



JOURNAL

JOURNAL OF THE CENTER FOR CHILDREN AND THE COURTS

VOLUME I ❖ 1999

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The *Journal of the Center for Children and the Courts* is a periodical dedicated to publishing a full spectrum of viewpoints on issues regarding children, families, and the interplay between these parties and the courts. Focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.

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Editor's Note

The Judicial Council of California is pleased to present the first issue of the *Journal of the Center for Children and the Courts*. The Center has been dedicated to the task of improving court proceedings involving children and families since its inception in 1997. The creation of the journal was one of the first tasks undertaken by the Center to achieve this goal. The journal was conceived to provide information concerning children and families in the California court system in a scholarly and educational format. Although focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.

The journal's editorial board is composed of a distinguished group of judges, academics, attorneys, and others from across the United States interested in improving court proceedings for children and families. The journal will be published annually, with each issue addressing a specific area within the judicial process affecting children and families.

This issue examines representation of children in its broadest sense. Representation of children affects children in all types of court proceedings, whether the child is in dependency

This issue examines representation of children in its broadest sense.

court, the subject of a custody dispute, the victim in a criminal matter, or the alleged perpetrator of a crime. Representation is also a timely subject. Recently the American Bar Association, the American Academy of Matrimonial Lawyers, and Fordham Law School devoted time and resources to develop representation standards or hold a symposium on the subject.

To gain a greater understanding of the various facets involved in the representation of children, the journal has compiled articles from a variety of people who have participated in the process, from attorneys and judges to children who have experienced the system. The articles address such topics as funding, the role of attorneys (both as advocates and prosecutors), and the historical development of children's representation.

First, to shed some light on the child's perspective, former foster child Johnny Madrid relates his personal experience in the courts and offers suggestions on how to better the process. Next, Donald C. Bross addresses the evolutionary development of independent representation. William Wesley Patton analyzes the role of children's counsel in dependency cases, and Jennifer Walter discusses the dynamics and future outlook of independent representation for children in the courts. Michael S. Piraino and Meghan Scahill assess the roles of other key participants in dependency proceedings: Court Appointed Special Advocates and prosecuting attorneys.

We next turn to Jan C. Costello, who addresses the unique issues that arise from proceedings involving children with mental disabilities. Finally, Comm. Josanna Berkow analyzes the responsibilities of lawyers who are representing children in family court.

The second section of the journal is a forum for addressing important and timely issues that are relevant to children and families in the court system but fall outside the focus topic of representation. In this issue Barbara Kaban and Ann E. Tobey consider the challenges of preserving constitutional rights when police interview children. Stephen P. Herman focuses on child custody evaluations and how to maintain standards for those evaluating children, while Judge Donna Petre examines the coordination of the proceedings involving children and families in order to create a unified family court. Finally, in the Perspectives section of the journal, Judge Steven J. Howell offers his experience as a judge in a coordinated family court, and Amariche Hawkins contributes his perspective as a foster child in the system.

We hope that this journal offers provoking perspectives while serving as a useful information and research tool. We look forward to continuing this important endeavor and welcome your comments and suggestions for improvement.



—Audrey Evje

Contributors

Hon. Josanna Berkow has served as a commissioner in the Superior Court of California, County of Contra Costa for over six years. She hears cases involving child custody and visitation, child and spousal support, division of marital property and debts, and domestic violence. Before taking the bench, Commissioner Berkow was a California deputy attorney general handling both criminal and family law appeals. The Attorney General appointed her statewide coordinator for child support and child abduction in 1987. Commissioner Berkow has also worked as a prosecutor and hearing officer for the federal labor relations authority and as staff counsel for U.S. Senator Paul Sarbanes (D-Md.).

Donald C. Bross is a professor of pediatrics (family law) at the University of Colorado School of Medicine, and director of Education and Legal Counsel for the C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect. Since being appointed to the faculty in 1976, he has represented maltreated children in court, drafted child protection legislation, and helped establish the National Association of Counsel for Children. He works clinically with the Children's Hospital/UCHSC Child Protection Team, the State and Regional Team Against Crimes on Children, and the Clinical Resource Center on Child Abuse. He has published on the law and ethics of child advocacy, child development and the law, confidentiality, medical care neglect, perinatal drug exposure, termination of the parent-child legal relationship, medical documentation for court, evidence of child abuse or neglect, and treatment of child abuse and neglect.

Jan C. Costello is a professor of law at Loyola Law School, Los Angeles. She teaches and writes in the areas of children and the law, mental disability law, and family law. She received her B.A., M.A., and J.D. from Yale University and, before joining the Loyola faculty in 1983, practiced public-interest law for seven years, representing children in the juvenile justice system and people with mental disabilities. She was chair of the State Bar of California Standing Committee on Legal Rights of Disabled Persons from 1983 to 1987, and chair of the Association of American Law Schools Section on Law and Mental Disability from 1989 to 1990. She sits on the boards of Mental Health Advocacy Services, Inc., and the Western Law Center for Disability Rights.

Amariche Hawkins is a former foster child who knows firsthand the difficulties of growing up as a dependent of the court. Despite the lack of positive role models and feelings of insecurity and degradation, Hawkins managed to locate mentors who helped him set priorities in his life and gain a sense of responsibility for his future. He is currently attending Grambling State University, where he plans to study criminal justice and also play football.

Stephen P. Herman is an associate clinical professor of psychiatry at the Mount Sinai Medical Center in New York City. He specializes in forensic child and adolescent psychiatry and practices in New York and Connecticut. He is board certified in forensic psychiatry. He is the principal author of *Practice Parameters for Child Custody Evaluation*, published by the American Academy of Child and Adolescent Psychiatry, and the author of *Parent vs. Parent—How You and Your Child Can Survive the Custody Battle* (Pantheon 1990).

Hon. Steven J. Howell has been a judge in Butte County since 1987. Originally appointed to the municipal court, he was elevated to Butte County's superior court in 1996. He is a past member of the Judicial Council of California (1993–1996). He currently is the juvenile judge for Butte County and has presided over the Butte County unified family court since June 1998. He has been active in launching and participating in H.O.P.E. (Helping Organize Parents Effectively), Butte County's unified family court program.

Barbara Kaban is a staff attorney at the Children's Law Center in Massachusetts. Most recently she was a recipient of a 1998 Soros Justice Fellowship. Ms. Kaban graduated *magna cum laude* from Boston College Law School and has an M.B.A. degree from Boston University and an M.Ed. degree in educational psychology from Harvard University. Ms. Kaban provides direct representation to children and youth in delinquency, Children in Need of Supervision (CHINS), and educational matters. She has coauthored three books in developmental psychology, authored a book on the selection of developmentally appropriate toys for children, and published over a dozen articles in newspapers and magazines such as the *New York Times* and *Harvard Magazine*.

Johnny Madrid began his seven-year odyssey in foster care at age 10 with his mother's death in a car accident. He has lived in 19 different Los Angeles–area homes (both in and out of foster care), both “the worst . . . and one of the best (the last one).” This year he graduated *magna cum laude* from Notre Dame High School, where he received the Cardinal Manning School Service Award and “Man of the Year” Award. He is now attending Stanford University and hopes to become a lawyer in public service. Madrid is an active member of the California Youth Connection.

California Youth Connection (CYC) is a unique nonprofit advocacy organization for foster youth that is built on the principles of youth empowerment. The CYC strives to improve the foster-care system by creating a voice for youth who are, or have been, the true “consumers” of our child welfare services. CYC works on the state and local level to educate legislators and policymakers about how policies and programs actually affect children. If you would like more information about California Youth Connection, please call the statewide office at 800-397-8236.

William Wesley Patton is a professor of law at Whittier Law School, where he has served as the director of the Center for Children's Rights since its inception in 1995. Professor Patton teaches juvenile law and juvenile trial advocacy. Prior to teaching at Whittier Law School, Professor Patton served as a state public defender, specializing in representing juveniles in the California appellate courts. During his four years of teaching at University of California, Los Angeles School of Law, he supervised students who represented parents in the Los Angeles dependency courts. He has spoken on the child dependency system at numerous annual meetings of the Association of American Law Schools (AALS), at the Annual AALS Clinical Conference, and at the Los Angeles Dependency Court annual conference, *A New Beginning for Partnerships for Children & Families in Los Angeles County*.

Contributors, continued

Hon. Donna M. Petre was appointed in 1989 to the Superior Court of California, County of Yolo. She has been nationally recognized for her court innovations, including an award from the Foundation for Improvement of Justice, Atlanta, Georgia. Judge Petre was recently recognized by the California Legislature as “Woman of the Year” for the 4th District and the recipient of a Kleps Award from the Chief Justice of California. After graduating from Hastings Law School in 1976, she worked as deputy attorney general in San Francisco and Sacramento. In 1999 she was appointed to the Judicial Council’s Family and Juvenile Law Advisory Committee. She is co-presiding judge of Yolo County’s unified family court.

Michael S. Piraino has been chief executive officer of the National Court Appointed Special Advocate Association for four years. In addition to teaching and practicing law, he has been a guardian ad litem for children, a consultant to international child advocacy organizations, and a staff member of the National Center for Children in Poverty at Columbia University. He has authored several publications and is a frequent speaker on children’s issues.

Meghan Scahill is a research assistant for the National Center for Juvenile Justice, where she is responsible for authoring reports on topics in juvenile justice and child welfare and provides research assistance for other projects conducted by the center. She graduated from the University of Pittsburgh School of Law after earning a B.A. in anthropology and sociology from the State University of New York (SUNY) at Buffalo.

Ann E. Tobey is a clinical psychologist who obtained her B.S. from the University of Alaska at Fairbanks and her Ph.D. from the State University of New York at Buffalo, where she conducted research with Dr. Gail Goodwin on children’s memory and suggestibility in legal contexts. Dr. Tobey completed a one-year postdoctoral fellowship at the Massachusetts General Hospital/Harvard Medical School’s Children and the Law Program. She is currently the staff psychologist at the Roxbury Defender’s Youth Advocacy Project, an innovative program that focuses on a contextual approach to representing youth in the juvenile justice system. Dr. Tobey is also a clinician at the Children’s Charter, Inc., where she conducts forensic evaluations involving matters of custody, visitation, and parental fitness. Her most recent publication stemmed from research on juvenile trial competence conducted with the MacArthur Foundation’s Program on Juvenile Justice.

Jennifer Walter is supervising attorney of juvenile projects at the Center for Children and the Courts, Judicial Council of California. Before joining the Center, she was directing attorney of Legal Advocates for Children and Youth, a nonprofit law office in San Jose, California, providing free legal services to children in Santa Clara County. She began her legal career as staff attorney at Legal Services for Children in San Francisco. She also serves on the State Bar of California’s Committee on Justice for Children. Ms. Walter received her law degree from the University of San Francisco Law School and her bachelor’s degree in linguistics from the University of California at Berkeley.

REPRESENTATION
OF CHILDREN



Photograph by Jonathan Alcorn

Essay

My Court Experience

Johnny Madrid

The court experience is another branch in the lives of foster youth—a branch amidst a forest that we’re supposed to muddle through and map out.

Let’s be frank: Foster youth are seen as burdens to society. It’s not said, but it’s felt. If we weren’t, good people would be popping out of every corner to take care of us, we would never feel that our faces carried dollar-bill signs, and we wouldn’t need to be skilled survivalists. But the fact is, we live in placements on a beds-available basis, we’re the new industry of the 20th century, and our survival instincts are keener than those of seasoned soldiers on enemy land.

We are “taken care of” because we are categorized as “children,” and negative media coverage, ACLU lawsuits, political suicide, and overwhelming guilt lie on the other side of the fence for the American culture. Slap a bunch more years on us and we become a different, more acceptable, kind of societal burden, homeless ones. Nobody wants to feel like a burden. Why do many older people feel dejected and rejected? Because many of us treat them like burdens. This is the type of culture that many foster youth must experience. Why do I mention this? Because the court experience is far from the least factor creating this culture for foster youth. When a judge looks down at me from a court stand, he’s not seeing Johnny Madrid, a breathing, vibrant youth that could be his own son; he sees case number 32 with 47 more to go for the day. The system makes people lose the compassion and caring they may have had when they came into it. Nobody has time for foster youth.

“Blook gai ki jak shimbladoo dee sot garka bloop, so, Johnny, det feir guit mitsa desda doo dee. Reunification tuty blur tohaset blek tekk dee sot permanent placement. Glak ke fot doa kee delotis da. Any questions?” Sure, where’s the translator?

There I was, a little kid, still a tad naive about the workings of the adult world, listening in court as my fate was pronounced in High English. I sat there and nodded my head as if I knew what was going on. I remember the scene well: big room (almost like the ones I’ve seen on TV), many people I didn’t know, a

judge talking down to me from an elevated desk-type thing, and a sense of rushing. I felt eerie and intimidated in court, as if it were a big machine that I was being fed and crunched through.

Court sophistication sent me into a whirl of bewilderment. I wished my lawyer had taken the time to walk me step by step through comprehending what was happening to me legally, in and out of court. She was nice and I felt that she was on my side, but I could tell that she was busy as heck and didn't have time for me. She couldn't be the helping resource and contact for me in the system. The three to five minutes that I saw her before a court hearing wasn't enough. Presently I work at a law firm, so I have a feeling of how attorneys should treat clients. Of course, foster youth don't pay, but does the issue always have to be about money? Having grown up in a "low-income," traditionally Hispanic home, I'd never have dreamed of being able to say, "I have a lawyer." But the beautiful luster of those four words was dulled by the lack of quality interaction between my lawyer and me.

Now that I'm a die-hard member of the California Youth Connection (CYC), a foster youth advocacy organization composed of foster youth throughout California, I very much know my various rights and responsibilities, but before I joined I knew squat. It would have been helpful if somebody would've explained to me the meaty words of *Legal Rights of Teens in Out-of-Home-Care* by the Youth Law Center. Knowing my rights would've been the best gift anybody could've given me to help me help me. If I had known that I could officially file complaints against my placement or social worker, I'd have nailed several very lousy ones.

For the most part, many of my social workers never encouraged me to go to court. "You don't have to be there," they'd say. I accepted this wholeheartedly because I didn't like going to court. But on the other hand, I didn't know that it was in court that all the big decisions were made. For me to voice myself in court was another way to sway the lean of my fate in the system, but I didn't know that.

Earlier this year a group of CYC members and I discerned our top five desires from our court attorneys. We sent a letter listing them to Ed Gilmore, the head of Los Angeles's Dependency Court Legal Services firm (DCLS). The following are the desires:

1. Foster youth want to be treated as paying clients rather than as another number among DCLS attorneys.
2. Foster youth want attorneys to explain what the judges are saying during court.

3. Foster youth want to be contacted a week before their court appointments.
4. Foster youth want more face-to-face and telephone communication with their attorneys.
5. Foster youth want to be involved in training attorneys about the foster system.

The problem with attorney-youth relationships, and ultimately one of the big problems of the whole court experience, is that attorneys are overloaded and are given limited resources. How can they be expected to effectively do all of the above, secure youth legal entitlements, and advocate for youth needs with the hundreds of cases they have? Simple—they don't. It can't get much better than dealing with files, returning some calls, and rapidly preparing for each court session. In such an atmosphere, lawyers, just like social workers, get jaded by the system and lose motivation. Who wouldn't?

The solution is to bring back their fire and motivation. Significantly decrease the quantity of their case-loads and significantly increase their resources. Let them have the possible joy of getting to know their clients. For as Ghandi says, "Service can have no meaning unless one takes pleasure in it. Service which is rendered without joy helps neither the servant nor the served. But all other pleasures and possessions pale into nothingness before service which is rendered in the spirit of joy." Of course, my solution means more money will be needed, which means politics, which is a whole slew of issues alone. And in that mess, the foster youth are surely, as always, to be forgotten. What a crazy world we live in!

The Evolution of Independent Legal Representation for Children

The theory of evolution includes three concepts: increased complexity, differentiation, and adaptation. A dictionary definition of “evolution” describes it in terms of “[a] process of change in a certain direction: UNFOLDING ... (or) a process of continuous change from a lower, *simpler*, or worse to a higher, more *complex*, or better state: GROWTH” (italics added).¹ But the dictionary definition conflicts with the meaning given by professional students of evolution. Complexity in life is perhaps “primary and irreducible,” but complexity does not necessarily mean that progress has occurred in the plant and animal kingdoms. In the life sciences, the presence of complexity indicates only that enough time has passed so that simpler forms of life can be clearly separated from more complex forms. However, evolutionary change in human society unfolds in a different manner, with the outcome difficult to foresee. Stephen J. Gould observes, “Natural evolution includes no principle of predictable progress or movement to greater complexity. But cultural change is potentially progressive or self-complexifying.”²

A common factor in both natural evolution and the development of human culture is the necessity for adaptation. Adaptation is “modification that ... makes (something) more fit for existence under the conditions of its environment.”³ Based on the assumption that child representation can be defined by objective criteria as a distinct field of practice, a crucial question for child representation is whether it is adapting to the world in ways that predict a future need for the work.

The representation of incompetents, which children are considered to be in the legal context, has been developed in English and American common law over hundreds of years. However, *In re Gault*⁴ and the federal Child Abuse Prevention and Treatment Act (CAPTA)⁵ created favorable conditions for the rapid growth and change of independent legal representation of children⁶ in the United States beginning in 1967. The subject of this essay is whether the favorable conditions for increased complexity, differentiation, and adaptation of independent representation for children⁷ have produced an enlarged field of practice.

Assuming there has been a significant development of independent representation for children, it must be asked if this development is reflected in improvements in the courts, in the law of childhood, and outcomes for children. Looking toward the future, we can only speculate on the continued evolution of independent representation. Nevertheless, it is possible to consider the presence or absence of conditions likely to foster the survival and future evolution of independent representation for children.

DEVELOPMENT OF COMPLEX AND DIFFERENTIATED CHILD REPRESENTATION

The advantage of using an “evolutionary” framework for analysis is that it encourages recognition of both diversity and similarity during periods of change. All life on Earth is defined by the capacity for procreation, but the means for procreation are



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The last 30 years have seen considerable growth in the representation of children, especially maltreated children. Laws, and consequently cases, have become more complex, and lawyers have specialized their practices. The representation of children charged with crimes has expanded dramatically as well; however, its quantity and quality seems to be deteriorating, and many hard questions about all forms of independent representation of children must be asked and answered. The response to these questions will determine the survival of child representation as an identifiable legal contribution to the welfare of children.

In this article, Dr. Bross places these issues in an evolutionary framework, examining the growth of children's representation through the concepts of increased complexity, differentiation, and adaptation. The article was funded by a grant from the Foundation for Child Development to the American Bar Association's Fund for Justice and Education. It was presented on April 9, 1999, at the Ninth National Conference on Children and the Law, ABA Center on Children and the Law, Washington, D.C., and was revised for publication here. ■

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amazingly varied. The legal needs of children are both similar and remarkably diverse, and the evolution of child representation has followed many different paths. For example, child representation involves advocacy for clients with extremely diverse legal risks, including delinquency, divorce, maltreatment, special needs education, human experimentation, mental health, free speech, and emancipation. However, even though children have quite varying ethnic, racial, genetic, environmental, and historical backgrounds, in the shared "minority" of their age all children with unmet legal needs are united and, thus, similar.

An issue with employing an evolutionary theory to evaluate the independent representation of children is the need to recognize how its practitioners are influenced by the type of children they represent (*e.g.*, preverbal infants or articulate adolescents), and especially by the age of the client. Just as those who specialize in the evolutionary science of shells must be aware of broader issues and trends, an attorney should be aware of the other areas of child representation. Those who represent older, verbal children can often adapt their experience with adult clients with little or no change in their approach. For clients who are not able to provide instructions on the desired course of representation because of a particular condition of mental illness, infancy, or disability, lawyers must rely on other resources and expertise.

Another consideration about the evolutionary approach is the asynchronous nature of a developing field of practice: progress can be made in one form of representation for one category of client, while response to the needs of others declines.

EVIDENCE FOR A "DISCIPLINE" OF INDEPENDENT LEGAL REPRESENTATION OF CHILDREN

In comparison with other forms of legal representation, it can be shown that most lawyers identify the representation of children as requiring an additional set of skills and competencies because the legal interests of children contain the potential for complexity and differentiation. When one is determining whether a field of human endeavor can be described as adequately contributing favorably to humanity, one obvious question is whether or not there is an associated, definable, and separate vocation of serious research, study, or discipline encompassing the work in question. Successful disciplines are self-sustaining and contribute to the evolution of thought and practice in a defined area. Lawyers and nonlawyers have represented children for a long time, but this does not necessarily prove that any special field of practice focusing on children in fact exists. Moreover, practicing criminal, probate,

or family law with children's representation as a component does not necessarily indicate that there is some form of subspecialty of practice with a primary focus on children or that such a subspecialty would be beneficial.

Measures of "discipline" and "professionalism" include the development of nomenclature, self-regulation, and resource control. Nomenclature, or a specialized "list of words," develops within such separate systems as science, art, and the professions. Current words or terms for children's advocates include "child's lawyer," "guardian ad litem," "lawyer for the guardian ad litem," "Court Appointed Special Advocate" (CASA), "lawyer for the CASA," "guardians ad litem who are lawyers," and "legal counsel for children." Debates regarding whether proper representation of children should be based upon the "client's direction," "best interest," "substituted judgment," some combination of these perspectives, or on another basis are ongoing. These terms indicate not only a developing nomenclature for child representation, but also the increasing complexity and differentiation in conceptualizing what child advocacy represents. Even seemingly well-understood terms such as "representation" and "advocacy" have acquired new meaning in the crucible of these discussions. All these issues relate to the question of "roles" in representation and, eventually, to the question of regulation of roles.⁸

Self-regulation is a mark of professionalism. With respect to child representation, standards of practice, guidelines, and training have proliferated to a great extent over recent decades. The American Bar Association (ABA) contributed early in the process through the Model Code of Professional Responsibility and the Institute of Judicial Administration Standards.⁹ More recently, the ABA House of Delegates approved Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.¹⁰ A major conference held at Fordham University School of Law allowed full discussion of the issues in 1995.¹¹ The lack of consensus among children's representatives and those appointing the representatives contributes to the ambiguous identity of the discipline. The inability to have a consensus also allows for criticism that progress is not being made in child representation. However, the continuing investment of thought and energy can also be considered a strong indication of the field's vigor.

The extent to which representation has been formally organized in cases of dependency, divorce, probate, mental health, education, and delinquency offers another test of the evolution of independent legal representation. With increased complexity and differentiation, organization of work performed, the definition of role boundaries, and systems of representation become available for analysis. An inventory of organizational work settings for independent legal representation of children reveals an increase

in the different models of representation since 1967. Individual practice continues, whether in solo settings or as part of larger practices. Child representation can be the main focus of the practice, a part of the practice, or largely an ancillary pro bono publico effort.

Governmental offices of child representation have developed slowly in the United States, primarily in the offices of the public defender. In the United States the focus of most governmentally supported child representation remains delinquency. This is in contrast with Canada's Office of Official Guardian, which provides representation for children in a broad range of civil cases, including divorce custody disputes, maltreatment, mental health commitment, toxic torts, and property.¹² The Massachusetts Office of Child Advocacy performs some of the same functions as the Official Guardian's office in Canada but does not appear to be litigation-focused.

