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***411 PRESSURES TOWARD MEDIOCRITY IN THE REPRESENTATION OF CHILDREN**Barbara Glesner Fines [\[FNa1\]](#)

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When children are the subject of dependency, adoption or guardianship proceedings, protecting those children requires attention to a variety of interests. Children need a voice: an advisor and an advocate whose judgment is unclouded by conflicting interests. Courts need information that the adult parties to the proceedings may not easily discover or willingly provide. [\[FN1\]](#) The families and social services agencies need monitors and mediators. The attorney guardian ad litem (GAL) is, in many situations, called upon to meet all these needs. During the past decade, major academic conferences [\[FN2\]](#) and professional organizations [\[FN3\]](#) have devoted *412 thousands of hours to developing standards of competence and calls for attention to the unique and critical demands of child representation.

While states and the federal government have recognized the need to attend to all of these interests, many have been unwilling to commit the resources necessary to truly meet the full range of interests. [\[FN4\]](#) The result is a system that creates pressures for and tolerance of mediocre or passive representation, or what one judge has referred to as a “potted plant” theory of representation of child clients. [\[FN5\]](#) Evaluative reports of appointed counsel indicate that competence has been a significant concern in representation of children. [\[FN6\]](#) Indeed child advocates themselves have raised concern about competency. In Connecticut, for example, child advocate attorneys filed suit against the state alleging that systematic inadequate representation by court appointed counsel was violating the rights of the children and families involved in child protection cases. [\[FN7\]](#) That is not to say that all *413 attorneys representing children are anything other than dedicated professionals. For many, however, the system simply does not provide the clarity or resources for long-term quality representation.

This essay explores the dimensions of this problem of competence and diligence in children's representation. [\[FN8\]](#) First, the practical realities of poor funding and heavy caseloads are described and the ethical obligations of attorneys in these circumstances are explored. Second, the article examines the standards and scope of training requirements being adopted by the states and contrasts these standards to the actual demands of child representation. Finally, the article explores the confused role definitions of attorneys in child welfare representation. The article suggests why that confusion persists and how it may cause attorneys to minimize some of their responsibilities in these cases. The article concludes with some practical suggestions for attorneys in these roles to minimize the pressures toward incomplete representation.

I. THE UNDER-RESOURCING OF CHILD WELFARE REPRESENTATION

Perhaps the most obvious structural pressure toward the underrepresentation of children and children's interests is that created by limited funding. Hourly rates for contract attorneys in child representation rarely exceed \$75 an hour, and many jurisdictions have caps on total fees of less than \$1,000 per case. [\[FN9\]](#) Other limitations on resources are equally significant. Funding for support personnel and expenses in child representation is even more limited. Only

one-third of children's lawyers *414 have paralegals on staff and less than half have investigators available. [FN10] Likewise, only one-third are supported by trained social workers. [FN11]

For public attorneys and many private attorneys who primarily work in the child welfare system, fewer resources mean higher caseloads, which in turn create downward pressures for quality representation. The National Association of Counsel for Children (NACC) recommends that, for quality representation, no children's lawyer should maintain a caseload of over one hundred individual child clients at a time. [FN12] Where states adopt caseload standards, this recommendation has been very influential. Arkansas's system, for example, provides that "[a] full-time attorney shall not have more than [seventy-five] dependency-neglect cases, and a part-time attorney shall not have more than [twenty-five] dependency-neglect cases." [FN13] Yet a recent study of attorneys in child welfare actions found that more than forty percent of all respondents have more than 100 cases and almost twenty percent of all respondents have over 200 cases. [FN14] Among child law specialists, over seventy percent have more than 100 cases and twenty percent have more than 300. [FN15]

Low fees and high caseloads create pressures for attorneys to provide incompetent (or even dishonest [FN16]) representation. Comment 2 to Rule 1.3 of the Model Rules of Professional Conduct states that "[a] lawyer's work load must be controlled so that each matter may be handled competently." [FN17] The National Council of Juvenile and Family Court Judges has recognized that "under-compensation often results in less *415 qualified and committed individuals and higher turnover." [FN18] Turnover rates are high because attorneys are unable to sustain the caseload or financial pressures of child representation. For example, a recent study of the Utah Office of Guardian ad Litem noted a twenty percent attorney turnover rate over the last three years. [FN19] The study found that these attorneys often move to other government offices that provide better pay, more support staff, and lower caseloads. [FN20]

To address these concerns, some courts attempt to recruit ("cajole, urge and even beg" [FN21]) more volunteer attorneys under the banner of pro bono values. [FN22] For example, when an Ohio court in *In re Ashton B.* [FN23] was called to consider the fee structure of \$40 to \$50 an hour with total caps as low as \$150 for GALS, [FN24] the court invoked these values noting:

I appreciate the fact that counsel who accept ... appointments are, in most cases, underpaid for their skill, effort, and time. Trial courts who are required to appoint counsel often have difficulty finding competent counsel who will undertake the defense, knowing they will not be adequately compensated. However, trite as it may sound, perhaps members of the bar owe to the courts and our system of justice, as imposed on us, an obligation to accept from time to time ... [an] appointment, full well knowing that they will not be fully compensated. [FN25]

*416 Volunteer attorneys simply cannot meet all of the demands of child representation. Moreover, even pro bono attorneys should not be expected to cover the out-of-pocket expenses involved in child representation [FN26]--home studies, psychological testing, and other forms of expert assistance are often essential to effective representation but also constitute substantial expenses. Yet, without an understanding of the costs of underrepresentation (in terms of health, family and neighborhood stability and delinquency), marshaling sufficient political pressure on legislatures to increase funding is difficult. [FN27]

Attention is sometimes drawn to underfunding and excessive caseloads by suits challenging the constitutionality of the child representation system. [FN28] Similar litigation has been brought in the context of the funding of indigent criminal defense, though the clarity of the constitutional right to effective assistance of counsel in criminal cases frames the analysis in slightly different terms. [FN29] In both the criminal and civil context, these suits have met with varying success in the courts, [FN30] but regardless of outcome of the case, they draw necessary attention to the issues.

Courts have been reluctant to find that compensation schemes violate constitutional rights. For example, attorneys in Arizona sued to be awarded fees in excess of the statutory cap of \$250 per case. [FN31] The *417 juvenile court granted the award but the court of appeals reversed, finding that the juvenile court did not have equitable authority to

increase fees beyond the statutory cap. [\[FN32\]](#) The court noted:

We can appreciate the judge's concern that court appointed counsel be adequately compensated for representing parties and children before the juvenile court. As appellants point out, these proceedings which determine familial rights are extremely important and it is vital and in the best interests of society that all parties be represented by adequate counsel. [\[FN33\]](#)

Nonetheless, the court summarily rejected the challenge to the constitutionality of this cap. It cited as controlling precedent a 1945 decision regarding compensation of attorneys appointed for indigent criminal defense, [\[FN34\]](#) even though that case had not directly addressed the constitutional issues. [\[FN35\]](#) While refusing to grant the requested relief, the *Haralambie* court did note that the legislature had, since the litigation ensued, removed the cap. [\[FN36\]](#)

Other courts have avoided the constitutional determination on procedural grounds. For example, in Connecticut, a suit by panel attorneys appointed for child representation challenged compensation systems as unconstitutional. [\[FN37\]](#) The attorneys alleged that “the rates and conditions of compensation are such that the persons represented by appointed counsel are routinely deprived of effective representation, notwithstanding the good faith efforts of court appointed counsel to provide zealous representation.” [\[FN38\]](#) The action was dismissed for lack of standing. [\[FN39\]](#)

Nonetheless, the Connecticut legislature turned its attention to the issue of compensation of children's lawyers. The state established the Commission on Child Protection and the Office of the Chief Child *418 Protection Attorney that same year with the intent of improving the quality of child representation. [\[FN40\]](#) One of the first goals of the office was to reduce attorney caseloads and implement a quality assurance program. [\[FN41\]](#) In the first year of the program, the number of attorneys with caseloads over 100 fell from 56 attorneys to 32, and attorneys with over 150 cases went from 41 to 23. [\[FN42\]](#)

Other litigation has met with more direct success. In New York, the panel attorneys providing children's representation alleged that contract rates of forty dollars and twenty-five dollars per hour for in-court and out-of-court time had not been raised in seventeen years. [\[FN43\]](#) The association argued that these low compensation rates and high caseloads had made the association “unable to satisfactorily discharge its responsibilities, as a member of the Departmental Advisory Committee to the Family Court and the Departmental Central Screening Committee of the Criminal Courts Panel Plan of the Assigned Counsel Plan, to provide and maintain a list of available and adequately trained attorneys for the Family Court and Criminal Court assigned counsel panels.” [\[FN44\]](#) In that case, the appellate court found that the case was justiciable and that the lawyers' association had satisfied the requirements of third-party standing requirements. [\[FN45\]](#)

In its final decision, the trial court decried the “pusillanimous posturing and procrastination of the executive and legislative branches [which] created the assigned counsel crisis impairing the judiciary's ability to function.” [\[FN46\]](#) The court catalogued the variety of costs the system imposed on the courts and litigants: cases delayed, negotiations blocked, and representation entirely unavailable or provided in such perfunctory manner that courts were unable to obtain the information necessary to make informed decisions. [\[FN47\]](#) The court noted in particular the effect on out-of-court work:

*419 The insufficient number of assigned counsel in the Family Court has resulted in less than meaningful and effective assistance of counsel. The testimony of experts, judges and experienced attorneys in Family Court showed that because of the rate levels assigned counsel do not: interview clients; consult with them on a regular basis throughout the proceedings; review all relevant records and documents; perform an independent investigation of the facts and the law; identify and interview witnesses; file motions, conduct discovery and follow up on appropriate discovery requests; make applications for investigators or other experts where appropriate; prepare for a negotiated settlement or litigation at each stage of the proceedings; ensure that clients receive necessary services and prepare appropriate service plans; secure appropriate orders, and monitor compliance. The lower rate paid for out-of-court time, in particular, operates as a substantial disincentive to perform many of these tasks. [\[FN48\]](#)

The court declared the statutory compensation rates unconstitutional as applied and directed payment in the amount of ninety dollars per hour without distinction between in- and out-of-court work. [\[FN49\]](#)

Most recently, a federal court in *Kenny A. ex rel. Winn v. Perdue*, [\[FN50\]](#) denied a motion for summary judgment in a case alleging that limited funding of county attorneys in Georgia caused unconstitutionally high case loads: some as high as 450 clients annually. [\[FN51\]](#) The court held that foster children have a statutory and constitutional right to counsel in termination-of-parental-rights (TPR) proceedings. [\[FN52\]](#) It found that termination of parental rights proceedings implicate the liberty interests of the children involved. [\[FN53\]](#) The court concluded that “only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR *420 proceedings.” [\[FN54\]](#) The court came to this conclusion by applying the *Mathews v. Eldridge* [\[FN55\]](#) test in which the court weighs the state's interest against the private interest implicated and the risk of erroneous decision. [\[FN56\]](#)

However, the court did not apply the analysis from the more recent United States Supreme Court opinion in *Lassiter v. Department of Social Services*. [\[FN57\]](#) In *Lassiter*, the United States Supreme Court faced the question of whether an indigent parent facing a possible termination of her parental rights had a right to appointed counsel. [\[FN58\]](#) The Court held that due process might, in an individual case, require appointed counsel but that as a categorical matter there is a presumption against the right to counsel absent a threat to physical liberty. [\[FN59\]](#) Even if a court were applying this presumption, a right to counsel for children might still be established if the state's legislature provided for such a right, as the legislative determination substitutes for the court's balancing test. [\[FN60\]](#) Thus, in those states in which a statute requires appointment of an attorney in child welfare cases, [\[FN61\]](#) a *421 challenge to inadequate funding for those attorneys might also be grounded on a due process basis.

