

ARTICLE: ETHICS, ADVOCACY, AND THE CHILD CLIENT

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LexisNexis Summary

... Lawyers for children in such proceedings can also advocate for the child's positions and for protection of children's legal rights and interests including protection from further harm, preservation of the family unit, and speedy resolution of cases. ... The placement of the child is often the most difficult issue addressed in court dependency proceedings and the lawyer must not only be aware of the effects of the placement on the child, but must also advocate for the outcome that would be most in accord with the child's point of view. ... Representation of the Diminished Capacity Client When lawyers for children in juvenile court abuse and neglect proceedings are instructed to take on the role of a guardian ad litem, the ethical obligations to the client become unclear. ... The following is a discussion of the MRPC pertaining to representation in situations involving clients with diminished capacity, and more specifically, the representation of elderly clients and criminal defendants. ... Still, how are attorneys to assess the child client's ability to make decisions relevant to the dependency proceeding?

Text

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Introduction

When a child enters the juvenile court system upon allegations of abuse and neglect, his life is in enormous turmoil. The decisions made by the court have a profound impact upon every aspect of his life: where he lives, where he attends school, what contact he has with his family. The child's positions on these issues that directly and tangibly affect his life should be raised before the court. The child in abuse and neglect proceedings thus needs a lawyer who can advise him, advocate for his goals, and protect his legal rights. ¹

Lawyers who represent children in abuse and neglect proceedings face ambiguities in the role they are to assume and the manner in which they must confront ethical issues that arise during the course of representation. ² Legislatures and courts often instruct lawyers to represent children as guardians ad litem would, and to make recommendations to the court about the children's best interests, without necessarily giving weight to the children's

¹ Marvin R. Ventrell, Rights & Duties: an Overview of the Attorney-Child Client Relationship, [26 Loy. U. Chi. L.J. 259, 260 \(1995\)](#).

² *Id.* at 269; see also Merrill Sobie, The Child Client: Representing Children in Child Protective Proceedings, [22 Touro L. Rev. 745, 755 \(2006\)](#); Sarah Valentine, Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child, [2008 Mich. St. L. Rev. 1053, 1062-65 \(2008\)](#).

stated positions. ³ When acting as guardians ad litem, lawyers serve as arms of the court rather than advocates for their clients. In doing so, lawyers tend to bypass the ethical and professional rules that govern the lawyer-client relationship and are unable to effectively advocate for the child client's legal rights. ⁴

Preconceptions about a child's lack of capacity have led to a paternalistic approach to the representation of children. Our legal system assumes that children, in general, are incapable of rational decision-making. The common presumption is that children do not know what is in their best interests and that they often desire outcomes that conflict with what would be in their best interests. This may be true under some circumstances, but not all. In many cases, if not the majority, children can communicate with their lawyers, understand their options, and assist their advocates. ⁵ In addition, when lawyers function in their traditional roles as advocates, they can assist the child clients in the comprehension [*635] of factual and legal issues involved in their cases and thereby facilitate the decision-making process.

Children involved in the court system need true legal advocacy in the form of the traditional lawyer-client model. ⁶ Lawyers who take on the advocate role must operate within the ethical rules set forth by the profession. Such rules provide a framework for lawyers who face the task of representing clients who may suffer from diminished capacity, including children. This Article addresses dilemmas lawyers face when representing children in abuse and neglect proceedings and how lawyers can effectively advocate for their child clients.

Part I provides background on the history of child representation, the procedures and legal principles that govern juvenile dependency proceedings, the ongoing debate about the role of counsel for children, and the standards promulgated by various professional associations to address the representation of children in dependency proceedings. Part II discusses the representation of the diminished capacity client under the model rules and in the areas of elder law and criminal defense law to illustrate the parallels in how lawyers can advocate for children. Part III discusses how lawyers can effectively represent children in dependency proceedings with reference to specific case scenarios. The Article concludes by emphasizing the importance of advocacy for children in dependency proceedings.

I. Background

In recent years, it has been estimated that 700,000 children are victims of abuse and neglect annually. ⁷ Approximately two-thirds of those children are placed in foster care. ⁸ Many children are moved several times from placement to placement while in foster care, resulting in a lack of permanency. ⁹ Child development research indicates that the [*636] consequences of child abuse and neglect can be quite severe, whether physically,

³ Sobie, supra note 2, at 752-53; Ventrell, supra note 1, at 267.

⁴ Valentine, supra note 2, at 1070-71; Ventrell, supra note 1, at 268-69.

⁵ Shannan L. Wilber, Independent Counsel for Children, 27 Fam. L.Q. 349, 354 (1993).

⁶ Ventrell, supra note 1, at 260.

⁷ See National Statistics on Child Abuse, Nat'l Children's Alliance, <http://www.nationalchildrensalliance.org/NCANationalStatistics> (last visited May 18, 2014); see generally Foster Care Statistics 2012, Child Welfare Info. Gateway (Nov. 2013), <https://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

⁸ Foster Care Statistics 2012, supra note 7.

⁹ Donald N. Duquette & Ann M. Haralambie, Child Welfare Law and Practice 525 (2d ed. 2010). The goal of the child welfare process is to either return the child to the original home or find a permanent alternative. Id. "The emphasis on legally secure permanent placement is meant to provide the child with psychological stability and a sense of belonging and to limit the likelihood of future disruptions of the parent-child relationship." Id.

psychologically and/or behaviorally. ¹⁰ Children suffer detrimental effects not only from the abuse and neglect itself, but also from languishing in long-term foster care and due to separation from families. ¹¹

When abuse and neglect allegations lead to juvenile court proceedings, lawyers represent state agencies and parents as advocates for their respective positions. The juvenile courts began the practice of appointing counsel for children in abuse and neglect proceedings in recent years. Lawyers for children in such proceedings can also advocate for the child's positions and for protection of children's legal rights and interests including protection from further harm, preservation of the family unit, and speedy resolution of cases. ¹² The likelihood of just outcomes for children improves when children are represented by counsel. ¹³

The need for effective advocacy for children is compelling. Effective outcomes for children in the child welfare system depend upon the recognition that children's voices be heard, that children have legal rights, and that children need legal counsel to advocate for them. ¹⁴ While courts and legislatures have taken steps since the nineteenth century to protect children and address their needs, the development of rights for children in legal proceedings has been slow. ¹⁵ The status of children has evolved from the sixteenth century view of children as chattel, to the nineteenth century view of children as welfare recipients in need of saving, to the current view of children as rights-bearing individuals. ¹⁶ Children viewed as property received no legal services and had no legal rights. ¹⁷ Children viewed as welfare recipients received services [*637] based upon the state's paternalistic view of what was best for them. ¹⁸ When viewed as rights-bearing individuals, children are positioned to receive independent legal counsel, an advocate who works to protect legal rights and give voice to the child's preferences. ¹⁹

The role of counsel for children in dependency proceedings, however, continues to be the subject of debate. ²⁰ The issue centers on whether the child's lawyer should function as a traditional advocate in compliance with the Model Rules of Professional Conduct (hereinafter "MRPC") or whether the lawyer should take on the paternalistic function of a guardian ad litem. Discussion of the historical development of child representation provides the framework for fully understanding the debate about the role of counsel.

A. Historical Development of the Practice of Law for Children

¹⁰ Long-term Consequences of Child Abuse and Neglect, Child Welfare Info. Gateway (2008), available at http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm; see also Duquette & Haralambie, supra note 9, at 127-28.

¹¹ Concept and History of Permanency in U.S. Child Welfare, Child Welfare Info. Gateway, <https://www.childwelfare.gov/permanency/overview/history.cfm> (last visited May 18, 2014).

¹² Sobie, supra note 2 at 784-85.

¹³ Erik Pitchal, Children's Constitutional Right to Counsel in Dependency Cases, *15 Temp. Pol. & Civ. Rts. L. Rev.* 663, 675 (2006); *In re Gault*, 387 U.S. 1, 36-37 (1967).

¹⁴ Duquette & Haralambie, supra note 9, at 197.

¹⁵ Sandra Keen McGlothlin, No More "Rag Dolls in the Corner": A Proposal to Give Children in Custody Disputes A Voice, Respect, Dignity and Hope, *11 J. L. & Fam. Stud.* 67, 67-68 (2008).

¹⁶ Duquette & Haralambie, supra note 9, at 164-165.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ See Suparna Malempati, Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings, *11 U.N.H. L. Rev.* 97, 110-27 (2013).