Independent legal clinics have arisen in many jurisdictions in the United States. Law schools sponsor some legal clinics, and they vary in their focus on delinquency, juvenile justice, or dependency.¹³ Courts in many of the nation's jurisdictions have also promoted participation by nonlawyers. The first Court Appointed Special Advocate (CASA) program was created by a judge from the state of Washington. Along with the recent professional development of child advocacy, CASA programs have been strongly established in a majority of the states, especially where the bar defaulted on developing programs of independent legal representation for maltreated children. Whether or not the CASA programs historically developed as a substitute for attorney programs, CASAs seem generally stronger in states where lawyers are less involved with children.

Only New Hampshire and Wisconsin have managed to establish statewide law requiring independent representation of children in divorce custody disputes. By 1988, six states explicitly required appointment of independent legal representatives for child victims in criminal proceedings.¹⁴ More recently, U.S. law extended the right to federal proceedings.

Support or membership organizations are another important sign of developing identity and differentiation within a field of practice. The National Association of Counsel for Children (NACC) was formed in 1977 and remains the only national membership organization whose sole purpose is to advance the legal interests of children in all areas of the law. The National Association of Court Appointed Special Advocates (NACASA) supports volunteers who work for maltreated children in the court system. The ABA Center on Children and the Law (ABA Center), celebrating its 20th anniversary in 1999, has linked the nation's largest membership of lawyers to

every aspect of children's law. The National Council of Juvenile and Family Court Judges (NCJFCJ) is an organization whose members wear the robes of the 100-year-old juvenile courts. The NCJFCJ in turn has supported the progress of each of these other organizations. Together, these organizations represent America's pioneering attempt to institutionalize the best approach to resolving the legal issues of children before the law. Opportunities for affiliation through membership in these groups has grown for those whose primary identification is representation of children. These membership groups also have supported attention to children's legal issues in their continuing education programs for lawyers, judges, and nonlawyers interested in child advocacy and protection.

LAWS AND STANDARDS CONCERNING THE ACT OR PROCESS OF REPRESENTATION

The constant reexamination of the rules¹⁵ and law¹⁶ governing child representation does not necessarily mean that lawyers for children are too preoccupied with their own roles to be distracted from the broader legal interests of children. The continuing discussion, and lack of complete resolution, is not unique to child law. The canons of ethics and disciplinary rules have evolved but gradually in all areas of American law. Continuing activity on the role of lawyers for children is crucial since how lawyers respond to the interests and wishes of the child, society's expectations, and their profession reflects a great deal about the practice of law and the significance of childhood. Much has been debated about client's direction, best interest, and substituted judgment in the representation of abused children in particular. Much less debate has developed in other areas of independent legal representation of children, such as delinquency and mental health adjudication, where nonpaternalistic, client-driven, and "due process" models apparently have predominated.

THE FINANCIAL ECOLOGY OF CHILD REPRESENTATION

Resource control is the last measure of the status of professions to be considered. Resource control is a factor clearly related to adaptation. Adaptation is the sine qua non of survival for all species of workers. A profession cannot exist without resources generated by compensation from the interests it directly serves, by the practitioner's individual sacrifice or donations of labor and opportunity costs, or by communal taxation. Most professions have succeeded through direct compensation for services rendered. Even publicly supported professions like the military and the clergy, which sometimes contribute more

than financial rewards can adequately compensate, are able to have their services purchased by private clients. The advantage of client-compensated service in terms of accountability and reputation for the profession is apparent. Some services are recognized as better than others by those paying for them, and unsatisfactory conduct is more easily sanctioned by withholding employment. Police officers consider themselves to be professionals as surely as do military officers; and the great majority of them, like the military, serve at taxpayer expense. So do accountants, physicians, and scientists who work for the public interest in government jobs.

Public defenders and lawyers at poverty law clinics provide the most prevalent model of public-interest representation currently in existence in the United States. Their prevalence illustrates what is possible and what has not occurred in areas of civil litigation for children, because there are so few offices of representation focused on children compared to offices for adult clients. Nevertheless, there is considerable evidence that the legal representation of children has increased in prevalence since 1967, and that the complexity and differentiation of representation efforts have expanded as well. The increase in numbers and complexity is shown partly by the writing on the subject, the number and variety of programs of representation, and the wide variety of public and private funding patterns for these activities. Left open still are questions of continuity and continued development of independent child representation in terms of careers and future financial support.

A healthy financial ecology for child representation would include lasting careers in children's law. A probing examination of the various means of organizing for child representation, previously noted in the discussion of legal organizations for child representation, might offer better and worse candidates for career support from the perspective of lawyers. In other words, should a strategy for improving legal representation of children strive for legal clinics for children in every state or an office of child representation located within each attorney general's office, or is it too soon to determine which setting will best support careers of child representation? Careers involving long commitments of experience and thought to human problems are assumed to increase the chances that understanding of and solutions to problems will occur. Our comprehension and solutions for the problems of children before the law are progressing; there is a new paradigm that is recognized as an advance in the position of children and might encourage public support. This is hopeful, because in order for evidence of highly significant and positive conceptualization to be shown, sustained and broad efforts—efforts that will only occur through substantial

investment over time—may be necessary. To advance the prospects for funding child representation research, however, it will be necessary to produce direct evidence, through research, irrespective of new concepts, that the lives of children have benefited systematically through independent representation. Any type of evidence would have to be satisfactory to those with the financial resources to advance the legal interests of children and support their belief that advancement for children can be accomplished through funding of independent child representation. Merely stating that independent legal representation for children helps children is not persuasive.

EVALUATION OF THE EFFECTS OF REPRESENTATION

On the face of it, a decision like *Sullivan v. Zebley*¹⁷ achieves enormous benefits for the children affected by the decision. Thousands of children—who would not have received disability benefits if the U.S. Supreme Court had not established eligibility both prospectively and retrospectively—began to receive them.¹⁸ In this situation the actual monetary benefit to children can be calculated for specific class action litigation, and calculated in terms of the costs versus the benefits of litigation. Nevertheless, attempts to evaluate the cost-effectiveness of law and lawyers have always been recognized as difficult. An early study calculated that the Office of Economic Opportunity (OEO) Legal Services Program expended approximately \$290 million from 1965 through the end of 1972.¹⁹ The study claims that the 1969 minimum-wage case, the 1969 welfare residency decision, a New York Medicaid decision, and case decisions on “man in the house” and food allotments produced “a total dividend in excess of \$2 billion annually for the poor.” The same study acknowledges the difficulty of measuring possible social and political gains.²⁰

Another example involves a brief study of representation in mental health proceedings in Iowa that looked at the “intangible” of reduced commitments to mental health evaluation and treatment following the enactment of a law requiring independent legal representation during commitment hearings. Clients with legal representation were committed two-thirds less often than those not represented.²¹ These are clear outcome differences, although with alternative interpretations for the changes observed.

In the early 1970s, Portland State University initiated a study to determine how to free children for adoption when there was no prospect of their returning home. A panel reviewed the records of children in care throughout the state, and for 51 cases (61 children) consensus was achieved that they should be placed for adoption.²² There

were concerns that the state's statutes, judges, or failures of legal advocacy would make even highly appropriate terminations of the child-parent legal relationship impossible. The Public Defender's Office was contracted to provide independent legal representation for the children in question. David Slader, an attorney just arrived in Oregon, was hired to spend his time pursuing these cases. At the end of the three-year pilot, children in 50 of 51 cases had been freed for adoption. This result refuted the view that the statutes or courts were completely unresponsive to the needs of children and suggested strongly that independent legal representation can make a major difference in their lives. Alternative explanations for observed changes can be suggested, but the study stands uniquely as a demonstration of altered outcomes for maltreated children who are well represented.

A national study comparing CASAs and lawyers²³ examined process variables primarily, with little yield of outcome data. CASAs interviewed a broader spectrum of witnesses, saw child clients more frequently, and participated more often in review hearings than lawyers working either as private practitioners or in legal clinics. Lawyers were more likely to appear in hearings in new cases, to be involved in contested cases, to examine and cross-examine witnesses, and to make closing arguments in cases. Judges rated the contribution of private attorneys as important to the outcome of negotiations in 50.8 percent of cases, staff attorneys in 43.3 percent of cases, and CASAs in 64 percent of cases. Judges rated presentation of options and advocating for the children's interests as very effective by 62.7 percent of the private attorneys, 60 percent of the staff attorneys, and 56 percent of the CASAs evaluated. If one were to consider the cost/benefit of lawyer representation based on these data only, the justification for lawyer representation might well be in question.²⁴ However, the study just cited apparently did not control through randomization the types of cases assigned. If the three groups were assigned cases that were essentially different in some respect, the findings would have to be considered in a different context, and, accordingly, any of the groups might look better or worse.

A separate question to be addressed is the apparent productivity of lawyers in developing better law for children, which is discussed in the next section, "The Law of Childhood."

Many represented children appear in juvenile courts, charged with delinquency or crime. Current writing about the juvenile courts is characterized by titles such as *A Celebration or a Wake? The Juvenile Court After 100 Years*,²⁵ and *The Juvenile Court at 100 Years of Age: The Death of Optimism*.²⁶ Concerned particularly with developments regarding delinquency, both publications review

developments in the past decade as largely negative. As the 1998 annual report of the Coalition for Juvenile Justice, *A Celebration or a Wake?*, relates:

In *McKeiver v. Pennsylvania*, Justice Harry Blackmun, after concluding that the right to a trial by jury should not be extended to juveniles in delinquency proceedings, said that juvenile adjudication proceedings should not be equated with adult criminal trials. He then sounded a more ominous note in the final paragraph of his opinion for the Court: "If the formalities of the criminal adjudicative process are to be superimposed on the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day but for the moment we are disinclined to give impetus to it."²⁷ Some would argue that the day of disillusionment has finally arrived and that the juvenile court should be completely transformed or abolished.

This quote permits the inference that representation of juvenile offenders by classic criminal defense methods contributes to the belief, at the highest levels of American jurisprudence, that there is no certain basis for juvenile justice separate from adult proceedings. Such a challenge cannot be answered by scientific study, and the public's concern for safety always threatens due process whenever a crime is committed. However, such concerns do justify a review of the record of legal representation, precedent, and theory developed by those representing children over the past several decades.

Making these worries real are data suggesting that children are faring worse in delinquency and criminal proceedings than before. During 1985, 7,200 cases of juvenile offenders were transferred to the criminal courts of the United States; during 1990, 8,700 cases; and during 1994, 12,300 cases.²⁸ According to a study supported by the Office of Juvenile Justice and Delinquency Prevention (hereinafter OJJDP), "[f]or every 1,000 formally handled delinquency cases, 14 were waived to criminal court in the U.S."²⁹ Without some objective "gold standard" it is not possible to know if these waivers were justifiable from a criminological, legal, or other basis. Unfortunately, an immediately prior OJJDP publication reported major flaws in the quality of legal representation of children. In only three of six states surveyed, the children charged with delinquency were being represented. According to the article,

This lack of counsel has been attributed to several factors: parents' reluctance to retain an attorney; inadequate public defender legal services in nonurban areas; and judicial ambivalence toward advocacy in treatment-oriented juvenile courts. The latter factor often results in pressure on juveniles with parents to waive counsel.³⁰

In 1993, OJJDP awarded the American Bar Association a grant to survey juvenile justice representation in all 50 states. The ABA heard from 46 juvenile defenders and made intensive visits to 10 jurisdictions, interviewing professionals and clients. As stated in the report:

Although many dedicated attorneys follow sound advocacy practices for juvenile offenders, the survey found such representation neither widespread nor common. Problems facing public defenders included (1) annual caseloads of more than 500 cases with up to 300 of these being juvenile cases; (2) lack of resources for independent evaluations, expert witnesses, and investigatory support; (3) lack of computers, telephones, files, and adequate office space; (4) juvenile public defenders' inexperience, lack of training, low morale, and salaries lower than those of their counterparts who defend adults or serve as prosecutors; and (5) inability to keep up with rapidly changing juvenile codes.

Consistent with findings in earlier studies, the ABA also found that a disturbing number of children waived the right to counsel. In 34 percent of the public defender offices surveyed, children "often" waive counsel during the initial court hearing.³¹

Serious gaps were identified in the training of public defenders: 78 percent of public defender offices have no budget for continuing education, half do not train all new attorneys, and about 40 percent do not have a specialized manual for juvenile court advocacy. Given the constitutional mandate for representation of minors facing confinement for delinquency or crime, these facts illustrate dramatically the challenge of protecting the legal interests of minors under any circumstances. Combined with the pessimism expressed by commentators on the juvenile courts, these findings present theoretical and practical reasons to be concerned about at least some aspects of the future of independent legal representation for children.

THE LAW OF CHILDHOOD

The focus of this essay thus far has been on the standards of child representation, the survival of a field of practice devoted to advancing the legal interests of children, and the law as practiced. But these concerns can distract from other underlying and core issues: Does the law as written and interpreted now better reflect how to protect and enable children's lives than before the recent developments of representation? Is there evidence of conceptual innovation that appears to strengthen the proposition that children have a unique, special value as individuals or persons irrespective of other attributes? Are children being afforded greater protections in any area of the law than before the expansion of representation?

Causal connections generally cannot be proven to exist between independent legal representation of children and better law for children. Nevertheless, independent legal representation of children can develop the facts, precedent, and argument that force legal issues of importance to be addressed. When important matters are litigated, signs of better thinking about the law of childhood should be found in appellate decisions, statutes, and law reviews. Such signs of activity do not "prove" children before the law are better off. Instead, these activities are markers for a process that historically has been associated with better law. With respect to the last example, a simple point to make here is that since 1967 a number of law reviews and other publications directed exclusively at advances in the law of childhood have come into existence.³²

CONCEPTUAL INNOVATION AND REFRAMING

In the consideration of whether the intellectual foundation of children's law has improved, what kinds of ideas might represent progress? Within the tort law, concepts such as enterprise liability, strict liability, and *res ipsa loquitur* were novel when first applied. However, application of these principles has evolved to help create greater accountability for behaviors that could not be justified and that harmed large numbers of people, even in the face of societal trends toward bigness and anonymity. As an example, adhesion contracts theory has introduced a more level playing field for "mutually induced exchanges of promises." So much of the Bill of Rights is now accepted as fundamental to civilized life that it is hard to imagine that strong safeguards against the power of government and favoring individual freedom are a recent invention.

Federal legislation has been used in the last three decades to enact both protection against state power and support for vulnerable populations. While many rue the threat represented by the potential for dependency on governmental sources, what is now Temporary Assistance to Needy Families (TANF), formerly Aid to Families With Dependent Children (AFDC), has been among the most important contributors to a financial safety net for children. Governmental funding of Women, Infants, and Children (WIC) helps ensure nutrition for thousands, and Early Periodic Screening and Diagnostic Testing (EPSDT) continues to identify medical and developmental problems early enough to mean better outcomes for many thousands more. Services to children with developmental disabilities have been augmented tremendously by federal legislation. For example, federal entitlements under Title XX of the Social Security Act were amended in 1980 to provide states with support for child protective services

and foster care and adoption assistance,³³ and in 1993 to assess and support various aspects of state education of children with disabilities.³⁴

Jurisdictional protective acts include the state-enacted Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Federal Parental Kidnapping Prevention Act. The enactment of suspected child abuse and neglect mandatory reporting laws by the 50 states independently preceded the Child Abuse Prevention and Treatment Act passed by Congress in 1973. Crimes against children were addressed by the states in multiple ways, while the federal government passed the Child Abuse Victims' Rights Act of 1986 and the Victims of Child Abuse Act of 1990, which extended protections to child crime victims in several ways, including increased admissibility of evidence.

Legislation cannot generally be traced to lawyers representing children in individual cases, although the long list establishes a complicated and changing background for the work. Even so, individual cases in which individual attorneys advocated directly or indirectly for children's interests laid behind support for many of these acts. Sometimes the legislation overruled court decisions inimical to children. Improvements include state laws concerning the testimony of children that, for example, allow videotaped depositions, closed-circuit television, and new hearsay exceptions.

Supreme Court decisions can be poor indicators of total progress in an area like children's law since so much family law is reserved to the states by constitutional design. However, convenience and the impact of its decisions alone make it appropriate to review U.S. Supreme Court decisions when asking if children's law has been changing.³⁵

As already noted, the admission of evidence concerning child victims, especially in criminal cases, has been facilitated by state and federal decisions. John E.B. Myers has documented progress in this area in his numerous books and law review articles on children's evidence, citing such U.S. Supreme Court cases as *Maryland v. Craig*,³⁶ *Estelle v. McGuire*,³⁷ and *White v. Illinois*.³⁸ Important questions of illegitimacy have been addressed in *Levy v. Louisiana*,³⁹ *Weber v. Aetna Casualty & Surety Co.*,⁴⁰ *Jimenez v. Weinberger*,⁴¹ and *Gomez v. Perez*.⁴² In cases like *Lehr v. Robertson*⁴³ and *Quilloin v. Walcott*⁴⁴ the Court found that active parenting, and not just biology, is necessary to sustain parental claims for custody. The Court thus addresses essential questions regarding the nature of the legal relationship between parent and child and contributes to closer analysis of fundamental questions of children's law. The case of *Baltimore City Department of Social Services v. Bouknight*⁴⁵ can be read as supporting

children's right of access to society and in so doing touches on the limits of claims of confidentiality where system accountability may be at stake. Free speech in the schools (*Tinker v. Des Moines Independent Community School District*)⁴⁶ and due process in mental health commitments (*Parham v. J.L.*)⁴⁷ were also addressed.

Individual case representation brought other matters to the U.S. Supreme Court, demonstrating increased attention to the legal aspects of childhood. Questions of illegitimacy and parent-child legal relationships are crucial to the young. For example, in cases like *Lehr v. Robertson*⁴⁸ and *Quilloin v. Walcott*,⁴⁹ the courts have differentiated between a "parent-versus-child" approach and an approach that favors "the parent who parents" over the parent who does not.

Becoming crucial again is the question of the criminal responsibility of minors. Applying the same approaches for adults and children has benefited juvenile defendants in cases like *In re Winship*⁵⁰ (requiring proof beyond a reasonable doubt in delinquency proceedings that can lead to confinement) and *Breed v. Jones*⁵¹ (minors cannot be prosecuted twice for the same crime). A popular reference book on delinquency representation reveals an approach strongly focused on criminal due process practices for minors, an approach almost indistinguishable from representation practiced for adults.⁵² Some of the implications of treating representation of minors more like the representation of adults are discussed further below.

In my opinion, certain issues seem to be missing from the list of important decisions, including a framework or theory of how children's rights properly accrue, passing from rights of protection to rights of choice. Also, the standards of care that society can reasonably impose on caregivers for the benefit of children are not clear, and only rarely is the relationship between confidentiality and accountability clearly stated. Summing up, there are advances in the legal position of children in certain respects. Visibility for children's rights is high now, certainly compared to almost any prior time in history; but the invention, discovery, and reframing of issues to benefit children before the law must progress further from attention to substance. I am concerned that we are not asking and answering enough of the hard questions. This is not to say that there has been no good legal scholarship on children's law. To the contrary: new law reviews, law review articles in established law journals, and valuable guides for practitioners demonstrate that considerable thought and practical experience are being encompassed and recorded.⁵³ Still, while the glass is far from empty, to fulfill the promise of legal representation for children, fountains of wisdom, tinted with caution, will have to be tapped.

UNANSWERED QUESTIONS AND UNQUESTIONED ASSUMPTIONS

In this section, the “where-you-stand-is-where-you-sit” biases of the author are most flagrantly obvious. Since beginning work as an advocate for children, I’ve worked as a lawyer and medical sociologist in a medical school department of pediatrics. Questions of whether children are developing well, in terms of their physical health, mental health, social and psychological relationships, education, and moral life, are the daily concerns of pediatric colleagues. Pediatricians and professionals specializing in children’s mental health bring as much science to bear as can appropriately be applied. Many factors are changing our basic understanding of what promotes or undermines children’s development, health, and, as a practical matter, rights. There are many questions that merit more of our attention as lawyers because they represent assumptions about the legal position of children that can be either protective or harmful, depending on how the assumptions are addressed.

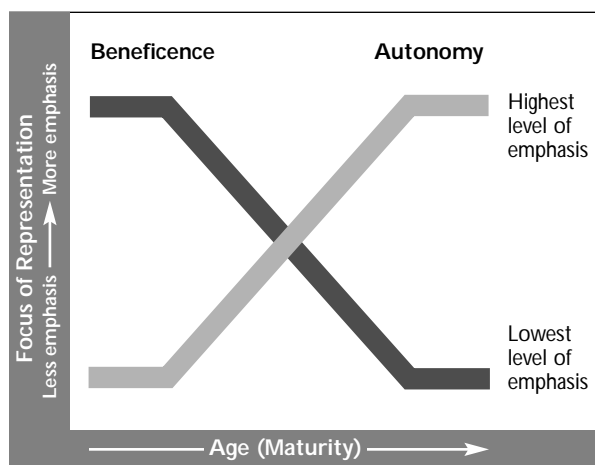
The notion of “pediatric law” grew directly out of my sitting and standing in a pediatrics department of a medical school these past 20 years. Even in a dozen years of courtroom representation of children, I was influenced not only by legal peers but also by colleagues whose professions relate to evaluating, diagnosing, and treating children. There should be a field of pediatric law that would address the law of the child’s development, care, problems, and treatment. Implicit is the notion that children’s development in either a “normal” or an “abnormal” context⁵⁴ should be the first concern, even though the law is more likely to become involved when conflict arises than in average circumstances.

As an illustration of the complexities involved, while sitting on biomedical ethics committees, I was led to the

belief that child representatives are ethically bound to consider both autonomy and beneficence in the process of independent legal representation of children. Figure 1,⁵⁵ “The implications of maturation for the proper representation of minor clients,” is a schema for the complex relationship between these two ethical principles and maturation. This might also be categorized as the “Autonomy-Beneficence-Maturation Exchange,” which implies that it is not possible to maximize simultaneously all of these considerations during the independent representation of clients whose maturation is in flux. For example, while a client’s maturation might lead to an autonomous decision that the lawyer views as most beneficent for the client, the predominant concern for the representative of the mature client must be autonomy irrespective of the beneficence achieved. For an infant, an attorney can present evidence to the court that a reasonably prudent parent would wish to have presented. Reflecting on what a reasonably prudent parent should wish the trier of fact to know before deciding a child’s fate allows beneficence to be emphasized for the nonautonomous child.