In May of 2006, the *Kenny A.* plaintiffs and defendant Fulton County entered into a consent decree that included the establishment of an office for the County Child Advocate Attorneys, which is independent from the juvenile court, to be staffed by twelve full-time child advocate attorneys, two full-time investigators, and three full-time support staff. [\[FN62\]](#) The court ordered that performance standards be adopted for these attorneys and that a complete workload study be undertaken. [\[FN63\]](#) That workload study concluded that, without any other changes to the system, caseloads should not exceed eighty cases per attorney, but that an appropriate caseload per attorney could be 120 cases if certain reforms were implemented. [\[FN64\]](#) These reforms included “implementation of a one judge-one family system, and a more consistent and predictable scheduling system that maximizes in-court and out-of-court time for the [attorneys].” [\[FN65\]](#) The study also reported that compliance was incomplete: caseloads for most attorneys still exceeded 100 even without the reforms having been implemented. [\[FN66\]](#)

*422 Even with progress being made under the threat of class action litigation, in many states the individual attorney in a child representation case is still likely to face the ethical dilemma of too much responsibility and too few resources. For private attorneys, the choice may simply be that they will be unable to take these cases, or at least confine them to their pro bono allocation. As a political matter, these attorneys could raise awareness of the issues by making these choices publicly and as a group.

For those attorneys for whom child representation is their full-time practice, underfunding places them in a near-constant battle to maintain their ethical duties of competence [\[FN67\]](#) and diligence. [\[FN68\]](#) ABA Formal Opinions, issued in response to Congressional efforts to drastically cut funding for legal services in 1981, [\[FN69\]](#) and again in 1996, [\[FN70\]](#) emphasize that attorneys have an affirmative duty to restrict the size of their caseloads and that underfunding of representation does not excuse attorneys for indigent clients from their duty of competence and diligence. An ABA Formal Opinion in 2006, directed primarily to the public defender community, but generally applicable to all attorneys facing excessive caseloads, directs attorneys to decline these excessive representations. [\[FN71\]](#)

The opinion recognizes that, when these representations come through court appointment, the matter is not simply one of just saying no. [\[FN72\]](#) While seeking to avoid excessive appointments is a necessary first step, if appointed by the court nonetheless, attorneys may pursue any available means of review of the court's order. [\[FN73\]](#) In the final

analysis, however, it is the court's decision as to whether an attorney can competently represent an appointed client, and an attorney will be subject to contempt for further *423 refusals to continue with the representation. [FN74] In these situations, attorneys are left to do the best they can, providing triage lawyering while continuing to advocate for improvements in the system.

II. LIMITED TRAINING FOR THE DIVERSE ROLES

One key component to providing more effective representation is training. While there are many well-qualified and well-trained guardians ad litem serving children, there are also those who are appointed to this task with less sufficient backgrounds. When courts are appointing guardians ad litem from lists of attorneys, those attorneys may not be full-time child advocates, but may have a diverse practice of which the GAL work is simply a supplement. [FN75] For new attorneys in particular, the ability to receive court appointments may be an important source of regular work and the limited compensation may not deter their interest as it might more established attorneys. "Once their skills become polished and their positions secure, the young attorneys then refuse further appointments, leaving the representation of the poor to the next batch of young and inexperienced lawyers." [FN76] Yet these same new attorneys may have the *424 fewest resources in terms of training, experience and mentoring to bring to this task.

The tasks required for child welfare cases require an extraordinarily diverse range of knowledge and skills. The roles that are played by children's lawyers include traditional core lawyering tasks, such as analyzing the application of the law to the child's situation, developing legal alternatives and strategies, and carrying out those strategies in negotiations and courtroom advocacy. However, the unique needs of counseling and instructing the client in these circumstances also require a sophisticated understanding of children, families, and cultures. This knowledge is drawn from the expertise of other professionals, such as psychologists or other child-focused professionals. Moreover, knowledge is not enough--there is a specialized skill dimension in communicating with children and families that attorneys in this field must develop. Finally, children's lawyers must be able to marshal the many interdisciplinary resources necessary to provide services to support the children and families with whom they are working. This ability is the core of social work expertise. Obviously, the ideal system would be one in which an interdisciplinary team would be available to serve the interests of children and insure that their voices are heard. As report after report indicates, however, the current system is far from ideal. [FN77] Children's lawyers may have expertise in one of these tasks areas but will require training to supplement the remaining areas.

As recently as 1995, only five states required training for attorney guardians ad litem. [FN78] In 2003, the Keeping Children and Families Safe Act, Pub. L. 108-36, which amended the Child Abuse Prevention and Treatment Act (CAPTA) and reauthorized programs under the Act, added *425 a requirement of training for guardians ad litem. [FN79] However, the Act does not require any specific quantity or quality of training. [FN80] Six years later, many states are still in the process of setting standards and developing training programs. [FN81]

Unquestionably, child representation requires significant investments of training in order to provide effective representation. [FN82] Initially, attorneys must master the unique procedural and substantive law involved in child representation. [FN83] The American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases include recommendations of training for both attorneys and judges. [FN84] Standard 1-2 suggests the content of this training, which includes the following: "relevant federal and state laws and agency regulations; [i]nformation about relevant court decisions and court rules; [o]verview of the court process and key personnel in child-related litigation; [and] [d]escription of applicable guidelines and standards for representation." [FN85] Some states require training in specific legal aspects, such as "best interests" factors. [FN86] When discussing continuing education, these same training standards emphasize even more strongly the updating of legal information, as they mention only "new federal and state legislation, *426 appellate court decisions, systemic reforms, and responses to professional literature" as topics for continued training. [FN87]

Law schools are unlikely to have provided this essential prerequisite training, even in the necessary legal doctrines in the field. While legal education focuses the majority of its educational resources on legal doctrine, education

in family law topics that relate to abuse and neglect are often given little attention compared to the topics that arise in the representation of wealthier clients. [FN88] That situation may be changing as more law schools are developing child law specialty programs, [FN89] but even these programs are only likely to serve those students who know before graduating that this is the field in which they will practice. Moreover, legal education's focus on legal doctrine and analysis leaves room for only a small portion of the training necessary for effective child advocacy. As the Family Law Education Reform project points out: "Lawyers trained only in legal analysis and the preparation of legal arguments will find themselves at a loss In this new interdisciplinary system, the lawyer's role and the tools he/she needs to serve the client have been radically altered." [FN90]

Beyond doctrinal knowledge, one of the most important areas of training is one that attorneys are least likely to have received in their legal education: that is, understanding and interacting with the child client. [FN91] Of course, attorneys in any field of practice must take time to become familiar with their client's world:

As an attorney handling an oil and gas matter will have knowledge of geology, an attorney in a medical negligence case will know something about medicine or an attorney dealing in commercial transactions will have a knowledge *427 of business, an attorney dealing with children should know something about childhood development. [FN92]

It is not surprising that the training guidance provided by national organizations and some states emphasizes knowledge of "family dynamics and dysfunction including substance abuse." [FN93] Law schools are unlikely to provide this training. Moreover, "As things now stand, however, many (probably most) of the students who receive credit for a course in family law have never heard of family systems theory, parental alienation, borderline personality disorder, or other psychological constructs that have, at various times, strongly influenced judicial decisions and legislative enactments." [FN94] This interdisciplinary knowledge will need to come from fairly intensive training after attorneys enter practice.

With this backdrop of understanding, attorneys can then communicate more effectively with their clients. Here again, the demands for children's lawyers are unique. Communicating with the oil and gas client is unlikely to require any specialized training in understanding the client's communication. These clients are adults who are more likely to come from a similar cultural perspective as the attorney. They are generally better able to clearly express their interests and perspectives to the attorney than are most child clients.