Prior to the nineteenth century, children were considered the property of their parents and the state refrained from interference with family life. ²¹ Post-Civil War industrialization led to a rise in social conscience and led to the "child savers" movement that promoted protection of impoverished or neglected children. ²² This movement was based upon the concept of *parens patriae*, which refers to the sovereign power of the state to act as guardian of persons with disabilities, including children. ²³ The child savers advocated for the improvement of the lives of children who were subject to abuse and neglect by their parents. ²⁴ Eventually, the legal system responded and created the first juvenile court system in 1899. ²⁵

During this era of the early juvenile courts, cases were heard in the form of informal summary adjudications and children remained without legal rights. ²⁶ The *parens patriae* doctrine allowed the courts to interfere in family life and to make decisions about the welfare of the child, [*638] but without regard for the child's point of view and without recognition of the child's legal right to protection. ²⁷

In the twentieth century, child abuse gained recognition as a significant societal problem and led to state child protection laws. ²⁸ In 1967, the U.S. Supreme Court recognized children's legal rights with its decision in *In re Gault*. ²⁹ In *In re Gault*, the Supreme Court established constitutional due process rights in juvenile courts for children accused of committing crimes. ³⁰ Those rights included the right to counsel, the right to notice, the right to be heard, and other rights similar to those of adult criminal defendants. ³¹ The decision led to the recognition of children as independent persons and not merely property of their parents. ³² In addition, as a result of *In re Gault*, juvenile courts began appointing legal counsel for children in delinquency matters. Lawyers for children in delinquency cases developed a clear directive to represent their child clients as advocates for the client's stated positions and for the protection of the client's legal rights. ³³ The role of counsel for children in dependency proceedings, however, developed differently. Those children did not gain a constitutionally recognized right to counsel through the *In re Gault* decision as did children in delinquency cases. The Supreme Court limited its holding to delinquency matters and did not address other proceedings involving children. ³⁴

Subsequently, in 1974, Congress enacted legislation that was designed to assist in the prevention of child abuse and that also addressed the representation of children in dependency proceedings. The Child Abuse Prevention

²¹ Ventrell, *supra* note 1, at 261-62.

²² *Id.* at 262; Sobie, *supra* note 2, at 748.

²³ Ventrell, *supra* note 1, at 262.

²⁴ McGlothlin, *supra* note 15, at 70.

²⁵ *Id.*

²⁶ Sobie, *supra* note 2, at 749-50.

²⁷ *Id.*

²⁸ Ventrell, *supra* note 1, at 264-65.

²⁹ [387 U.S. 1, 13 \(1967\)](#).

³⁰ [Id. at 13](#).

³¹ *Id.*

³² Ventrell, *supra* note 1, at 267.

³³ Kristin Henning, Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, [81 Notre Dame L. Rev. 245, 256 \(2005\)](#).

³⁴ [In re Gault, 387 U.S. at 13-14](#).

and Treatment Act ³⁵ (hereinafter "CAPTA") provides federal funding for the prevention and treatment of child abuse upon the condition that states appoint representatives for children in dependency cases. ³⁶ CAPTA specifically mandates the appointment of a guardian ad litem who makes a recommendation to the court about the [*639] best interests of the child. ³⁷ CAPTA permits the guardian ad litem to be a lawyer, but does not require this. ³⁸

The CAPTA representative provided to children in dependency proceedings differs from the independent legal counsel provided to children in delinquency proceedings pursuant to the mandate of *In re Gault*. Lawyers appointed to represent children in dependency proceedings are often instructed by state legislatures and juvenile courts to act as guardians ad litem, as opposed to functioning as traditional legal counsel. ³⁹

The role of counsel for children has, thus, developed upon two diverging paths. The role of the lawyer for the delinquent child is clearly that of a traditional advocate who gives voice to the client's position and protects their legal rights. ⁴⁰ The role of the lawyer for dependent children, in contrast, is unclear and inconsistent across the fifty states. ⁴¹

B. Process and Law of the Dependency Case

The dependency case begins with a report of abuse or neglect of a child to the state welfare agency. ⁴² The agency makes an initial determination of whether to remove the child from the home for safety reasons and then whether to file a petition in juvenile court. ⁴³ If the juvenile court receives a filing, it first decides whether the child has suffered abuse or neglect and then decides where the child should be placed. ⁴⁴

The initial determination of dependency is the court's finding on whether the child is in fact abused or neglected. This determination is based upon either a preponderance of the evidence or a clear and convincing standard. ⁴⁵ The burden of proof rests with the party which filed the petition and made the allegation of abuse or neglect, generally the [*640] state agency. This first step operates in many aspects as a traditional trial although the threshold for finding a child dependent is low and often times the determination is uncontested by the parents. ⁴⁶

³⁵ [42 U.S.C. § 5106a\(b\)\(2\)\(B\)](#)(xiii) (2010).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Malempati, *supra* note 20, at 99.

⁴⁰ See Henning, *supra* note 33, at 255-56.

⁴¹ See FIRST STAR & CHILDREN'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 23-131 (3d ed. 2012) [hereinafter FIRST STAR REPORT], available at <http://www.firststar.org/library/report-cards.aspx>.

⁴² Duquette & Haralambie, *supra* note 9, at 351.

⁴³ *Id.*

⁴⁴ *Id.* at 354.

⁴⁵ [In re Michael T.](#), 111 A.D.3d 750 (N.Y. App. Div. 2d Dept. 2013); [In re D.T.](#), 284 Ga. App. 336 (2007).

⁴⁶ Similar to many criminal cases where defendants enter guilty pleas, many parents in dependency cases do not contest the allegation at the adjudication phase and subsequently work to regain placement of the child.

The second phase of the proceedings concerns placement and may involve numerous hearings over the course of months and years.⁴⁷ At issue is the placement of the child while the parents are provided an opportunity to correct the offending behavior. For example, a finding of dependency could be based upon neglect due to lack of proper food, clothing, and shelter. Once such finding is made, the law allows the parents to make appropriate behavioral and lifestyle adjustments in order to receive return of the child to the home. The cases can become quite complex, however, depending on the individual circumstances of the family. Some parents may have drug addiction issues, which take much longer to resolve. The placement of the child while such matters are addressed is the primary issue, but just as important is the child's safety, well-being, educational needs, and need for contact with family members.

In making determinations about placement, the court is bound to follow two guiding principles: preservation of the family unit and the best interests of the child. The principle of family preservation originates in federal legislation, which recognizes that integrity of the family unit is a critical objective for the well-being of children.⁴⁸ Federal law requires state agencies to make reasonable efforts to preserve and reunify families.⁴⁹

The "best interests of the child" is a principle that governs many of the court determinations in a dependency case after the initial finding that the child is an abused or neglected child. The current juvenile court process is designed to focus on the safety and well-being of the child and to consider the best interests of the child in many of its decisions.⁵⁰

[*641] Lawyers who represent parties in juvenile dependency proceedings work to present evidence and argue on behalf of their respective clients' positions. They must do so with the understanding that the court makes determinations that are in the best interests of the child and that preserve the family unit.

In addition, just as lawyers for parents seek to preserve parental rights and autonomy, lawyers for children must seek to preserve children's rights to health and safety, and to seek less restrictive alternatives.⁵¹ When children are in the custody of state welfare agencies, their liberty interests are at stake.⁵² State agencies may place children in foster homes, with relatives, with parents, or in more restrictive environments, such as group homes or juvenile facilities. The placement of the child is often the most difficult issue addressed in court dependency proceedings and the lawyer must not only be aware of the effects of the placement on the child, but must also advocate for the outcome that would be most in accord with the child's point of view.

C. The Role of Counsel Debate

⁴⁷ Duquette & Haralambie, *supra* note 9, at 354-56.

⁴⁸ *Id.* at 195; Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, [94 Stat. 500](#) (codified as amended in scattered sections of 42 U.S.C.) (requires state agencies to make reasonable efforts to preserve and reunify families); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, [111 Stat. 2115](#) (codified as amended in scattered sections of 42 U.S.C.) (clarifies language of reasonable efforts and family preservation).

⁴⁹ [42 U.S.C. § 671](#) (2010).

⁵⁰ Duquette & Haralambie, *supra* note 9, at 194.

⁵¹ Sobie, *supra* note 2, at 760-761.

⁵² See [Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 \(N.D. Ga. 2005\)](#); see also Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, [44 Cumb. L. Rev. 181 \(2014\)](#).

In dependency proceedings, as mentioned above, the role of counsel for the child has been and continues to be controversial among scholars and professionals.⁵³ The debate centers on whether the attorney should act as a lawyer in the traditional sense, taking direction from the client and advocating for the client's counseled position, or whether the attorney should act as a guardian ad litem, substituting judgment for the client about the outcome that would, in the lawyer's view, be in the client's best interests.