There are many substantive areas in which the law remains insufficiently elaborated. Clarification of the nature of the legal ties between parents and children is needed because legal decisions are heavily influenced by assumptions of priority or equality within this fundamental relationship. Concepts of biology, status, and contract interplay in legal writing without clear definition of the nature of the child-parent legal relationship. Legal writing routinely employs the terms “family” and “parent” interchangeably without acknowledging that children need someone to provide the specific care that only someone in a parental role can provide. While other relatives matter, more in some families and for some children than others, and while social networks matter, young children must have essential care provided in a personal and particular way to survive. Being biologically connected, whether closely or remotely, does not alone ensure that a child will receive minimally adequate care. Further clarification must occur regarding the difference between parents and nonparent relatives when relatives proclaim a right to care for a child. It will help considerably when we reach greater consensus on the definition of “relative” for the purposes of determining the right of a child to be cared for by a given individual. An associated but nevertheless separate issue is the enforceability of a child’s claims to legal interests in the identities of race, religion, national origin, or ethnicity. Courts often must weigh the child’s love for or “attachment” to a foster or adoptive parent against the child’s need for identity as a member of a racial group different from that of the caregiver. Claims made by others regarding the primacy of one factor over another are not

Figure 1. The implications of maturation for the proper representation of minor clients



proven to match up with the preferences of children affected by these decisions. The child's claims regarding class identities are theoretically and practically very distinct from the claims of others on behalf of the child.⁵⁶

There is great uncertainty about how early in life different forms of protection for children can begin (such as preconceptually, prenatally, or only at birth) and when emancipation should be granted legally. Figure 2,⁵⁷ "Dis-

tribution of accruable legal interests as a function of developmental stage," offers a schema in which many of the elements that should be considered are presented. As another example, the most appropriate standards of care for children by parental, voluntary, and compensated caregivers have not been examined in comparative terms. Different standards of optimal care, best interest, reasonable care, reasonably adequate care, or minimal care are

Figure 2. Distribution of accruable legal interests as a function of developmental stage

| L E G A L C O N T I N U U M | | | | | |
|--|--|---|--|---|--|
| Inchoate and Speculative | Contingent | Voidable | Vested | Selective Emancipation | Full Emancipation |
| | | | | Provisional Licenses | Full Citizenship Emigration Travel Voting Binding contracts Marriage Alcohol consumption Licenses |
| | | | | Assent/consent to: Medical care Contraception STD counseling Drug counseling Mental health care Abortion Early emancipation | Consent to: Medical care Contraception STD counseling Drug counseling Mental health care Abortion |
| | | | Interests in: Legitimacy Entitlements Primary attachments Property | Interests in: Legitimacy Entitlements Primary caregiving relationships Property | |
| | Protection from: Experimentation Assault on mother | Protection from: Experimentation Drug exposure Assault on mother Medical neglect Paternal neglect Actionable negligence | Protection from: Experimentation Drug exposure Medical neglect Paternal neglect Maternal neglect Abuse Actionable negligence Infanticide | Protection from: Experimentation Drug exposure Medical neglect Paternal neglect Maternal neglect Abuse Actionable negligence Crimes | Protection from: Actionable negligence Crimes |
| Regulation of: Marriage Medical practice Pharmaceuticals Surrogacy Institutions | Regulation of: Marriage Medical practice Pharmaceuticals Surrogacy | Regulation of: Marriage Medical practice Pharmaceuticals Surrogacy | Regulation of: Marriage Medical practice Pharmaceuticals Surrogacy | Regulation of: Marriage Medical practice Pharmaceuticals | |
| Identifiable Parents | Conceptive Process | Zone of Viability | Birth | Childhood | Adulthood |
| L I F E C O N T I N U U M | | | | | |

↑ GREATER CHOICE — GREATER PROTECTION — ↓

applied in different contexts to caregivers for children; the justification for these differences is not obvious. Yet another example of a lack of clarity relates to the tradeoff between confidentiality and accountability for children. It is true that the latter issue has received increasing attention, but clear, practical approaches for resolving the dilemmas of privacy and accountability have not been articulated by practitioners working with children. The profession and the public remain uncertain about how the balance should be achieved.⁵⁸

The justification for juvenile jurisdiction in delinquency matters is a pressing need. Are there any constitutional, legal, or decency restrictions on the age at which children can be charged with offenses? Is there any way a "least-restrictive-alternative" basis can be used to revisit the punitive/due process linkage? Can we extend the spectrum of legitimate responses to an ameliorative or mediated process, a process promoting restitution, or a therapeutic/status adjudication framework, rather than having our clients limited to the options of the punitive model only? In *Kent v. United States*, Justice Fortas lamented in a famous phrase that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁵⁹ Given the stated two possibilities, "protections accorded to adults" has been chosen.

The current practice of juvenile justice appears to strongly favor, as the major priority, the assurance that children will be accorded the same protections accorded to adults. Young or old, persons charged with crimes experience society's penchant for punishment. Perhaps, as a result of focusing on criminal rights to the exclusion of all other considerations, society's willingness to punish children and to ignore solicitous care and regenerative treatment has been reinforced. In choosing only one side of the conundrum, the possibility of synthesis is abandoned and responsibility for the rejected choice is ignored.

In brief, advances in the law of childhood can be seen in several areas. These include increased visibility for the legal interests of children, improvements in the admissibility of evidence favorable to child victims, more complex characterization of relationships essential to children, and extensive efforts to fund various preventive and ameliorative efforts in child welfare. There is also evidence that treatment for children with visible problems of delinquency has not advanced greatly. In broad due process terms, many children in the justice system may be losing ground. Overall, it would seem there has been more attention than progress, and yet continued attention is a necessary condition for improvements.

EVOLUTIONARY TRENDS CONSIDERED

Complexity and differentiation in the roles of those providing independent legal representation for children have been demonstrated. However, the adaptation that has occurred in the field of independent child representation is precarious. The political, social, and cultural environment may not sustain the work for further improvements in the field. Evidence for this rests in the uncertainty of funding sources and the indistinct and uncertain vision that not only the public but also the field itself shares.

Tangible benefits to children from child representation are debatable given a lack of scientific study. Nevertheless, in numbers of cases and in attention to children as individuals, and not only as derivatives of parents, families, or other identities, there are signs of development. The law of evidence is more favorable to the admission of evidence concerning the safety and position of children. Many children who otherwise would not have had their interests articulated in the law have been served over the past 30 years. From this experience the public and the legal profession have been made aware of the challenge and potential for improving the lives of children through careful application of the law.

At the beginning of this essay it was recognized that the anticipation of evolution must be speculative given that future conditions cannot be known. The discussion therefore ends not with speculation about the future of independent legal representation for children, but with a list of conditions likely to weaken or strengthen the prospects for further unfolding of independent legal representation.

Weakening Conditions

- The persistent lack of a recognized and shared identity, profession, or legal specialty of child representation with proven efficacy in addressing unique life problems
- Limited support from the public beyond those engaged directly in developing the field
- Lack of data demonstrating the favorable outcomes of independent representation
- Insufficient intellectual development in the field of children's law, given the large number of challenging questions of jurisprudence for children that remain not only unanswered but also rarely explored
- The lack of primary and reliable funding sources

None of these conditions alone will necessarily destroy independent representation for children, but the threats to future representation work are nonetheless genuine.

Strengthening Conditions

■ The nearly constant revelation of new scientific information about the situation of children, the implications of good or inadequate care, and the effects of other ecological variables, such as the availability or lack of medical, mental health, and educational resources

■ The continuing discussion of what lawyering for children should be

Child representation can and should contribute to the continually evolving philosophies and traditions examining the ethics of beneficence and autonomy in modern democratic life.

■ Deliberate efforts to evaluate different approaches to representation

These are already occurring, providing models that can be examined for signs of how to improve support for children before the law.

■ The excitement of a young, developing discipline

There is inherent interest for many people in addressing human problems of great consequence that are not yet financially well compensated. Lack of compensation leaves some areas of knowledge ripe for exploitation, notwithstanding prior neglect, owing to their importance for humanity. This is the early history of many disciplines that later proved useful, such as anthropology, archaeology, genetics, microbiology, and the study of evolution itself. Some disciplines were begun by people wealthy enough not to care much about financial compensation, by monks who had vowed poverty, or by researchers driven by curiosity long before science became big business.⁶⁰

■ The quantity and depth of children's unmet legal needs

Without someone to advocate the law for children when others fail to advocate for them, large numbers of children will suffer irreparable damage. Fortunately, many share the belief that rights are meaningless without enforcement. Time will tell if there are enough such people.

The existence of even one of the factors listed above is sufficient to ensure that quality representation of children before the law will evolve in the future. Most of these factors, however, are likely to prove necessary. By attacking and solving these problems thoroughly, we can improve the chances that a self-disciplined, responsive, and creative approach to the hard problems of children before the law will evolve.

1. Webster's New Collegiate Dictionary 397 (G & C Merriam Co. 1976).

2. Stephen J. Gould, *Full House: The Spread of Excellence from Plato to Darwin* 222 (Three Rivers Press 1996).

3. Webster's New Collegiate Dictionary 13 (G & C Merriam Co. 1976).

4. 387 U.S. 1 (1967). *In re Gault* established the right of minors faced with criminal proceedings to have independent legal representation. *In re Gault* also established that other due process safeguards extend to minors charged with crimes, endorsing a range of legal rights justifying representation.

5. Effective in 1974, Pub. L. No. 93-247 (42 U.S.C.A. § 5103(b)(2)(G)) created a monetary incentive for states to ensure independent legal representation of maltreated children. *See* 42 U.S.C.A. § 5103(b)(2)(G) (West 1995).

6. As used here, "independent legal representation of children" relates primarily to legal advocacy for individual children or siblings. System change that occurs is likely to be secondary to the case and incremental but nonetheless can be cumulatively important.

7. As used here, "independent legal representation for children" entails an absence of conflict of interest in the representation of a child client. For example, it would be a conflict of interest for an attorney to represent both a Department of Children and Family Services and a child client. *Los Angeles County Dep't of Children and Family Services v. Superior Court of Los Angeles*, 59 Cal. Rptr. 2d 613 (Cal. 1996).

8. Ann M. Haralambie makes a thoughtful presentation of the complex environment of child representation in different civil litigation settings. She cites case law, the Model Code of Professional Responsibility, and many other legal and nonlegal sources as to how an experienced practitioner defines the role in different situations. Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (American Bar Ass'n 1993).

9. Standards Relating to Counsel for Private Parties (Institute of Judicial Admin., American Bar Ass'n Comm'n on Juvenile Justice 1979) (hereinafter IJA-ABA Standards). *See generally* Jan C. Costello, *Ethical Issues in Representing Juvenile Clients: A Review of the IJA-ABA Standards on Representing Private Parties*, 10 N.M. L. Rev. 255 (1980).

10. *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375 (1995).

- NOTES
11. See Symposium, *Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1301 et seq. (1996).
 12. Donald C. Bross & Myra M. Munson, *Alternative Models of Legal Representation for Children*, 5 *Okla. City U. L. Rev.* 561-618 (1980).
 13. A 1995 list prepared for the National Association of Counsel for Children catalogued programs at American University, Washington School of Law; Brigham Young University; Columbia Law School; Cornell University; District of Columbia Law School; Florida State University School of Law; Franklin Pierce Law Center; Georgetown University; Hamlin University School of Law; Loyola University of Chicago School of Law; Loyola University School of Law, New Orleans; New York University School of Law; Northern Kentucky University—Salmon P. Chase College of Law; Northwestern University Law School; NOVA University; Seton Hall University; St. Mary's University; Syracuse University; University of Chicago Law School; University of Dayton School of Law Clinic; University of Maryland Law School Clinic; University of Michigan Law School; University of Nebraska College of Law; University of Pittsburgh School of Law; University of Puerto Rico School of Law; University of Richmond—T.C. Williams School of Law; University of San Diego Law School; University of Texas at Austin; University of Washington School of Law; University of Wisconsin; Whittier School of Law; and Yale Law School.
 14. Deborah Whitcomb, *Guardians Ad Litem in the Criminal Courts 5 and App. A* (National Inst. of Justice 1988). The states were California, Florida, Iowa, Oklahoma, Pennsylvania, and Wisconsin.
 15. See the previous discussion on self-regulation and accompanying notes 1-6.
 16. Examples are these cases from New York alone during the current decade: *Matter of Jennifer M. and Nina G.* (1990), N.Y. L.J., Oct. 26, 1990, at 31 (no basis for law guardian's dismissal); *Matter of Jamie T.T.*, 599 N.Y.S.2d 892 (1993) (child client entitled to effective counsel); *Matter of Elianne M.* (1993), 601 N.Y.S.2d 439 (child client entitled to substitute counsel of her own choosing); *Matter of Samuel H.*, 684 N.Y.S.2d 42 (dismissal of neglect charges over objection of the law guardian reversed); *Matter of Amkia P.*, 684 N.Y.S.2d 761 (10-year-old child not entitled to replacement of law guardian acting reasonably when child has no person in mind to be assigned as legal counsel to follow minor's wishes).
 17. *Sullivan v. Zebley*, 493 U.S. 521 (1990).
 18. Dan Skoler, former associate commissioner of the Social Security Administration and founder of the American Bar Association Center on Children and the Law, brought this case to my attention after reading the earlier version of this article presented in Apr. 1999. I would like to acknowledge and thank Dan for both this and many other contributions to the field of child representation.
 19. Earl Johnson, Jr., *Justice and Reform, the Formative Years of the OEO Legal Services Program*, in *Law and the Behavioral Sciences* 530-31 (Laurence M. Friedman & Stewart McCaulay eds., Bobbs-Merrill Co. 2d ed. 1977). Methodological weaknesses or limitations of the empirical studies cited are not analyzed here because of space limitations and because they are used only for illustration. This essay is required to be brief, available studies in the area are quite limited, and suggestive data are better than impression alone.
 20. *Id.* at 521.
 21. Dennis L. Wenger & C. Richard Fletcher, *When a Sick Man Needs a Lawyer*, 6(11) *Trans-Action* 8 (1969). Of 81 patients facing commitment hearings, 15 had a lawyer. Sixty-one of 66 patients (91 percent) without a lawyer were committed. Only 4 of 15 individuals (26 percent) with a lawyer were committed.
 22. Diane H. Schetky et al., *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 *J. Am. Acad. Child Psychiatry* 366 (1979).
 23. National Center on Child Abuse and Neglect, U.S. Dept of Health and Human Services, *Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardians Ad Litem* (n.d.).
 24. A different survey of court improvement specialists was conducted by the National Council of Juvenile and Family Court Judges. The two most frequently stated strengths pertaining to representation of children were the quality of representation and timely appointment of counsel, but strengths were mentioned less often than weaknesses. General weaknesses were that representation was problematic and representatives needed training. Shirley A. Dobbin et al., *Child Abuse and Neglect Cases: Representation a Critical Component of Effective Practice* 13-15 (National Council of Juvenile and Family Court Judges 1998).
 25. Coalition for Juvenile Justice, *Annual Report, A Celebration or a Wake? The Juvenile Court After 100 Years* (1998).
 26. E. Hunter Hurst, in 49 *Juv. & Fam. Ct. J.* (1998).
 27. 403 U.S. 528 (1971).
 28. Coalition for Juvenile Justice, *supra* note 25, at 31.

29. Jeffrey A. Butts, Delinquency Cases Waived to Criminal Court, 1985–1994, 1 (Office of Juvenile Justice and Delinquency Prevention Fact Sheet No. 52, 1997); or *see* www.ncjrs.org/pdffiles/fs-9752.pdf.
30. *Id.*
31. Douglas C. Dodge, Due Process Advocacy 2 (Office of Juvenile Justice and Delinquency Prevention Fact Sheet No. 49, 1997).
32. These include *Children's Legal Rights Journal*, *Youth Law Reporter*, *Child Law Practice*, *The Guardian*, *J.R.D. Newsletter of the Legal Aid Society of New York*, and this journal.
33. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 42 U.S.C. § 420 (1988).
34. Pub. L. No. 96-611, 28 U.S.C. § 1783 (1980). *See also* 18 U.S.C. 1073 (1988); 42 U.S.C.A. §§ 653–55, 663 (West Supp. 1999).
35. In preparing this section I was helped greatly by *Seminal Children's Law Cases*, by the National Association of Counsel for Children (1999).
36. 497 U.S. 836 (1990).
37. 502 U.S. 62 (1991).
38. 502 U.S. 346 (1992).
39. 391 U.S. 68 (1968).
40. 406 U.S. 164 (1972).
41. 417 U.S. 628 (1974).
42. 409 U.S. 535 (1973).
43. 463 U.S. 248 (1983).
44. 434 U.S. 246 (1978).
45. 493 U.S. 549 (1990).
46. *Tinker v. Des Moines Indep. Community School*, 393 U.S. 503 (1969).
47. *Parham v. J.L.*, 444 U.S. 584 (1979).
48. 463 U.S. 248 (1983).
49. 434 U.S. 246 (1978).
50. 397 U.S. 358 (1970).
51. 421 U.S. 519 (1975).
52. F. Lee Bailey & Henry B. Rothblatt, *Handling Juvenile Delinquency Cases* (Lawyers Cooperative Publishing Co. 1982).
53. *See, e.g.*, Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* (Shepard's McGraw-Hill 1993); Robert M. Horowitz & Howard A. Davidson, *Legal Rights of Children* (Shepard's McGraw-Hill 1984); Donald T. Kramer, *Legal Rights of Children* (Shepard's McGraw-Hill 2d ed. 1994); Mark I. Soler et al., *Representing the Child Client* (Matthew Bender 1987).
54. Jean Koh Peters, *Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions* (Lexis Law Publishing 1997).
55. Donald C. Bross, *Pediatric Law*, ch. 9 (forthcoming). Marvin Ventrell has applied this model in *Models of Child Advocacy: Achieving a Balance of Beneficence and Autonomy*, in *Child Advocacy at a Crossroads: The Development and Direction of Children's Law in America* 135–42 (National Ass'n of Counsel for Children 1996).
56. The importance of this area is illustrated by the recent enactment of the Multiethnic Placement Act of 1994, Pub. L. No. 103–382, and the 1996 Interethnic Placement Provisions, Pub. L. No. 104–188. The latter statute repealed the former statute. *See* 42 U.S.C. § 5115A.
57. Donald C. Bross, *supra* note 55, ch. 3.
58. A number of writers have sorted through the dilemmas of confidentiality and accountability. *See, e.g.*, Mark I. Soler et al., *Glass Walls: Confidentiality Provisions and Interagency Collaborations* (Youth Law Center 1993); and Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 *Fam. L.Q.* 143–212 (1984).
59. *Kent v. United States*, 383 U.S. 541, 556 (1966).
60. The complaint of inadequate financial reward is a major ethical and psychological trap for those representing children before the law. The optimism that the world can be improved by independent representation also embeds the seeds of self-interest. All “do-gooders” are at risk of falling into the trap of thinking that because there are few financial rewards, what they do for children under such conditions of “sacrifice” must necessarily be good for children. History and personal observation will provide many examples of those who are able to disregard the possible harm of their views because they act “for children's own good.” Those who work in the field largely recognize the problem. Differences arise regarding whether the answer is to emphasize client autonomy or to emphasize client beneficence.

Searching for the Proper Role of Children's Counsel in California Dependency Cases

Or the Answer to the Riddle of the Dependency Sphinx

What perfects best interest
With minimal cost
While serving dual masters
With zeal, yet loyalty to both?

—*Riddle of the Dependency Sphinx*

We come to the problem like prospectors bitten by California gold-rush fever, Jason in search of the Golden Fleece, Alice for the elixir, Dorothy for Oz. If only we could answer the riddle, find the Golden Fleece, mix the magic elixir, or decipher the dependency Rosetta Stone we might be able to solve our perplexing dilemma: How can California provide children caught in the child abuse legal maelstrom with advocates who are competent, who balance zealousness, the child's best interest, and judicial economy, and at a cost the taxpayers are willing to bear? Hundreds of dedicated juvenile law experts, law professors, judges, the California Judicial Council, and bar associations have attempted, but failed, to solve the riddle.

This article will discuss the current status of children's representation in California dependency cases, delineate some of the causes for our failure to deliver needed representation, and, it is hoped, provide a few clues to the enigma we face. Those who claim to do more are selling snake oil, promising to turn lead to gold, or to extract sunbeams out of cucumbers. However, rational debate regarding child abuse in general, and children's best interest in particular, is extremely difficult to realize because of the personal histories and passion which people bring to the discussion.

Anyone who has been involved for long with the dependency system knows that attitudes and emotions regarding the best interest of children are colored by one's past experiences, which often generate unconscious biases, stereotypes, and generalizations. As early as 1981 the U.S. Supreme Court in *Santosky v. Kramer* noted the subjectivity of the dependency system:

[I]mprecise substantive standards [are employed] that leave determinations unusually open to the subjective values of the judge. [citation omitted] In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups ... such proceedings are often vulnerable to judgments based on cultural or class bias.



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California children who find themselves swept up in the child dependency legal maelstrom are frequently being denied competent and zealous advocates because of the often diametrically opposing objectives of dependency judges, social workers, children's counsel, the Judicial Council, and the Legislature.

This article discusses how the politics surrounding California Welfare and Institutions Code section 317, which gives juvenile court judges discretion to appoint counsel for children in dependency cases, has created a dysfunctional system. First, many attorneys are financially pressed to handle excessively large caseloads. In addition, many courts have contracted with the "lowest-bidder" panel of "quasi-governmental" attorneys to provide blanket representation for children. Finally, the Legislature and the Judicial Council have promulgated several statutes and rules of court that often place children's counsel in positions directly violating client loyalty, zealousness, and competence. The author suggests that those tradi-

tional attorney-client principles should apply to the attorney-child client relationship to ensure that children's dignity, privacy, and right to competent representation are not sacrificed for multiple visions of the child's best interest or for speculative fear of future injury. ■

Perhaps the greatest triumph of subjectivity over empirical evidence is the fear of providing abused children with zealous advocates who owe those children the identical loyalty and confidentiality owed to adult clients. Some states have avoided the issue of providing zealous advocates by appointing nonlawyer court-agent guardians ad litem who offer children neither zealous representation nor confidentiality, or by handcuffing appointed attorneys with the overarching duty of protecting child clients, which often extinguishes zealousness, confidentiality, and loyalty. But in the thousands of pages of law review articles, cases, and legislative histories regarding children's advocacy that I have read, not once has anyone offered an empirical cost-benefit analysis supporting the necessity of deleting zealousness, loyalty, and confidentiality from the lexicon of children's lawyers. We hypothesize about worst-case scenarios in determining the ambit of dependency law: What if, for example, a child informs her attorney that in fact she was abused and there is a chance that if she returns home, which is her preference, she might be harmed again? In this hypothetical, in order to avoid a possibility of future harm, we genuflect toward protection and quickly forsake the traditional lawyer-client relationship by not advocating for her preference. But how real is the threat of harm, and how often is harm likely to occur? For instance, consider the 1997 modification to California Welfare and Institutions Code section 317(e), which forbids attorneys from arguing their competent child client's stated preference to the court in certain circumstances:

Counsel for the minor shall not advocate for the return of the minor [to her home] if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor.²

What if we apply a Learned Hand cost-benefit analysis to section 317(e) to determine whether abrogation of the traditional attorney's obligation to argue a client's stated preference was necessary to perfect this legislative attempt to prevent the possibility of future harm to the child?³ First, the statute does not specify what quantum or type of danger triggers the attorney's duty to remain silent⁴ and not zealously argue the child's wishes. Under a Hand analysis, the severity of injury could range from the threat of death or serious bodily injury to mild psychological harm that might have an evanescent detrimental effect upon the child. In addition, section 317 does not require an analysis of the injury's likelihood as a component of the attorney's decision about abandoning his client's right to zealous advocacy. Must the attorney reasonably believe that there is a remote chance of further injury, that injury is more likely than not, or that the evidence indicates that injury is likely to occur if the child is returned home? The statute does not guide the attorney regarding when the likelihood or the severity of injury triggers the statutory obligation not to argue the child's preference. However, since the child's attorney may be found civilly liable for injuries occurring after the child is returned home, children's counsel are likely to apply the statute in contexts that do not significantly threaten the child's safety, thus needlessly depriving children of zealous advocacy.