For the attorney representing the child, however, ascertaining the child's "wishes, feelings, attachments, and attitudes" [FN95] requires specialized training in communicating with children and an understanding of the context in which they are communicating. For example, a child's orientation is to the present and the concrete. [FN96] Thus, if the attorney asks a first-grade child "Are you in school?" the child may very well answer, "No" because the child is not at that moment in school. If such misunderstandings regarding basic information are common, then misunderstanding the child's wishes, feelings and attitudes is nearly inevitable if attorneys lack training in communicating with the child. Even *428 if the child's wishes do not direct the representation, competent representation requires at least understanding those attitudes. [FN97]

It is perhaps a function of the difficulty of this communication that there is some lack of clarity regarding its necessity. The ABA Standards direct that all attorneys should meet with the children they represent both early and at significant stages in the proceedings. [FN98] Many state standards require that the attorney meet with and interview the child. [FN99] But not all states have this requirement, leaving open the possibility that an attorney could represent a child's interests without ever having met the child. [FN100] Indeed, recent studies of guardians ad litem in practice indicate that attorney GALs do indeed neglect critical meetings and interviews. A 2000 study of Colorado GALs indicated that in forty-one percent of cases, the GAL did not meet with the child. [FN101] In a 2007 study of Ohio GALs, ninety percent of attorneys indicated that they "always or nearly always" had a face-to-face meeting with the children; [FN102] however, only sixty-three percent of attorneys documented these meetings. [FN103] Even fewer attorneys observed the child interact with the parent(s): eighty-two percent reported they did so and only forty-one percent documented these observations. [FN104] However, few states provide guidelines beyond a minimum first

meeting. Most ^{*429} recently, Ohio has adopted standards for guardian ad litem, effective March 1, 2009. [\[FN105\]](#) Those standards provide very specific guidelines for contact with both the child and the family, including a requirement that the GAL meet with the child separate from parents or custodians, and visit the child in his or her home. [\[FN106\]](#) Beyond these minimums, however, the extent of contact with the child up to the discretion of the attorney. Minnesota's GAL standards provide that the GAL "must have sufficient contact with the child to ascertain the best interests of the child," but goes on to indicate that "[t]here is no specific benchmark with respect to frequency of contact." [\[FN107\]](#)

There are three components to the necessary training in communicating with children. First is an information component. Attorneys must know how their communication with children will be affected by each child's development, [\[FN108\]](#) and the training should "[f]ocus on child development, needs, and abilities." [\[FN109\]](#) State training programs commonly include this information, though the depth and quality of that information is unlikely to be substantial in those states with limited numbers of overall training hours required. [\[FN110\]](#) For example, in Missouri, which requires twelve hours of training for attorney GALs, [\[FN111\]](#) a study on ^{*430} training quality indicated that fewer than half of the attorney GALs surveyed believed that they had received excellent or good training on child development issues. [\[FN112\]](#)

Cultural competence is a second critical component of communicating with children and their families. For presentations in dependency actions in particular, attorneys are likely to come from a vastly different cultural context than their clients. [\[FN113\]](#) Obviously, attorneys must be able to bridge the gulf of age and education differences with their child clients, but class and race differences are common as well. [\[FN114\]](#) The majority of children in child welfare cases are children of color living in poverty. [\[FN115\]](#) The significance of these differences should not be underestimated. As Professor Appell instructs us:

These disparities go both to the heart of attorney-client communication and the attorneys' competence to represent their clients. That is because these disparities create the risk that children's attorneys will not appreciate, or even apprehend, the social dimensions of the presenting legal problems. An attorney's lack of familiarity with a child's culture and social systems may, in turn, lead the attorney to discount the child's clearly stated preferences. Thus, attorneys may not understand the consequences of the various available outcomes or decisions they may make. For example, the attorney may not be aware that a counseling center to which a child is referred is in rival gang territory. Similarly, children's attorneys may not see or understand factors contributing to or even causing other legal problems relating to housing, employment, immigration, or other family issues. The fact that children's law offices are litigation-focused and less likely ^{*431} to engage in community outreach and education further removes attorneys from their clients. [\[FN116\]](#)

Recognizing the critical role of cultural competence, comments to the Uniform Act do direct that necessary training include "the central role of culture and ethnicity in family relations and children's identities." [\[FN117\]](#) Some state standards require training in "[c]ultural and ethnic diversity and gender-specific issues." [\[FN118\]](#) New Hampshire, for example, provides that training should include "[t]he dynamics of family groups, including but not limited to the broad range of ways in which families of different social, cultural and economic backgrounds may meet the needs of children" [\[FN119\]](#) However, not all states recognize the necessity of this training. [\[FN120\]](#) Significantly, the ABA omits any reference to diversity or cultural competence in its standards for training. [\[FN121\]](#) Alaska, on the other hand, requires the guardian ad litem to consider and understand:

the ethnic, cultural, and socio-economic backgrounds of the population to be served[, and] the Indian Child Welfare Act and the prevailing social and cultural standards of the Indian community in which the child, parent, Indian custodian, or extended family resides or with which the child, parent, Indian custodian, or extended family members maintain social and cultural ties [\[FN122\]](#)

^{*432} A third component--interpersonal communication skills--is equally important. A few state standards for training do appear to require this type of training. [\[FN123\]](#) For example, the recommendations to the Ohio Supreme Court for training minimums include instruction in "[c]ommunication skills/ability to speak with children and adults, including critical questions, open-ended questions, [and] interview skills." [\[FN124\]](#)

For communication skills training in general and cross-cultural communication in particular, more is required than merely providing information to attorneys about communication. Learning communication skills requires modeling, practice, and opportunities for feedback and repractice in context. [\[FN125\]](#) Unfortunately, typical training programs often include communication skills sandwiched into information about child development with few, if any, opportunities for individualized practice and feedback and rarely in the context of actual representations. It is not uncommon for these programs to be made available entirely online or through video or audio replays. [\[FN126\]](#) Necessarily, while substantial *433 information might be provided, one cannot expect significant skill development from training presented in this format.

One way to improve training requirements for communication skills is to include experience prerequisites. The ABA Standards suggest the value of mentoring or “second chair” opportunities as important to training, but do not list this as a core requirement. [\[FN127\]](#) In contrast, the National Association of Counsel for Children provides a certification program to indicate specialization and expertise. [\[FN128\]](#) The approach used to verify an attorney’s specialization and expertise is instructive as to the components of effective training. The certification program does not require a particular training program or hours of instruction. [\[FN129\]](#) Rather, the program requires a quantum of experience. [\[FN130\]](#) Some states follow this model and do include experiential minimums as part of their training requirements. New Hampshire, for example, requires “at least [four] hours of observation of, or participation in, a court case, or in court cases, involving a child or children.” [\[FN131\]](#) Arkansas has a “clinical prerequisite” for initial certification as attorneys ad litem in abuse and neglect cases, necessitating assistance in representing a child with an experienced attorney in a specified list of hearings. [\[FN132\]](#) Connecticut provides “[a]ll new contract attorneys ... an *434 assigned paid mentor responsible for ensuring shadowing, supervision on three cases, ongoing consultation and reporting to [Chief Child Protection Attorney] regarding the mentee’s progress and needs.” [\[FN133\]](#)

Some aspects of suggested training standards may seem especially foreign to attorneys. Child representation calls upon attorneys to be able to marshal community resources on behalf of their client. As the ABA Standards suggest, attorneys must be able to know how to locate, communicate, and cooperate with experts, must have access to “[i]nformation on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services,” and must understand the agencies providing these services. [\[FN134\]](#) Yet, many attorneys are reluctant to take a systemic view of the children they represent, feeling that “[t]his isn’t law, it’s social work.” [\[FN135\]](#) For example, in *State Public Defender v. Iowa District Court for Polk County*, [\[FN136\]](#) an attorney who contracted with the public defender’s office was granted the statutory \$45 an hour pay for time spent helping his client, a mother in a termination case, find housing. [\[FN137\]](#) The public defender’s office challenged the pay, arguing that it was the provision of “social services” not “legal services.” [\[FN138\]](#) The court disagreed, noting that finding housing for the mother was a logical part of the overall strategy to avoid termination of the mother’s parental rights. [\[FN139\]](#)

A Missouri study of the guardian ad litem system reveals some interesting contrasts among judges, attorneys, and Court Appointed Special *435 Advocates (CASA) regarding the responsibility of guardians ad litem. [\[FN140\]](#) CASA volunteers and attorneys agree with the judges on many core responsibilities: for example, having familiarity with statutes, [\[FN141\]](#) reading case files, [\[FN142\]](#) and interviewing pertinent parties. [\[FN143\]](#) However, perceptions of other responsibilities draw pictures of three different role conceptions. Attorneys and judges were more likely to describe the role of the child advocate as essentially “legal,” while CASAs were not comfortable with the legal tasks. [\[FN144\]](#) Over seventy-three percent of judges and 68.5 percent of attorneys believed that reading case law was an important responsibility; yet, this was among the duties CASA respondents were least likely to describe as a responsibility (seven percent). [\[FN145\]](#) On the other hand, attorneys were least willing to identify “social work” functions as within their responsibilities. Nearly all CASAs believed their role included maintaining a relationship with the child, while only about half of the attorneys believed this was their responsibility. [\[FN146\]](#) CASAs overwhelmingly believed that consulting and working with other professionals was part of their duties, whereas only about three-quarters of attorneys agreed. [\[FN147\]](#) Other significant differences in opinion were found with “quasi-judicial” tasks such as recommending appropriate placement [\[FN148\]](#) and monitoring visitation. [\[FN149\]](#) The overall conclusion of the

study was that “[i]t is obvious when examining the results ... that guardian ad litem respondents indicate *436 the perception that their responsibility focuses on their courtroom duties. They are, after all, trained attorneys.” [\[FN150\]](#)

Trainings tend to reflect the attorney discomfort with social work, emphasizing the legal aspects of child representation rather than the community resources and services and the knowledge of allied disciplines. [\[FN151\]](#) This is especially unfortunate because attorneys for children must work on interdisciplinary teams and must be able to understand the perspectives of those other professions. Yet studies of attorney interaction with other professionals in the child abuse and neglect field indicate that “competition, rather than shared ‘ownership’ of the system, makes collaboration difficult” [\[FN152\]](#) and “professionals involved often lack a shared basis in language, ethical precepts and world view which leads to an inability to resolve those misunderstandings.” [\[FN153\]](#) Training for multidisciplinary cooperation is no small task and works best when multidisciplinary teams are used for this training. [\[FN154\]](#)

Obviously, the demands of training are immense. Yet state mandates for training are minimal. In most states, training of less than a day is all that is required for attorneys to become qualified to represent children as guardians ad litem. For example, West Virginia [\[FN155\]](#) and Wisconsin [\[FN156\]](#) require only three hours each year. Nebraska, [\[FN157\]](#) Kansas, [\[FN158\]](#) and Ohio [\[FN159\]](#) *437 require six initial hours and three each year thereafter. Colorado [\[FN160\]](#) requires ten hours and Missouri requires twelve hours of initial training. [\[FN161\]](#) At the upper end of the scale are states such as New Hampshire [\[FN162\]](#) and Maine, [\[FN163\]](#) both of which require sixteen initial hours along with annual continuing education. Compare all these standards with that of the National CASA training requirements for lay volunteers. Before beginning their appointments, CASA volunteers must complete at least thirty hours of pre-service training and must observe a court hearing. [\[FN164\]](#) Twelve hours of annual continuing education are required. [\[FN165\]](#)

One might protest that attorneys do not need as extensive training because they already come to the role with professional preparation. But as the preceding discussion demonstrates, many of the child representation tasks are unique to the role and are unaddressed by traditional legal education. It is likely that, apart from courtroom advocacy, attorneys are no better prepared to undertake these tasks than any other educated individual. That states are reluctant to require at least as much training for attorneys as they do for lay volunteers is a pressure for accepting mediocrity in child representation.

