹ Based on the additional obligations placed upon the attorney, it is important that the attorney communicates with the child on a regular basis to gauge the child's improvement, decision-making ability, and ability to participate in the judicial [*212] process.²⁹²

South Dakota's neighboring states have made progress in defining the best interests attorney's duty when communicating with the child.²⁹³ In light of these states' progress, South Dakota should enact a comprehensive statute defining the communication between the attorney and the child.²⁹⁴ The statute should include where the attorney is to meet with the child.²⁹⁵ The first meeting will be at the child's first placement, but as the proceedings continue the child will likely move to a more permanent setting.²⁹⁶ This means that the attorney should periodically be meeting with the child as he or she moves from home to home, especially in the setting that provides the most permanent living situation.²⁹⁷ The statute should require the attorney to meet with the child shortly after being assigned the case and before each hearing or significant event.²⁹⁸

2. Collecting Records and Engaging in Discovery

Unfortunately, many times abuse and neglect cases do not get the proper amount of attention from the representing attorneys.²⁹⁹ A Nebraska study found that in abuse and neglect cases preparation for hearings and other proceedings is rushed, leading to insufficient representation.³⁰⁰ CASA workers find that it is rare for an

²⁹⁰ ABA Standards, *supra* note 18, at 2 (citing David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977)).

²⁹¹ See *id.*

²⁹² Tandy & Heffernan, *supra* note 55, at 1406. There are "several factors that should occur in the normal lawyering process, and especially when assessing the capacity of a child client to make decisions." *Id.* These factors include:

1) the child's development state, including cognitive abilities, socialization and emotional development; 2) the child's expression of a relevant position, especially the ability to communicate with the attorney and articulate reasons for a decision; 3) the child's individual decision-making process as observed by the attorney (i.e. the presence of influence or coercion, the desire to conform, and variability and consistency in position); and 4) the child's ability to understand immediate and collateral consequences for the decision.

Id.

²⁹³ See [Iowa Code Ann. § 232.2\(22\)](#) (West 2005 & Supp. 2010); [Minn. Stat. Ann. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007); [Neb. Rev. Stat. Ann. § 43-272.01](#) (LexisNexis 2005).

²⁹⁴ See [Iowa Code Ann. § 232.2\(22\)](#) (West 2005 & Supp. 2010); [Minn. Stat. Ann. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007); [Neb. Rev. Stat. Ann. § 43-272.01](#) (LexisNexis 2005).

²⁹⁵ See Hall, *supra* note 62, at § 3.7.4. Since the meeting place is likely to be at an emergency placement "counsel should obtain the address and phone number of the placement from the [Department of Social Services] social worker or the [Department of Social Services] attorney and then call the placement to schedule a visit." *Id.*

²⁹⁶ *Id.*

²⁹⁷ See *id.* "Counsel can gain valuable information simply by observing the child in the placement and the caregivers' interactions with the child." *Id.*

²⁹⁸ See ABA, Standards, *supra* note 18, at 2 (citing James Garbarino, *What Children can Tell Us: Eliciting, Interpreting, and Evaluating Critical Information from Children* (1992)).

²⁹⁹ NJDC, *supra* note 78, at 56.

³⁰⁰ *Id.* at v.

attorney to contact and work with the advocate toward a resolution in the case.³⁰¹ Judges, on the other hand, see attorneys working to the best of their ability with the resources that are available to them.³⁰² However, even with [*213] limited resources and time constraints, it is important for an attorney to partake in thorough investigation throughout the entire proceeding.³⁰³ Like Iowa, South Dakota should place importance on the discovery process.³⁰⁴ If the attorney is going to competently represent the child's best interests, it is "simply not sufficient for attorney guardian ad litem to sit-back, review the records and documents, and arrive at a decision."³⁰⁵ The attorney is not just a fact-finder, but instead must adequately prepare for each hearing.³⁰⁶ The American Bar Association has identified several steps attorneys representing children in abuse and neglect cases should follow:

- (1) Obtain copies of all pleadings and relevant notices;
- (2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) 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;
- (4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) 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;
- (6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- (7) Identify appropriate family and professional resources for the child.³⁰⁷

These standards are a start to developing guidelines in South Dakota.³⁰⁸ Minnesota has enacted statutory guidelines, which include interviewing the child's parents, caregivers, and other parties with relevant knowledge as duties of the discovery process.³⁰⁹ South Dakota would greatly benefit from enacting a comprehensive statute containing aspects of both Minnesota's statute and the American Bar Association's recommendations.³¹⁰ A statute should, at a minimum, require attorneys to participate in depositions, negotiations, pretrial conferences, hearings, and interview each party with relevant knowledge of the circumstances regarding the abuse and neglect.³¹¹

³⁰¹ Interview with LaRae Oberloh, supra note 21.