But there are many other variables regarding likelihood of injury that must be considered under a Hand test or under any rational determination of the need to radically alter the attorney-client relationship. First, it is unlikely that the attorney's closing argument will be dispositive in light of all the evidence presented by the State and the parents regarding the best interest of the child. Second, the dependency system is like no other area of California law. The following specialized rules of evidence, procedure, and discovery significantly lighten the State's burden in demonstrating that the petition should be sustained:

1. Under section 319, at the detention hearing, the county need only present a prima facie case that the child comes within section 300 jurisdiction and that the child should not be released to his or her parents;
2. Pursuant to section 355.1, if the court determines that the child's injuries "would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent ... that evidence shall be prima facie evidence ... that the minor is a dependent child." This presumption shifts the "burden of producing evidence" to the parents and/or child and operates like a *res ipsa loquitur* instruction in a tort action;
3. Section 355 substantially liberalizes the civil law hearsay rule and permits the introduction of hearsay contained in social worker reports even if the minor declarant possesses neither truth competency when the statement was made nor testimonial competency at the time of the dependency hearing;⁵
4. The burden is on the parent and/or child to produce hearsay declarants contained in the government's reports.⁶ In fact, the California Supreme Court, in *In re Malinda S.*,⁷ determined that "due process does not require that the county ... call all witnesses mentioned in the social study."⁸ Thus, the burden of calling hearsay declarants contained in the county's reports is shifted to the parents and/or child;
5. Pursuant to section 361.5(b), the Legislature has continually added to the catalog of cases in which the county can demonstrate that reunification services should not be granted, thus expediting termination and eliminating parents' or children's ability to demonstrate that changed circumstances have cured the defects that initially led to dependency;
6. Pursuant to section 366.21(f), the period between the removal of the child and the permanency planning hearing has been shortened to 12 months;
7. Under section 366.21(e), a parent's failure to participate regularly in court-ordered treatment programs "shall be prima facie evidence that return [of the child] would be detrimental"; and, finally,
8. Unlike in ordinary criminal and civil cases, the court can force the parents to testify and waive their Fifth Amendment privilege against self-incrimination by granting them immunity pursuant to section 355.1(d), which holds that "[t]estimony by a parent, guardian, or other person ... shall not be admissible as evidence in any other action or proceeding."⁹

Therefore, in light of the special presumptions, liberal admissibility rules, and compelled testimony, it is

extremely likely that the court will discover the dangerous conditions that led the county to file the petition, and it is more likely than in almost any other action brought by government agents that the county will prevail in having its petition sustained. Since the judge is likely to discover almost all relevant facts concerning the alleged abuse because of the dependency court's liberal admissibility rules, and because the court will have heard from numerous other parties regarding the child's best interest, if the child's counsel fails to zealously argue the child's preference, that omission will likely be determinative.

But even in light of the remote chance that the child's attorney will be effective in having the court adopt the child's preference, section 317(e) provides only one drastic remedy, abrogation of the child's right to a zealous advocate, for all cases involving even speculative future injuries to children. Under a Hand cost-benefit analysis the statute imposes an excessive burden for avoiding the possible harm. In those dependency cases in which the child's attorney discovers evidence from which he or she determines that there is a slight chance of serious harm or a likelihood of insubstantial harm to the child, Leonard Hand would conclude that, "overall ... welfare would be diminished rather than increased by incurring a higher accident-prevention cost in order to avoid a lower accident cost."¹⁰ Or, put more aptly, a lawyer's silence even in cases of speculative minor future injury, results in the child's needless loss of the one adult in the proceeding who can advocate his or her position to the court. Of course, it is easy to modify section 317's overbreadth by merely defining the seriousness of the future injury to the child and by establishing the degree of certainty of the injury occurring. For instance, one slight modification might be: "Counsel for the minor shall not advocate for the return of the minor if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor, because of the likelihood that the child will suffer serious physical or emotional abuse or neglect."

As the illustration of the overbreadth of section 317 demonstrates, it is important to keep in mind from the beginning that much of the genesis of dependency law has been politically reflexive to child tragedies rather than reflective and analytical. Such dramatic changes seldom consider the systemic and/or synergistic effects upon the entire dependency process.

CALIFORNIA'S DISCRETION TO DEFINE THE ATTORNEY-CHILD CLIENT RELATIONSHIP

Because most courts routinely appoint counsel for children who are the subject of a dependency petition, few

California lawyers or trial courts consider whether these children are entitled to the appointment as a matter of due process.¹¹ If appointment is mandated by due process, then the Legislature's prerogative to modify the traditional attorney-client relationship is substantially circumscribed; defining counsel as other than a zealous and loyal advocate within the bounds of confidentiality might not satisfy constitutional scrutiny.

The pivotal case on the Fourteenth Amendment's due process right to counsel is still *Lassiter v. Dep't of Social Services*.¹²

Lassiter held that the Fourteenth Amendment due process clause creates a presumption for the appointment of counsel for indigents only when their physical liberty may be constrained. Although the court noted that under a case-by-case analysis parents may be able to rebut the presumption and demonstrate that loss of their First Amendment right of association with their child requires appointment of counsel, a parent must prove that he or she has a right to counsel under *Mathews v. Eldridge*.¹³ *Mathews* established a three-prong balancing test for analyzing due process questions: (1) the private interest at stake, (2) the governmental interest, and (3) the risk of error or injustice.¹⁴

In *Lassiter*¹⁵ the Court noted that although the loss of the right to rear one's child is a fundamental loss, it is not equivalent to losing one's liberty. However, when *Mathews* is applied to child victims in dependency cases, a different result might be reached. Children do not just lose companionship with parents when they are temporarily or permanently removed from home. "For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado [and in most jurisdictions], for example, it had been noted: 'The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.' [citation omitted] *Some losses cannot be measured.*"¹⁶ In fact, in California, termination severs all rights, responsibilities, and relationships between the parents and the child.¹⁷ However, unlike the parent who loses custody of the child, the child's physical liberty is severely implicated in dependency actions, often to the detriment of the child. *Santosky* not only recognized that dependency actions implicate "important liberty interests of the child," but also that the child may be placed at risk by state intervention: "Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. '[C]oercive intervention frequently results in placing a child in a *more detrimental situation*

than he would have been in without intervention'" (italics added).¹⁸

A state's mandated separation of a child from his or her parents based upon a best-interest-of-the-child rationale is analogous to an involuntary mental health commitment in many ways. Both types of interventions are mandated in order to protect and benefit the child, both result in the physical separation of the child and often the placement of the child in an unfamiliar environment, in both the state acts in its *parens patriae* capacity, and both normally involve a determination of appropriate therapy and social services for the child. In *Parham v. J.R.*¹⁹ the Supreme Court noted that although a voluntary mental health commitment by the state of one of its minor wards was not a loss of liberty equivalent to the incarceration of delinquents, nonetheless such commitment was a serious deprivation of liberty that required significant due process protections, such as detailed fact investigation by a neutral expert prior to institutionalization and independent periodic reviews.

The California Supreme Court had reached a similar conclusion regarding the liberty deprivation of children voluntarily committed by their parents a year earlier in *In re Roger S.*²⁰ Although *Parham* did not consider whether the mentally committed child had a right to court-appointed counsel, *Roger S.* determined that the liberty deprivation was so significant that it required the appointment of counsel for a child at the precommitment hearing, and that parents could not waive their child's due process rights if the child was 14 or older.²¹ There is thus a strong argument that dependent children, because they are similarly situated with children who are committed to a mental health facility, are entitled to the appointment of counsel under the due process clause.²² Therefore, under the first prong of the *Mathews* test, children's liberty interests are more implicated by dependency proceedings than parents' because the judicial proceedings affect both the children's physical liberty and First Amendment right to association.

The second prong of the *Mathews* balancing test involves an examination of the governmental interests involved in the proceeding. *Lassiter* noted that the state has several interests in dependency proceedings, including the best interest and protection of children, an "interest in an accurate and just decision," and "the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause."²³ However, *Lassiter* noted that even though fiscal concern is important, "it is hardly significant enough to overcome the private interests as important" as a parent-child relationship.²⁴ The California Legislature has already determined that appointing counsel for children in dependency cases is

important; section 317(c) mandates appointment of counsel for children if the court determines that the minor would benefit from it. Thus, California has already determined that appointing counsel is in the best interest of children and that public funds should be used to pay for the representation. Therefore, the second prong of the *Mathews* test is satisfied in California.

The final prong of the *Mathews* balancing test is the risk of error or injustice if the asserted procedural due process is not provided. The *Lassiter* court identified a number of variables to be considered in determining whether the risk of error is great. First, the court must determine whether expert medical or psychiatric evidence will be presented.²⁵ Since parents are not likely to have sufficient education to cross-examine experts or to present affirmative and/or rebuttal evidence, counsel in such cases could make a significant difference. A child's plight is obviously much more severe than a parent's in cases where expert evidence is presented. In fact, because children usually lack the education or experience to cross-examine any witness, the presumption under the *Mathews* test should be that the presentation and rebuttal of evidence is too complicated for children to perform competently. Therefore, in many cases in which parents might not be entitled to the appointment of counsel under the Fourteenth Amendment due process clause, an opposite result would be reached if those cases involved the appointment of counsel for children who were the subject of the petition.

A second variable in determining the risk of error is whether the Department of Social Services (DSS) is represented by counsel, since in some jurisdictions social workers represent the department.²⁶ In virtually all California counties the department is represented by legal counsel in dependency court, usually by either county counsel or the district attorney.²⁷

A third factor is whether the charges in the dependency petition might give rise to a criminal action. Although most children appearing in dependency court are victims, it is possible that a petition will be based upon a parent's failure to prevent a sibling from abusing another sibling. In such situations the child could be charged with a delinquency violation pursuant to section 602.

Next, the court should determine whether the case involves "specially troublesome points of law" such as hearsay.²⁸ Often dependency cases will involve complex hearsay issues that also involve questions of a witness's competency to testify and the admissibility of hearsay statements that might have been made when a child witness lacked truth competence.²⁹ Finally, the court should consider the substantiality and weight of the evidence.³⁰

It is clear that if the Supreme Court applies a *Lassiter/Mathews* test in determining whether the Fourteenth Amendment requires the appointment of counsel for children in dependency cases, children will often be entitled to court-appointed representation in cases in which parents might not be entitled. But the problem in California is that because trial courts usually appoint counsel for minors, children's counsel rarely, if ever, ask for a *Lassiter* hearing.

The failure of counsel to make a *Lassiter* record undermines the child's rights in a number of ways. First, if the child's counsel is appointed under *Lassiter*, rather than section 317, the child will be entitled to a traditional attorney-client relationship, not one modified through legislative changes like section 317(c), prohibiting the minor's counsel from arguing the child's stated preference if it might jeopardize the child's safety. In addition, the standard of review for an issue of counsel's incompetence will be much more in favor of the child if counsel is appointed under *Lassiter* rather than pursuant to section 317(c).³¹ Finally, if counsel is appointed pursuant to *Lassiter*, the trial court will not have discretion to relieve the minor's counsel during the dependency hearing based upon the court's determination that the child will no longer benefit from the appointment.³²

Therefore, if a child is appointed counsel pursuant to *Lassiter*, California would probably be precluded from modifying the traditional zealous attorney-client relationship in a manner inconsistent with U.S. Supreme Court decisions. Attempts, such as those contained in section 317(c) to transform the child's attorney into a quasi-guardian ad litem by stripping the attorney of traditional notions of zealousness, would probably run afoul of the appointment-of-counsel guarantees under the federal due process clause.

THE CURRENT STATUS OF DEPENDENCY COURT REPRESENTATION IN CALIFORNIA

Any specialized California dependency statutes, rules of court, or codes of professional conduct are controlling in the definition of the attorney-child client relationship only to the extent that *Lassiter* and the Fourteenth Amendment do not constitutionally compel the appointment of counsel. It is in those cases where *Lassiter* is inapplicable that we must analyze California law.

CALIFORNIA DEPENDENCY LAW UP TO 1996

From 1989 until 1996 legislative activity regarding the nature of the attorney-child client relationship in California child dependency actions remained relatively static.³³

During that period various agencies and private attorneys represented children, and the focus was on what level of conflict of interest between the child and his or her attorney would require substitution of counsel.³⁴ Further, only one California case prior to 1996 specifically analyzed the child's right to a zealous advocate. In *In re Richard H.*,³⁵ the court found that there was not an actual conflict of interest when the DSS's attorney, who also represented the minor, did not recommend family reunification. Both counsel and courts have mistakenly interpreted *Richard H.* as precedent for the proposition that children's counsel have no traditional attorney-client obligation to argue the child's stated preference if the child's counsel does not consider it to be in the child's best interest.³⁶ However, not only was that not the issue litigated in *Richard H.*, but the facts of that case also would not even support such a holding, because the child was only 19 months old and the record does not indicate whether the child had the verbal ability to express his wishes or whether the child ever expressed a preference. All that *Richard H.* stands for is the conclusion that when a child has not expressed a preference, or when a child lacks capacity to verbalize a preference, it is not presumptively a conflict of interest if the child's attorney does not argue for the return of the child. In dictum, the court opined that "[a]fter all, the preference of the minor is not determinative of his or her best interests."³⁷ Whether a preference is or is not in the child's best interest is a substantially different question than whether counsel must argue the child's stated preference even if the attorney does not believe that it is in the child's best interest. In addition, two subsequent statutory modifications cast doubt on any continuing validity of *Richard H.* First, the Legislature has declared that child victims are now parties to the dependency proceeding.³⁸ Second, subsequent to *Richard H.*, the Legislature has provided that "all parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."³⁹ Therefore, currently there is no case law that defines the attorney-child client relationship differently from the relationship of the attorney and adult client.

CALIFORNIA DEPENDENCY LAW SINCE 1996

Historically, defining the role of children's counsel in California dependency cases has been difficult for several reasons. First, prior to 1997, neither the California Supreme Court nor the Legislature had provided special case law⁴⁰ or statutory guidance differentiating adult client representation from the representation of children. In fact, the California Rules of Professional Conduct, unlike the American Bar Association Model Rules, do not even differentiate between obligations for competent and zealous

representation for "competent adult" and "competent minor" clients.⁴¹ But starting in 1996, the California Legislature, the courts, and the Judicial Council have been extremely active in redesigning the representation of children in dependency cases.

The first salvo on the status quo was fired by the California Legislature in 1996 with the modification to section 317 that now provides: "Counsel for the minor shall not advocate for the return of the minor [to his or her home] if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor." In addition to the result of overprotecting children and needlessly denying them zealous advocates, which is outlined in the introduction of this article, there are a number of other problems created by section 317:

First, it takes a zealous advocate away from the child client. Second, it transforms the child's attorney into a fact-finder who must balance the credibility of the child's witnesses against the state's in determining the ultimate legal issue: placement of the child. Third, it provides no guidance for the attorney regarding which evidentiary rules or standards of proof should be used in reaching the factual conclusion of whether return of the child would create an unreasonable risk. Fourth, it violates the confidential attorney-client relationship if the attorney uses any evidence provided by his minor client. Fifth, it transforms the child's attorney into the strongest witness against the child because the attorney's silence tacitly, yet resoundingly, informs the court that the attorney possesses information which might not have been admitted at trial, but which has led the attorney to conclude that returning the child home would create an unreasonable risk.⁴²

Besides the functional problems of section 317, the Legislature's involvement in redefining the attorney-child client relationship raises the equally troubling issue of separation of powers.⁴³ The California Supreme Court in *Santa Clara County Counsel Attorneys Ass'n v. Woodside*⁴⁴ declared that it has the plenary and exclusive authority to regulate attorneys. Although the court may have from time to time permitted the Legislature and Judicial Council to regulate attorneys when "reasonable restrictions upon the constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions,"⁴⁵ defining the attorney-client relationship and the scope of zealousness, confidentiality, and loyalty are clearly outside even the boundaries of comity.⁴⁶

The second major change to the role of counsel in representing abused children in dependency court concerns the definitions of competency and minimal education for children's advocates promulgated in 1996 by the Legislature and the Judicial Council in section 317.6 and in rule 1438 of the California Rules of Court. In section 317.6

the Legislature ordered the Judicial Council to “adopt rules of court regarding the appointment of competent counsel in dependency proceedings,” to which the Judicial Council responded with rule 1438, which promulgated numerous prerequisites and continuing educational requirements for dependency counsel.⁴⁷ However, section 317.6 and rule 1438 suffer from the same separation-of-powers problem that was discussed earlier with regard to section 317’s definition of zealotry, loyalty, and confidentiality. The bottom line is that neither the Legislature nor the Judicial Council may establish “prerequisites or continuing education requirements which would nullify the [California Supreme Court’s] certification of attorneys’ competence to practice law in any court” within the State of California.⁴⁸ Therefore, if California is to make attorney competence in special areas of practice, such as dependency court, dependent upon special expertise, the Supreme Court is the only constitutional body able to sanction such revisions.⁴⁹

Another recent statutory modification regarding the attorney–child client relationship is contained in section 317(e), which provides that “[t]he attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide *nonlegal* services to the child” (italics added). Because this modification did not go into effect until January 1, 1999, there is as of yet no interpretation of its meaning. Obviously, children’s court-appointed advocates wanted a limit to their liability in providing representation for abused and neglected children since, in addition to representing the child at the dependency proceedings, counsel “shall investigate the interests of the minor beyond the scope of the juvenile proceeding and report to the court other interests of the minor that may need to be protected by the institution of other administrative or judicial proceedings.” Although the modified section 317 language indicating that children’s counsel are not social workers is warranted, the further statement that children’s attorneys are “not expected to provide nonlegal services” is ambiguous and may lead attorneys from properly and completely counseling children regarding “nonlegal” consequences inherent in the dependency case, such as the long- and/or short-term alternative consequences among different legal options. Children will thus be denied the counseling on strictly nonlegal matters to which adult clients are entitled. For instance, according to rule 2.1 of the American Bar Association, Model Rules of Professional Conduct, “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Further, comment 2

to rule 2.1 provides that “[a]dvice couched in narrowly legal terms may be of little value to a client” Because children often lack the ability to decipher abstract legal concepts, it is often important to counsel them about the nonlegal ramifications of their cases in order to enable them to make a reasoned choice among the alternatives. So what effect will section 317 have on the counseling function for young children? What do the “responsibilities of a social worker” entail, and how are attorneys to determine the meaning and scope of that phrase?

If section 317’s suggestion that attorneys are “not expected to” counsel children on nonlegal matters applies to issues in the dependency case, as opposed to issues outside that case, then it will have a significantly contrary effect, since the literature on client counseling is moving rapidly toward a model that significantly involves the attorney in counseling clients on nonlegal issues. For instance, Professor Robert F. Cochran, Jr., has recently delineated the role of “lawyer as friend” who practices a “moral discourse model of lawyering” that enables attorneys to engage clients in discussions of the moral and nonlegal consequences of their decisions.⁵⁰ Others have recently suggested that an attorney has an obligation to counsel the client on the nonlegal and psychological consequences involved in the representation.⁵¹

The tactical decisions that children’s counsel make in dependency court, such as whether to have the child victim testify at all, and if so, whether to ask for in-chambers examination, or whether the child should request a temporary out-of-home placement where the child will possibly lose psychological support from nonthreatened siblings, will have significant psychological (nonlegal) consequences for the child. There is a good chance that section 317, as modified, might dissuade children’s counsel from providing that needed nonlegal counseling to children at risk of being psychologically harmed by the court process or by the trial tactic chosen. If the words “not expected to provide nonlegal services” were deleted from section 317, children’s counsel would receive just as broad a protection from civil lawsuits because the language indicating that they are not “social workers” subsumes the notion that they are not required to provide ordinary legal services beyond the dependency proceeding.

Finally, section 317(e) provides that children’s counsel may “make recommendations to the court concerning the minor’s welfare” This charge is ambiguous. First, it can only mean that the child’s attorney is free to exercise the traditional role of a zealous advocate by making recommendations consistent with the child’s stated preference. This interpretation is consistent with section 317(e), which requires counsel “[i]n any case in which the minor

is four years of age or older ... [to] interview the minor to determine the minor's wishes and to assess the minor's well-being, and ... [to] advise the court of the minor's wishes." Of course there is not necessarily a consonance between the attorney's ideas concerning the "minor's welfare" and the "minor's wishes." This has led to speculation that what section 317 is really saying is that the child's attorney has latitude to both inform the court of the "minor's wishes" and the attorney's views of the recommendations "concerning the minor's welfare."

But that interpretation would create three different advocacy scenarios for children's attorneys: (1) Counsel *shall* inform the court of the child's wishes and *may* make recommendations to the court regarding the child's welfare that are consistent with the child's stated preferences; (2) the attorney *shall* inform the court of the child's wishes and *may* make recommendations to the court for the child's welfare even if those recommendations conflict with the child's stated preferences; and (3) counsel *shall* inform the court of the minor's wishes but "shall not advocate for the return of the minor if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor," but *may* make other recommendations concerning the minor's welfare consistent with the child's preference.

Interpretation 1, which permits the child's attorney to zealously argue the child's stated preference, is consistent with the ABA Model Rules and with the California State Bar Rules of Professional Conduct because it provides zealous advocacy, ensures confidentiality, and promotes the attorney's loyalty to the child client.⁵² However, Interpretation 2 is problematic for several reasons. Section 317 is inconsistent with the State Bar Rules of Professional Conduct which do not provide for a different standard for competence, confidentiality, and loyalty toward minor clients. Section 317 violates each of those three components of the traditional lawyer-client relationship by permitting the child's attorney to advocate against his client's position, possibly by using confidential data discovered from his client or through fact investigation directly related to the case. In addition, it violates a cardinal principle that attorneys are not to testify. "The fact that an attorney disagrees with the child's perspective or believes that the child is making unwise choices does not, in itself, warrant refusing to advocate the child's position. Further, such disagreement does not permit the attorney to argue against the client's expressed position."⁵³

Interpretation 3 combines the charge of silence in section 317 with the attorney's discretion to make other recommendations.

SHOULD CALIFORNIA MODIFY THE CURRENT CALIFORNIA DEPENDENCY ATTORNEY-CHILD CLIENT RELATIONSHIP?

To determine whether and/or how to modify the California dependency attorney-child client relationship, we must first examine the demographics of the juvenile clientele and the status of children's attorneys. Only then can we meld the quality of representation to the needs of child clients.

THE DEMOGRAPHICS OF ABUSED CHILDREN

We must guard against overprotecting all children just because a certain percentage may not currently be well served by the system. Unfortunately, the high-profile cases that incite the public and spur legislative action almost always involve infants. However, that is a patently false picture of the demographics of children involved in the child abuse and neglect system. For instance, consider the December 1996 Total End-of-Month Caseload for the California Department of Children and Family Services (Table 1).