*438 III. AMBIGUOUS AND CONFLICTING ROLES THAT ENCOURAGE PASSIVITY

Since the passage of CAPTA [\[FN166\]](#) requiring appointments of guardians ad litem in child abuse and neglect proceedings, attorneys acting on behalf of children have faced significant role ambiguity and resulting ethical dilemmas. Mountains of paper have been devoted to the conflict between the role of attorney for the child and that of attorney for the child's best interests. The conflict appears to present fundamental ethical dilemmas. The rules of professional conduct of every state require that attorneys pursue their client's lawful objectives, [\[FN167\]](#) yet an attorney in many states must, if the child's best interests demand, advocate for a result the child does not wish. [\[FN168\]](#) An attorney must keep confidential the information relating to the representation of their client, [\[FN169\]](#) yet child representatives are sometimes required to disclose information the child would prefer be kept confidential. [\[FN170\]](#) Every national organization and conference to address this *439 role ambiguity has emphasized the importance of clarifying the role of attorneys serving children. Nonetheless, in the majority of states, models of representation remain confused, broad, and conflicting. [\[FN171\]](#) Many states retain a “hybrid” model in which attorneys are expected to advocate for the child's wishes and for the best interests of the child (where these ends do not conflict). [\[FN172\]](#)

As a practical matter, some flexibility in role is likely necessary. Even the strongest advocates for the traditional representational role for children recognize that some children will simply be too young to express their wishes or to make informed decisions regarding the representation. [\[FN173\]](#) About one-third of children in adoption and guardianship proceedings are under the age of six. [\[FN174\]](#) Attorneys representing children in these circumstances are necessarily called upon to engage in substituted decision-making. [\[FN175\]](#) The role, however, is not unique to child representatives. Attorneys representing any client with diminished capacity, while maintaining as normal an attor-

ney-client relationship as possible, are authorized to exercise some independent decision making to serve the client's "best interests." [FN176] Attorneys for entity clients, as well, sometimes face a conflict between what they hear expressed as the client's interest and what they believe would be the in the client's best interests. [FN177] *440 Attorneys in these instances are left to negotiate the conflict between wishes and interests through counseling, request for additional representation, [FN178] or withdrawal.

The purpose of this article, however, is not to try to resolve the debate among those who prefer the traditional attorney model over the "best interests" model of representation. Rather, the focus here is to explore how the ambiguity of role causes the underrepresentation of either of these perspectives. In this respect, it is not the tension between attorney for the child and attorney for the child's best interests that is the primary problem. Rather, it is the lingering role of attorney as agent of the court that creates the most significant pressures toward passivity. The ambiguity of role for the child's attorney leaves individual attorneys without a clear perspective from which to speak. Without a clear perspective from which to speak, the voice provided by child advocates is sometimes lost amid the din of other voices speaking in permanency proceedings.

A. Loyalty to the Court Undermines Effective Advocacy for the Client

Many courts continue to demand that attorney guardians ad litem combine the advocacy and "judicial" functions, with the judicial role taking precedence. [FN179] There are two problems with blending the judicial role with a children's representation role. First, the judicial role conception is a pressure toward underrepresentation. Second, the *441 immunity granted to these representatives reduces individual accountability for incompetence. It may be that the pressure to retain a judicial agent in child representation is so strong that states will be unwilling to separate this role from children's representation, but society should be prepared to acknowledge the costs of that choice.

The judicial role conception itself creates pressures toward underrepresentation. The problem with this conception is that the role of judicial agent and the role of attorney are quite opposite in many respects. Judges are required to be neutral, disinterested and passive; attorneys represent a particular client's objectives with "warm zeal." [FN180] While the ethical conflict of advocating for the child's interest as opposed to the child's wishes can be resolved by a clear identification of the client, it is more difficult to reconcile the roles of the attorney (whether for the child or the child's best interest) and agent of the court. The attorney must refrain from acting as a witness in the case, [FN181] yet an agent of the court is expected to be the "eyes and ears of the court," investigating facts and preparing reports, testifying to facts and providing recommendations to the court. There are parallels of course. Both attorneys and court investigators bring facts to the court's attention, but with attorneys those facts are selected and advocated so as to represent the client's objective. [FN182] Not so with judicial agents, whose presentation of facts is expected to be catholic and neutral. Attorneys advocate for results from a position of partisanship; judicial agents recommend results from a position of disinterested neutrality. Attorneys are held accountable to their clients; judicial agents are accountable only to the judges. [FN183]

*442 How is it that scholars have devoted so much time and attention to role ambiguity, developing statutes and standards advocating for one or another attorney role, yet the states continue to adhere to the role conception that the child representative should act as the "eyes and ears of the court"? It is not surprising that state courts, when implementing the dictates of CAPTA, have chosen to emphasize the roles of serving the court and the overall child protection system rather than the role of representing the child. Courts have come to rely on these judicial agents--the network of volunteer CASA and pro bono or minimally paid GAL attorneys--to supplement the minimally-funded state child dependency agencies. [FN184] Of all the role ambiguity laced through these representations, the attorney-as-judicial-agent role is arguably the most ambiguous. One state's definition of a guardian ad litem indicates that a GAL "does not act as a member of the Guardian's underlying profession, but rather as a judicial officer" and is therefore given "substantial latitude and deference in tailoring her or his role to the particular circumstances of a case and needs of a child" [FN185]

Any clarity provided by the Rules of Professional Conduct becomes clouded by the uncertainty of whether these

rules apply to the role of a judicial agent. Consider as an example the Rule prohibiting attorneys from “communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter” [\[FN186\]](#) Does this rule apply to attorneys who are appointed to represent a child or the best interests of a child?

The rule should apply if that attorney is acting within the constraints of the adversary system as an advocate for the child or the child's interests. If the attorney is acting as a judicial agent, however, the answer is not at all clear. A New Mexico court has held that the Rules of Professional Conduct designed for the traditional role of attorneys do not govern the conduct of an attorney-guardian who acts on the court's behalf. [\[FN187\]](#) The court dealt with the question of whether the ethical rule barring attorneys *443 from communicating with another party they know to be represented by counsel precluded a court-appointed guardian ad litem from obtaining information about the child from state employees, even though the child is in state custody. [\[FN188\]](#) The court held that even though state law requires that GALs be attorneys, the role of a GAL in an abuse and neglect case is not to serve as an adversary to the state, but rather to act as a fact-finder assigned to the court. [\[FN189\]](#)

Other states, who also apply the hybrid theory of attorney role in these cases, have come to the opposite conclusion. [\[FN190\]](#) If courts believe it is important that the representative of the best interests of a child be given broad access to parties and witnesses, it could achieve that same result by providing clear court orders appointing attorneys and authorizing those attorneys to speak with persons represented by counsel. [\[FN191\]](#)

The confusion that is engendered by a separate role conception is substantial. What does it mean that the Rules of Professional Conduct do not apply to these attorneys? Is the attorney exempt from just this rule regarding contact with represented persons, or from all of the rules? [\[FN192\]](#) Of course, attorneys are subject to discipline for dishonest or criminal conduct even when it occurs outside their capacity as attorneys. [\[FN193\]](#) Thus, in one case in which a guardian ad litem lied about the extent of his investigation, he was subsequently disbarred. [\[FN194\]](#) However, the court was careful to note that this disbarment was for behavior “outside the practice of law”:

*444 [H]ow one conducts himself or herself as a [guardian ad litem] reflects on their ability to practice law, and ‘we [the Supreme Court of Washington] have not hesitated to impose appropriate sanctions upon attorneys engaging in misconduct outside the practice of law, provided that such conduct reflected adversely upon that attorney's ability to practice law.’ ... Attorneys ... who fail to uphold their ethical duties when acting as a [guardian ad litem] are, consequently, subject to discipline. [\[FN195\]](#)

But if attorneys are not practicing law when they are acting as guardians ad litem or best interests attorneys, what are the substitute standards that guide the attorney's conduct when the Rules of Professional Conduct do not apply? States have begun to apply standards of practice for attorneys acting as child representatives [\[FN196\]](#) and certainly must do so if they are to have any reasonable system of accountability for these attorneys.

When attorneys do under-represent children or their interests, how are they held accountable? Attorneys appointed by judges are subject to removal by those same judges. [\[FN197\]](#) Civil liability is unavailable as a control in most states, which provide either qualified [\[FN198\]](#) or absolute [\[FN199\]](#) immunity for attorneys representing a child's best interests or acting as a guardian ad *445 litem for the court and performing quasi-judicial duties such as preparing reports and making recommendations. The justification for this immunity is to insulate GALs from the pressures of highly emotional parties.

[T]he guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents. [\[FN200\]](#)

Immunity protects attorneys from being used by parties to manipulate and prolong a dispute. It also serves to encourage attorneys to serve as child representatives pro bono by lowering the risks of malpractice and discipline. [\[FN201\]](#) But the consequence of this protection is to insulate attorneys from public scrutiny. To the extent attorneys

serve at the pleasure only of the courts that appoint them, it is the court's interest that is likely to be best served. That is, perhaps, exactly the result that the states desire: placing a higher priority on the needs of the judicial system than the interests of children, but it is a mistake to assume that the two are the same.

B. Uncertainty of Role Creates Pressures for Passivity

Passivity is a reasonable response to the role confusion that results from continuing to try to serve many masters. One of the most striking observations of the Missouri study of the opinions of attorneys, judges and CASA volunteers regarding the responsibilities of guardians ad litem was the number of tasks that the substantial majority of the CASA volunteers and judges believed to be responsibilities compared to the number of tasks the vast majority of attorneys characterized as responsibilities of the guardian ad litem. [\[FN202\]](#) Of the forty-eight items on the survey, at least seventy-five percent of CASAs believed that twenty-seven of those items were responsibilities of the guardian ad litem. [\[FN203\]](#) Seventy-five percent of *446 judges agreed on twenty-two of the items. [\[FN204\]](#) But seventy-five percent of attorneys agreed that only thirteen of the forty-eight tasks listed were the responsibility of a guardian ad litem. [\[FN205\]](#)

While attorneys may perceive legal tasks as central to their role, without a clear perspective from which to speak, the attorneys are more likely to be swayed by the perspectives of others. These perspectives can include the judge who appoints the attorney, the person or entity who pays (or fails to pay), the attorneys for the public or private agencies concerned with placement of the child, or the attorneys for the adults involved in the child's life. Attorneys representing children often are at the fulcrum of alliances of these interests. The child's attorney can play a critical and active role in mediating, balancing or opposing any or all of those interests. However, rather than active interaction, a passive deference to those interests is not uncommon. Why is that? As this article has discussed, one reason is the passivity that comes from lip service to children's interests. When too few resources are devoted to representation of children and too little attention given to requiring that the representation be effective, it is of little surprise that passive and even incompetent representation will result.