³⁰² Telephone Interview with the Honorable Jeff Davis, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21.

³⁰³ ABA, Standards, supra note 18, at 3,7.

³⁰⁴ [Iowa Code Ann. § 232.89](#) (West 2006).

³⁰⁵ In the [Interest of J.V. and C.W., 464 N.W.2d 887, 893 \(Iowa Ct. App. 1990\)](#).

³⁰⁶ ABA, Standards, supra note 18, at 3.

³⁰⁷ Id.

³⁰⁸ See id. at 1.

³⁰⁹ [Minn. Stat. Ann. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007 & Supp. 2010).

³¹⁰ ABA, Standards, supra note 18, at 3; [Minn. Stat. Ann. § 260C.163\(5\)\(a\)-\(f\)](#) (West 2007 & Supp. 2010).

³¹¹ See ABA, Standards, supra note 18, at 3.

South Dakota practitioners seeking to improve the discovery process are providing judges with an order pertaining to discovery when the judge appoints [*214] the attorney.³¹² The order gives a time frame for every agency involved with the child to provide all relevant documents pertaining to the proceeding.³¹³ This allows for the attorney to obtain all discovery in time to be adequately prepared for each hearing.³¹⁴ Iowa law requires that the order appointing the guardian ad litem to also grant authorization to the ad litem "to interview any relevant person and inspect and copy any records relevant to the proceedings, if not prohibited by federal law."³¹⁵ Since South Dakota utilizes the best interests model, and the attorney is appointed in the role of a guardian ad litem, incorporation of a statute similar to the Iowa statute into South Dakota law would improve the efficiency of the discovery process.³¹⁶

Gathering documents quickly is not the end to discovery in abuse and neglect cases.³¹⁷ The attorney must conduct thorough, continuous, and independent investigation regarding the child's case.³¹⁸ If a CASA representative has been appointed, it is also important for the attorney to converse with the representative.³¹⁹ The CASA representative will also have conducted an independent investigation and prepared an extensive report to give to the judge containing the representative's personal recommendations.³²⁰ The attorney's independent investigation, paired with that of the CASA representative, will help assist the attorney when trying to determine the child's best interests.³²¹ While recognizing time is a significant factor in child representation, it is important to assist attorneys in obtaining as much information as quickly as possible.³²² South Dakota should provide guidelines to assist attorneys in gathering information quickly by imposing time requirements on protective agencies.³²³

3. Hearings

It is important for the child to be present at each hearing as the child's [*215] presence allows the judge to see the child as a real party in the case.³²⁴ If the attorney decides to call the child as a witness, whether he or she should

³¹² Interview with William Janklow, supra note 21.

³¹³ Id.

³¹⁴ Id.

³¹⁵ [Iowa Code Ann. § 232.2\(22\)\(c\)](#) (West 2006 & Supp. 2010).

³¹⁶ See [Iowa Code Ann. § 232.89](#) (West 2006 & Supp. 2010); Interview with William Janklow, supra note 21.

³¹⁷ Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³¹⁸ ABA, Standards, supra note 18, at 7; Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³¹⁹ Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³²⁰ Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³²¹ Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³²² ABA, Standards, supra note 18; Interview with William Janklow, supra note 21; Interview with the Honorable Patricia Riepel, supra note 21; Interview with LaRae Oberloh, supra note 21.

³²³ See generally Peters, supra note 30, at 93 (discussing the time constraints on abuse and neglect cases).

³²⁴ ABA, Standards, supra note 18, 11.

testify is another important decision for the attorney to make.³²⁵ Even though a child witness is significantly different from an adult witness, this should not deter the attorney as children have proven to provide the court with reliable and relevant information.³²⁶ If the attorney does decide to call the child as a witness, the attorney must take into account the child's developmental needs and abilities.³²⁷ Children develop the ability to testify as they age; however, research has shown that for basic identification children as young as three have skills comparable to most adults.³²⁸ The passage of time is significant for younger children, but younger children will likely be more faithful to what they see, smell or hear, and less likely to make assumptions than older children and adults.³²⁹

The legal system is often confusing for children and testifying can be traumatic if the child is not adequately prepared.³³⁰ Children are more likely than adults to accept misleading or incorrect facts into their memory.³³¹ This means that the questions the child is asked can have a significant impact on the child's memory.³³² Questions should be phrased in a developmentally appropriate manner and be structured to account for the child's education, culture, and language.³³³ If the questions presented to the child are neutral, the child will be protected from suggestibility in the courtroom.³³⁴ By understanding the child witness, attorneys will protect the child from further victimization in the courtroom.³³⁵

4. Training Requirements

Training requirements are another area of concern.³³⁶ Practicing attorneys in abuse and neglect cases agree that child representation is chaotic and attorneys need better training and more guidance in the courtroom.³³⁷ The rules of professional conduct require the attorney to represent a child competently³³⁸ and the South Dakota statute requires the attorney to represent a child zealously.³³⁹ Neither the Model Rules nor the South Dakota statute actually direct the attorney [*216] as to what he or she must do to adequately represent a child, or address specific duties pertaining to the child's representation.³⁴⁰ To be competent as a practicing child attorney, it is critical for the attorney to develop knowledge that is different from the knowledge required to represent an adult.³⁴¹ The attorney must know how to communicate with the child, understand the child's development, and understand

³²⁵ Id.