Table 1. December 1996 Caseload, California Department of Children and Family Services⁵⁴

| Age Group | No. of Cases | % of Total Cases |
|------------|--------------|------------------|
| 0-2 years | 12,079 | 16.4 |
| 3-4 years | 9,593 | 13.0 |
| 5-12 years | 34,269 | 46.5 |
| 13+ years | 17,713 | 24.1 |

Children ages 5 to 18 were 70.6 percent of the department's 1996 caseload, and infants to two-year-olds were merely 16.4 percent of the caseload. The total child abuse investigations by the Los Angeles County Sheriff's Department were very similar in 1996 (Table 2).

Table 2. 1996 Child Abuse Investigations, Los Angeles County Sheriff's Department⁵⁵

| Age Group | % of Total Cases |
|-------------|------------------|
| 0-4 years | 20.6 |
| 5-9 years | 25.5 |
| 10-14 years | 31.5 |
| 15-17 years | 18.8 |
| 18+ years | 3.6 |

And, finally, the demographics of Los Angeles Police Department child abuse investigations in 1996 demonstrate similar statistics (Table 3).

Table 3. 1996 Child Abuse Investigation Demographics, Los Angeles Police Department⁵⁶

| Type of Investigation | Age Group | No. of Cases |
|------------------------|-------------|--------------|
| Physical Abuse: | 0-4 years | 319 |
| | 5-9 years | 391 |
| | 10-14 years | 275 |
| | 15-17 years | 141 |
| Sexual Abuse: | 0-4 years | 313 |
| | 5-9 years | 668 |
| | 10-14 years | 559 |
| | 15-17 years | 82 |
| Endangering: | 0-4 years | 931 |
| | 5-9 years | 648 |
| | 10-14 years | 355 |
| | 15-17 years | 110 |

These figures indicate that most cases of child abuse and neglect involve children over 4 years of age, and that the most represented group is children 5 to 14. However, most literature concerning advocacy in dependency matters has focused on either preverbal or very young children who lack the capacity to make a knowing choice among the alternatives presented in the dispute. Most commentators and courts substantially undervalue children's capacity to engage in reasonable decision making:

Traditionally, minor children have been under legal disabilities that flow from their dependent position on their parents. In most jurisdictions such legal disabilities of children include the inability to establish their own domicile, retain their own earnings, enter into binding contracts, consent to their own medical ... care ... , sue or be sued in their own name ... or convey real property.⁵⁷

Although the trend is for standards and statutes to treat "unimpaired children" identically with "unimpaired adults" with regard to defining the attorney-client relationship, the real distinctions have been in determining when children are "unimpaired."⁵⁸ Most statutes and standards place the burden of determining client competence upon attorneys representing those clients. However, Ross notes that "while attorneys give lip service to the developmental needs of children, they do not have the training to identify them, particularly in the complex context of best interest

litigation. Lawyers have not been trained to measure a child's capacity."⁵⁹ Haralambie and Glaser observe that while the Supreme Court has "differentiated between the rights of 'mature' and 'immature' minors, ... [it] has not provided guidance on how lower courts should measure or ascertain maturity. Moreover, the Court has never unbundled the vulnerabilities that characterize 'immaturity.'"⁶⁰

Because of the difficulty of determining a child's competence, standards, statutes, and courts have often established presumptive ages of competence. For example, standard 2.2 of the American Academy of Matrimonial Lawyers provides "a rebuttable presumption that children twelve and older are 'unimpaired' and that children under twelve are 'impaired.'"⁶¹ California has established a number of age cutoffs in dependency cases. First, California presumes competence of 14-year-old children because they qualify for membership on the County Juvenile Justice Commission.⁶² A 14-year-old is entitled to a copy of a referee's findings.⁶³ A minor who is "under the age of five and has suffered severe physical abuse" may be judged a dependent.⁶⁴ "In any case in which the minor is four years of age or older, counsel shall interview the minor to determine the minor's wishes"⁶⁵ "The social worker shall interview any child four years of age or older"⁶⁶ If a child is 12, the court shall directly inform the minor of his or her rights; however, if the child is under 12, the court shall inform his or her guardian ad litem or counsel.⁶⁷ There is a hearsay exception for statements made by minors "under the age of 12."⁶⁸ A child under the age of 6 may be placed in a group home only upon a special showing.⁶⁹ Reunification services are provided for a shorter period if the "child was under the age of three on the date of the initial removal" from his parents' custody.⁷⁰ And, children "12 years of age or older" may object to adoption.⁷¹

It is difficult to divine a unified field theory of children's ages in the California scheme. It is clear that 4-year-old children are presumptively determined capable of expressing their desires because both attorneys and social workers are mandated to interview them. It is also clear that 12-year-olds are presumed capable of understanding an age-appropriate explanation of their constitutional and statutory rights, of consciously lying in their hearsay statements, and definitively determining their best long-term interest by exercising a veto to adoption. Fourteen-year-old children are sophisticated enough to receive court documents and serve on governmental policy boards. What appears from California's patchwork of presumptive age competencies is that competency must be assessed in relation to the particular task being considered. A single age of presumptive maturity for all activities simply does not exist. Haralambie and Glaser further note: "It is difficult to use cut-off points, even rebuttable presumption,

for determining competency, or 'impairment,' because ... '[f]or children as well as adults, competence is relative to a specific decision, and an adolescent's competence may vary over time with changes in his or her condition and so may be intermittent or fluctuating."⁷²

If California decides to establish a presumption of competency regarding the attorney-child client relationship, the age of 4 is probably the best cutoff since by then most children are capable of verbalizing their placement preferences. The attorney would then need to determine whether the facts in the individual case rebutted that presumption of competency. However, there is a distinct chance that overburdened dependency counsel will not sufficiently investigate the child's individual case, so that many children under 4 will be incorrectly treated as "impaired," and incompetent children over 4 will be presumed competent. A far safer and fairer standard for children is to create a presumption that all children are competent and unimpaired unless the child's attorney discovers facts rebutting that presumption. That standard will force attorneys to be vigilant in determining their clients' capacity in every case.⁷³

There are a number of options for the attorney who determines that the minor is incompetent. First, the attorney could argue for the appointment of a guardian ad litem who could present the court with that attorney's determination of the child's best interest. But even if a guardian ad litem is appointed, the attorney initially appointed to represent the child should continue to provide the child zealous advocacy in a number of ways. First, if possible, the attorney should determine whether the context will permit her to act under a substitute judgment position. In other words, if the attorney can piece together sufficient data from which she can deduce what the child's preference would be, she should articulate that position to the court. If the attorney cannot determine the incompetent child's preference, then she can still act as a protector of her client's rights by presenting relevant evidence, objecting to inadmissible evidence, and making a closing argument that outlines the weakness in the DSS's case. However, even if the attorney determines that a very young child is not impaired, it is highly unlikely that she will be able to convince the court to give sufficient weight to that young child's wishes regarding his best interest. Most judges discount the weight of testimony that is not delivered with the expected logical structure.⁷⁴ For example, a survey of Virginia judges found that "89% of the judges surveyed ranked the preference of children fourteen or older as dispositive or extremely important, 96% ranked the preferences of children ten to thirteen as extremely or somewhat important, and 92% ranked the

preferences of children six to nine as somewhat important or not important ..."⁷⁵

It is vital that California not promulgate prophylactic rules that overprotect children at the expense of the loyalty,⁷⁶ confidentiality, and zealousness⁷⁷ that form the traditional underpinnings of the attorney-client relationship. As was demonstrated above, only a small percentage of abused children raise troubling questions concerning their capacity to consider the limited variables presented by the case in determining their best interest; only 20 to 25 percent of abused children in the Los Angeles system were younger than 5 years old. Those from 0 to 2 years old will usually be "impaired" either in their decision-making ability or in their verbal capacity to relate their wishes; this age group thus provides easy cases in which counsel must determine capacity. From 3 to 4 years old children will usually be able to articulate their wishes to a limited degree but may lack a decision-making framework to intelligently make a reasoned choice among alternatives. However, children older than this will usually have a sufficient command of language and a sufficient experiential base to determine where they would rather be placed and therefore will usually be determined competent. Therefore, any new rules or standards promulgated to protect children should be aimed at the age group that provides the most difficult cases for determining competency, those between 3 and 5 years old.

THE STATUS AND DEMOGRAPHICS OF CHILDREN'S COUNSEL

Surprisingly little is known about the attorneys who represent children in California child abuse and neglect cases. As Edwards notes, "Child advocacy is a recent phenomenon. Fifty years ago there was little concern about who would speak for children in legal proceedings that affected them."⁷⁸

A variety of attorneys are eligible to represent children in dependency cases: (1) the private bar under court appointment,⁷⁹ (2) county counsel, (3) the district attorney, (4) the public defender, or (5) "other public attorney."⁸⁰ The court has the discretion to choose among any of those five categories of attorneys to represent children; however, in Los Angeles, which has a disturbingly high number of child abuse cases, the juvenile court has determined that Dependency Court Legal Services and the private bar shall litigate on behalf of children because of a potential conflict of interest between county counsel, which represents DSS, and children.⁸¹ Having the district attorney represent children also creates problems, especially when the allegations in the petition can support a criminal charge against parents for abuse or neglect, because the

prosecutor can indirectly discover data that would be confidential and beyond the pale of reciprocal discovery in the criminal action.⁸²

THE NEW TREND OF QUASI-GOVERNMENTAL CHILDREN'S ADVOCACY CONTRACT LAW FIRMS

Providing competent, zealous advocates for parties in dependency proceedings is expensive. For example, "from June 1990 through May 1991, Los Angeles County paid court appointed private dependency panel attorneys \$9,839,971.22."⁸³ By July 2, 1997, through June 29, 1998, the cost of hiring the private bar had escalated to \$16,510,750.⁸⁴ Because of the escalating costs of hiring the private bar to represent parties in dependency court, many counties have entered into contractual relationships with governmentally created attorney groups. The largest such group is Dependency Court Legal Services (DCLS), which represents children in Los Angeles County pursuant to a contract with the County of Los Angeles.

According to that January 22, 1990, contract, the county sought "to develop an economical and cost effective way to provide high quality representation for such parties to Dependency Court proceedings when such legal services are required ..."⁸⁵ The contract specifies how attorneys will be compensated and specifically states that DCLS shall be reimbursed for "[e]xpenses necessarily incurred in the representation of persons ... for such items as travel, expert witness fees and transcript costs ..."⁸⁶ The County of Los Angeles also provides indemnity, workers' compensation and social security benefits to DCLS attorneys.⁸⁷ However, DCLS is referred to as an "independent contractor," and the contract indicates that the parties do not intend to "create the relationship of agent, servant, employee, partnership, joint venture, or association, as between the COUNTY and CONTRACTOR."⁸⁸ Therefore, the contract has created a hybrid organization, an independent contractor indemnified by the county. Whether DCLS is an "appointed counsel" or "other public attorney" pursuant to section 317 is unclear.⁸⁹

The number of attorneys hired by DCLS and the percentage of their workload dedicated exclusively to minor clients have continued to rise: "In January 1996 children's appointments were 61.5% of [DCLS] workload. By August of 1998 that percentage had increased to 86.5%" with an average of between 1.9 and 2.0 children represented per case.⁹⁰ By January 1996 DCLS had a staff of 73 attorneys; the "current staff includes 85 attorneys, 6 social workers, 11 social work investigators, and 6 paralegals ..."⁹¹ From January 1996 until December 1998 DCLS received

between 760 and 272 new appointments, with an average of two child clients per appointment; the average number of new appointments is approximately 450 cases, or 900 children, per month. Since there is a common set of facts, perhaps representing 2 siblings in the same proceeding should be weighted at 1.5. The DCLS total active caseload has fluctuated between 18,618 and 21,154, and there is a relatively close approximation between the number of new cases and the number of files closed per month.⁹² Although the average number of cases per attorney fluctuates during the year and among different attorneys, the ratio is approximately 240 cases per attorney.⁹³ The number of contested hearings argued by DCLS each month ranges from a high of 474 to a low of 284, and the number of mediations conducted ranges from a high of 279 to a low of 141.⁹⁴

Having children represented by a quasi-governmental firm like DCLS instead of relying exclusively upon the private bar is a decided advantage. First, having expert peer lawyers available for consultation on difficult or novel issues provides a significant advantage that most private solo practitioners lack. Second, DCLS is able to provide its attorneys with ongoing continuing education through weekly training sessions at the courthouse. Third, unlike private counsel, DCLS has a resident staff of social workers and other fact investigators with whom the attorneys can develop a sophisticated working relationship. Also, because it is a formal quasi-governmental law office, many local law schools provide law student externs to assist children's counsel by frequently contacting the child clients.⁹⁵ However, quasi-governmental children's law firms are also problematic because of their close relationship with the court. Under the Trial Court Funding Act of 1997 it is now the court that renews and negotiates contract services with DCLS and other legal services providers.⁹⁶ There is the potential that the court, as employer, can chill zealous advocacy.⁹⁷

CHILDREN'S COUNSEL CARRY HEAVY CASELOADS AND ARE SUBSTANTIALLY UNDERPAID

Standard J-1 of the ABA Standards for Lawyers Who Represent Children in Abuse and Neglect Cases provides that "[a] child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation ..."⁹⁸ However, in California, most children's attorneys receive neither adequate compensation nor any payment for work accomplished outside the courtroom.⁹⁹

Although the switch in emphasis to contracting with quasi-governmental law firms rather than exclusively with private-panel attorneys has some collateral benefit in relation to the evenness and quality of advocacy, the driving force for the change was to save money.¹⁰⁰ For instance, Ventura County was expected to save up to \$100,000 annually by switching to a contract system.¹⁰¹ The Ventura firm will be paid \$190,000 to handle 462 cases next year, or \$411 per case.¹⁰² And the Orange County La Flamme firm, which "has on staff 1.5 investigators for each lawyer ... has been able to represent these children at a cost of approximately \$230 per child."¹⁰³ On January 2, 1996, Los Angeles County adopted a "flat-fee" payment system—a maximum of \$760 for the first two years of representation—for all panel attorneys.¹⁰⁴

The problem with the flat-fee system of attorney compensation is that like a 99c Store, the only way to make a profit is through an economy of scale; the lawyer must maintain an extremely high caseload. For instance, a review of the section 317 private-panel attorneys in Los Angeles demonstrates that various attorneys billed the court substantial fees for representing high volumes of clients in dependency court last year: 658 cases (\$182,290); 572 cases (\$186,600); 541 cases (\$150,360); 478 cases (\$156,460); 439 cases (\$117,860); and 413 cases (\$131,080).¹⁰⁵ One must wonder what quality a private attorney can provide when representing 658 clients a year in dependency court.¹⁰⁶ Of course, some of each attorney's fee filings are for review hearings, not just adjudications. For instance, Attorney 1, who billed for 658 clients, earned less than Attorney 2, who billed for 572 clients. This was probably because Attorney 1 was billing more cases over 13 months old, which are compensated at a flat rate of \$200, than cases in their first 13 months, which are compensated at a flat rate of \$380.¹⁰⁷

The new flat-fee attorney compensation systems are premised upon on a speculative "averaging" concept as well as economy of scale. The theory is that if an attorney takes a significant number of cases compensated at either \$380 or \$200, the average number of "difficult" cases will be substantially offset by a greater number of "routine" cases. However, that theory is statistically flawed because average occurrences do not spread out evenly on a timeline. There is, rather, "clustering"—events happen in groups rather than being equivalently distributed. The most apt statistical analogy for California is that scientists can predict that over a year there is an X percent chance that the Greater Los Angeles area will have 30 magnitude-2.5 earthquakes. However, 15 of those 30 magnitude-2.5 earthquakes may occur in a single month and the other 15 over the next 11 months. Just so with the distribution of "difficult" and "routine" dependency cases. An attorney

may be saddled with many more "difficult" cases at any given moment, even though the total number of difficult cases will be spread out during the entire year. Thus, it is impossible to rely upon a model that presupposes an attorney will have a caseload approximating at any given time a balance between "difficult" and "routine" cases.

Unfortunately, the child clients who will be most affected by statistical clustering are those represented by private-panel attorneys because counsel do not have alternative resources to draw upon during clusters of difficult cases. Panel attorneys have few salient options because continuances are disfavored,¹⁰⁸ because they rarely have partners who can take over some of the cases, and because they would probably be reluctant to acknowledge their inability to handle a regular-panel caseload for fear that they would not be reappointed to the panel. However, quasi-governmental firms like DCLS can shift aberrational caseloads among attorneys so that child clients are not nearly as negatively affected by clusters.

Another problem with the current flat-fee system is that it is not adjusted for inflation. The amounts paid to panel attorneys have remained the same since the system was instituted in 1996. However, because panel attorneys are not compensated for their fact investigation outside the courtroom or for their expenses, profit per case continues *to decrease* with inflation. This places greater pressure upon panel attorneys to accept more cases in order to earn the same amount as in the previous year. Think of a truck driver paid by the mile who does not get a raise in three or four consecutive years. The only way he can maintain his economic status quo is to drive more miles and spend more hours behind the wheel, thus exacerbating the chance of accidents. The same can be said of panel attorneys; less profit per case and the failure to adjust payments to at least the inflation index increase the chances that competent advocacy will be denied to a growing percentage of children.

What is perhaps even more amazing is that the dependency court does not even directly track the number of clients whom the panel attorneys represent.¹⁰⁹ If the contracts with quasi-governmental firms like DCLS and the flat fees awarded to panel attorneys are not reasonably increased over time, there is a real chance that all the "seasoned" attorneys will leave and work for agencies, such as the Los Angeles County Counsel, who make substantially more for working in the dependency courts.¹¹⁰ Quasi-governmental attorneys like those who work at DCLS are even more at risk of being skimmed away by other governmental agency law offices since the contract is subject to renegotiation and open bidding. In fact, the DCLS contract may be terminated "at any time for any reason by giving the other party at least sixty (60) days prior written

notice. COUNTY may immediately terminate this Agreement upon the termination, suspension, discontinuance, or substantial reduction in funding for the Agreement activity.¹¹¹ If DCLS pushes too hard to increase its contract compensation, the county or the court under the Trial Court Funding Act of 1997 can simply put the services out to new competitive bid. Because of the tenuousness of the contract and the likelihood that the contract sum will not be substantially increased annually, novice attorneys may leave the office after gaining practical experience, thus depleting the office of senior children's law specialists.¹¹²

Another problem with the flat-fee system is that it is not reciprocally applied to counsel who represent the government's position. Although children's counsel are severely limited in the amount of fact investigation and outside court work that can be accomplished for \$380, DSS attorneys have no such cap on the per-case cost. This substantial disparity in resources between the child's and the department's counsel further strains the Supreme Court's conclusion in *Cynthia D.*¹¹³ that parents and children are on an even procedural footing with the State. As that disparity increases with further stagnation of children's counsel's pay and the creation of presumptions that effectively lower the State's burden, the rationale of *Cynthia D.*—that a clear and convincing evidence standard is not required at a section 366.26 severance hearing—is no longer justified.

The new trial court funding system further magnifies the difficulty of ensuring that children are appointed competent advocates. Traditionally the responsibility to ensure competent representation has rested with the court. The ABA has indicated that “[t]he trial court judges should control the size of the court-appointed caseload of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation.”¹¹⁴ In addition, if “the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.”¹¹⁵ We must wait to determine whether under the Trial Court Funding Act the court can maintain its role of ensuring competence and reasonable compensation for children's appointed counsel while also serving as the contractor and paymaster. The potential for a conflict of interest while the court attempts to balance finances with competency is manifest. Perhaps a neutral body such as the Judicial Council of California should study and continuously monitor courts'

payments to court-appointed attorneys as well as the caseloads carried by those attorneys. It would also be extremely advantageous to trial courts, children's attorneys, and child clients if the Judicial Council were to formulate definitions of reasonable caseloads and reasonable compensation for children's attorneys. It is irresponsible for the Judicial Council to enter only half way into providing competent counsel to parties in dependency court. In rule 1438 of the California Rules of Court the Judicial Council requires the courts to draft and implement guidelines for certifying that attorneys are competent to practice in dependency court. However, once the courts certify that attorneys are competent, they can only remain competent if their working conditions permit them a reasonable opportunity to earn a living and provide excellent representation. There is now a conflict of interest between the trial courts' certifying counsel as competent and the courts' responsibility to pay attorneys out of the courts' limited resources. Because the Judicial Council has the authority to request detailed data from the superior courts on the cost of providing attorneys in dependency cases, it is the governmental body in the best position to recommend to the Supreme Court standards for reasonable caseloads and attorney compensation.

REPRESENTING CHILD CLIENTS IN THE WORLD OF CONCURRENT PLANNING

The philosophy of concurrent planning is that the dependency system should simultaneously provide reunification and permanency planning services to families with dependent children so that children will be provided stable home placements as soon as possible.¹¹⁶ Although California adopted concurrent planning in 1997, few jurisdictions have yet realized the problems inherent in implementing the apparently conflicting simultaneous goals of reunification and termination.¹¹⁷ Concurrent planning involves a multitude of services and options not previously available, including (1) increased efforts to establish paternity at the earliest possible date;¹¹⁸ (2) a broadened definition of “relative”;¹¹⁹ (3) increased placement of siblings in the same home if that placement is in the children's best interest;¹²⁰ (4) a reduction in the duration or an elimination of reunification services;¹²¹ (5) increased reliance on voluntary relinquishment by parents;¹²² and (6) kinship adoption agreements.¹²³

One thing is certain about California's new concurrent planning requirement: It will significantly expand the scope of the child's lawyer's fact investigation. Prior to concurrent planning the focus was initially on three different issues: (1) Did the alleged abuse or neglect in fact occur? (2) If it did occur, what reunification services

should be required? (3) If the child cannot remain in the home during reunification, what is the best temporary placement? Under the old system children's attorneys rarely spent significant time investigating the backgrounds of temporary caretakers, such as foster parents, since periodic review hearings focused upon the parents' steps to reunite with the child, not the DSS's alternative plans to permanently place the child with these foster parents should reunification fail. Under concurrent planning the child's attorney will now be forced at the disposition hearing and at all future review hearings not only to argue what reunification services should be provided, but also to advocate his or her client's desire for alternative permanent placement should parental severance take place. Concurrent planning changes the context and the tactics of the child's advocate because it functionally presents a balance of competing parental universes.¹²⁴ If the child indicates that he or she wants to return home, the zealous children's advocate under the concurrent planning model will attempt to demonstrate the weaknesses of the prospective adoptive parents at all hearings subsequent to the adjudication hearing based on the "doctrine of sequentiality," which holds that initial decisions by fact-finders are often dispositive on later determinations, even if the decision occurs over time through sequential hearings.¹²⁵ The minor's attorney must advocate the child's affirmative case for reunification while simultaneously rebutting DSS's evidence that the prospective adoptive parents will provide the child a wonderful, or least a more legally acceptable, home.

By combining the usual dependency consideration of reunification and severance simultaneously with the issue of the alternative prospective placement, concurrent planning has made relevant a host of evidence not previously considered in pretermination hearings, such as the character and quality of the prospective adoptive parents. Because section 355 permits the introduction of all relevant evidence, children's counsel will begin to often vigorously attack the character of prospective adoptive parents or long-term caretakers.¹²⁶ Although predicting the exact changes in children's advocacy that concurrent planning will wreak is difficult, what is certain is that postadjudication hearings will become more complex, more adversarial, more time consuming, and more expensive. In light of concurrent planning, courts must rethink the amount of flat fees paid to panel attorneys and terms of contracts with quasi-governmental children's advocacy law firms.