But passivity can also result because the attorney for the child feels that he or she is merely duplicating the effort of others. Advocating for the interest of a particular adult is often the best advocacy for the child or the child's best interests or both. If the attorney for the child perceives this to be true in any given case and hears other attorneys taking an active and competent role in directing advocacy toward an optimal outcome, the attorney for the child may curtail active representation, concluding that it is duplicative and unnecessary.

At the other end of the spectrum are situations in which the adults who might best provide a safe and stable home for the child are not present in the litigation or are not competently represented. The child's attorney may nonetheless be reluctant to step in and introduce entirely new parties, theories, or strategies. If that attorney is hearing the voice of the judge most forcefully, he or she may be conceiving the role as judicial agent as requiring only information and opinion on the parties and positions placed before the court and valuing efficient resolution of the case. Because attorneys and other professionals in the child permanency system are often *447 repeat players, regularly working with and across from one another, attorneys for the children in these cases may place a premium on professional collegiality and be unwilling to battle for control over strategies and legal positions. The Colorado Supreme Court recently issued an order stating that it would not allow "attorneys to practice as both respondent parents' counsel and in the capacity of guardian ad litem." [\[FN206\]](#) As the court observed, this shifting role causes pressures to passivity in order to preserve relationships. [\[FN207\]](#)

Too often, permitting attorneys to fulfill these different roles in separate cases subtly subverts the best interests of the children. For instance:

[One] court has observed that the shifting of roles tends to benefit the litigant who has the right to appear in court and is in a position to pressure counsel to obtain a desired result. Where an attorney is representing the

respondent in one case but is the guardian ad litem in the next, subtle compromises are made to insure a working relationship when the roles of counsel are reversed. Since the children are almost never in attendance at court hearings and the historical trend has been for guardians ad litem to infrequently visit their children, the children's interest is too often not adequately represented. By removing this subtle conflict of interest, [this] court has observed that the quality of representation of parents and children has been improved. [\[FN208\]](#)

As states continue to refine their standards and requirements for GAL representation, they must necessarily address these systemic pressures to defer to the courts and the adults rather than truly represent the child.

IV. CONCLUSION

Many attorneys in child representation do not become active advocates for the children on whose behalf they are appointed. Many do not perceive *448 a relationship with the child as part of their responsibilities. As the states move toward improving their child representation systems, they must pay more than lip service to providing a voice for children. They must provide adequate resources for child representation. They must require training of sufficient quality and quantity to allow attorneys to undertake the broad range of tasks required by these representations. They must clarify the role of attorneys in the representation. Without these essential elements, attorneys will still face pressures to remain passive participants attempting to serve the needs of many, with the needs of the child quietly coming in last.

Until states provide greater clarity and resources for the GAL role, the best antidote to counter the pressures for underrepresentation is a well-formed relationship with the child. Despite the general reluctance of attorneys to establish and maintain these relationships, without them attorneys have no lodestar for their representation. With a clear perspective of the child as the primary focus of the attorney's efforts, the attorney is more likely to resist the pressures to defer to other voices. With a sense of responsibility to the child that grows from relationships, attorneys are less likely to retreat to passivity in the face of uncertain roles.

[\[FN1\]](#). Ruby M. Hulen Professor of Law, University of Missouri Kansas City School of Law. Thanks also to my colleague Mary Kay Kisthardt for her insight, suggestions and editing and to Kevin Kelly for his outstanding research assistance. This article is dedicated to the many extraordinary child advocates in my community whose example of excellence, dedication, and caring inspires my own efforts, with special appreciation to my colleague Professor Mary Kay O'Malley, for whom mediocrity in the representation of children is never an option.

[\[FN1\]](#). A court explains the role of the guardian ad litem:

In essence, the guardian ad litem role fills a void inherent in the procedures required for the adjudication of custody disputes. Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the "best interests of the child," has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents. Unhampered by the *ex parte* and other restrictions that prevent the court from conducting its own investigation of the facts, the guardian ad litem essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision--*i.e.*, the "best interests of the child."

[State ex rel. Bird v. Weinstock](#), 864 S.W.2d 376, 384 (Mo. Ct. App. 1993).

[\[FN2\]](#). See, e.g., [Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham](#), 6 NEV. L.J. 592, 592-93 (2006) [hereinafter *UNLV Conference*]; [Recommendations of the Conference on Ethical Issues in the Legal Representation of Children](#), 64 FORDHAM L. REV. 1301, 1301 (1996).

[\[FN3\]](#). See, e.g., ABA, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), [http:// www.abanet.org/child/repstandwhole.pdf](http://www.abanet.org/child/repstandwhole.pdf) [hereinafter *STANDARDS OF PRACTICE 1996*]; NAT'L ASS'N OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIA-

TION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC Revised Version) (1999), <http://www.naccchildlaw.org/resource/resmgr/Docs/juvenilejustice.doc>; NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (2001), http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf [hereinafter NACC RECOMMENDATIONS]; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2006), http://www.abanet.org/legalservices/probono/nccusl_act_rep_children.pdf.

[FN4]. See *UNLV Conference*, *supra* note 2, at 602.

[FN5]. Sherrill L. Rosen, *Guardian Ad Litem Practice*, 63 UMKC L. REV. 371, 377 (1995).

[FN6]. PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 43 (2004), <http://pewfoster-care.org/research/docs/FinalReport.pdf>; ABA Child Custody & Adoption Pro Bono Project, *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, 41 FAM. L.Q. 365, 381 (2007) (“Inadequately trained or poorly qualified counsel has been a problem in adoption and guardianship proceedings.”).

[FN7]. *Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, No. 3:04CV773(CFD) (D. Conn. Mar. 28, 2005), available at <http://www.ctd.uscourts.gov/Opinions/032805.CFD.Juvenile.pdf>.

[FN8]. Attorneys representing children or children's interests in child protection, guardianship, and adoption proceedings are known by many terms: child's attorney, best interests attorneys, guardians ad litem, attorneys ad litem. Recognizing that these terms represent many different roles, for purposes of convenience, I will refer to all the attorneys playing one or more of these roles as “children's lawyers.”

[FN9]. See the collection of statutory fee standards collected in Appendix D, 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, 1082-83 (2006).

[FN10]. Howard Davidson & Erik S. Pitchal, *Caseloads Must Be Controlled So All Child Clients Can Receive Competent Lawyering* 7 (working paper, Oct. 2006), available at <http://ssrn.com/abstract=943059>.

[FN11]. *Id.*

[FN12]. NACC RECOMMENDATIONS, *supra* note 3, at 7.

[FN13]. Attorney Qualifications and Standards, Ark. Adm. Order 15 § 2(n) (2008), available at http://courts.state.ar.us/rules/admin_orders_sc/index.cfm#15.

[FN14]. Davidson & Pitchal, *supra* note 10, at 6.

[FN15]. *Id.* at 7.

[FN16]. *Lewis v. Comm. for Pub. Counsel Servs.*, 739 N.E.2d 706, 708 (Mass. App. Ct. 2000) (Attorneys who represented children were fined for charging in excess of the statutory rate.).

[FN17]. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2 (2008).

[FN18]. See NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE 65 (1998).

[FN19]. Eric Ray, *Guardian Ad Litem Office In Need of Funding*, KCPW NEWS, July 9, 2008, <http://www.kcpw.org/article/6296>.

[FN20]. *Id.*

[FN21]. N.Y. County Lawyers' Ass'n v. State, No. 102987/00, slip op. at 17 (N.Y. Sup. Ct. filed Feb. 5, 2003), <http://www.sado.org/fees/newyorkfeecase.pdf>.

[FN22]. See Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 337 (2003).

[FN23]. No. S-03-003, [2003 WL 21384862 \(Ohio Ct. App. June 13, 2003\)](#).

[FN24]. *Id.* at *1.

[FN25]. *Id.* (quoting [In re Widener, No. H-77-11, 1978 WL 214656, at *3 \(Ohio Ct. App. Mar. 3, 1978\)](#) (Connors, J., concurring)).

[FN26]. *C.f.* [State v. Green, 470 S.W.2d 571, 572-73 \(Mo. 1971\)](#) (en banc) (holding that “counsel appointed to represent defendant indigents charged with crime are entitled to receive compensation for services and reimbursement for out of pocket expenses”).

[FN27]. Whytni Kernodle Frederick & Deborah L. Sams, *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children* (2007), <http://www.firststar.org/research/documents/FIRSTSTARReportCard07.pdf> (recommending “longitudinal studies of cost and benefits of legal representation for children, including the relationship between effective representation in cases of abuse/neglect/dependency and prevention of delinquency”).

[FN28]. See, e.g., [Green, 470 S.W.2d 571](#).

[FN29]. See [Luckey v. Harris, 860 F.2d 1012 \(11th Cir. 1988\)](#); [Wallace v. Kern, 392 F. Supp. 834 \(E.D.N.Y. 1973\)](#); [State v. Smith, 681 P.2d 1374 \(Ariz. 1984\)](#); [State v. Peart, 621 So. 2d 780 \(La. 1993\)](#); [Kennedy v. Carlson, 544 N.W.2d 1 \(Minn. 1996\)](#); [Madden v. Township of Delran, 601 A.2d 211 \(N.J. 1992\)](#); [State v. Lynch, 796 P.2d 1150 \(Okla. 1990\)](#).

[FN30]. Successful suits include [Smith, 681 P.2d 1374](#); [Peart, 621 So. 2d 780](#); and [Lynch, 796 P.2d 1150](#). Unsuccessful suits include [Luckey, 860 F.2d 1012](#); [Wallace, 392 F. Supp. 834](#); [Kennedy, 544 N.W.2d 1](#); and [Madden, 601 A.2d 211](#).