³²⁶ Id. at 286.

³²⁷ ABA Standards, supra note 18, at 11.

³²⁸ Goodmark, supra note 58, at 286.

³²⁹ Id. at 287-88.

³³⁰ Id. at 307.

³³¹ Id. at 288.

³³² Id. at 289.

³³³ Bohr, supra note 17, at 997.

³³⁴ Goodmark, supra note 58, at 289.

³³⁵ Id. at 338.

³³⁶ Katner, supra note 61, at n.14.

³³⁷ Interview with William Janklow, supra note 21.

³³⁸ Green, supra note 5, at 1289.

³³⁹ In the Interest of T.A., Child, and concerning [A.L. Mother, and J.L. Stepfather, 2003 SD 56, P 18, 663 N.W.2d 225, 232.](#)

³⁴⁰ Green, supra note 5, at 1289; [S.D.C.L. § 26-8A-18](#) (2004 & Supp. 2010).

³⁴¹ Katner, supra note 61, 105 n.14.

the child's race, culture, and class.³⁴² The attorney must also be able to work with psychologists, social workers, and other professionals involved in the case.³⁴³

The South Dakota Unified Judicial System has developed a training series for attorneys representing children in abuse and neglect cases.³⁴⁴ However, the training requirements for an attorney acting as a guardian ad litem in South Dakota are significantly less than what is required in South Dakota's sister states for attorneys in the same role.³⁴⁵ In South Dakota, best interests attorneys must watch approximately fifty-two minutes worth of videos explaining child representation.³⁴⁶ Once the attorney has completed the videos, their name is added to a list stating they are qualified to represent children in abuse and neglect cases.³⁴⁷ North Dakota requires that the attorney complete eighteen hours of training initially, and then an additional eighteen hours of training every three years.³⁴⁸ Nebraska requires six hours of initial training and three hours of subsequent training.³⁴⁹

Although attorneys have three years of specialized training in law school, law school does not prepare students to represent and communicate with children.³⁵⁰ It is a daunting task for an attorney to represent a client that cannot communicate with the attorney to help direct the case.³⁵¹ The Unified Judicial System has taken a step in the right direction by providing a series of training videos to prepare attorneys for practice in abuse and neglect cases.³⁵² However, abuse and neglect cases are a unique and new area of the law and fifty-two minutes of training is not adequate to prepare attorneys to competently practice [*217] in this area.³⁵³

³⁴² Green, supra note 5, at 1296.

³⁴³ Id.

³⁴⁴ Unified Judicial Policy 3-PJ-05, revised and effective February 1, 2010. "An attorney appointed to represent abused or neglect children, including those that have been appointed as guardian ad litem, shall certify that they have viewed and completed the A&N attorney training developed by the South Dakota Unified Judicial System." Id.

³⁴⁵ See N.D. R. Ct. 8.7 (2009), available at <http://www.ndcourts.com/court/rules/ndroc/rule8.7.htm>; see also NEB. CT R. § 4-401, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

³⁴⁶ South Dakota Unified Judicial System Training Requirements, available at <http://ujsatv.sd.gov>.

³⁴⁷ Id.

³⁴⁸ N.D. R. Ct. 8.7 (2009), available at <http://www.ndcourts.com/court/rules/ndroc/rule8.7.htm>.

³⁴⁹ NEB. CT R. § 4-401, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

³⁵⁰ Green & Dohrn, supra note 5, at 1286.

³⁵¹ Id. at 1286-87.

³⁵² South Dakota Unified Judicial System Training Requirements, available at <http://ujsatv.sd.gov>; Interview with the Honorable Patricia Riepel, supra note 21.

³⁵³ See generally Green & Dohrn, supra note 5, at 1290 (discussing the challenges for attorneys representing children in abuse and neglect cases). At the Conference on Ethical Issues in the Legal Representation of Children hosted at the Fordham University School of Law in December 1995, the conference found that "children's lawyers have a lot to learn." Id. The conference further stated:

To represent children competently, lawyers must undertake training and develop expertise that is substantially different from that ordinarily necessary for representing adults. Among other things, lawyers must know how to interview and counsel children; must understand child development; must become educated about the role of culture, race, ethnicity, and class in the choices that a child client might make; and must be conversant with the work of social workers and psychologists; and know how to work as a team with these and other non-lawyer professionals.