**CHILDREN'S COUNSEL SHOULD NOT BE
RELIEVED UNTIL ALL OF THE CHILD'S
INTERESTS HAVE BEEN PERFECTED**

The inherent risks associated with statutory rights, as opposed to constitutional rights, is that they may be evanes-

cent: he who giveth can taketh away. As courts search for creative means of playing the zero-sum-dependency-budget game, they are likely to become more creative in interpreting statutes that require significant funding. A recent case, *In re Jesse C.*,¹²⁷ is but one bright example of new statutory interpretations whose main purpose is to save money rather than ensure fairness in the dependency system. Welfare and Institutions Code section 317(d) provides that counsel shall continue to represent the "minor at the detention hearing and at all subsequent proceedings before the juvenile court ... unless relieved by the court upon the substitution of other counsel or for cause." However, *In re Jesse C.* implemented a novel interpretation of section 317(d): because the initial appointment of counsel for the minor is discretionary upon the court's finding that the "minor would benefit from the appointment," once the court finds that the child no longer needs an attorney, sufficient "cause" exists to relieve the child's appointed counsel.¹²⁸

One must ask, however, whether there is a sufficient reason, other than reducing the court's budget, for providing different procedures for relieving children's, rather than parents', attorneys. The law clearly sets out the required procedural due process for the court to relieve parents' counsel. First, the burden is on the person alleging that parents in dependency cases no longer have a continuing need for counsel; there is a presumption that they do.¹²⁹ And, second, before parents' counsel can be relieved, parents must be given notice of a hearing in which the motion to relieve counsel will be argued.¹³⁰

Consider the inherent conflict of interest in a judge relieving a child's counsel without a noticed motion. First, the child would have no voice in the proceeding because the failure to notify the child's counsel will have stripped away his or her zealous advocate. Second, without a presumption of the continuing need for counsel, all the court need do is rule that counsel is not needed without anyone having an opportunity to question the judge's decision. Economic efficiency alone has been held insufficient to support relieving parents' counsel;¹³¹ but if the child's attorney does not have a right to a hearing before being relieved, there will be no one available to contest the court's order. Third, what criteria should the court consider in deciding whether to relieve a child's counsel? Because the court, unlike the child's counsel, is not privy to all the facts that the child's counsel has discovered, the judge is in a very weak position to determine whether counsel might continue to assist the child or whether the child still needs counsel. The judge can only speculate based upon generalizations about how cases normally proceed throughout different stages of the dependency process.

For instance, a judge might decide that the minor's counsel is no longer needed after the parents' rights are severed pursuant to section 366.26. However, the Legislature has recently provided that postadoptive sibling visitation is a post-termination option. Section 366.29 now provides that, with the consent of the adopting parents, the court may facilitate postadoptive sibling visitation and sets up mechanisms for continuing court involvement.¹³² Therefore, consider the following hypothetical:

Parental rights are severed regarding two siblings, John, age 4, and Pam, age 5. Although relatives are seeking a kinship adoption of both children, the DSS determines that the children's interest would be better served by placement in one of two prospective adoptive homes, the Jameses or the Smiths. The Jameses are willing to adopt Pam and consent to postadoptive sibling visitation, but the Smiths want to adopt John only and will not consent to postadoptive sibling visitation. If the court relieved John's and Pam's attorneys after the parental severance trial, the children would lack representation in attempting to either perfect the kinship adoption for both with relatives or adoption in the Jameses home for Pam with postadoptive sibling visitation between Pam and John.

In section 16002 the Legislature has recently indicated a policy of continuing sibling contact and ordered that the agency "shall make diligent effort in all out-of-home placements . . . to maintain sibling togetherness" or "ongoing and frequent interaction" as part of a permanent plan. Therefore, since *In re Jesse C.*¹³³ involved the law prior to the promulgation of section 16002, it should no longer be regarded as authority that children do not need counsel after permanent planning has begun. Further, counsel can now argue that a court should still have jurisdiction to determine the specific sibling placements even after parental severance. Thus, in the above hypothetical, counsel could argue that DSS abused its discretion in placing Pam with the Smiths rather than with relatives or another adoptive family who would permit sibling visitation. The trial court could then use its discretion to place the children in homes that would further their contact or order DSS to search for additional placements that would further sibling association.¹³⁴

Therefore, it is clear that with the passage of postadoptive sibling visitation children's counsel serve a continuing important function even after parental rights have been severed but before adoption is completed. Without providing the child and the child's counsel notice of a hearing in which the court is considering relieving counsel, children will be unjustly stripped of a badly needed zealous advocate at a critical stage of the dependency process, the final decision on the child's alternative permanent placement.

CONCLUSION

If you will just stand still for a minute you will hear it—a rustling in the wind, a ripple in the sea of change, a muffled clarion call: "They're coming—the child reformers are coming."¹³⁵ And so we sit on the promontory viewing the shifting sands of child advocacy. We have seen the spearhead in the Judicial Council's promulgation of rule 1438 of the California Rules of Court and its new definition of "competent" dependency counsel,¹³⁶ and in the Legislature's many modifications to section 317, which now attempts to protect children *from* zealous advocacy, narrow the ambit of representation to purely legal issues, and permit children's attorneys to express personal views to the judge. The only question is whether or when zealous representation will be stripped from children in need of an effective advocate; will the Legislature take the final step in modifying section 317(c) to provide "[i]n any case in which it appears to the court that the minor would benefit from the appointment of a guardian ad litem [rather than an attorney] the court shall appoint a guardian ad litem for the minor"?

If that time comes and guardians ad litem are to replace zealous advocates, the dependency system will indeed metamorphose into a new social organization. First, no one will be required to argue for the child's stated preference, even if he or she is mature and "unimpaired."¹³⁷ Second, since the guardian ad litem's role is to assist the judge in fact-finding, the child will no longer have an advocate who is bound by duties of loyalty and confidentiality.¹³⁸ In fact, since it is the guardian ad litem's duty to bring information relevant to the child's best interest before the court, the guardian may be mandated to violate the child's confidentiality. Indeed, there is nothing to prevent the guardian from being called as a witness against the child.¹³⁹

If one of the purposes of the dependency system is to make the physically and emotionally abused child whole again and to restore the child's faith in adult authority figures, this guardian ad litem system will certainly be counterproductive. The child will feel betrayed and will have no one with whom to bare his or her soul without the threat of public exposure. Although the court may possibly learn a few facts that the DSS's and the parents' attorneys were unable to discover, the price for that additional data is simply too high.

However, if the real goal for moving from zealousness to guardian ad litem representation is economic, the changes are likely *to appear* extremely successful. If the real purpose of the system is merely to provide the child with an adult who can protect him or her from the "Jurogenic effects"¹⁴⁰ of the adversary system, there is certainly no

need for the guardian ad litem to be an attorney. Thus, magically, the Legislature, Judicial Council, and the courts can turn lead into gold by transmogrifying zealous attorneys into nonattorney volunteer guardians ad litem.

But there is a rub.¹⁴¹ How does the Legislature resolve its conflicting view of children trapped in the dependency system? How does it justify labeling children as *parties* in the dependency system who are entitled to competent counsel while at the same time eviscerating zealousness, loyalty, and confidentiality?¹⁴² Or do the child reformers have a broader, more insidious plan of sending abused children back to the netherworld of just being “victims” of abuse and “subjects” of the DSS’s petition? Even if autonomy is not as important in the attorney–child client context as in the attorney–adult client relationship, the dependency system should not strip children of their dignity, privacy, and representation under the guise of “best interest” or under the cloak of *parens patriae*.

NOTES

1. *Santosky v. Kramer*, 455 U.S. 745, 762 (1981). Some might argue that *Santosky* is no longer controlling precedent in California since the California Supreme Court held that *Santosky*’s requirement of a clear-and-convincing-evidence standard is not applicable to parental terminations in California. *Cynthia D. v. Superior Court*, 851 P2d 1307, 1314 (1993). However, it is not that simple. The rationale behind *Cynthia D.* was that unlike the New York procedures held unconstitutional in *Santosky*, California’s dependency procedures do not create a “disparity between the litigation resources available to the parties. . . . [and] California dependency statutes . . . provide . . . a much more level playing field.” *Id.* at 1304. (But see Justice Kennard’s dissent, which argued that California procedures do not cure the defects of the New York system because “[w]hen termination of parental rights is at issue under the California dependency statutes, the child will always be a dependent of the court and not in parental custody. This situation tends to magnify the state’s ability to marshal its case. Moreover, the potential for class or cultural bias in a decision that will result in freeing a child for adoption by a family with greater resources than the natural parents is no less acute in California than in New York.” *Id.* at 1320.)

But the thrust of this article is whether children are entitled to counsel and how we define competent counsel. If the child does not have counsel or if counsel is not a zealous advocate, but rather some variant of guardian ad litem, then the U.S. Supreme Court’s fears in *Santosky* will be manifest in California because the state will have substantially greater resources than the child. It must be remembered that in raising the parental termination stan-

dard from a mere preponderance to clear and convincing evidence, *Santosky* assumed that all parties, including the child, were represented by traditionally required zealous advocates: “The State, the parents, and the child are all represented by counsel.” *Santosky*, 455 U.S. 762. Therefore, if a child lacks a zealous and competent attorney, the balance is shifted to the State in an adversarial proceeding, and the rationale of *Cynthia D.* for not requiring the *Santosky* clear-and-convincing-evidence standard evaporates. Therefore, *Santosky* is still vital in California dependency cases where all parties are not represented by counsel and in any case where a party lacks the resources accorded the state.

The subjectivity of the dependency system was illustrated by an empirical analysis of New York cases in which a panel of three judges each reviewed 95 cases. The research found that “although the agreement among judges was considerably better than chance, all three judges agreed in less than half (45 out of 94) of the cases.” Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Fam. L.Q. 287, 299–300 (1983). And even in cases in which they agreed, they often disagreed on the reasons given for their decisions.

2. The modification to section 317 of the California Welfare and Institutions Code was a political reaction to the infamous death of Lance Helms, whom the court returned to his father’s house upon the advice of the child’s attorney. See Mark Gladstone, *Child Welfare System Blasted*, L.A. Times, Jan. 20, 1996, at B1; Andrew Blankstein, *Lawyer to Seek Release of Woman Imprisoned in Toddler’s Death*, L.A. Times, Sept. 11, 1997, at B5; Andrew Blankstein, *Woman to Be Freed in Toddler’s Slaying*, L.A. Times, Sept. 13, 1997, at B1.

Attorneys often disagree with their client’s goals and preferences, but they are still obliged to argue those positions zealously. As long as the child’s attorney determines that her client is competent to make decisions regarding the dependency case, the attorney must zealously and competently represent those interests. That means that if the attorney disagrees with the competent child’s desire to stay in what the attorney opines might be an abusive home, or unsafe home, the attorney’s hands are tied; she must argue the child’s preference. However, if the attorney concludes that the child is not competent, a different set of questions arises: Must or should the attorney request appointment of a guardian ad litem to present the perceived best interest of the child? Will such a disclosure weaken the child’s arguments because the court will be put on notice that the child probably is incompetent to make a reasoned choice among alternatives? Must or can the child’s attorney still zealously argue the incompetent

child's stated preference even if she disagrees with it? These are just some of the ethical dilemmas that are not explicitly answered either by existing professional responsibility rules or by statutes.

3. In *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), Judge Learned Hand defined the "calculus of risk" as a function of three variables: the probability of the occurrence of the injury, the gravity of the injury should it occur, and the burden of adequately protecting against the injury. Conduct is unreasonable if the burden of avoiding injury is less than the product of the probability times the severity of injury. I do not recommend using the Hand test for determining the best interest of children since it subordinates individual rights to economic efficiency; creates statistical fact-investigation nightmares; often results in morally culpable conduct; fails to factor in risk aversion, neutrality, or preference; and does not account for distinctions between risk of greater harm and greater risk of harm. However, the Hand test is a valuable tool because it forces nonempirically based decisions to be closely examined for overgeneralizations and biases.

4. The duty of silence mandated by Welfare and Institutions Code section 317 places the child's attorney in a cruel dilemma. First, if the attorney remains silent she may violate the duty of zealous and competent representation found in almost all professional codes. Second, the silence may anger a judge who requests the attorney to give the judge her position on what should happen in the dependency case. And third, if the attorney follows the dictates of section 317 that prohibit arguing the child's desire to return home and if the attorney argues her own view of the child's best interest, the child's attorney becomes perhaps the most convincing witness against the child since the child will not have an opportunity to cross-examine her attorney concerning the basis of the attorney's conclusions.

5. *In re Cindy L.*, 947 P.2d 1340 (Cal. 1997); *In re Lucero L.*, 80 Cal. Rptr. 2d 537 (Cal. 1998) (*review granted*, Mar. 9, 1999).

6. If the state does not produce the hearsay declarant, Welfare and Institutions Code section 355(c)(1) (West 1998) holds that "the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding"

7. *In re Malinda S.*, 795 P.2d 1244 (Cal. 1990). Further, *In re Jeanette V.* held that a father's right to cross-examine the social worker who prepared the report for the dispositional hearing was not controlled by statute, but rather by the due process clause which "is a flexible concept which depends upon the circumstances and a balancing of various factors." 80 Cal. Rptr. 2d 534, 536-37 (Cal. 1998).

The *Jeanette V.* court held that denying the father a right to such cross-examination was not prejudicial because the cross-examination could have only uncovered facts that were not relevant to the current procedural status of the case. *Id.* at 537.

8. *Malinda S.*, 795 P.2d at 1252.

9. *See In re Jessica B.*, 254 Cal. Rptr. 883, 893-94 (Cal. 1989); *Baltimore City Dept of Social Services v. Bouknight*, 493 U.S. 549 (1990). For a discussion of the interrelationship between the Fifth Amendment privilege against self-incrimination and use immunity in dependency cases, *see* William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. 473 (1990).

10. Judge Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 32-33 (1972).

11. Welfare and Institutions Code section 317(c) provides that "[i]n any case in which it appears to the court that the minor would benefit from the appointment of counsel the court shall appoint counsel for the minor."

12. *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27 (1981) held that fundamental fairness presumptively requires the appointment of counsel for an indigent "only when, if he loses, he may be deprived of his physical liberty." However, *Lassiter* noted that due process may be violated under certain circumstances if counsel is denied in dependency cases.

13. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

14. *Id.* at 335.

15. *Lassiter*, 452 U.S. at 18.

16. *Santosky v. Kramer*, 455 U.S. 745 at n.11.

17. California Family Code section 7803 provides that "[a] declaration of freedom from parental custody and control . . . terminates all parental rights and responsibilities with regard to the child."

18. *Santosky*, 455 U.S. 745 at 754 n.7 and 765 n.15.

19. *Parham v. J.R.*, 442 U.S. 584 (1979).

20. *In re Roger S.*, 569 P.2d 1286 (Cal. 1977).

21. *Id.* at 1292.

22. Under the Lanterman-Petris-Short Act, Welfare and Institutions Code sections 5350-5371, a minor who is involuntarily committed may have a conservator appointed who, if indigent, is entitled to the appointment of counsel to help perfect the child's rights. *See* Cal. Welf. & Inst. Code § 5370.1 (West 1998).

- NOTES
23. *Lassiter*, 452 U.S. at 27–28.
 24. *Id.* at 28.
 25. *Id.* at 30.
 26. *Id.* at 29.
 27. Pursuant to Welfare and Institutions Code sections 317(c) and 318, if there is no conflict of interest, the county counsel, district attorney, or public defender may represent the child at the hearing, and if the district attorney has not represented the minor in the dependency case, the district attorney can appear in dependency court even though the minor may be subject to a delinquency petition pursuant to section 602.
 28. *Lassiter*, 452 U.S. at 31.
 29. *In re Cindy L.*, 947 P.2d 1340 (Cal. 1997); *In re Lucero L.*, 80 Cal. Rptr. 2d 537 (Cal. 1998).
 30. *Lassiter*, 452 U.S. at 31. For California cases considering the due process implications of denying counsel in dependency cases, see *In re Andrew S.*, 32 Cal. Rptr. 2d 670 (Cal. 1994) and *In re Emilye A.*, 12 Cal. Rptr. 2d 294 (Cal. 1992).
 31. For a detailed discussion of the different standards of appellate review for denial of counsel and incompetence of counsel see William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loy. U. Chi L.J. 195 (1996).
 32. For a discussion of how some courts relieve minor's counsel prior to the termination of jurisdiction or adoption, see *infra* at text accompanying notes 33–39.
 33. Welfare and Institutions Code section 317 received only a modest modification in 1992 (Stats. 1992, ch. 433 (AB 2448)).
 34. Christopher Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 Fordham L. Rev. 1857, 1865–66 (1996) (detailing a survey of California counties in which county counsel “jointly represented children and the petitioning Department of Social Services.”) Several California cases determined whether a conflict between the agency and child existed. For example, see *In re Patricia E.*, 219 Cal. Rptr. 783 (Cal. 1985); *In re Mary C.*, 4 Cal. Rptr. 2d 346 (Cal. 1995); *In re Richard H.*, 285 Cal. Rptr. 917 (Cal. 1991).
 35. *In re Richard H.*, 285 Cal. Rptr. 917 (Cal. 1991).
 36. At a 1997 training session I was involved in at the Los Angeles Child Dependency Court, I argued to a group of counsel who exclusively represent children that they had a duty to argue the child's stated preference. The immediate response from the audience was that their hands were tied by *Richard H.* It was also interesting that among these dependency court children's advocates, the group was almost evenly split on whether they wanted the obligation to argue a child's position that they thought was not in the child's best interest.
 37. *Richard H.*, 285 Cal. Rptr. at 1368.
 38. Welfare and Institutions Code section 317.5 provides that “[e]ach minor who is the subject of a dependency proceeding is a party to that proceeding.”
 39. Cal. Welf. & Inst. Code § 317.5.
 40. None of the seminal California cases defining attorney zealouslyness, client loyalty, or confidentiality concerned minor clients. See, e.g., *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990); *People v. Wade*, 750 P.2d 794, 809 (Cal. 1988); *Maxwell v. Superior Court*, 639 P.2d 248, 253 n.4 (Cal. 1982); and *Santa Clara County Counsel Attorney Ass'n v. Woodside*, 869 P.2d 1142 (Cal. 1994).
 41. California does not have an equivalent provision to rule 1.14(a) of the ABA Model Rules of Professional Conduct, which provides that “[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority*, mental disability or for some other reason, the lawyer shall, as far as possible, maintain a normal client-lawyer relationship with the client” (italics added).
 42. William Wesley Patton, *Legislative Regulation of Dependency Court Attorneys: Public Relations and Separation of Powers*, 24 Notre Dame J. Legis. 3, 6–7 (1998).
 43. For an extended analysis of the issue of separation of powers in relation to Welfare and Institutions Code section 317, see Patton, *id.* at 8–11.
 44. *Santa Clara County Counsel Attorneys' Ass'n v. Woodside* 869 P.2d 1142 (1994).
 45. *Id.* at 1151.
 46. The Legislature's promulgation of Welfare and Institutions Code section 317 violates the *Santa Clara* test in a number of ways. First, defining zealouslyness, loyalty, and confidentiality have traditionally been the exclusive province of the Supreme Court. Second, such a paring back of zealouslyness permits attorneys “to act in such a way as to seriously violate the integrity of the attorney-client relationship.” *Santa Clara*, 869 P.2d at 1152. And finally, section 317 creates an absolute conflict with existing California ethical rules defining zealouslyness, loyalty, and confidentiality. For California cases concerning the definition of zealouslyness, see *Drociak v. State Bar*, 804 P.2d 711, 714 (Cal. 1991); *Ramirez v. State Bar*, 619 P.2d 399, 405–06

(Cal. 1980); *Codiga v. State Bar*, 575 P.2d 1186, 1188 (Cal. 1978); *In re Katz*, 3 Cal. Bar Ct. 430, 438 (Cal. 1995); *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990); *People v. Wade*, 750 P.2d 794, 809 (Cal. 1988); *People v. McKenzie*, 668 P.2d 769, 778 (Cal. 1983); *Davis v. State Bar*, 655 P.2d 1276, 1279 (Cal. 1983); and *Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982). For cases discussing client loyalty, see *Anderson v. Eaton*, 293 P. 788, 789–90 (Cal. 1930); see also Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. Davis L. Rev. 367 (1995).

47. California Rules of Court, rule 1438(b)(3) provides that “[o]nly those attorneys who have completed a minimum of eight hours of training or education in the area of juvenile dependency, or who have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency, shall be appointed to represent parties” in dependency court. Further, rule 1438(b)(1) states that “‘Competent counsel’ means an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceeding, the specific statutes, rules of court, and cases relevant to such proceeding, and procedures for filing petitions for extraordinary writs.” Rule 1438(b)(3) further provides that “[w]ithin every three years attorneys are expected to complete at least 8 hours of continuing legal education related to dependency proceedings.”

48. Patton, *supra* note 42, at 18.

49. The fact that the Chief Justice and other appellate court justices sit on the Judicial Council does not resolve the separation of powers problem. Cal. Const. art. VI, § 6 states that the Judicial Council “shall survey judicial business and make recommendations to the court, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.” It is clear that in terms of the Supreme Court’s plenary and exclusive power over the admission of attorneys that the Judicial Council rules shall not conflict with decisions of the California Supreme Court as well. See *In re Jeanette H.*, 275 Cal. Rptr. 9, 15 (Cal. Ct. App. 1990); *Cantillon v. Superior Court*, 309 P.2d 890 (Cal. Ct. App. 1957). For a more detailed discussion of the separation of powers issues inherent in Welfare and Institutions Code section 317.6 and rule 1438 of the California Rules of Court, see Patton, *supra* note 42, at 11–18.

50. Robert R. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 Hous. L. Rev. 327, 333, 379 (1998).

51. Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psychological Soft Spots and Strategies*, 34 Cal. W. L. Rev. 439, 439, 444 (1998).

52. “The goals of the attorney-client privilege are to engender trust, confidence, and full communication.” Robin A. Rosencrantz, *‘Hear No Evil Speak No Evil’: Expanding the Attorney’s Role in Child Abuse Reporting*, 8 Geo. J. Legal Ethics 327, 360 (1994). “Loyalty has also been described as ‘the most basic obligation of any lawyer, an obligation to serve his clients rather than to become part of the official machinery that judges them.’” James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. Miami L. Rev. 529, 557–58 (1998). Rule 1.7 of the ABA Model Rules of Professional Conduct states that “[l]oyalty is an essential element in the lawyer’s relationship to the client.” For California cases defining the duties of zealousness, confidentiality, and loyalty, see *supra* note 46.

53. Ann M. Haralambie, *The Role of the Child’s Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. Rev. 939, 953–54 (1995).

54. Los Angeles County Inter-Agency Council on Child Abuse and Neglect: *The State of Child Abuse in Los Angeles County*, 1996, at 124.

55. *Id.* at 142–43.

56. *Id.* at 154.