[FN31]. [Haralambie v. Pima County, 669 P.2d 984, 985 \(Ariz. Ct. App. 1983\)](#).

[FN32]. *Id.* at 986.

[FN33]. *Id.*

[FN34]. *Id.* (citing [McDaniels v. State, 158 P.2d 151 \(Ariz. 1945\)](#)).

[FN35]. [McDaniels, 158 P.2d at 155-56.](#)

[FN36]. [Haralambie, 669 P.2d at 986.](#)

[FN37]. [Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't, 363 F. Supp. 2d 239, 241 \(D. Conn. 2005\)](#).

[FN38]. *Id.* at 242.

[FN39]. *Id.* at 251.

[FN40]. CHIEF CHILD PROT. ATT'Y, FIRST ANNUAL REPORT 10 (2007), *available at* http://www.ct.gov/ccpa/lib/ccpa/TheFirstAnnualReport_12-3-07.pdf.

[FN41]. *Id.* at 27-28.

[FN42]. *Id.* at 28.

[FN43]. N.Y. County Lawyers' Ass'n v. State, No. 102987/00, slip op. at 3 (N.Y. Sup. Ct. filed Feb. 5, 2003), *available at* <http://www.sado.org/fees/newyorkfeecase.pdf>.

[FN44]. [N.Y. County Lawyers' Ass'n v. State, 742 N.Y.S.2d 16, 21 \(App. Div. 2002\)](#).

[FN45]. *Id.* at 20-22.

[FN46]. N.Y. County Lawyers' Ass'n, No. 102987/00, slip op. at 1.

[FN47]. *Id.* at 10-13.

[FN48]. *Id.* at 15-16.

[FN49]. *Id.* at 2.

[FN50]. [356 F. Supp. 2d 1353 \(N.D. Ga. 2005\)](#).

[FN51]. *Id.* at 1362.

[FN52]. *Id.* at 1359.

[FN53]. *Id.* at 1360.

[FN54]. *Id.* at 1361.

[FN55]. [424 U.S. 319 \(1976\)](#).

[FN56]. [Perdue](#), 356 F. Supp. 2d at 1360 (citing [Mathews](#), 424 U.S. at 334-35).

[FN57]. [452 U.S. 18](#) (1981).

[FN58]. *Id.* at 31.

[FN59]. *Id.* at 27.

[FN60]. See [Battishill v. Ark. Dep't of Human Servs.](#), 82 S.W.3d 178, 180 (Ark. Ct. App. 2002) (Arkansas statutes providing for right to counsel in abuse and neglect proceedings creates due process right in all cases).

[FN61]. According to the *Representation of Children in Court* survey. (October 2004), <http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/Oct2004MtgSurvey.pdf> (table of statutes prepared for NCCUSL as background in drafting the Uniform Act), an attorney--whether acting as a guardian ad litem or attorney for the child--is mandatory in dependency or abuse and neglect cases in Alabama, [ALA. CODE § 26-14-11](#) (LexisNexis 1992); Arizona, [ARIZ. REV. STAT. § 8-221](#)(I) (West 2007); Arkansas, [ARK. CODE ANN. § 9-27-316](#)(f) (LexisNexis 2008); Connecticut, [CONN. GEN. STAT. ANN. § 46b-129a](#)(2) (West 2004); Florida, [FLA. STAT. § 39-822](#) (West 2003); Georgia, [GA. CODE ANN. § 15-11-98](#)(a) (2008); Illinois, [705 ILL. COMP. STAT. § 405/2-17](#) (West 2007) (requires that GAL, if not an attorney, be represented by counsel); Iowa, [IOWA CODE ANN. § 232.89](#)(2) (West 2006); Kansas, [KAN. STAT. ANN. § 38-1505\(a\)](#) (2000); Kentucky, [KY. REV. STAT. ANN. § 620.100](#)(1)(a) (West 2008); Louisiana, [LA. REV. STAT. ANN. § 9:345](#)(B) (2008); Maryland, [MD. CODE ANN., CTS. & JUD. PROC. § 3-813](#)(d)(1) (LexisNexis 2006); Massachusetts, [MASS. GEN. LAWS ch. 119, § 29](#) (West 2008); Michigan, [MICH. COMP. LAWS ANN. § 722.630](#) (West 2002); Minnesota, [MINN. STAT. ANN. § 260C.212](#)(4)(c)(4) (West 2007); Mississippi, [MISS. CODE ANN. §§ 43-21-151](#)(1), [43-21-201](#)(1) (2004); New Hampshire, [N.H. REV. STAT. ANN. § 169-C:15](#) (LexisNexis 2001); New Jersey, N.J. STAT. ANN. § 9-6-8.23 (West 2002); New Mexico, [N.M. STAT. ANN. § 32A-3B-8](#)(C) (LexisNexis 2008) (for children fourteen and older); New York, [N.Y. FAMILY CT. ACT § 249](#) (West 2008); North Carolina, [N.C. GEN. STAT. ANN. § 7B-601](#) (West 2008); Oklahoma, [OKLA. ST. ANN. tit. 10, § 7002-1.2](#)(C) (West 2007); Oregon, [OR. REV. STAT. 419B.195](#)(1) (2007); Pennsylvania, [42 PA. CONS. STAT. ANN. § 6311](#) (West 2007); South Carolina, [S.C. CODE ANN. § 20-7-110](#)(1) (Supp. West 2007); South Dakota, [S.D. CODIFIED LAWS §§ 26-8A-9, -18, -20](#) (2004); Tennessee, [TENN. CODE ANN. § 37-1-149](#) (LexisNexis 2005); Virginia, [VA. CODE ANN. § 16.1-266](#)(A) (LexisNexis 2003); Wisconsin, [WIS. STAT. ANN. § 48.23](#) (West 2008); and Wyoming, [WYO. STAT. ANN. § 14-3-211](#) (2007); see also Peters, *supra* note 9, at app. C (U.S. State-by-State Chart).

[FN62]. Kenny A. *ex rel.* Winn v. Perdue, No. 1:02-CV-1686-MHS, slip op. at 4-6 (N.D. Ga. Feb. 13, 2006) (Consent Decree). The consent decree, along with many other court documents, are available at [http:// childwelfare.net/activities/kennya/](http://childwelfare.net/activities/kennya/).

[FN63]. *Id.* at 6-7.

[FN64]. GOVERNMENTAL SERVS. DIV. CARL VINSON INST. OF GOV'T, CHILD ADVOCATE ATTORNEY REPRESENTATION AND WORKLOAD STUDY 4 (2007).

[FN65]. WILLIAM G. JONES, SECOND FULTON COUNTY KENNY A. REPORT 27 (2008).

[FN66]. *Id.* at 23.

[FN67]. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

[FN68]. *Id.* R. 1.3.

[FN69]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

[FN70]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399, 368 (1996).

[FN71]. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

[FN72]. *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 6.2 (attorneys should not seek to avoid appointment unless there is good cause).

[FN73]. See ABA Formal Op. 06-441, *supra* note 71. But see [Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Hughes](#), 557 N.W.2d 890, 894 (Iowa 1996) (“[I]gnoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility.”).

[FN74]. See ABA Formal Op. 06-441, *supra* note 71; Tenn. Op. Att’y Gen. No 02-107, 2002 WL 31249889 (Oct. 1, 2002); see also [State ex rel. Picerno v. Mauer](#), 920 S.W.2d 904, 910 (Mo. Ct. App. 1996).

[FN75]. *Cf.* STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS AD LITEM (2007), http://www.courts.state.va.us/gal/gal_standards_children.pdf (adopted pursuant to [VA. CODE ANN. § 16.1-266.1 \(LexisNexis 2003\)](#), which does not require attorneys to be full-time child advocates in order to be placed on the list of qualified attorney guardians ad litem); see also [FLA. STAT. ANN. § 39.821 \(West 2008\)](#) (implying that any attorney who is a member in good standing of the Florida Bar may serve as a guardian ad litem and does not have to go through the strict background checks required of others); [KY. REV. STAT. ANN. § 387.305 \(West 2006\)](#) (stating that the only requirement to be appointed a guardian ad litem is that the lawyer “must be a regular, practicing attorney of the court”); [TENN. CODE ANN. § 34-1-107](#) (2007) (stating that the only requirement to be appointed a guardian ad litem is that the lawyer “shall be licensed to practice in the state of Tennessee”); [ILL. SUP. CT. R. 906 \(2004\)](#) (does not require attorney to be a full-time child advocate in order to qualify as a guardian ad litem).

[FN76]. Catherine Greene Burnett, Michael K. Moore & Allan K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 606-07 (2001).

[FN77]. See, e.g., OHIO SUP. CT., REPORT OF THE GUARDIAN AD LITEM STANDARDS TASK FORCE (2002), available at <http://www.sconet.state.oh.us/publications/GAL/finalreport.pdf> [hereinafter OHIO REPORT]. The report was created to address the problems in Ohio regarding guardians ad litem. *Id.* It acknowledged that the prior to this report there was no uniformity amongst local districts. *Id.* The special task force was created to develop recommendations for statewide standards of practice for guardians ad litem, all of which are contained therein. *Id.*

[FN78]. BETSY WRIGHT KREISEL & FRANCES P. REDDINGTON, THE ROLE, TRAINING, USE AND PERCEIVED EFFECTIVENESS OF THE GUARDIAN AD LITEM WHEN USED IN CHILD ABUSE AND NEGLECT CASES IN MISSOURI JUVENILE/FAMILY COURTS 8 (2001) (report prepared for Missouri Governor's Juvenile Justice Advisory Group, copy on file with author).

[FN79]. [42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (Supp. 2007).

[FN80]. *Id.* The statutory scheme requires states to have provisions and procedures for the appropriate training of guardians ad litem but does not specify any standards for such training, effectively leaving it up to the states to decide.

[FN81]. See, e.g., R. SUPERINTENDENCE CTS. OHIO 48 (2009), available at <http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf> (new court rule which sets standards and requirements for persons desiring to become guardians ad litem). The rule is a result of the Final Report by the Ohio Guardian ad Litem Standards Task Force, which was authorized to establish standards. [OHIO REV. CODE ANN. § 2151.281 \(LexisNexis 2007\)](#).