The guardian ad litem model of representation has gained support, in large part, based upon the notion that children cannot assist their counsel or meaningfully participate in their cases. When lawyers are directed to represent the best interests of children, they function as [*642] guardians ad litem or social workers.⁵⁴ In this role, they serve as extensions of the court. Generally, guardians ad litem investigate the case, make a conclusion about the outcome that would be in the child's best interest, and make a recommendation to the court.⁵⁵ The guardian ad litem functions as an arm of the court and owes no duty to the client.⁵⁶

Proponents of the traditional attorney model argue that the child's voice should be heard in the proceedings and that client-directed lawyers are better able to protect the legal rights of the child.⁵⁷ In a traditional lawyer-client relationship, the lawyer must abide by the client's stated preferences and objectives, factors that are based on information and counseling provided by the attorney.⁵⁸ The lawyer may not substitute his judgment and abrogate a client's stated goals, even in situations where the lawyer regards the client's position as erroneous or unsuitable.⁵⁹ However, a dilemma occurs when the lawyer disagrees with the client and takes on a paternalistic view. Paternalism allows the attorney to use the guardian ad litem role as authority to vitiate a client's stated positions and thereby causes a direct conflict with the lawyer's role as an advocate for the client's desired outcome.⁶⁰

The controversy among the competing roles for attorneys in the dependency arena results in role confusion and a lack of uniformity in the manner in which children are represented.⁶¹ Such confusion and disparity leads to ineffective and inconsistent representation of children.⁶² Lawyers must have clear directives about their role as counsel in order to provide effective representation.⁶³ How the lawyer proceeds in a particular case is dependent upon how her role is defined.⁶⁴

⁵³ See, e.g., Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, [39 Colum. Hum. Rts. L. Rev. 573 \(2008\)](#); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best interests Lawyering or No Lawyer At All?*, [53 Ariz. L. Rev. 381 \(2011\)](#).

⁵⁴ Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, [43 Loy. U. Chi. L.J. 833, 858 \(2012\)](#); Marcia M. Boumil, Cristina F. Freitas, Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, [13 J. L. & Fam. Stud. 43, 45-46 \(2011\)](#).

⁵⁵ Bernabe, *supra* note 54, at 857-58; Boumil, Freitas, & Freitas, *supra* note 54, at 45-46.

⁵⁶ Bernabe, *supra* note 54, at 857-58; Boumil, Freitas, & Freitas, *supra* note 54, at 45-46.

⁵⁷ See Malempati, *supra* note 20, at 99.

⁵⁸ Jean Koh Peters, *Representing the Child in Child Protective Proceedings: Ethical and Practical Dimensions* 127 (International 3d ed., 2007).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Bernabe, *supra* note 54, at 858.

⁶² See Malempati, *supra* note 20, at 99.

⁶³ Ventrell, *supra* note 1, at 259.

⁶⁴ Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, [71 N.D. L. Rev. 939, 947 \(1995\)](#).

[*643] If lawyers are to be involved in the representation of children in dependency proceedings, their role must be clear. To be effective, lawyers should be advocates for the client's stated goals and interests, and should not attempt to act as social workers or guardians ad litem. Lawyers should not make decisions without consulting their clients. ⁶⁵ Lawyers should avoid the tendency to take on a paternalistic, or substituted judgment, approach to the representation of children just as lawyers should avoid paternalism when representing clients with diminished capacity. ⁶⁶

The primary dilemmas occur when the child is too young to communicate with her lawyer or when the child seeks an outcome that may not be in her best interest. When lawyers confront such dilemmas in other areas of practice, they must look to the MRPC for guidance. Standards promulgated by professional associations can also assist the lawyer in defining her role.

D. Standards and Recommendations for the Representation of Children

In 1996, the American Bar Association (hereinafter "ABA") issued standards of practice for lawyers representing children in abuse and neglect proceedings. ⁶⁷ The ABA standards define the role of the child's attorney as a traditional lawyer who advocates for the stated positions of the child client, provides legal services, and owes duties of confidentiality and competency to the child client. ⁶⁸ The ABA Standards acknowledge that lawyers may be appointed as guardians ad litem, but express a strong preference for the traditional attorney role. ⁶⁹

The ABA Standards generally provide that attorneys for children share the same duties and obligations as lawyers who represent adults. ⁷⁰ For example, lawyers for children must investigate cases by obtaining copies of all relevant records, participate in court proceedings, and zealously **[*644]** advocate for the legal rights of the child clients. ⁷¹ In addition, a lawyer is bound by the child's stated preferences and should maintain client confidentiality. In eliciting the child's preferences, these standards provide that the lawyer should communicate in a developmentally appropriate manner and explain the relevant facts and law to the child. ⁷² The standards also caution against usurping the child's will. ⁷³ The ABA recognizes that the tendency toward paternalism is strong when a child's objective may put the child in harm's way. In response, the standards emphasize the lawyer's role as advisor and counselor, and propose that the lawyer take time to establish rapport and trust within the lawyer-client relationship. ⁷⁴

⁶⁵ Robert A. Solomon, Staying in Role: Representing Children in Dependency and Neglect Cases, 70 Conn. B.J. 258, 278 (1996).

⁶⁶ David A. Green, "I'm Ok-You're Ok": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Mental Disability, *28 J. Legal Prof.* 65, 82 (2003-04).

⁶⁷ American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375 (1995) [hereinafter ABA Standards], available at http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf.

⁶⁸ Id. at 376 (Standard A-1).

⁶⁹ Id. at 375-76 (Preface).

⁷⁰ Id. at 376 (Standard A-1).

⁷¹ Id. at 378 (Standard B-1 and Commentary).

⁷² Id. at 380-81 (Comment B-4).

⁷³ Id.

⁷⁴ Id.

In addition, in order to ascertain a complete understanding of the child's situation and goals, the lawyer should, as is applicable, consult with the child's therapist, social worker, family members, teachers, and others involved in the care and life of the child. The lawyer will also likely have to review records from all such sources.

The ABA standards gain support from legal scholars and practitioners. At about the same time that the ABA issued standards for lawyers in abuse and neglect proceedings, leading scholars convened at Fordham University and issued recommendations on the ethical representation of children.⁷⁵ Ten years later, the University of Nevada Las Vegas (hereinafter "UNLV") held another conference, which also issued recommendations on the representation of children.⁷⁶ Both the Fordham and UNLV recommendations support a traditional lawyer-client model of representation for children. They also emphasize that the attorney should take measures to help the child understand the situation and formulate a position.

The National Association of Counsel for Children (hereinafter "NACC") also sets forth recommendations for the representation of [*645] children in abuse and neglect proceedings.⁷⁷ The NACC Recommendations acknowledge the existence of the two models of representation in the dependency area and provide guidance to lawyers regardless of the role in which they find themselves. The NACC Recommendations, similar to the ABA Standards and the Fordham and UNLV Recommendations, call for attorneys to present the child clients' positions, maintain confidentiality of communications, and be involved in all phases of the litigation process.

Although the ABA standards provide guidance to lawyers for children, competing guidelines do exist. For example, the Uniform Law Commission issued an act which authorizes, and in some instances requires, attorneys who represent children in abuse and neglect matters to represent the child's best interest as opposed to the child's stated positions.⁷⁸

Additionally, state laws vary on the appointment of lawyers for children, with many states appointing guardians ad litem and a few states appointing attorneys as traditional advocates.⁷⁹ The majority of states appoint attorneys to function as guardians ad litem without distinguishing the ethical obligations of the lawyer from the professional responsibilities of the guardian ad litem.⁸⁰

The lawyer for the child in dependency proceedings thus receives conflicting directives about the goals of representation. If the goal is to make an objective recommendation to the court about the best interests of the child, the lawyer functions as an arm of the court and not as a lawyer with ethical obligations to the child client. On the other hand, if the goal is traditional advocacy for the child client, the lawyer must operate within the rules of professional conduct that govern all lawyers.

II. Representation of the Diminished Capacity Client

⁷⁵ Recommendation of the Conference on Ethical Issues in the Legal Representation of Children, [64 Fordham L. Rev. 1301 \(1996\)](#) [hereinafter Fordham Recommendations].

⁷⁶ Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, [6 Nev. L.J. 592 \(2006\)](#) [hereinafter UNLV Recommendations].

⁷⁷ NACC Recommendations For Representation of Children in Abuse and Neglect Cases (2001) [hereinafter NACC Recommendations], available at http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf.

⁷⁸ Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, [42 Fam L.Q. 1, 10 \(2008\)](#).

⁷⁹ See FIRST STAR REPORT supra note 41 (finding that the majority of states require counsel for children to represent the best interests of the child, rather than to represent the child's wishes).

⁸⁰ Id.

When lawyers for children in juvenile court abuse and neglect proceedings are instructed to take on the role of a guardian ad litem, the [*646] ethical obligations to the client become unclear.⁸¹ The primary rationale for the hybrid role for counsel is the assumption that children lack capacity to assist their counsel. Adults assume that children cannot make decisions about their situations and thereby discount children's voices. The law also presumes children to be incompetent and the guardian ad litem role allows the attorney to substitute his judgment for the child.⁸² The presumption of incompetency justifies the paternalistic approach to representing children. However, the status of being a minor does not automatically confer the status of diminished capacity, and attorneys are not relieved from complying with the ethical obligations imposed by the MRPC simply because the client is a child.

The most common approach in cases of child abuse and neglect is for the lawyer to substitute her judgment for that of the child.⁸³ The lawyer who is instructed to perform as a guardian ad litem investigates the case, makes a determination about the best interests of the child, and presents that recommendation to the court.⁸⁴ This recommendation assists the court in reaching a decision in the case. The child's preference is simply one of several factors the lawyer guardian ad litem considers in reaching a best interest determination.