57. Jay C. Laubscher, *A Minor of “Sufficient Age and Understanding” Should Have the Right to Petition for the Termination of the Parental Relationship*, 40 N.Y.L. Sch. L. Rev. 656, 668–69 (1996).

58. *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings* (Amer. Acad. of Matrimonial Lawyers 1995) state that representation of an “unimpaired” child should be identical to the representation of an “unimpaired” adult. Robert E. Shepherd, Jr. & Sharon S. England, *“I Know the Child Is My Client, But Who Am I?”*, 64 Fordham L. Rev. 1917, 1940 (1996). Rule 1.14(a) of the ABA Model Rules of Professional Conduct provides that “[w]hen a client’s [without distinguishing between children and adults] ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” “The lawyer for a child who is not impaired (i.e.,

- NOTES who has capacity to direct the representation) must allow the child to set the goals of the representation as would an adult client." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1301 (1996).
59. Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *Fordham L. Rev.* 1571, 1590 (1996). Some of the factors that have been identified in determining whether or not to interfere with a client's autonomy based upon a determination of incapacity are (1) the extent to which the choice seriously invades the rights, resources, and welfare of others; (2) the irreparability of the harm to self and others threatened by the proposed choice of action; (3) whether those whose interests are threatened by the proposed action will learn about the threat in time to take self-protective action; (4) the effect in the aggregate of such individual choices on the commonwealth; and, as a countervailing consideration, (5) how integral the choice in question is to the individual's most intimate life and values." Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choice—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *Fordham L. Rev.* 1101, 1102 (1994).
60. Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 *J. Am Acad. Matrim. Law* 57, 58 (1995).
61. *Supra* note 58.
62. Cal. Welf. & Inst. Code § 225 (West 1998).
63. Cal. Welf. & Inst. Code § 248 (West 1998).
64. Cal. Welf. & Inst. Code § 300(e) (West Supp. 1999).
65. *Id.* at § 317(e).
66. *Id.* at § 328.
67. Cal. Welf. & Inst. Code § 353.1 (West 1998).
68. *Id.* at § 355(B).
69. Cal. Welf. & Inst. Code § 361.2(e)(6) (West Supp. 1999).
70. *Id.* at § 361.5(a)(2).
71. *Id.* at § 366.26(B).
72. Haralambie & Glaser, *supra* note 60, at 60. Michigan recognizes the difficulty of setting specific age-competencies. The comment to Michigan Rules of Professional Conduct, Rule 1.14 states that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Albert E. Hartman, *Crafting an Advocate for a Child: In Support of Legislation Redefining the Role of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases*, 31 *U. Mich. J.L. Reform* 237, 238 n.7 (1997).
73. The child's attorney should "initiate representation premised on a presumption that the child is competent and needs autonomy and empowerment." Shepherd & England, *supra* note 58, at 1942. This is similar to California Evidence Code section 700, which provides that "[e]xcept as otherwise provided by statute, every person, *irrespective of age*, is qualified to be a witness and no person is disqualified to testify to any matter" (*italics added*).
74. "The legal process values logical thinking. Judges are apt, because of this bias, to value decisions which are based upon logic. Thus, they are more likely to listen to children who can frame their wishes in a logical structure than to children who cannot." Janet Weinstein, *And Never Shall Meet: The Best Interest of Children and the Adversary System*, 52 *U. Miami L. Rev.* 79, 117 (1997).
75. Haralambie & Glaser, *supra* note 60, at 64.
76. Since abused children already have been betrayed by an adult, thus weakening their trust of authority figures, if the attorney breaches the attorney-client relationship and fails to maintain the duties of loyalty and confidentiality, the child will be severely emotionally re-traumatized and any needed therapy may take much longer to be effective. "In a purely therapeutic environment, the rationale behind confidentiality may be even stronger ... the first goal of therapy is the development of a trusting relationship in which the patient can disclose secrets. Once this therapist-patient relationship is in place, any violation of this trust is devastating to the therapeutic intervention." Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 *J. Marshall L. Rev.* 617, 627 (1994).
77. "[T]he adversary system functions best and most fairly only when all parties are represented by competent counsel.' Indeed, the absence of counsel in an adversary system severely diminishes the odds of justice being served." Ross, *supra* note 59, at 1572-73. If statutes or rules of court silence the child's attorney merely because she determines that her client has minimal capacity, no one will represent the child's interests as seen through the child's eyes. "[T]he other participants in the proceedings cannot be counted on to speak for the child. Parents and those who represent them have their own perspectives to present, while the court, with all of its other responsibilities, cannot be expected to focus upon the needs of the child."

Leonard P. Edwards, *Who Speaks for the Child?*, 2 U. Chi. L. Sch. Roundtable 67, 68 (1995).

78. Edwards, *supra* note 77, at 67.

79. "The private bar remains an essential source of representation for children." *Id.* at 91.

80. Cal. Welf. & Inst. Code § 317(c) (West Supp. 1999).

81. Los Angeles County Dep't of Children's Services v. Superior Court, 59 Cal. Rptr. 2d 613 (Cal. 1996).

82. For a detailed analysis of the constitutional and strategic dilemmas caused by the participation of the district attorney in dependency actions, *see* Patton, *supra* note 9, at 478–83. Although Welfare and Institutions Code section 318 sets up a wall between a district attorney who represents a child in the dependency system and other district attorneys who may represent the state in a status or delinquency action, it does nothing to insulate the district attorney's office from the criminal case against the parents arising from the same precipitating facts. *See* William Wesley Patton, *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 Loy. L.A. L. Rev. 1009, 1017–18 (1992).

83. William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. Louisville J. Fam. L. 37, 50 (1992–93). In addition, it cost \$4,653 per court day to operate each of the dependency courts for a total operating cost in 1988–1989 of \$1,163,330 per courtroom. *Id.* at 49.

84. Pace System Appointee Earnings Summary Report of the Los Angeles Superior Court MP District for Appointee Types, All Juvenile Dependency Cases 07/02/97 Through 06/29/98, at 15 (hereinafter Appointee Earnings).

85. Jan. 22, 1990, DCLS Contract at 1. I wish to thank Judge Michael Nash; Edgar B. Gilmore, Executive Director Dependency Court Legal Services, Inc.; and Richard Martinez, Assistant Dependency Court Administrator for providing me with invaluable data regarding the DCLS contract and the budget for section 317 private-panel attorneys. A copy of the DCLS contract (hereinafter DCLS Contract) and the court's attorney budget reports are maintained by the author. Ventura County has contracted dependency court representation with "[a] group of three lawyers . . ." Amy Bentley, *Ventura Defense Attorneys Fear Dependency Court System Unfair*, L.A. Daily J., Jan. 7, 1999, at 3. In addition the Orange County Juvenile Court and the Orange County Board of Supervisors have

contracted dependency attorney services to the law firm of Harold LaFlamme. Edwards, *supra* note 77, at 91.

86. DCLS Contract at 8.

87. *Id.* at 9.

88. *Id.* at 10.

89. When the current DCLS contract with Los Angeles County expires, DCLS will be forced to contract with the court pursuant to the new Trial Court Funding Act. At that time it is likely that DCLS will lose its indemnification since that would create a conflict of interest between the court and parties suing DCLS. It is difficult to determine the consequences of the loss of indemnification on quasi-governmental children's law firms. However, it is clear that their malpractice premiums may rise exponentially because of the new tort exposure.

90. Feb. 26, 1999, letter from Edgar B. Gilmore, Executive Director, DCLS, to author at 2.

91. *Id.* at 2.

92. *Id.*

93. *Id.* The data do not include the cases that DCLS litigates at its small satellite office in Lancaster.

94. *Id.*

95. Since I am the externship director for Whittier Law School and director of the Whittier Law School Center for Children's Rights, I send several externship students to DCLS during the Fall, Spring, and Summer law school sessions. Many of the externship students have taken courses in juvenile dependency law, juvenile trial advocacy, and family law and therefore have a fairly sophisticated understanding of the context of those cases.

96. "Court officials switched to a contract system because the new Trial Court Funding law transfers courts' budgeting to the courts . . ." Amy Bentley, *Ventura Defense Attorneys Fear Dependency Court System Unfair*, L.A. Daily J., Jan. 7, 1999, at 3.

97. Standard G-1 of the American Bar Association Standards for Lawyers Who Represent Children in Abuse and Neglect Cases (approved Feb. 1996) (hereinafter ABA Standards) provides that "[t]he child's attorney should be independent from the court, court services, the parties, and the state."

98. *Id.* at Standard J-1.

99. A study of California dependency court attorney fees "found that counties had a maximum limit on cases ranging from \$300 to \$1,500 a case." Edwards, *supra* note 77, at 69 n.12. The Los Angeles Dependency Court does not pay any "of the ordinary expenses incurred by panel

- NOTES attorneys in representing their clients” Revised Policy for Appointment and Payment of Fees to WIC 317 Panel Attorneys and Blanket Order, July 1, 1998, at 9 (hereinafter Revised Policy).
100. “Unfortunately, high costs make it difficult to provide comprehensive advocacy for children in legal proceedings Even when required by the Constitution or by statute, courts and political leaders have balked at providing adequate representation for children.” Edwards, *supra* note 77, at 69.
101. Bentley, *supra* note 96, at 3.
102. *Id.*
103. Edwards, *supra* note 77, at 91–92.
104. Revised Policy, *supra* note 99, at 1, 3. Los Angeles County has recently imposed a “flat-fee” payment system for private defense counsel in juvenile delinquency cases; the county is expected “to realize annual savings of \$600,000 from the previous year.” Cheryl Romo, *Defenders of Poor Kids Earn \$250 per Case; Flat Fees Lambasted for Excising Children From the Constitution*, L.A. Daily J., Dec. 24, 1998, at 1.
105. Appointee Earnings, *supra* note 84, at 1–15.
106. The quality of advocacy of dependency court attorneys is low because they may “be unable to investigate their cases, consult with experts, or prepare for hearings. It is typical for cases to settle just before a scheduled hearing, not because the parties suddenly discovered a way to resolve their differences, but simply because this may be the first time all of the attorneys have had the opportunity to discuss the case with each other.” Weinstein, *supra* note 74, at 120. One report listed 40 to 50 cases as a reasonable dependency attorney caseload; “in San Diego, for example, the Public Defender’s Office, Child Advocacy Division, expects its attorneys to handle a caseload of 200 children.” *Id.* at 120 n.132. One author has indicated that in order for children’s attorneys to remain competent, they should have no larger a caseload than attorneys representing adults. Edwards, *supra* note 77, at 77.
107. Bentley, *supra* note 96, at 3.
108. Welfare and Institutions Code section 352 provides that “[c]ontinuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing”
109. Feb. 26, 1999, letter from Richard Martinez, Assistant Dependency Court Administrator to author: “We do not track WIC 317 Panel caseloads per se” However, taking the total annual fee billed by a panel attorney and dividing it by the number of claims “will give a very good approximation of each individual panel attorney caseload.” *Id.* In addition, DCLS does not track the caseloads of its attorneys. Although DCLS knows the total number of cases allocated among the three separate offices and the total number of attorneys on staff, it does not break down that data in relation to each attorney’s individual caseload. Feb. 26, 1999, letter from Edgar B. Gilmore, Executive Director, Dependency Court Legal Services, Inc., to author at 1, and attachment, DCLS Responses to Questions 4, 5, and 6.
110. Although it is true that several panel attorneys were awarded fees in 1997–1998 that exceeded the salary of county counsel, many panel attorneys only earned between \$50,000 and \$70,000.
111. DCLS Contract, *supra* note 85, at 3.
112. Unlike the “flat-fee” compensation system for private-panel attorneys, the DCLS contract includes an “inflation adjustment” that may be granted by the project director as long as the money exists and as long as the agreement “remains cost effective.” *Id.* at 8.
113. *Cynthia D.*, 851 P.2d 1307.
114. ABA Standards, *supra* note 97, Standard L-1, at 10.
115. *Id.*, Standard J-1, at 10.
116. Linda Katz, one of the architects of concurrent planning, defines it as working “towards family reunification while, at the same time, developing an alternative permanent plan.” Cal. Dep’t of Social Services, *Concurrent Services Planning: Resource Guide* (June 19, 1998) at I-2 to I-3. The California model of concurrent planning has been defined as “[t]he process of immediate, simultaneous and continuous assessment and case plan development that provides a continuum of options to achieve early, family-based permanency for every child removed from his or her family.” 19 Cal. Dep’t of Social Services, *The Governor’s Adoptions Initiative: Progress Report II, Report to the Legislature* (Feb. 1, 1997 & Mar. 1, 1997).
117. Concurrent planning was adopted as part of AB 1544, Stats. 1997, ch. 793 (1997), which is codified in Welfare and Institutions Code section 366.21(c), to require that the court at each review hearing consider “the efforts made to achieve legal permanence for the child if efforts to reunify fail.”
118. Welfare and Institutions Code section 316.2 provides that paternity shall be established at the detention hearing, “or as soon thereafter as practicable”
119. Welfare and Institutions Code section 319(d) provides that “‘relative’ means an adult who is related to the

child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons"

120. Cal. Welf. & Inst. Code § 361.3(a)(4) (West Supp. 1999).

121. *See id.* §§ 361, 5(b)(1)–(b)(12) and (e)(12); *id.* § 361.5(a)(1) (reduction of reunification services to 12 months for children under 3 when taken from the parents' custody).

122. Cal. Welf. & Inst. Code § 361(b) (West 1998); Cal. Fam. Code § 8700(b) and (h) (West Supp. 1999).

123. Cal. Fam. Code § 8417 (West 1994). For a survey of concurrent services options, *see* The Southern Region Public Child Welfare Training Academy Presents: Concurrent Planning: The Video Conference (video and handout presented by Gary Seiser & Irene Becker, 1998).

124. Although concurrent planning does not permit balancing the quality of the life the child will receive if returned home with the quality of life if placed in an adoptive home, that comparison, even if only subconscious, cannot help but affect any fact-finder's decisions, no matter how conscientious the judge. "As a result of the prevalence of the 'best interests' standard, judges will often be preoccupied throughout all phases of the proceedings with the 'best interests of the child,' even when, at a given phase of the proceeding, another standard, such as parental fault, is controlling." Jean Koh Peters, *The Roles and Context of Best Interest in Child-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505, 1515 (1996).

125. "Sequentiality describes the effect of the first decision on later decisions when the decision-making follows a standard pattern. In the context of both child protection and family custody proceeding, the effect of sequentiality is that the first decision is often determinative of later decisions . . ." Weinstein, *supra* note 74, at 112.

126. Of course, if counsel assumes a "best interest" advocacy model rather than a "child's preference" model, the attorney may not even cross-examine or attack the prospective adoptive parents for fear of driving them away from the child in case parental termination occurs.

127. *In re Jesse C.*, 84 Cal. Rptr. 2d 609 (Cal. 1999).

128. *Id.* at 613, 615.

129. "There is no requirement in the statute that a parent establish, by a preponderance of the evidence or otherwise, a continuing need for counsel. The right is unqualified." *In re Tanya H.*, 21 Cal. Rptr. 503, 507 (Cal. 1993).

In re Janet O., 50 Cal. Rptr. 2d 57, 61 (Cal. 1996) held that the "need for counsel in the case of an interested, concerned parent is presumed."

130. "An attorney may be relieved in a noticed hearing upon substitution of another attorney." *In re Julian L.*, 78 Cal. Rptr. 2d 839, 841 (Cal. 1998). *See also In re Marilyn H.*, 851 P.2d 826 (Cal. 1993).

131. *Tanya H.*, *supra* note 129, at 507 n.5.

132. Welfare and Institutions Code section 366.29 provides that "[w]ith the consent of the adoptive parent or parents, the court may include in the final adoption order provisions for the adoptive parent or parents to facilitate postadoptive sibling contact."

133. *Jesse C.*, *supra* note 127, at 609.

134. In 1994 Dr. Sara Latz and I presented the first empirical database regarding siblings placed outside the home into different placements: *Severing Hansel From Gretel: An Analysis of Siblings' Association Rights*, 48 U. Miami L. Rev. 745 (1994). In that article we chronicled empirical research that demonstrated that the longer siblings remained apart in separate placements, the less likely they were ever to be reunited. *Id.* at 758. Therefore, in the above hypothetical, the siblings could demonstrate prejudice from the department's failure to place them in a prospective adoptive home that would either adopt both children or adopt one and grant liberal postadoptive visitation to the other.

135. For a history of the 19th-century child reformer movement wherein the house of refuge, the juvenile asylum, foster homes, and the Society for the Prevention of Cruelty to Children developed, *see* Mason P. Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 306–13 (1972).

136. For instance, rule 1438(b)(3) of the California Rules of Court creates a presumption that attorneys who have "completed a minimum of eight hours of training" are competent. I praise the Judicial Council for its efforts to increase the quality of advocacy in dependency courts; however, the standards set are so low that I doubt whether participation in such a minimal level of training will make a significant difference in the quality of advocacy. In addition, as demonstrated earlier, the Judicial Council has violated separation of powers by declaring specific standards of competency for attorneys declared competent to practice in any court of this state by the California Supreme Court. Of course, the Supreme Court could adopt rule 1438 and thus easily cure the separation-of-powers problem.

NOTES 137. "In representing the best interest of the child, the GAL is not required to adhere to the stated desire of the child." Francis G. Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 Ind. L. Rev. 605, 618 (1998).

138. "[A] GAL serves as an officer of the court . . ." *Id.* at 617.

139. Rule 3.7 of the ABA Model Rules of Professional Conduct, which prohibits an attorney from serving as a witness in the litigation, does not apply to GALs. *Id.* at 630.

140. "'Jurogenic effects' refers to the harm 'that flows from [a child's] contact with the legal system.'" William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 Ind. L.J. 635, 655 n.71 (1998).

141. Some see volunteer guardians ad litem as saviors because they believe administering such a volunteer system costs almost nothing. On the contrary, according to the National CASA Association Annual Program Survey 1998: the median annual cost of CASA services per child nationwide is \$562 (\$940 per child in areas where the population served is greater than 400,000). For example, the Los Angeles Dependency System Child Advocates Office "is funded privately by Friends of Child Advocates through the solicitation of financial support from corporate and foundation grants as well as individual contributions. Public funding matches private funding from two sources, the State of California Superior Court Trial Fund budget, and by funds from Los Angeles County Superior Court's budget." Nina Weisman, *Court-Appointed Special Advocates' Perceived Effectiveness* (master's thesis, presented to the Dep't of Social Work, California State University, Long Beach, 1991, *microformed on* UMI No. 1387665), at 10.

Several empirical studies have indicated that GALs are as effective as most dependency attorneys in perfecting children's rights. However, the results of those samples are easy to explain. First, unlike dependency attorneys who have caseloads of 200 to 400 children, most volunteer guardians ad litem handle only one or two cases simultaneously. "CASAs, in general, carry no more than one to two cases at a time, leaving ample time for fact investigation and social aspects of the case, leaving attorneys to analyze results of the case." *Id.* at 17. "One study concluded that trained volunteers, such as CASA workers, are as effective as trained attorneys in representing their clients, and more effective than untrained attorneys. This is understandable since trained volunteers have fewer cases than the professionals and more time to devote to each

child they represent." Edwards, *supra* note 77, at 91. *See also* Cynthia Ann Calkins, *The Effectiveness of Court Appointed Special Advocates (CASAs) to Assist in Permanency Planning* (thesis presented to the University of Nevada, 1997, *microformed on* UMI No. 1387119); Cynthia Sutton McDanal, *Guardians Ad Litem and Judicial Decision-Making in Cases of Child Abuse and Neglect* (thesis presented to University of Florida Dep't of Philosophy, 1994, *microformed on* UMI No. 9606823). However, there has never been an empirical study comparing the results of trained dependency court attorneys who have very small caseloads with volunteer guardians ad litem. It is obvious that if GALs are not attorneys, they will not recognize the legal significance of facts they discover and will not have the ability to marshal, as opposed to merely present, the facts to the court.

142. Welfare and Institutions Code section 317.5 provides that minors are a party to the dependency proceeding and that parties "shall be entitled to competent representation."

Averting Revictimization of Children

State Funding Needed for Independent Counsel Representing Children in Juvenile Court

Most courts and practitioners in the juvenile dependency system accept the premise that the courts have a moral imperative to ensure that abused, neglected, and abandoned children are protected and not revictimized by the dependency system. The legal structure we have in place has the potential to protect these children. Yet when we judge it by how children fare in out-of-home care as a result of our legal intervention, we find that it falls short in a number of respects. While some would argue for tearing down the legal structure and eliminating such costly protections as court-appointed counsel, this article argues that we have not provided the local juvenile courts with adequate resources to fulfill their mission.

The article is organized in three sections. The first provides the historical context for why children in dependency cases should have independent counsel. By tracing the legislative history of legal representation in dependency cases, this section argues that not only did the Legislature intend to provide independent counsel for all children in these proceedings, but it also understood that without that representation the juvenile court would be unable to adequately serve all the children under its jurisdiction. The second section illustrates how, despite the good intentions of all the participants in the court system, some children are inadvertently harmed by the very system established to protect them. The last section shows both why and how the key stakeholders can correct this injustice. The article concludes by recommending practical steps for key stakeholders to take to redress this wrong.

HISTORICAL CONTEXT FOR COURT-APPOINTED COUNSEL IN JUVENILE COURT ABUSE AND NEGLECT PROCEEDINGS

This section explores why children in abuse and neglect proceedings in California do not have an automatic right to independent counsel in all cases and provides support for instituting that right by tracing the historical and political changes behind it. It argues that we have an obligation to minimally protect children by appointing independent counsel who are both adequately funded and trained if we expect our local juvenile courts to ensure that our legal interventions do not revictimize children.

INTERNATIONAL AND CONSTITUTIONAL LAW ARGUE FOR INDEPENDENT REPRESENTATION¹

Under article 12 of the 1989 United Nations General Assembly *Convention on the Rights of the Child*,² governments should guarantee certain minimum rights to children:

- (1) the right to express his or her views freely in all matters affecting him or her;



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With the passage of Assembly Bill 233, the Lockyer-Isenberg Trial Court Funding Act of 1997, the local juvenile courts, the Judicial Council, and the Legislature in California have an opportunity to adequately fund the juvenile courts throughout the state. While AB 233 requires the state to fund all future growth in court operations costs, the Legislature reserved judgment on which expense items are included within the definition of court operations. Costs for court-appointed counsel representing children and indigent parents in dependency matters are currently defined as "trial court operations" expenditures. Therein lies the problem. The Legislature may decide to treat dependency representation costs like criminal defense costs and shift them back to the counties. This article argues that all children should have independent representation and that these costs should continue to be borne by the state rather than the counties. The article

recommends that juvenile courts and practitioners reach a consensus on minimum legal service standards and that the Legislature appropriate adequate funding for independent counsel for all children in dependency care.

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(2) the right to have those views considered and given due weight in accordance with the age and maturity of the child; and

(3) the right to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.³

According to the Convention, children have a right to have their views considered in abuse and neglect proceedings and to have representation in a manner consistent with our nation's Constitution and state laws.