[FN82]. See Mary E. O'Connell & J. Herbie DiFonzo, [The Family Law Education Reform Project: The Family Law Education Reform Project: Final Report](#), 44 FAM. CT. REV. 524, 524-26, 530, 546-47 (2006) (noting the need for more specialized programs in family law and a complete reform of current family law curriculum due to its evolving complexity and nature).

[FN83]. See STANDARDS OF PRACTICE 1996, *supra* note 3, § I-2.

[FN84]. *Id.* § I-1.

[FN85]. *Id.* § I-2.

[FN86]. See, e.g., KREISEL & REDDINGTON, *supra* note 78, at 27.

[FN87]. STANDARDS OF PRACTICE 1996, *supra* note 3, § I-3 cmt.

[FN88]. O'Connell & DiFonzo, *supra* note 82, at 535-36.

[FN89]. Marvin Ventrell, [The Practice of Law for Children](#), 66 MONT. L. REV. 1, 2 (2005) (describing law school programs specializing in child advocacy).

[FN90]. O'Connell & DiFonzo, *supra* note 82, at 528.

[FN91]. *Id.* at 534.

[FN92]. Robert M. Murphy, [Child Protection for the Non-Specialist: A Random Overview of Issues](#), 6 OKLA. B.J. 495, 501 (2004).

[FN93]. STANDARDS OF PRACTICE 1996, *supra* note 3, § I-2(7).

[FN94]. O'Connell & DiFonzo, *supra* note 82, at 534.

[FN95]. [MO. REV. STAT. § 211.462\(3\)\(2\)](#) (2008).

[FN96]. CHARMAINE BRITTAIN & DEBORAH ESQUIBEL HUNT, [HELPING CHILDREN IN PROTECTIVE SERVICES: A COMPETENCY-BASED CASEWORK HANDBOOK](#) 132 (2d ed. 2004).

[FN97]. *In re* Cody T. Walling, No. C-050646, 2006 Ohio App. LEXIS 729, at *13-15 (Ohio Ct. App. Feb. 24, 2006) (error to terminate parental rights without wishes of the child having been expressed either directly or through a GAL).

[FN98]. STANDARDS OF PRACTICE 1996, *supra* note 3, § C-1 (“[I]rrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.”).

[FN99]. See, e.g., ME. R. GUARDIANS AD LITEM app. A § 2.2 (2004) (requires meeting child regardless of age as soon as possible after appointment).

[FN100]. See, e.g., [MO. REV. STAT. § 211.462](#)(3)(2) (2008) (A GAL “shall conduct all necessary interviews with persons, other than the parent, having contact with or knowledge of the child and, if appropriate, with the child.”).

[FN101]. DANIEL P. GALLAGHER, CHILD ABUSE AND NEGLECT CASES IN THE COLORADO COURTS 1996-2000: A REASSESSMENT 2 (2002), available at http://www.cde.state.co.us/artemis/sc1_8/SC92C432002INTERNET.pdf.

[FN102]. OHIO CASA/GAL STUDY COMM., FINAL REPORT: IN THE INTEREST OF ABUSED AND NEGLECTED CHILDREN 18 (2007) (copy on file with author).

[FN103]. *Id.* This discrepancy may indicate either an over-reporting of meetings, or may reflect the fact that attorney GALs do not document all their activities.

[FN104]. *Id.*

[FN105]. See R. SUPERINTENDENCE CTS. OHIO 48(d)(13)(a)-(b) (2009).

[FN106]. See *id.*

[FN107]. MINN. STATE COURT ADM’R, GUARDIAN AD LITEM SYSTEM PROGRAM STANDARDS pol’y 6.03a § V(A)(1) (2007), available at http://www.mncourts.gov/documents/0/Public/Guardian_Ad_Litem/SCAO_Policy_6_03_GAL_Program_Standards.pdf.

[FN108]. STANDARDS OF PRACTICE 1996, *supra* note 3, § A-3 (“‘Developmentally appropriate’ means that the child’s attorney should ensure the child’s ability to provide client-based directions by structuring all communications to account for the individual child’s age, level of education, cultural context, and degree of language acquisition.”).

[FN109]. *Id.* § 1-2(5).

[FN110]. See, e.g., Barbara J. Sturgis, *Interviewing Children: Top Ten Things You Need to Know* (Mar. 10, 2008), http://www.throughtheeyes.org/gal/online_training.php (follow “Interviewing Children” hyperlink). This twenty-seven minute training module on interviewing children is part of the Nebraska online basic training program. Nebraska requires only six hours of training initially, and three hours each year thereafter. NEB. CT. R. § 4-401, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

[FN111]. MO. STANDARDS WITH COMMENTS FOR GUARDIANS AD LITEM IN MISSOURI JUVENILE AND FAMILY COURT MATTERS, Standard 16.0 Training of Guardian Ad Litem (1996), available at <http://www.rollanet.org/~childlaw/galstd/mogalstd.htm>.

[FN112]. KREISEL & REDDINGTON, *supra* note 78, at 27.

[FN113]. Annette Ruth Appell, [Representing Children Representing What?: Critical Reflections on Lawyering for Children](#), 39 COLUM. HUM. RTS. L. REV. 573, 608-09 (2008).

[FN114]. *Id.*

[FN115]. *Id.*

[FN116]. *Id.* at 609-10 (footnotes omitted).

[FN117]. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & CUSTODY PROCEEDINGS ACT § 7 cmt., at 22 (2007), *available at* [http:// www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf).

[FN118]. *Cf.* SUP. CT. MO., STANDARDS WITH COMMENTS FOR GUARDIANS AD LITEM IN MISSOURI JUVENILE AND FAMILY COURT MATTERS, Standard No. 16.0(6) (1997), *available at* <http://www.courts.mo.gov/file/Guardian%20ad%CC201item%20Standards.pdf> [hereinafter MO. STANDARDS].

[FN119]. N.H. CODE ADMIN. R. ANN. GAL 303.02(b)(1)(e) (2008).

[FN120]. *See, e.g.,* ME. R. GUARDIANS AD LITEM II(2)(C)(ii) (2008), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf (the core curriculum does not include training on social, economic or cultural differences).

[FN121]. *See* STANDARDS OF PRACTICE 1996, *supra* note 3, § I-2.

[FN122]. ALASKA CINA R. P. 11(c)(2)(F)-(G) (2008).

[FN123]. Maine's sixteen-hour “core training” requirement is one example. Attendance at the training is mandatory and the curriculum is required to include “interviewing techniques.” ME. R. FOR GUARDIANS AD LITEM II(2)(C)(2)(ii) (2008), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf. Nebraska requires training in “[i]nterviewing skills, regarding both children and adults.” NEB. CT. R. § 4-401 app. A, *available at* <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

[FN124]. OHIO REPORT, *supra* note 77, at Recommendation 9(f). The Task Force recommendations have not yet been codified in Ohio law, though the Ohio Network of Children's Advocacy Centers (ONCAC) delivers training sessions throughout Ohio based on the recommendations. Ohio Network of Children's Advocacy Ctrs, GAL Training Purpose and History, http://www.oncac.org/~oncac/index.php?option=com_content&task=view&id=58 (last visited Jan. 12, 2009).

[FN125]. This is why, for example, ABA accreditation requirements for law school professional skills instruction mandates that this instruction “must engage each student in skills performances that are assessed by the instructor.” ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS Interpretation 302-3 (2008-2009), *available at* <http://www.abanet.org/legaled/standards/standards.html> (follow “Chapter 3: Program of Legal Education” hyperlink).

[FN126]. *See, e.g.,* State Bar of Wisconsin, GAL Training 2008, http://www.wisbar.org/AM/Template.cfm?Section=Guardian_ad_litem&template=/Conference/ConferenceDescription.cfm&ConferenceID=3008.

[FN127]. STANDARDS OF PRACTICE 1996, *supra* note 3, § I-4.

[FN128]. *See* NAT'L ASS'N OF COUNSEL FOR CHILDREN, STANDARDS FOR CHILD WELFARE LAW ATTORNEY SPECIALTY CERTIFICATION (2007) *available at* <http://www.naccchildlaw.org/resource/resmgr/certification/ca-current-12-08.pdf>. These standards require substantial involvement in child welfare cases over the preceding three years, which can be demonstrated by thirty percent of

representation being child welfare practice, or more specific indicia, such as participation in forty-five child welfare matters during the three years preceding the filing of the application. *Id.* § 2.2, 2.2.1. In addition, certification requires peer review and testing on substantive law. *Id.* § 2.3, 2.4. Three states, California, New Mexico and Michigan currently accept this program certification. See NACC Child Welfare Law Certification, State Status Chart (January 1, 2008), <http://www.naccchildlaw.org/> (follow “Certification” hyperlink; then follow “State Status Chart” hyperlink).

[FN129]. See NAT’L ASS’N OF COUNSEL FOR CHILDREN, *supra* note 128, § 2.

[FN130]. *Id.*

[FN131]. N.H. GUARDIAN AD LITEM BD. ADMIN. R. 303.02(b)(2), *available at* <http://www.gencourt.state.nh.us/rules/ga1300.html>.

[FN132]. ARK. ADMIN. ORDER 15, § 1(c), *available at* <http://courts.state.ar.us/juvenile/AAL%20Docs/PDF/10b%20ADMINISTRATIVE%CC20ORDER%CC20NUMBER%C.pdf>. The following hearings require an experienced attorney: Emergency; Adjudication/Disposition; Review; Permanency Planning; and Termination of Parental Rights. *Id.*; see also VA. JUD. SYS., STANDARDS TO GOVERN THE APPOINTMENTS OF GUARDIANS AD LITEM, Standard C, http://www.courts.state.va.us/gal/gal_standards_children.pdf (requiring participation or assistance in related cases in the two year period preceding application).

[FN133]. CHIEF CHILD PROT. ATT’Y, *supra* note 40, at 8.

[FN134]. STANDARDS OF PRACTICE 1996, *supra* note 3, § I-2(8).

[FN135]. Jane Aiken & Stephen Wizner, [Law as Social Work](#), 11 WASH. U. J.L. & POL’Y 63, 63 (2003).

[FN136]. [620 N.W.2d 268 \(Iowa 2000\)](#).

[FN137]. *Id.* at 269-70.

[FN138]. *Id.* at 269.

[FN139]. *Id.*

[FN140]. See KREISEL & REDDINGTON, *supra* note 78, at 35-36. Missouri’s attorneys appointed for children serve a hybrid role. *Id.*

[FN141]. This was described as a responsibility by judges most: judges (95.9%); GALs (78.3%); and CASAs (76.7%). *Id.* at 36.