The lawyer guardian ad litem then is not necessarily required to adhere to the mandates of the MRPC in representing the child.⁸⁵ The lawyer guardian ad litem is not required to maintain confidentiality, give voice to the child's preferences in court proceedings, or advocate for the child's preferences.⁸⁶ Lawyers for children can, nevertheless, provide effective representation to diminished capacity clients without substituting judgment for the client.⁸⁷ The question of how a lawyer can function as a traditional advocate when representing children gains guidance from the practice of law in other areas. Lawyers who represent elderly clients or defendants in criminal cases routinely face situations of diminished capacity clients. The following is a discussion of the MRPC [*647] pertaining to representation in situations involving clients with diminished capacity, and more specifically, the representation of elderly clients and criminal defendants.

A. Model Rules

Lawyers often deal with clients who are mentally, physically or developmentally disabled.⁸⁸ When faced with a client who lacks capacity to communicate or to make decisions, lawyers must first turn to MRPC 1.14.⁸⁹ Part (a) of this rule states: "when a client's capacity to make adequately considered decisions in connection with a

⁸¹ Bernabe, *supra* note 54, at 858.

⁸² Larry Cunningham, A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under the Law, *10 U.C. Davis J. Juv. L. & Pol'y* 275, 285 (2006).

⁸³ Ventrell, *supra* note 1, at 268-69.

⁸⁴ Bernabe, *supra* note 54, at 858.

⁸⁵ Jean Koh Peters, The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings, *64 Fordham L. Rev.* 1507, 1522-24 (1996).

⁸⁶ *Id.*; see e.g., *In re W.L.H.*, 739 S.E.2d 322, 324 (Ga. 2013); *In re J.P.B.*, 419 N.W.2d 387 (Iowa 1988); *People v. Gabriesheski*, 262 P.3d 653, 655 (Colo. 2011).

⁸⁷ See Peters, *supra* note 85, at 1523-24.

⁸⁸ Daniel L. Bray & Michael D. Ensley, Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney, *33 Fam. L.Q.* 329, 329-30 (1999).

⁸⁹ *Id.*

representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." ⁹⁰

The commentary to the rule does not specify or define a "normal client-lawyer relationship." ⁹¹ The rule and commentary also do not provide much specific guidance to the lawyer who faces the situation of an impaired client. ⁹² This lack of specificity in the Model Rules often leads to a departure from the traditional attorney role toward a substituted judgment model. Lawyers can interpret the MRPC to provide unchecked power in the attorney-client relationship. ⁹³ Lawyers can also use the vagueness of the rule to shed the traditional lawyer role and adopt a paternalistic best interest role through which they substitute their judgments to make decisions for the client's. ⁹⁴

Despite the seeming failure of Rule 1.14 in establishing clear procedures, lawyers can glean substantive guidance from the rule and be effective advocates for diminished capacity clients within the traditional lawyer role. ⁹⁵ In doing so, lawyers must understand that their responsibilities to their clients do not change when the clients have mental impairments or disabilities. ⁹⁶

[*648] Pursuant to the preamble of the MRPC, the lawyer is a "representative" of the clients. ⁹⁷ In that role, the lawyer must inform the client of his or her legal rights and obligations, as well as the practical implications of those rights and obligations. ⁹⁸ The lawyer must continue to advocate for the client's position and seek a result advantageous to the client. ⁹⁹ Lawyers should maintain communication with clients regarding the representation and maintain the confidentiality of client communication and information. ¹⁰⁰ When representing a client who lacks capacity, the lawyer must adhere to such aspects of lawyering, aspects that form the basis of a "normal lawyer-client relationship".

For example, Model Rule 1.14 directs the lawyer to take reasonably necessary protective action when the lawyer believes that the client has diminished capacity, is at risk of harm, or cannot adequately act in his own best interest. ¹⁰¹ Such action includes consulting with third parties. ¹⁰² The commentary further indicates that the lawyer should maintain communication with the client, have family members or other persons participate in discussions, and keep the client's interests at the forefront. ¹⁰³

⁹⁰ Model Rules of Prof'l. Conduct R. 1.14 (1983) [hereinafter MRPC].

⁹¹ Id. cmts.

⁹² Bray & Ensley, *supra* note 88, at 333, 338; Robert B. Fleming & Rebecca C. Morgan, Lawyers' Ethical Dilemmas: A "Normal" Relationship when Representing Demented Clients and Their Families, [35 Ga. L. Rev. 735, 740 \(2001\)](#).

⁹³ Bray & Ensley, *supra* note 88, at 330.

⁹⁴ Id.

⁹⁵ Id. at 348; Fleming & Morgan, *supra* note 92, at 746.

⁹⁶ Green, *supra* note 66, at 66.

⁹⁷ MRPC Preamble 1.

⁹⁸ Id. at 2.

⁹⁹ Id. at 4.

¹⁰⁰ Id.

¹⁰¹ Id. R. 1.14(b).

¹⁰² Id.

¹⁰³ Id. cmts.

Initially, the lawyer must make the determination that the client is so impaired that a normal lawyer-client relationship is not possible. ¹⁰⁴ Generally, impairment can be determined by the client's ability to understand, deliberate, and reach conclusions about matters relevant to the legal issue. ¹⁰⁵ However, lawyers cannot jump to conclusions about the client's capacity, as an individual's awareness and ability to comprehend may change over time. ¹⁰⁶ In fact, commentary to Rule 1.14 recognizes that clients with diminished capacity often have the ability to understand, deliberate upon, and reach conclusions about matters affecting their own well-being. ¹⁰⁷ For example, children as young as five or six [***649**] years of age can have opinions that are entitled to weight in legal matters concerning their own custody. ¹⁰⁸

If a client is impaired to the extent that a normal lawyer-client relationship is not possible, the attorney can seek the appointment of a guardian ad litem. ¹⁰⁹ However, the mere fact that a client may demonstrate diminished capacity in some form does not automatically require the attorney to cease representation and seek the appointment of a guardian ad litem. ¹¹⁰ Attorneys must make diligent efforts to communicate with their impaired clients in a manner which facilitates their understanding of the legal issues. ¹¹¹ For example, the lawyer may have to meet with the client multiple times, speak slowly, ask open-ended questions, and explain matters in basic terms rather than with legal jargon. ¹¹² Lawyers may also need to consult with family members in order to gain a full understanding of the client's concerns. ¹¹³

Lawyers often confront the situation of representing an impaired client in areas of practice outside of the juvenile dependency context. This is the case particularly when elderly clients and persons accused of criminal conduct are involved. The manner in which lawyers routinely handle diminished capacity clients in such contexts can provide guidance to lawyers for children.

B. Representation of Elderly Clients

Elder law attorneys deal with issues of diminished capacity or diminishing capacity of clients on a regular basis. ¹¹⁴ Professors Morgan and Flowers emphasize that the elder law attorney should not substitute her judgment for that of the client because the client retains the right to make decisions about the matter. ¹¹⁵ They recommend adherence to the rules and standards set forth in MRPC 1.14 ¹¹⁶ and discuss how the MRPC provide guidance to the elder attorney in dealing with diminished capacity clients.

¹⁰⁴ Bray & Ensley, *supra* note 88, at 344.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 335.

¹⁰⁷ MRPC R. 1.14 cmt 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* R. 1.14(b).

¹¹⁰ *See id.* R. 1.14.

¹¹¹ Fleming & Morgan, *supra* note 92, at 775-76; Green, *supra* note 66, at 82.

¹¹² Fleming & Morgan, *supra* note 92, at 775-76.

¹¹³ Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. Rev. L. & Soc. Change 609, 647 (1989/90).

¹¹⁴ Rebecca C. Morgan & Roberta K. Flowers, Ethics in the Practice of Elder Law 124 (ABA 2013).

¹¹⁵ *Id.* at 128.

¹¹⁶ *Id.* at 130.