Id. at 1296.

Nebraska's rules governing training for attorneys representing children in abuse and neglect proceedings would be a guideline to follow in taking South Dakota's training requirements one step further.³⁵⁴ By moving the training locations around the state, Nebraska's training requirements allow for unified training.³⁵⁵ Attorneys have instructors providing hands-on training that they can interact with, providing information into areas that are still unclear.³⁵⁶ By requiring a re-qualification session every three years, attorneys will continue to be accountable and will receive updated information to remain competent in child law.³⁵⁷ The Nebraska requirements allow leniency when there are no attorneys available who have taken the training, by allowing the court to appoint an untrained attorney.³⁵⁸ This allows the court flexibility when there are no trained attorneys available.³⁵⁹

CASA representatives must complete thirty hours of training in order to represent children in abuse and neglect cases.³⁶⁰ Instructors are brought in to help teach the representatives about this unique area of the law.³⁶¹ The training explains the representatives' role, the parties involved, how to understand the child, how to gather information, how to understand the child's best interests, and how to report their findings to the court.³⁶² By providing the child's attorney with the same training materials as that of CASA volunteers, South Dakota would ensure uniform training in the courtroom.³⁶³

Many times attorneys are reluctant to participate in additional training because they feel as if they are doing social work instead of practicing law.³⁶⁴ It [*218] is important to convey that even though attorneys have received a legal education, "[they] are no better prepared to undertake these tasks than any other educated individual."³⁶⁵ The fact that South Dakota is hesitant to require as much training as the surrounding states sets a precedent for accepting mediocre child representation.³⁶⁶ Nebraska's statute ensures that attorneys are adequately prepared to competently practice in this area of the law, and provides the court with flexibility when a trained attorney is unavailable.³⁶⁷ To help resolve this issue and provide guidance to attorneys practicing in this area, South Dakota, like Nebraska and North Dakota, should adopt a required training program into statutory law that should include

³⁵⁴ See supra Part II.E.3.

³⁵⁵ See NEB. CT R. § 4-401 app., available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf> (discussing Nebraska's training requirements).

³⁵⁶ See NEB. CT R. § 4-401 app. A, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

³⁵⁷ See generally id.

³⁵⁸ See id.

³⁵⁹ Id.

³⁶⁰ Interview with LaRae Oberloh, supra note 21. Further information pertaining to CASA volunteer training requirements is available at www.casaforchildren.org.

³⁶¹ Interview with LaRae Oberloh, supra note 21.

³⁶² See CASA Training Manual, supra note 110, at F-vi, F-vii (providing an overview of the CASA Volunteer Training Manual).

³⁶³ Interview with LaRae Oberloh, supra note 21.

³⁶⁴ Fines, supra note 15, at 436.

³⁶⁵ Id. at 437.

³⁶⁶ Id. Passivity may also result because the attorney feels as if they are duplicating the work already completed by other representatives working on the case. Id. at 446. This may cause the attorney to feel reluctant in introducing new theories in the case. Id.

³⁶⁷ See generally NEB. CT R. § 4-401, available at <http://www.supremecourt.ne.gov/rulespdf/Ch4Art4.pdf>.

follow-up training every few years. ³⁶⁸ This would ensure that attorneys are not only receiving training upfront, but that they are continuing to prepare for this difficult and unique area of the law. ³⁶⁹

IV. CONCLUSION

The current statutes governing child representation in South Dakota often place attorneys in a position to question their role as effective counsel. By adopting a dual role of representation South Dakota will not only help guide attorneys through this unique area of the law, but will also empower abused children by giving them a voice in these life changing proceedings. Further, enacting a comprehensive statute defining the attorney's duties and providing adequate training requirements will eliminate confusion and provide a more effective system of representation. Defining the appropriate standards for attorneys representing children will create difficult questions regarding policy and professional responsibility. However, South Dakota's sister states have already recognized these critical issues and have taken steps to provide adequate resources for child representation through statutory reform.

Until the South Dakota Legislature recognizes these issues, the South Dakota court system will remain ill equipped to prevent additional abuse and emotional upheaval for children in need of protection. This makes it imperative for the legislature to clarify the role and duties of the child's attorney, as well as provide adequate resources for attorneys to competently undertake the tasks required by child representation. By providing proper guidelines, the legislature will remove the confusion plaguing the attorney's role and duties, ensuring an effective system of representation for both the child and attorney.

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³⁶⁸ See *id.*; N.D. R. Ct. 8.7 (2009), available at <http://www.ndcourts.com/court/rules/ndroc/rule8.7.htm>.

³⁶⁹ Fines, *supra* note 15, at 448.