[FN142]. This was described as a responsibility by the highest total percentage of all three groups: judges (93.9%); CASAs (95.3%); and GALs (80.1%). *Id.* at 37.

[FN143]. This was more often described as a responsibility by CASAs (95.3%) than by either judges (89.8%) or GALs (77.4%). *Id.*

[FN144]. See *id.* at 35-36.

[FN145]. *Id.* at 36.

[FN146]. 62.9% of GALs, 81.4% of CASA, and 69.4% of judges believed that developing a relationship with the child was a responsibility. *Id.* 48.1% of GALs, 95.3% of CASAs, and 63.3% of judges believed that maintaining regular contact with the child was a responsibility. *Id.*

[FN147]. GALs (75.4%); CASAs (94.2%); and judges (79.6%). *Id.*

[FN148]. GALs (67.4%); CASAs (82.6%); and judges (83.7%). *Id.* at 37.

[FN149]. GALs (27.6%); CASAs (52.3%); and judges (24.5%). *Id.*

[FN150]. *Id.* at 55.

[FN151]. *Id.* at 8. The survey found that, while attorneys believed training in family and domestic violence, cross-cultural issues, and community resources and services were among the most important information they could receive, the training quality in these areas was very poor. *Id.* at 48. In fact, overall training quality was such that “not even one individual training topic received higher than [a] 71.5 percent rating in the excellent and good category.” *Id.*

[FN152]. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 9 (2006), http://lawrecord.typepad.com/rutgers_law_record/files/Law_Record_Spring_Article_1_2006.pdf.

[FN153]. *Id.* at 4.

[FN154]. *Id.* at 72 (“Involving individuals from different disciplines in the training and ongoing education for all players in the system will also enhance the likelihood of collaboration.”).

[FN155]. W. VA. CODE ANN., § 49-6-2(a) (LexisNexis Supp. 2008).

[FN156]. WIS. STAT. ANN. § 757.48(1)(a) (West Supp. 2B 2008).

[FN157]. NEB. CT. R. § 4-401, available at <http://www.supremecourt.ne.gov/rules/pdf/Ch4Art4.pdf>.

[FN158]. SUP. CT. OF KAN., ADMIN. ORDER NO. 100 (2001), available at <http://www.kscourts.org/kansas-courts/supreme-court/administrative-orders/Admin-order-100.pdf>.

[FN159]. OHIO REPORT, *supra* note 77, at Recommendation 8(a).

[FN160]. OFFICE OF THE CHIEF JUSTICE, SUP. CT. OF COLO., COURT APPOINTMENTS THROUGH THE OFFICE OF THE CHILD'S REPRESENTATIVE, Chief Justice Directive 04-06 (2006), available at http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-06.pdf.

[FN161]. MO. STANDARDS, *supra* note 118, at Standard No. 16.0.

[FN162]. N.H. ADMIN. R. Gal 303.02, available at <http://www.gencourt.state.nh.us/rules/gal300.html>.

[FN163]. ME. R. FOR GUARDIANS AD LITEM II(2)(C)(2)(ii) (2008), available at http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf.

[FN164]. NAT'L CASA ASS'N, STANDARDS AND QUALITY ASSURANCE SYSTEM FOR LOCAL CASA/GAL MEMBER PROGRAMS (May 2006), http://www.nationalcasa.org/JudgesPage/Resource_ExeStandardsSummary.htm (last visited Jan. 12, 2009).

[FN165]. *Id.*

[FN166]. CAPTA requires each state to have in place provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings--(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child[.]

[42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (Supp. 2007).

[FN167]. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2008).

[FN168]. See, e.g., [Veazey v. Veazey](#), 560 P.2d 382, 390 (Alaska 1977); *In re Marriage of Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988) (approving attorney's conduct in recommending against following the child's wishes), *cert. denied*, 490 U.S. 1021 (1989); *In re Marriage of Rolfe*, 699 P.2d 79, 86 (Mont. 1985).

[FN169]. MODEL RULES OF PROF'L CONDUCT R. 1.6.

[FN170]. This may be required by state statute. See, e.g., [DEL. CODE ANN. tit. 29, § 9007A\(c\)](#) (2003) ("The attorney guardian ad litem's duty is to the child. The scope of the representation of the child is the child's best interests. The attorney guardian ad litem shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child's best interests."); see also *In re Christina W.*, 639 S.E.2d 770, 778 (W. Va. 2006) ("[W]hile a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren]."); Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1792 (1996).

[FN171]. See Peters, *supra* note 9, at app. C.

[FN172]. *Id.*

[FN173]. Emily Buss, "[You're My What?](#)" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1703-05 (1996).

[FN174]. ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEPT' OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008 (14) (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf.

[FN175]. Buss, *supra* note 173, at 1703-05.

[FN176]. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2008).

[FN177]. *Id.* R. 1.13.

[FN178]. *Id.* R. 1.14(b). The Rule states:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Id.

[FN179]. *See, e.g.,* [Cok v. Cosentino](#), 876 F.2d 1, 3 (1st Cir. 1989) (per curiam); [Myers v. Morris](#), 810 F.2d 1437, 1465 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987); [Kurzawa v. Mueller](#), 732 F.2d 1456, 1458 (6th Cir. 1984); [Widoff v. Wiens](#), 45 P.3d 1232, 1235-36 (Ariz. Ct. App. 2002); [Kennedy v. State](#), 730 A.2d 1252, 1255 (Me. 1999) (quoting *State ex rel Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993)); [Tindell v. Rogosheske](#), 428 N.W.2d 386, 387 (Minn. 1988).

[FN180]. A central tenet of advocacy under the 1980 ABA Model Code was “[a] lawyer should represent a client zealously within the bounds of the law.” MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980). The ABA removed the language of “zealous advocacy” from the text of the rules, focusing on diligence and competence instead; but, the preamble to the rules still does mention zealous representation. ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, Preamble ¶¶ 8-9 (2008). Comment 1 to the rule on diligence indicates that zealous advocacy is an aspect of diligent representation, though noting that “[a] lawyer is not bound ... to press for every advantage that might be realized for a client.” MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

[FN181]. MODEL RULES OF PROF'L CONDUCT R. 3.7(a).

[FN182]. *See id.* R. 1.2(a).

[FN183]. ME. R. GUARDIANS AD LITEM R. I(B) (2008), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf.

[FN184]. *See* NAT'L CASA ASS'N, MAKE A LIFELONG DIFFERENCE FOR A CHILD (May 2006), http://www.nationalcasa.org/about_us/index.html (last visited Jan. 12, 2009).

[FN185]. ME. R. GUARDIANS AD LITEM R. I(B) (2008), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf.

[FN186]. MODEL RULES OF PROF'L CONDUCT R. 4.2.

[FN187]. [State ex rel. Children, Youth & Families Dep't v. George F.](#), 964 P.2d 158, 163 (N.M. Ct. App. 1998).

[FN188]. *Id.* at 160.

[FN189]. *Id.* at 163.

[FN190]. *See, e.g.,* WASH. SUP. CT. GUARDIAN AD LITEM R. 4(a) (requiring permission of attorney for represented persons), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf.

www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=supgalr4&pdf=1; *see also* D.C. Bar, Ethics Op. 295 (2000), *available at* http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion295.cfm; NYSBA Comm. on Prof'l Ethics, Op. No. 656 (1993), 1993 WL 555956 (citing similar ethics opinions from Wisconsin, Arizona, and North Carolina).

[FN191]. MODEL RULES OF PROF'L CONDUCT R. 4.2 (indicating that the prohibition on communication applies "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order").

[FN192]. *Id.* R. 8.4.

[FN193]. *In re Whitney*, 120 P.3d 550, 555-56 (Wash. 2005) (en banc).

[FN194]. *Id.* at 554.

[FN195]. *Id.* at 556 (quoting *In re Huddleston*, 974 P.2d 325, 334 (Wash. 1999) (en banc)).

[FN196]. *See, e.g., Marquez v. Presbyterian Hosp.*, 608 N.Y.S.2d 1012, 1017 (Sup. Ct. 1994).

[FN197]. *See, e.g., In re B.B.B.*, 393 N.W.2d 436, 437 (Minn. Ct. App. 1986).

[FN198]. *See, e.g., OR. REV. STAT. § 419A.170*(4) (2007) (providing qualified immunity to court appointed special advocate for acts in good faith within scope of duties); *Marquez*, 608 N.Y.S.2d at 1018 (holding that law guardian is entitled to qualified immunity).

[FN199]. *See, e.g., Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam); *Myers v. Morris*, 810 F.2d 1437, 1467 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984); *Carrubba v. Moskowitz*, 877 A.2d 773, 782 (Conn. 2005); *Sarkisian v. Benjamin*, 820 N.E.2d 263, 266 (Mass. App. Ct. 2005); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 386 (Mo. Ct. App. 1993); *Billups v. Scott*, 571 N.W. 2d 603, 607 (Neb. 1997); *Fleming v. Asbill*, 483 S.E.2d 751, 754-55 (S.C. 1997); *Delcourt v. Silverman*, 919 S.W.2d 777, 786 (Tex. App. 1996), *cert. denied*, 520 U.S. 1213 (1997); *Paige K.B. v. Molepske*, 580 N.W.2d 289, 295 (Wis. 1998). *But see MD. CODE ANN., FAM. LAW § 1-202*; *Fox v. Wills*, 890 A.2d 726, 729, 733 (Md. 2006) (holding "child advocate attorney" and "best interest attorney" to a standard of ordinary care and diligence).

[FN200]. *Weinstock*, 864 S.W.2d at 386 (citing *Ward v. San Diego County Dep't of Social Servs.*, 691 F. Supp. 238, 240 (S.D. Cal. 1988)).

[FN201]. *Id.* at 386.

[FN202]. KREISEL & REDDINGTON, *supra* note 78, at 36-37.

[FN203]. *Id.*

[FN204]. *Id.*

[FN205]. *Id.*

[FN206]. CHRIS MELONAKIS & WILLIAM DELISIO, A REPORT TO THE CHIEF JUSTICE OF THE COLORADO SUPREME COURT PURSUANT TO CHIEF JUSTICE DIRECTIVE 98-02 14 (2003).

[\[FN207\]](#). *Id.* at 14-15.

[\[FN208\]](#). *Id.* at 14.

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