[*650] Initially, the lawyer must determine the extent to which the client is impaired and whether the client is incapable of making decisions. ¹¹⁷ Elder law attorneys are guided by the National Association of Elder Law Attorneys (hereinafter "NAELA") Aspirational Standards (hereinafter "Standards" or "NAELA Standards"). ¹¹⁸ The NAELA Standards recommend a holistic approach to the representation of diminished capacity clients. ¹¹⁹ In addition, the elder law attorney has the obligation to evaluate whether the client has the capacity to make legal decisions. ¹²⁰

As explained above, MRPC 1.14 requires the attorney to maintain a normal client-lawyer relationship to the extent possible. The "normal client-lawyer relationship" involves the ability of the client to define the scope of the representation and the lawyer's adherence to the core values of the attorney/client relationship, including communication (MRPC 1.4), confidentiality (MRPC 1.6), and commitment to the client (MRPC 1.7). ¹²¹ Professors Morgan and Flowers explain that capacity is not static and changes. ¹²² They instruct attorneys to take measures to improve the comprehension and decision-making capabilities of the diminished capacity clients. For example, attorneys must recognize the difference between diminished capacity and erratic behavior, and not be quick to presume incapacity based upon poor judgment or forgetfulness. ¹²³

Attorneys must provide the same level of respect and attention to diminished capacity clients as they do to other clients. ¹²⁴ In doing so, attorneys must adhere to the mandates of the MRPC. Pursuant to MRPC 1.4, communication with the client plays a critical role in the "normal client-lawyer relationship." Attorneys must communicate effectively with their clients and provide them with sufficient information to make informed decisions. In order to facilitate communication, the attorney for the elderly diminished capacity client must pay attention to the environment, to the interview process, and to the method of communication. Attorneys may have to involve third parties, such as family **[*651]** members, counselors, or medical personnel to facilitate communication and understanding on the part of the client. Ultimately, the goal of the communication process between the lawyer and the diminished capacity client should be to maximize the client's capacity. ¹²⁵

In addition, the representation of the diminished capacity client should be guided by the clients' needs and desires. ¹²⁶ Model Rule 1.2 provides that the client determines the objectives of the representation not the attorney. ¹²⁷ Although the attorney retains the obligation to determine the means by which the client's objectives are accomplished, the attorney should not usurp the overall goals as stated by the client. ¹²⁸

C. Representation of Criminal Defendants

¹¹⁷ Id. at 127.

¹¹⁸ NAELA Aspirational Standards for the Practice of Elder Law, 2 NAELA J. 5 (2006), available at www.naela.org.

¹¹⁹ Id. at Standard D.2; see also Morgan & Flowers, supra note 114, at 133.

¹²⁰ Morgan & Flowers, supra note 114, at 133.

¹²¹ Id. at 129.

¹²² Id. at 131.

¹²³ Id. at 132-33.

¹²⁴ Id. at 130.

¹²⁵ Id. at 142.

¹²⁶ Id. at 139.

¹²⁷ MRPC R. 1.2.

¹²⁸ Morgan & Flowers, supra note 114, at 144; see also Green, supra note 66, at 82.

Lawyers for criminal defendants also routinely face difficult ethical issues and uncertainty in representing their clients.¹²⁹ In the context of criminal defense, the lawyer's duty is to be a zealous advocate for the client within the confines of the law.¹³⁰ Criminal defense lawyers generally prioritize commitment and loyalty to the client above all else.¹³¹ This role becomes ethically complex when the client suffers from diminished capacity.¹³² When a criminal defendant suffers from mental impairment or diminished capacity, the lawyer may face the dilemma of whether to continue with an advocacy role or to take on a paternalistic approach to representation.¹³³

In an adversarial system, the client's autonomy is considered paramount.¹³⁴ The client's right to make decisions about the goals of representation is not only required by the rules of professional conduct, but is also fundamental to the due process protections afforded to defendants in criminal cases.¹³⁵ Adequate legal representation is a corollary to the [*652] protection of the legal rights of criminal defendants.¹³⁶ Thus, the attorney must navigate the often unclear path between allowing the client control over the litigation process and the attorney's own duty to provide effective representation and serve the best interests of the client.¹³⁷

Adding to this controversial issue is the duty of candor to the court. The defense lawyer must balance the obligation to inform the court of concerns regarding the client's competence against the obligation to protect the client's confidences.¹³⁸ Criminal defendants must be legally competent in order to stand trial.¹³⁹ They must also have a rational understanding of the proceedings against them and be capable of assisting their counsel.¹⁴⁰ This requirement is rooted in the due process protections afforded to criminal defendants.¹⁴¹

Several commentators suggest that defense attorneys have an obligation to inform the court whenever issues of competency are present.¹⁴² This would often times require attorneys to place the obligation of candor to the court above other ethical obligations, such as client confidentiality.

¹²⁹ Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: zealous Advocate or Officer of the Court?, [1988 Wis. L. Rev. 65, 65-66 \(1988\)](#).

¹³⁰ [Id. at 65](#).

¹³¹ [Id. at 66](#).

¹³² *Id.*

¹³³ [Id. at 73-74](#).

¹³⁴ Christopher Slobogin & Amy Mashburn, The Criminal Defense Lawyer's Fiduciary Duty to Client's with Mental Disability, [68 Fordham L. Rev. 1581, 1615-18 \(2000\)](#).

¹³⁵ *Id.*

¹³⁶ [Id. at 1619](#).

¹³⁷ See, e.g., John D. King, Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant, [58 Am. U.L. Rev. 207, 209-11 \(2008\)](#).

¹³⁸ [Id. at 215](#).

¹³⁹ [Drope v. Missouri, 420 U.S. 162, 171-72 \(1975\)](#); King, *supra* note 137, at 226-27.

¹⁴⁰ [Dusky v. U.S., 362 U.S. 402, 402 \(1960\)](#); King, *supra* note 137, at 226-27.

¹⁴¹ King, *supra* note 137, at 231-32; James A. Cohen, The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant, [52 U. Miami L. Rev. 529, 540-41 \(1998\)](#).

¹⁴² King, *supra* note 137, at 234; Cohen, *supra* note 141, at 532-33.

However, competency in the criminal context is not an all-or-nothing concept.¹⁴³ Many mentally impaired defendants are capable of understanding the proceedings and communicating with their counsel, and thus, are legally competent to stand trial.¹⁴⁴ When a client is clearly incapable of functioning or when a mental health expert deems a client to be incompetent, the criminal defense lawyer has little choice but to raise the competency issue before the court. The result is generally a civil competency hearing during which the fact-finder determines whether or not the defendant is competent to stand trial.

The dilemma for the criminal defense attorney occurs when the client has some mental impairment or deficiency that affects the client's rational thinking and decision-making. Not all such cases require the lawyer to raise the competency issue with the court. For example, if a [*653] defendant faces a minor charge with minor consequences, a competency hearing might result in a greater restriction on his liberty. A defendant may end up in a mental health facility for a much longer period of time than if he simply enters a guilty plea to a minor offense.¹⁴⁵ In addition, a defendant may not want his attorney to raise the issue of competency during the case.

What is clear in the area of criminal defense is that the lawyer should respect the client's autonomy and should adhere to the ethical obligations of maintaining client confidentiality and engaging in advocacy for the client's wishes. Many commentators oppose a form of paternalistic representation of the mentally impaired client.¹⁴⁶

Professor Uphoff argues that the lawyer's duty to the court should not override the lawyer's duty to zealously advocate for the client's wishes.¹⁴⁷ Uphoff critiques Standard 7-4.2 of the ABA Standards for Criminal Justice, which requires the criminal defense attorney to raise competency whenever counsel has a good faith doubt about the client's competency.¹⁴⁸ He takes the position that defense counsel should not take on a "friend of the court" role at the expense of the advocate role.¹⁴⁹ He emphasizes respect for the client's autonomy and decisions throughout the course of representation.¹⁵⁰ Of course, counsel should discuss the competency issues with the client to determine whether to raise the issue with the court.¹⁵¹ Defense counsel should first make an assessment of the client's ability to understand the proceedings and to assist counsel.¹⁵² Counsel should also assess the advantages and disadvantages to the client of raising the competency issue with the court.¹⁵³

However, some cases involve clients whose mental disorders interfere or impede communications with their attorneys. Within the context of criminal cases, some defendants may face involuntary civil commitment proceedings. Individuals facing involuntary civil commitment may be delusional, incoherent, or even catatonic. The role of the [*654] lawyer in such cases is to continue to act in the traditional role of counsel and zealous advocate.

¹⁴³ Slobogin & Mashburn, *supra* note 134, at 1586.

¹⁴⁴ Uphoff, *supra* note 129, at 70.

¹⁴⁵ *Id.* at 72; King, *supra* note 137, at 239-40.

¹⁴⁶ See Uphoff, *supra* note 129, at 106; Joan L. O'Sullivan, Role of the Attorney for the Alleged Incapacitated Person, [31 Stetson L. Rev. 687, 688 \(2002\)](#).

¹⁴⁷ Uphoff, *supra* note 129, at 89.

¹⁴⁸ *Id.* at 77.

¹⁴⁹ *Id.* at 89-90.

¹⁵⁰ *Id.* at 97.

¹⁵¹ *Id.*

¹⁵² *Id.* at 99.

¹⁵³ *Id.* at 100.

¹⁵⁴ At a civil commitment hearing, the client faces confinement in a mental health facility. ¹⁵⁵ Thus, similar to criminal defense cases, at stake for the client are fundamental liberty interests that require due process protection and the right to representation by a zealous advocate. ¹⁵⁶ Professor Stone argues that the guardian ad litem model of lawyering undermines the nature of the civil commitment process. ¹⁵⁷ He proposes that the role of the attorney for the mentally ill defendant is to advocate for the liberty interests of the client by challenging involuntary hospitalization and by pursuing the least restrictive form of intervention. ¹⁵⁸ Even when the client is unable to communicate with the lawyer or lacks capacity to make coherent decisions, the attorney can maintain the traditional role of counsel and zealously advocate for discharge of the silent or incompetent client. ¹⁵⁹

III. Effective Representation of Children in Dependency Proceedings

When lawyers function as guardians ad litem and make recommendations to the court about the best outcome for the child, they serve as friends of the court and do not necessarily comply with the ethical rules that govern lawyers or provide adequate and effective advocacy. Just as lawyers represent elderly clients and criminal defendants who may suffer from diminished capacity, lawyers for children can also operate within the MRPC and be effective advocates. To do so, lawyers must understand the parameters of child representation and their duties and obligations regarding the diminished capacity client.

A. Determination of Capacity

The initial step in representing clients who may have diminished capacity is to determine the client's ability to participate in the legal process. Generally, the lawyer makes the initial assessment about the client's abilities to comprehend and make decisions about his situation. The law does not impose a single uniform standard for capacity because [*655] different decisions require varying degrees of understanding. ¹⁶⁰ Additionally, capacity does not necessarily equate with the ability to understand the nuances of the law. Although a child may not understand the legal underpinnings of the case, he may have an opinion or preference regarding some of the issues involved with the case. ¹⁶¹ Thus, there are differing levels of capacity. ¹⁶² The question of capacity must be addressed within the context of the goals of representation. ¹⁶³

If the goal is to represent the child's perceived best interest, the standard for capacity might necessarily be high. ¹⁶⁴ The child would need to be capable of making a "correct" decision, one which improves or furthers his situation.

¹⁵⁴ Donald H. Stone, Giving Voice to the Silent Mentally Ill Client: An Empirical Study of the Role of Counsel in the Civil Commitment Hearing, [70 UMKC L. Rev. 603, 617 \(2002\)](#).

¹⁵⁵ [Id. at 607](#).

¹⁵⁶ [Id. at 611](#).

¹⁵⁷ [Id. at 615](#).

¹⁵⁸ [Id. at 614](#).

¹⁵⁹ [Id. at 617](#).

¹⁶⁰ Nancy J. Knauer, Defining Capacity: Balancing the Competing Interests of Autonomy and Need, [12 Temp. Pol. & Civ. Rts. L. Rev. 321, 326 \(2003\)](#).

¹⁶¹ Peters, *supra* note 58, at 128.

¹⁶² Knauer, *supra* note 160, at 325-329.

¹⁶³ Sarah H. Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity, 17 Fam. L.Q. 287, 305-06 (1983).

¹⁶⁴ *Id.* at 306.

¹⁶⁵ Otherwise, the child's voice would be discounted in the determination of what is in the child's best interest. When the goal is to represent the client's stated positions, the standard might involve whether the child has the ability to express a preference related to a particular issue. ¹⁶⁶ The stated position need not necessarily be the "best" decision. The child need only have the capacity to answer questions and make decisions about matters that affect her daily life or daily needs, such as with whom she lives and where she attends school.

But the ability to answer a question should not be the end of the assessment of capacity. Comprehension of information provided and of consequences of decision-making, as well as risk assessment, is part of determining the child's capacity. With children, the capacity to understand their situation and make rational choices not only depends in part on their cognitive abilities, but also on the manner in which they are engaged in communication.

The lawyer can focus on the ability of the child to engage in the decision-making process rather than the child's ability to reach a "correct" decision. ¹⁶⁷ Such an approach would guard against the paternalistic tendency to decide what would be best for the child. ¹⁶⁸

[*656] Nevertheless, the problem for children's lawyers on the capacity issue is that while adults are presumed to be competent unless declared otherwise by a court, children are presumed to lack capacity in many circumstances. ¹⁶⁹

For legal purposes, capacity is synonymous with competency and is, in essence, the ability to make a decision. ¹⁷⁰ Capacity is determined not on absolutes, but on a varying spectrum. ¹⁷¹ Children pose particular challenges in determining capacity because they experience changes in growth and development on a daily basis. Attorneys are appointed in dependency proceedings to represent children across a broad spectrum of ages. Attorneys may represent a child who initially is too young to communicate verbally or too immature to engage in decision-making, but who becomes communicative or more mature over time.

Still, how are attorneys to assess the child client's ability to make decisions relevant to the dependency proceeding? Some commentators recommend imposing an age-based threshold. For example, several authors propose seven as the age above which children should be presumed to be competent. ¹⁷² This age, it is proposed, is when children's cognitive development reaches a sufficient level for rational thought. However, some children as young as age five can communicate about their preferences. ¹⁷³ A five-year-old child may be able to state whether she was beaten by her mother and, for placement purposes, whether she has a closer relationship with her aunt or with her grandmother. These are the types of decisions an attorney can pose to the child client, rather than asking the more complex, legally conclusive questions, such as whether the parent-child relationship should be terminated.

Regardless of the child's capacity, lawyers must protect the legal rights and interests of the child client. The child's competency is irrelevant to the issue of the child's rights in dependency proceedings. ¹⁷⁴ The Supreme Court, in In

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Wilber, *supra* note 5, at 357-59.

¹⁶⁸ Id.

¹⁶⁹ Cunningham, *supra* note 82, at 285.

¹⁷⁰ Id. at 279.

¹⁷¹ Id. at 281.

¹⁷² Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, [59 N.Y.U. L Rev. 76, 78 \(1984\)](#); Ramsey, *supra* note 163, at 311.

¹⁷³ See MRPC R. 1.14 cmt 1.

¹⁷⁴ See Cunningham, *supra* note 82, at 357-59.

re Gault, held that fundamental due process rights applied to children in delinquency proceedings.¹⁷⁵ The Court, however, did not discuss whether children in such proceedings had the capacity to [*657] understand or exercise those rights.¹⁷⁶ Due process protections apply regardless of the client's capacity.

In dependency proceedings, children are entitled to protection, safety and preservation of their family units.¹⁷⁷ State agencies must make reasonable efforts to preserve and reunify families.¹⁷⁸ Dependent children also have the right to least restrictive state intervention into their lives.¹⁷⁹ Regardless of the child's actual decision-making capacity, lawyers have the responsibility to advocate and juvenile courts have the responsibility to make determinations in light of such principles.

B. Respect for the Child's Voice and Autonomy

A typical dependency proceeding in juvenile court often involves several participants, including the parents of the child, attorneys for the parents, attorney for the state welfare agency, social workers, and foster care providers. The child, whose interests and well-being are the primary issue in the case, often has no voice without an attorney.

When the child's welfare is the subject of a legal proceeding in juvenile court, the court should consider the child's position on matters relevant to the litigation.¹⁸⁰ Children have significant interests at stake in dependency cases where their safety, health, well-being and family relationships hang in the balance.¹⁸¹ The consideration of the child's position and the respect for the child's autonomy is a clear improvement from the paternalistic approach of the child saver's movement of the 1800's and the early juvenile courts of the 1900's. The current trend in the practice of law in juvenile court is to hear and consider children's voices.¹⁸² The weight of scholarly opinion and professional standards also falls on the side of respecting the child's voice and autonomy.¹⁸³ [*658] And practically, the child's opinion on matters relating to his own well-being should be considered.

The American legal system is fundamentally rooted in the emphasis on individual rights and autonomy of litigants.¹⁸⁴ The lawyer provides the means through which individual litigants pursue and protect their legal rights. When a lawyer fails to advocate for the client's position, he not only fails to respect the client's autonomy but also excludes the client's voice from the court's consideration.

Respect for an individual's position regarding issues in his legal proceeding corresponds to and supports respect for client autonomy. Our legal system is premised on the idea that individuals retain the right to make decisions

¹⁷⁵ [In re Gault, 387 U.S. 1, 30-31 \(1967\).](#)

¹⁷⁶ Cunningham, supra note 82, at 357-59.

¹⁷⁷ Sobie, supra note 2, at 751.

¹⁷⁸ Adoption Assistance and Child Welfare Act of 1980, supra note 48; Adoption and Safe Families Act of 1997, supra note 48.

¹⁷⁹ Sobie, supra note 2, at 751.

¹⁸⁰ Malempati, supra note 20, at 107-08.

¹⁸¹ See e.g. [Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 \(N.D. Ga. 2005\).](#)

¹⁸² Jean Koh Peters, How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study, [6 Nev. L.J. 966, 1015 \(2006\).](#)

¹⁸³ See Melissa L. Breger, Against the Dilution of a Child's Voice in Court, [20 Ind. Int'l & Comp. L. Rev. 175, 181 \(2010\)](#); Theresa Glennon and Robert G. Schwartz, Looking Back and Ahead: The Evolution of Children's Rights, [68 Temp. L. Rev. 1557, 1565 \(1995\)](#); Catherine Ross, From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation, [64 Fordham L. Rev. 1571, 1572 \(1996\).](#)

¹⁸⁴ Wilber, supra note 5, at 353.

regarding their own legal matters, regardless of the correctness of those decisions.¹⁸⁵ This is reflected in the Model Rules of Professional Conduct, which require lawyers to abide by the client's decisions regarding the overall objectives of representation.¹⁸⁶

Thus, in general, the role of counsel in legal proceedings is to advocate the client's position rather than to make decisions for the client. When a lawyer takes on a paternalistic approach to representing clients, she not only violates ethical rules but also diminishes the client's autonomy. The criticism of paternalistic treatment of adult clients by lawyers applies equally in the context of child clients.¹⁸⁷ Allowing the client to make decisions in his case demonstrates respect for the individual, his values, and his autonomy.¹⁸⁸

C. The Lawyer's Duties

i. Communication

Communications between the lawyer and client are governed by MRPC 1.4, which provides in part that lawyers shall: (1) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (2) keep the client reasonably informed about the status of the case; and (3) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the [*659] representation.¹⁸⁹ Pursuant to MRPC 1.2, lawyers must also abide by the client's decisions regarding the objectives of the representation.¹⁹⁰ The ethical obligation of the lawyer is to allow the client to make the key decisions in a case.¹⁹¹ In order to make key decisions, the client must have adequate information.¹⁹² It is incumbent on the lawyer to communicate the information necessary for the client to make decisions in her case.

When the client is a child, effective communication that complies with the MRPC requires the attorney to engage in age appropriate methods of speaking. A lawyer may have to spend additional time establishing a rapport and trust with a child, perhaps by meeting with the child in the child's home or some other location where the child is comfortable. A lawyer's office, an interview room in the courthouse, and other formal environments may not be conducive to making a child feel comfortable and may actually add to anxiety and fear. Such locations would not be ideal or conducive settings for an attorney to have effective discussions with the child about her case.

In addition, the lawyer may have to involve other persons to facilitate the communication process. For example, communicating with a child along with a therapist or counselor who has been working with the child is one way to ensure that the child clearly understands the information being relayed to her. The lawyer may also need to involve or consult with family members or care providers of the child.

To effectively communicate with the child client, lawyers should adopt a holistic, collaborative, and engaged client-centered approach to representation.¹⁹³ Client counseling literature proposes several models of lawyering to

¹⁸⁵ *Id.*

¹⁸⁶ MRPC R. 1.2.

¹⁸⁷ Ramsey, *supra* note 163, at 295.

¹⁸⁸ *Id.*

¹⁸⁹ MRPC R. 1.4.

¹⁹⁰ *Id.* R. 1.2.

¹⁹¹ Henry Dlugacz & Christopher Wimmer, The Ethics of Representing Clients with Limited Competency In Guardianship Proceedings, [4 St. Louis U. J. Health L. & Pol'y 331, 343 \(2011\)](#).

¹⁹² *Id.*

¹⁹³ See Katherine Kruse, Fortress in the Sand: Plural Values of Client-Centered Representation, [12 Clinical L. Rev. 369, 371 \(2006\)](#).

increase client participation in the legal process and to reduce the risk of lawyer infringement upon client autonomy.¹⁹⁴ When the client is a child, the attorney must be cognizant of the potential for influence over the child's decisions and take efforts to appropriately [*660] communicate with the child depending on the age and circumstances. Ethical lawyering encompasses methods of communication that empower and enable the client to make choices and decisions that will impact his or her own life, and ultimately allow his or her voice to be heard in the legal proceedings.¹⁹⁵

ii. Investigation

An essential element of adequate representation of any client involves the determination and analysis of facts and law.¹⁹⁶ Holistic representation requires the lawyer to gain an understanding of the client's world, that is the context in which the legal issue or issues arose. Lawyers outside of juvenile court engage in the discovery process through which they obtain necessary documents and records that inform the matters in a case. In juvenile court dependency proceedings, some discovery processes may allow the lawyer to obtain necessary documents and information about the child client from the state child welfare agency. The lawyer should also obtain, through discovery requests, subpoena power, or other means, additional documents about the child such as school records, health records, and counseling records. Family members, schoolteachers, counselors, social workers, coaches, and foster parents are all sources of information about a child's circumstances. Lawyers for children have an obligation to speak with as many people involved in the child's life as possible to ascertain a complete picture of the case. In this manner, a lawyer can begin to understand the child client's world, the context within which the allegations of abuse or neglect arose, and the relationships which impact the child's life.

Clearly then, lawyers for children cannot merely rely on the client's description of events or recitation of the case. Lawyers must routinely review other documents concerning the client's legal matters and speak with potential witnesses and other persons who may have information relevant to the case.

With child clients, the people who have relevant information about the client may or may not be apparent from the records and documents in the state child welfare agency's file. Lawyers cannot rely solely on the agency's caseworker to provide all necessary information. Nor can lawyers rely on the parents or other guardians to provide adequate information. Lawyers must consult with the child client, obtain information [*661] from other parties, and then seek out additional information from other sources. A lawyer's duty to investigate in a child abuse and neglect case therefore involves resourceful thinking, patient listening, and initiative.

iii. Protection of Legal Rights

As discussed above, preservation of the family unit is one guiding principle in abuse and neglect proceedings. Federal law recognizes the right that family members have to live with each other.¹⁹⁷ In an abuse and neglect case, where the state agency removes a child from his or her home, the agency must make reasonable efforts to reunify and preserve the family.¹⁹⁸ Such efforts include placing the child with family members not involved with any alleged abuse or providing visitation with family members while the child is in foster care.

The reality of the child welfare system is that many caseworkers, while well-meaning, may overlook a family member for placement or may fail to prioritize visitation with family members. Caseworkers also face overwhelming bureaucracy to approve family members for placement, for example, when the family members reside in a different county or jurisdiction. A typical caseworker will handle multiple cases at one time and inevitably, high caseloads

¹⁹⁴ See Katherine Kruse, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, [64 Fordham L. Rev. 1655, 1681 \(1996\)](#).

¹⁹⁵ *Id.*

¹⁹⁶ MRPC R. 1.1 cmt. 5.

¹⁹⁷ Adoption and Safe Families Act of 1997, *supra* note 48.

¹⁹⁸ *Id.*

lead to oversights. The lawyer for the child can step in and advocate for preservation of the family unit by requesting placement with family members or visitation with family members as is applicable.¹⁹⁹

While in the custody of the state agency, children are also entitled to receive adequate education and health care, and to be in a safe environment.²⁰⁰ Lawyers for children must advocate for these rights as well. To do so, the lawyer must regularly communicate with the child client and family members, and must understand the client's situation. For example, if the child is taken from the home and required to attend a new school, the lawyer must ensure that the child receives the same, if any, educational accommodations she was receiving at the former school. If a child was receiving therapy, the lawyer must ensure that the therapy continues while the child is in state custody.

The representation of the child in abuse and neglect proceedings involves numerous challenges for the lawyer and requires the lawyer to [*662] "step outside of the box" of typical lawyering methodologies. With children's cases, understanding the context, engaging in appropriate communication with the client and others involved in the child's care, and pursuing all avenues to obtain information about the child's situation are as important as knowledge of the law.

D. Case Illustrations

i. The Child Whose Position is Not in His Best Interest

The primary ethical dilemma inevitably raised in the discussion of dependency cases is the situation of a child client seeking an objective that may place him in harm's way. The following are three examples of such cases. The analysis of such ethical issues is not even easy with adult clients who raise similar questions when seeking objectives that may have harmful consequences. The answer, while not easy or clear in any situation, depends upon application of ethical mandates that do not permit the attorney to substitute his judgment for the client, as a guardian ad litem would.

a. Ben

Eleven-year old Ben lives with his mother and her boyfriend. The boyfriend beat Ben, critically injuring him. Ben wants to remain in the home with his mother and the boyfriend, whom he considers a father figure. The state caseworker learns that the mother has been struggling with discipline measures for Ben's increasingly disruptive behaviors and that this was not the first incident of physical abuse, although it was the most severe. The agency removed Ben from the home and placed him in a group home where his behavior continues to worsen.

The lawyer who speaks with Ben will learn that Ben wants to go home where he will likely be beaten again. A guardian ad litem could easily ignore the child's voice. A guardian ad litem could take the position that placing Ben back in the home would not be in the child's best interest because the mother is unable to protect and control the child. The guardian ad litem could recommend to the court that he remain in foster care, or in a restrictive environment with the goal of protecting Ben from harm as well as improving his behavior. A guardian ad litem is not required to communicate with Ben about his legal rights or his options under the law.

A lawyer, however, has the obligation to follow the directives of the client and to explain the law to his client. Ben's desire to return home is [*663] not surprising, as most adolescents would want to be in a familiar environment: the home in which they were raised. Furthermore, most adolescents would want to remain with their mothers. The lawyer's ethical obligation is to discuss the situation with Ben, to ascertain why Ben chooses to return home, to explain the potential harm, and to discuss alternatives. Just as ignoring the child's voice would be inadequate or

¹⁹⁹ See Sobie, *supra* note 2, at 784.

²⁰⁰ *Id.* at 782-83.

ineffective legal representation, simply voicing Ben's stated desire to a judge would also not be adequate representation - lawyers are more than mere mouthpieces for their clients.²⁰¹

One possibility would be to require counseling and parenting classes for the mother and her boyfriend, and to allow Ben to return home pursuant to a protective order. The protective order would allow Ben's placement in the home on the condition that mother and boyfriend refrain from engaging in physical violence against Ben. Violation of the protective order could lead to criminal or civil contempt charges for the mother and her boyfriend. Another option would be to place Ben with a family member and allow for visitation with the mother while she and her boyfriend complete counseling. The court could also require frequent review hearings, such as at two-week intervals, until the family becomes stabilized.

In addition to conditions on the mother and boyfriend, the lawyer could speak with third parties familiar with Ben, including teachers and social workers, to determine if Ben himself is in need of services. Many children suffer from learning disorders or attention disorders that cause them to display difficult behaviors and affect their ability to respond to disciplinary strategies of adults. Enrolling Ben in an athletic program may benefit him and improve not only his behavior but also his relationship with his mother and her boyfriend.

b. Anna

Another difficult example would be fifteen year old, Anna, a diabetic who lives with her alcoholic mother.²⁰² Anna's condition requires the administration of regular medication to control her diabetes. Her mother, however, is not capable of keeping up with Anna's medical [*664] needs due to her own bouts of alcohol-induced disorders. Anna's doctors are concerned that she may enter into a diabetic coma or die from a lack of appropriate medication and management of her diabetes. Anna is adamant in her refusal to leave her mother. She insists that she is capable of administering her own medications and does not share the doctor's concerns.

A guardian ad litem for Anna would easily recommend that Anna be removed from her mother's care and placed in a foster home or other placement where her diabetes medication would be properly administered.

A lawyer who communicates with Anna, however, might explore the reasons why Anna refuses to leave her mother. Anna's lawyer should also advise her about the consequences of her stated objective and the low likelihood that a court would agree to allow her to live with her mother when presented with other evidence about her health issues. Anna's lawyer could work to obtain assistance for the mother with her addiction. Her lawyer could seek out family members willing to assist the child and the mother. Her lawyer could search for programs, such as in-home healthcare assistance, that would be beneficial to both Anna and her mother. Lawyers for children must often work to assist the parents of the child in order to pursue the stated goals of the child. Advocacy for children may necessarily require advocacy for the parent.

Anna needs a lawyer who will advise on her options based upon the existing facts and law. Only then can she make informed decisions about her case. Her ultimate goal may be attainable but may take patience and time to achieve.

c. Sarah

Sarah is six-years old and made an outcry of sexual abuse. Sarah told her maternal aunt that her stepfather touched her private area. Sarah's mother refuses to believe the child and the stepfather denies the allegation. Sarah has refused to repeat the allegation to anyone else and wants to return home to her mother and stepfather.

²⁰¹ Wilber, supra note 5, at 351.

²⁰² See Robert F. Harris, A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model, [6 Nev. L.J. 1284, 1289-90](#) (author poses a similar scenario and concludes that a guardian ad litem would most effectively represent and protect the child).

Procedurally, the state agency removed Sarah from her home and placed her with a grandparent. The court upheld the removal and placement of the child at the initial probable cause hearing. The case is scheduled for an adjudicatory hearing, or trial, where the court will determine if Sarah is in fact an abuse or neglected child.

[*665] This scenario poses, in theory, one of the most difficult ethical situations for a lawyer. In practice, the standard for the determination of dependency is low - preponderance of the evidence in most jurisdictions. The burden of proof is upon the state agency. If there are other factors to support the allegation such as physical evidence, the determination for the juvenile court judge is straight forward. If the child recants the allegation or there is no other supporting evidence, the determination may be more difficult. The court will rely upon evidence of expert witnesses, such as a child psychologist. The child's attorney should likewise become familiar with the recommendations of the professionals involved with the child and family.

The attorney owes a duty to the client and should not interject his own opinions about what did or did not occur. The attorney, however, also has an ethical obligation to investigate the facts and advise the client about the probable outcome. With a young child, the attorney cannot simply ask the child what happened in a situation of sexual abuse. The attorney must facilitate the child's understanding of the legal process through communication and consultation with the child's therapist and other professionals. The child's therapist will be able to guide the attorney in the appropriate method of communication. The attorney can also analyze the case based upon the conclusions of the professionals involved with the child.

Ultimately, the attorney may or may not be able to present evidence during the adjudication depending upon the extent to which the child will communicate about the alleged abuse at that time. The state agency will present evidence in support of sexual abuse and the parents will likely present evidence in defense against such allegations. If the court determines that the child is dependent based upon the evidence presented, the subsequent issue is placement. Placement may very well be the child's main concern because the child likely would seek return to her home and to her mother. In such a situation, the attorney can advocate for return to the home with the condition that the stepfather have no contact with the child. This would involve the mother's agreement to have the stepfather move out. A restraining order or no contact provision would accomplish the goal of the child and would satisfy the court about the child's protection from possible harm. Because such an order would require the mother to move out, or have the stepfather move out of the home, the attorney should communicate with the mother or her lawyer to determine the likelihood that she would comply. [*666] If the mother is uncooperative with such an arrangement, the court will not likely return the child home regardless of what an attorney for any party advocates. Family members may also provide a resource for placement and the child may be able to have regular visitation with her mother. The continued monitoring of the family's circumstances would be paramount in a case such as this.

In the end, while there is no easy solution for the court or for the child's attorney, the respective roles must be clear. The court will make the ultimate determination about the child's placement. The attorney should function as a traditional advocate, communicate with the client, and advise the client based upon the law and facts.

ii. The Child Who Lacks Capacity

The child who lacks capacity may present an easier situation for the lawyer. Pre-verbal children do not have the capacity to communicate with counsel. As discussed above, lawyers may face a similar situation when representing an adult who is incapable of communicating. In circumstances of clear diminished capacity, lawyers can request the appointment of a guardian ad litem.²⁰³ Lawyers must, however, recognize that capacity may change with time. A two-year-old child may become verbal and able to communicate with counsel over the course of the representation. Dependency cases generally take months or years to resolve. The initial determination by the court that the child is a dependent child is the beginning of a case, not the end.

In addition, lawyers for pre-verbal children can continue to protect legal rights, such as preservation of the family, which includes placement with family members. Take for example, a child who is abandoned at the hospital at birth.

²⁰³ MRPC R. 1.14.

Certainly, because the client is clearly incapacitated, the attorney representing the newborn can ask for the appointment of a guardian ad litem. The attorney's obligations to advocate and protect the child client's legal rights and interests, however, do not cease. ²⁰⁴ The attorney should continue to independently determine the client's interests and work in collaboration with the guardian ad litem. ²⁰⁵

[*667]

Conclusion

In cases of abuse and neglect, the general agreement is that children should receive just outcomes; outcomes that protect the child's well-being and preserve the family unit to the extent possible. Agreement also exists that children need representation to effectuate just outcomes. The disagreement is the manner and mode of their representation.

A lawyer does not and should not simply parrot the client's stated positions. At the same time, a lawyer cannot simply ignore the client's objectives when those do not appear to be appropriate to the lawyer. Lawyers must also investigate the law and facts of the case in order to advise and counsel the client about a prudent and probable outcome, as required by ethics.

To require an attorney to take on a dual role as advocate and guardian ad litem places the attorney in a position to potentially violate the MRPC. The likelihood for conflict between the child's wishes and the child's best interests as defined in dependency law inevitably exists in every case. But the best interest determination is properly a decision for the juvenile court judge.

In any legal proceeding, the judge hears from all parties before reaching a decision in the case. The judge relies upon the lawyers to effectively advocate for their respective clients. Ineffective lawyering can detrimentally impact the court's decision, while effective representation will necessarily enhance the likelihood of just outcomes.

Lawyers cannot ethically take on a dual role to represent a party and simultaneously be a friend of the court to make a neutral determination about the appropriate outcome in the case. This duality is unacceptable in all other areas of legal practice.

In most areas of legal practice, effective representation by a lawyer means advocacy for the client's counseled positions and protection of the client's legal rights. This is no different when the client is a child. The condition of being a child or having diminished capacity does not justify a "kangaroo" court that undermines procedural and substantive due process. ²⁰⁶ Only when attorneys function as advocates for the child or alleged incapacitated person is due process protected. ²⁰⁷

In practice, the general way for a lawyer to make a neutral determination would be to ignore the child's voice or to consider the child's **[*668]** voice as one of many factors. However, the goal should clearly be for lawyers to let the client drive the objectives of the litigation. To ignore the client's voice is to violate the ethical rules that are central to the legal profession.

As advocates, lawyers can function in the role for which they are suited and comply with the mandates of ethical conduct that are essential to effective lawyering. While no easy answer exists to the myriad of problems an attorney will face when representing children in abuse and neglect proceedings, traditional advocacy for the child client will allow the child's voice to be heard and the representation to be effective and ethical.

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²⁰⁴ Dlugacz & Wimmer, supra note 191, at 359.

²⁰⁵ Id.

²⁰⁶ O'Sullivan, supra note 146, at 703-04.

²⁰⁷ Id.

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