Turning to the rights of children under the U.S. Constitution, we find that while the federal due process clause of the Fourteenth Amendment⁴ protects adults from unnecessary governmental intrusion, its application to children has not been interpreted so broadly. Case law interpreting constitutional protections afforded to adults sheds light on what protections ought to be afforded to children. In the seminal case of *Lassiter v. Department of Social Services*, the Supreme Court held that

Indigent parents have a due process constitutional right to representation by counsel on a case-by-case basis when the result of a hearing may be termination of parental rights; such constitutional right will depend on the complexity of the issues and likelihood that counsel might sway the outcome or that the petition contains allegations that could result in criminal charges against the parent.⁵

In *Lassiter* the Supreme Court found that the U.S. Constitution allows a case-by-case determination of the parental right to appointed counsel in termination proceedings, rather than guaranteeing that right in every case.⁶ The Court recognized that informed public opinion recommends, and most state statutes provide, appointed counsel in termination proceedings.⁷ The Court noted, however, that the decision whether to impose mandatory appointment should be left to each state.⁸

California jurisprudence has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings.⁹ The courts have arrived at this broad protection in noncriminal proceedings by applying a three-part balancing test set out in the Supreme Court case *Mathews v. Eldridge*.¹⁰ By weighing the following interests, the court determines whether or not the privacy interest at stake rises to the level of constitutional protection:

The private interest at stake;

The risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the additional or substitute procedural safeguards; and

The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹¹

Under the California Constitution, the state supreme court has added an additional factor to the test enunciated in *Mathews*: "the dignity interest of individuals in being informed of the nature, grounds, and consequences of the action and being able to present their side of the story."¹²

Children's rights are coextensive with adult rights when the government seeks to deprive them of liberty interests.¹³ Therefore, children are guaranteed a right to counsel in all critical stages of delinquency proceedings where there is a risk of deprivation of liberty (i.e., government confinement).¹⁴ While there is no similar right in abuse and neglect cases for children, the analysis the courts have used to

determine that adults have the right to counsel, when applied to children, argues for the same legal protection.

The child's interests that are affected by governmental intrusion in an abuse and neglect case are

■ An interest in being free from abuse:¹⁵

"[Children] have compelling rights to be protected from abuse and neglect."¹⁶

■ An interest in growing up with their families:

A child's family is his or her birthright, whereas the child's parent has a legal interest in his or her child.¹⁷

The California Supreme Court has described the child's interest in his or her family as comparable to the parent's interest in that "children have a fundamental independent interest in belonging to a family unit"¹⁸ and consequently share the parent's interest "in avoiding erroneous termination [of the family unit]."¹⁹ One Court of Appeal decision went as far as finding that children do have a cognizable liberty interest in their familial relationship.²⁰

■ An interest in a swift and legally permanent plan:

The California Supreme Court has acknowledged the legislative policy of providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful and has described this permanency interest as a compelling one.²¹ The Supreme Court recognized that a child has a fundamental interest in the opportunity to have a stable relationship with a caregiver which resembles a parent-child relationship.²²

■ A dignity interest in being informed and having a voice:

The child has a dignity interest in being informed of the life choices being explored on his or her behalf by all the professionals in the system, and these same professionals have an obligation to hear the child. Whether or not the child is appointed an attorney, each local juvenile court is expected under Welfare and Institutions Code section 317.6 to establish "[p]rocedures for informing the court of any interests of the minor that may need to be protected in other proceedings."²³

Weighing what the child has at stake in these proceedings, the trend in the courts has been to affirm that the child's liberty interests are at least comparable to the parent's liberty interests. Arguably, the child's liberty interests are greater than that of his or her parent's because every decision the court makes will affect the child's current situation and future life. Decisions to remove children from their parents, to place them out of their homes, and to

move them from placement to placement affect them in many ways that sometimes do irreparable harm. The next section of this article explores some of the types of harm children suffer in the system and posits that some of the harm might be prevented if children had independent counsel who were well trained and adequately funded.

In conclusion, international law would seem to direct that children be afforded representation consistent with state law. In California, parents have a statutory right to independent counsel in dependency cases—a right that at certain times rises to the level of a constitutional right. If we apply the same analysis that courts have used to determine that parents have a right to independent counsel, we can logically conclude that their children should have the same statutory right. And indeed, some courts have stated that the child's interests in these cases rise to the level of liberty interests and thus deserve the same level of due process protection. But while it is essential that children have a voice in abuse and neglect proceedings, the courts have not held that the juvenile court should appoint an independent attorney for every child, and the Legislature has stopped short of mandating independent counsel for all children in these proceedings. Nevertheless, national and state policies argue in favor of independent representation for children in dependency proceedings.

NATIONAL AND STATE POLICIES PROVIDE COMPELLING REASONS FOR INDEPENDENT REPRESENTATION

The prevailing national policy in this area since 1974 has been that children in abuse and neglect cases should have independent representation. Under the Child Abuse Prevention and Treatment Act (CAPTA), federal law requires, as a condition of receiving federal funds, that states provide independent representation in every case involving an abused or a neglected child that results in a judicial proceeding.²⁴ This representative is called a "guardian ad litem" and is expected to represent and protect both the rights and best interest of the child.²⁵ The idea is that the guardian ad litem has allegiance only to the child and not to any other interest. The guardian ad litem can be an attorney or a lay advocate but may not be the representative of the agency that files the abuse and neglect petition. California is one of only three states that permit the child to be represented by the same attorney who represents the agency.²⁶ Consequently, California is ineligible for CAPTA funding.²⁷

To understand why children are treated differently from their parents in dependency cases, we turn to recent legislative policy in this area. Indigent parents and their children have always had a long-standing statutory right

to court-appointed counsel at public expense in dependency and termination of parental rights proceedings, both at trial and on appeal. But while this right was extended to parents as an automatic right, it was not extended to children as an automatic right.²⁸

Senate Bill 243,²⁹ effective January 1, 1988, recognized that children and parents should receive appropriate legal representation³⁰ by adding new responsibilities for appointed counsel and clarifying the court's responsibility to determine whether a conflict of interest exists between a dependent child and the petitioning agency or other public or private counsel.³¹ The duties of counsel for the child were specified in then-section 318 and included a mandate for a personal interview of all children under 4 years of age.³²

Under SB 243, section 318 was incorporated into new section 317, which we know today as the statute governing court-appointed counsel. It defined for the first time the court's responsibility for providing counsel to indigent parents whose children have been removed or are at risk of being removed as well as for their children. The bill envisioned vertical representation for all parents and children.³³ Despite the legislative intent to provide equal procedural protections to parents and their children, the policy was never implemented. "The changes were delayed in order to allow counties adequate time to reorganize staff and to secure adequate funding pursuant to SB 709 (Stats. 1987, ch. 709) to cover any additional costs attributable to the changes contained in SB 243."³⁴ The Legislature left some issues unresolved, one of which was the source of the funding for court-appointed counsel.³⁵

At that time, children were not recognized as parties to their dependency actions. It was not until 1995 that the California Legislature in Senate Bill 783 recognized the importance of the child interests at stake in these proceedings. In SB 783 the Legislature decided that children deserved party status and all rights attendant to that status. Unfortunately, the Legislature again failed to address the funding needed for court-appointed counsel for children. The Legislature opined that "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel,"³⁶ and that once an attorney was appointed for the parent, guardian, or child, that attorney shall provide representation "at all subsequent proceedings before the juvenile court . . . unless relieved by the court upon the substitution of other counsel or for cause."³⁷

For more than 25 years psychological experts have sought to explain to policymakers why children in these proceedings need their own independent attorneys. In the 1973 book *Beyond the Best Interests of the Child*, one of the foundational books in the field, the authors assert that

the child must have personal representation by counsel in the court, and that counsel for the child "must independently interpret and formulate his client's interests, including the need for a speedy and final determination."³⁸ And since 1989, the American Bar Association (ABA) has stated that all children in abuse and neglect proceedings should be represented by both a lay guardian ad litem and an attorney acting as the child's legal counsel.³⁹ Under the ABA Standards for the Child's Attorney, the child's attorney is defined as a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. The standard recognizes that the child is a separate individual with potentially discrete and independent views and thus deserves an attorney independent of the agency.

Many leading juvenile court judges agree that their role is to ensure competent representation for all children who appear in dependency proceedings. Judge Leonard P. Edwards observes that "[i]t is particularly important that children have consistent independent representation throughout their dependency. In that way someone will be able to retain the child's history . . ."⁴⁰

Over the past few decades, national and state policies have evolved in abuse and neglect cases and have elevated the child's interest to that of his or her parents as deserving of court-appointed competent counsel. Such policies support the contention that the California Legislature should make good on its promise to provide mandatory independent representation for all children in these proceedings. But despite prevailing national policies, the opinions of psychological and legal experts in the field, and the availability of CAPTA funds to defray costs, California allows discretionary appointment of counsel for children and permits the guardian ad litem for the child to also represent the agency.⁴¹

STATUTES WERE ENACTED BECAUSE OF THE PARENTS' AND CHILD'S VITAL INTERESTS

The courts have long recognized these vital interests and have stated that "[p]arents have a 'vital interest in preventing erroneous termination' of their relationship with their children (citations omitted), and that to protect that interest, few safeguards are as important as the assistance of counsel (citations omitted)."⁴² The same is true for children. The Court of Appeal in *Adoption of Kay C.* stated, "Courts have also recognized that natural children have a fundamental, independent right in belonging to a family unit."⁴³

For both the parent and the child, the initiation of a dependency action presents a substantial possibility that the child and parent will be separated, either temporarily

or permanently. As the Court of Appeal in *In re Emilye A.* expressed, “[D]ependency proceedings may work a unique kind of deprivation. Indeed, they are frequently the first step on the road to permanent severance of parental ties.”⁴⁴

The legal and real-life ramifications of reversing a juvenile court order underscores how vital the child’s interests are. Reversal of an order because of failure to appoint counsel or ineffective assistance of counsel requires that the trial court rehear the case. Since the child’s life cannot be put on hold while the system remands the case for a new proceeding, the legal remedy is often inadequate. Pending new proceedings, children lose attachments or, worse yet, learn not to attach; family relationships change and may be lost forever. As the California Supreme Court explained, “The reversal of a judgment refusing to terminate parental rights can potentially lead to the loss of such rights and may itself directly cause the loss.”⁴⁵

In reviewing the appellate rights afforded to parties, specifically those of the parent, it is clear the California Legislature has afforded parties in a dependency action the right to an appeal and the right to independent appointed counsel whenever the appeal is from an order terminating parental rights.⁴⁶

Similarly, children have the same appellate rights in their dependency actions, because they are now parties. However, without independent counsel, the Legislature has effectively held children hostage in a system designed to protect them. They have all the legal trappings, but no one appointed exclusively to protect their due process rights and safeguard them against erroneous decisions.

The legislative promise of due process for abused and neglected children, in the absence of funding for independent counsel costs, has meant that the administration of justice in these cases has not been uniform. When the Legislature failed to address the nettlesome question of funding, jurisdictions did their best to protect the interests of children, but decisions to fund court-appointed counsel was left to local politics and financially strapped counties. The effects on many of the children in the juvenile dependency system in California has been devastating and is documented in virtually every local juvenile court system.

In conclusion, due process and fundamental fairness require that children have independent counsel. National and state policies have long supported the need for independent representation for children in these proceedings. Experts agree that independent representation means an attorney for the child who does not represent the petitioning agency. California’s court-appointed counsel statute for children is inconsistent with these due process principles and long-standing policy goals.

THE CHILD’S INTERESTS ARE NOT ALWAYS ASSERTED

In the 1960s and 1970s attorneys were not generally appointed for children. It was assumed that the court as *parens patriae* (surrogate parent) would ensure that the children under its jurisdiction would be protected. And the courts believed that the procedural safeguards that exist for the parties would protect the child’s interests.⁴⁷ Over the years, however, courts have found it necessary to appoint counsel for children in more and more cases. This section suggests that the motivating factor for the courts’ decision to increase their appointments has been that procedural safeguards have proven to be insufficient in protecting the interests of children.

A court’s decisions can only be as good as the information it has before it, and it is the attorneys who generally control the flow of information to the court in any given case. So in terms of protecting the child’s best interest, it would be folly to rely on the attorney for the parent. The procedural safeguards afforded to the parent (*i.e.*, representation by counsel at every stage in the proceeding;⁴⁸ notice of all hearings;⁴⁹ clear and convincing standard for removal;⁵⁰ clear and convincing standard for reunification services;⁵¹ and independent case review hearings at which the child’s placement, case plan services, and family’s extent of progress are reviewed⁵²) cannot always protect the child. The removal standard may protect unnecessary removals of children from their homes and the standard for reunification services may protect children from parents who will never be able to safely take care of them, but independent counsel who will investigate the allegations of abuse and examine the agency’s position will ensure greater protection of children. Additionally, in spite of independent court reviews of case plan services, the court may not have all the information on how the child is faring. The parent whose child has been removed is simply unaware of how his or her child is doing in out-of-home care and cannot know whether or not the child’s physical and emotional interests are being met, and thus cannot assert them. The court may have even a greater need to know how the child is doing if he or she is at home. Without an independent attorney who will investigate whether or not the child is safe at home and has the necessary services or family support to safely remain at home, the court is severely limited in receiving accurate information from the parent’s attorney. Therefore, whether the child is living at home or is placed in out-of-home care, the child needs a representative who does not have competing interests and who can solely focus on his or her interests.

One might expect that the agency, since it is charged with the protection of all children under its care, would be able to safeguard each child's interests, but its many conflicting interests make this expectation unrealistic. These conflicting interests include (1) legal interests, such as obtaining jurisdiction through a court finding that the child is described as abused, neglected, or abandoned under the code; (2) financial interests, such as minimizing costs; (3) quasi-political, legal, and financial interests, such as meeting adoption quotas; and (4) institutional pressures to handle an ever-increasing number of cases. How these interests play out in cases can inadvertently place a child in jeopardy.

Sometimes the agency will negotiate the petition language and remove certain allegations to avoid litigating jurisdiction. The attorneys for the agency and parents have a common legal interest: settling jurisdiction. During these negotiations, the child's interests may become lost. As the court in *In re Melissa S.*, noted,

[w]hen a welfare department's social worker has recommended a minor be made a dependent child and removed from parental custody, and when a parent has entered into a "plea" arrangement, conceivably to preclude adjudication of the more serious acts alleged in the petition, both the welfare department and the parent may have an interest in letting the allegations of the petition and the substance of the report pass unchallenged. This does not, however, assure that the best interests of the minor are being served, precisely the reason that independent counsel is statutorily required.⁵³

Placement decisions are another example of where the agency might treat the child's interests as secondary to other agency interests. When the agency decides on a particular placement, its attorney, whose role is to represent the agency and also the county, may inappropriately consider specific placement costs. This can occur in counties that have contracts with certain group homes and typically use these rather than others that might be more suitable for a particular child. It can also occur in counties that do not prioritize available resources so that they may fund specialized residential treatment programs. In these instances, the child's interests conflict and sometimes lose to the county's pocketbook interests; without an attorney for the child, the court would never learn of the conflict, nor would there be an attorney to litigate the placement issue.

Since the 1980s the pendulum has shifted away from family preservation and toward permanency for children, and with this political shift has come increased funding for adoptions. There are additional federal and state funds for adoptions, and therefore, a great deal of political and financial pressure on agencies from the federal and state governments to place children for adoption. Under the

Adoption and Safe Families Act, an agency is eligible to receive \$4,000 for each foster child with a finalized adoption plus an additional \$2,000 for each special needs adoption exceeding its base year of adoptions.⁵⁴ In California, the Adoption Initiative provides additional funding to county adoption agencies for increased adoption placements. Funding allocations are based on individual county performance agreements designed to double the number of children annually placed for adoption statewide over a three-year period.⁵⁵ Statewide fiscal-year funding levels are as follows: (1) 1996–1997, \$10.6 million; (2) 1997–1998, \$26.8 million; and (3) 1998–1999, \$29.4 million.⁵⁶ The financial pressure on overworked and understaffed social service agencies may therefore make it difficult for them to keep the child's interest in reunification with his or her family in context.

Sometimes both the court and the social worker can be more predisposed to providing services to the family when the child's attorney, rather than the parent's attorney, advocates for services. This differential treatment may be because they view the child's attorney as more objective than the parent's attorney, and consequently view the services as serving the best interest of the child rather than exclusively benefiting the parents. Given this perception, in difficult cases where there are questions about the family's ability to care for their child and everyone in the system has all but given up on that family, the child's attorney may be the only person who can bring a balanced view to the court.

Consider for example, a child who is under 3 at the time of removal: in his or her case, the shortened statutory time frame for permanency may mean that the court will adopt a permanent plan at six months. In this situation, the pressure on the agency to work toward adoption is great. The social worker knows that a child under 3 can be easily adopted and also frequently views the six-month statutory period of reunification⁵⁷ as too short to permit many of the families to reverse the problems that brought them to the attention of the agency in the first place. For a social worker with this outlook on a case, it is understandable if he or she decides to give a family with older children more assistance with reunification efforts than one with a younger child.

The role of the agency is further complicated by high caseloads. Since 1988, caseloads have grown in California by 163 percent. The State Budget funds approximately 7,500 full-time-equivalent county social workers at an average annual cost of approximately \$100,000 each, including salary, benefits, and overhead.⁵⁸ Counties are required to match state and federal funds or their allocation can be reduced. According to the California Department of Social Services, local county fiscal constraints

have prevented some counties from receiving all of the federal and state money available to them.⁵⁹ Therefore, in some counties caseloads exceed the caseloads established by the state for reimbursement. The state allocates a full-time-equivalent position for a specified number of cases in five work categories: Emergency Response Assessment is 1:320; Emergency Response Services is 1:15.8; Family Maintenance Services is 1:35; Family Reunification is 1:27; Permanent Placement Services is 1:54.⁶⁰ Not only is it typical for agencies to exceed these standards, but it is also not atypical for a county to pay for additional social workers with all county funds because of how the claiming process works.⁶¹

The institutional pressure on social workers handling upwards of 50 family reunification cases is tremendous. With these kind of caseloads, social workers are forced to make difficult decisions in work priorities: families are prioritized for attention and services, investigations may be abbreviated, and risk assessments streamlined. Sometimes these decisions will be at the cost to the child. Many social workers describe their case management role as akin to triage in a hospital emergency room: Families that are perceived as having the best likelihood of succeeding in reunification are given priority, *i.e.*, more attention and services. Families that the social worker perceives as having poor chances of reunification will necessarily receive less assistance. The perception may be accurate or inaccurate either because information about the family is lacking or because of unintentional bias resulting from cultural differences. Because social workers are performing under great pressure to handle these cases appropriately, it is critical that there be a check on their perceptions and consequently their judgments. Sometimes certain assistance to a family might have made the difference between the child returning home or languishing in foster care.

Along with heavy caseloads, the responsibility of “concurrent planning”⁶² is making a social worker’s job even more difficult. With concurrent planning, the social worker is statutorily mandated to provide simultaneous services aimed at reunifying the family and at obtaining a legally permanent plan for the child unless two social workers are assigned to the case. In the face of a heavy caseload, the diligent social worker necessarily tries to be faithful to both roles but is faced with a Herculean task: pursuing both goals equally vigorously without one compromising the other. Without independent counsel for the child to assert the child’s interests in reunification and permanency as appropriate and to advocate for services, the needs of many children in the juvenile court system go unmet.

Under the doctrine of *parens patriae*, the court has an obligation to become the substitute parent and care for all

the children under its jurisdiction. Unfortunately, courts have not been given the resources they need to adequately perform this role.⁶³ A recent study concluded that California’s juvenile courts do not comply with the national resource guidelines on judicial caseloads articulated by the National Center for State Courts.⁶⁴ According to a recent statewide needs assessment, California juvenile court case-processing times do not adhere to statutory timelines.⁶⁵ Furthermore, in many jurisdictions, high caseloads and lack of resources for data collection have made it impossible for the courts to even report definitively on how many children are actually under their care at any given time, much less keep track of each child’s complex legal and psychosocial interests.⁶⁶

In conclusion, upon examining the roles of the parent, the agency, and the court, we see that none of these system participants currently has the capacity to ensure that each child’s interests are met. Without an independent attorney who can conduct thorough investigations, assess the child’s needs, and advocate for the child, there will always be children in the system who are inadvertently neglected and consequently whose lives will be unalterably affected.

TOO MANY ABUSED AND NEGLECTED CHILDREN HAVE BEEN REVICTIMIZED BY THE SYSTEM DESIGNED TO PROTECT THEM

Despite procedural safeguards, the hard work of social workers, and the best intentions of the juvenile courts, some children in the juvenile court system have been harmed by the very system designed to protect them. The system inadvertently harms a child when it neglects the child’s emotional needs at removal and fails to address the child’s emotional and physical health needs through the provision of services. It harms a child when, despite its best efforts, a child must spend extended periods of his or her life in the system, which all too often means enduring multiple placements—the agency removing the child from home after home in an attempt to find the most permanent familylike setting for the child.⁶⁷

In the last decade we have learned that while removal of very young children can be life-saving, the traumatic separation and loss affect the child’s development in profound ways.⁶⁸ Experts agree that infants who have been removed from home

react with complex emotions and behaviors that are often misunderstood, misidentified, or ignored. The frightening, bewildering, and unexpected events surrounding placement leave these children with few coping resources, given their immature ego structure, limited cognitive capacity, and the unavailability of familiar adults. Attachment research confirms that loss through separation from

the primary mothering figure frequently leaves preverbal children with anger, depression, premature independence, and often, amnesia about the event. This puts them at special risk, compounded if they are moved again ... (citations omitted).⁶⁹

The court has an obligation to ensure that the professionals who are charged with identifying and meeting the special health needs of these children are able to and are doing so. However, according to the Institute for Research on Women and Families' March 1998 report *Code Blue*, children in foster care do not receive even basic health services. The evidence shows that nearly 50 percent of the children in foster care have chronic medical conditions, such as vision, hearing, and speech problems, untreated tooth decay, skin lesions, elevated lead levels, sickle cell disease, mental health problems, anemia, asthma, and a host of other difficulties.⁷⁰ They have higher rates of acute and chronic health-care problems and developmental delays than other children.⁷¹

Although their poor health may initially be the result of harm endured while in the care of their parents, the responsibility for their continued poor health record after removal rests with all the participants in the juvenile court system, but especially the court under the doctrine of *parens patriae*. Yet foster children are not routinely assessed for medical, psychological, or developmental conditions.⁷² Medical records for foster children are poorly maintained or nonexistent, placing these children at risk for overimmunization or misdiagnosis.⁷³

Foster children are entitled to early and periodic screening (medical, vision, hearing, dental, and other screenings), diagnosis, and treatment, but most infants in the foster-care system are not receiving these services.⁷⁴ They are also eligible for early Head Start, but there are no data on how many children in foster care are enrolled in the program. If they have disabilities, they and their families are eligible for the federal special education program of early intervention for children under age three,⁷⁵ and regardless of age, supplemental security income (SSI) benefits. Foster families are eligible for child care and substance abuse treatment under federal child-care and substance abuse block grants, yet most counties do not access these funds for their foster-care children. To fill in the gap, independent counsel should be charged with finding and accessing these basic health and educational services for their clients.

We also know that while foster care is needed to protect some children from abusive situations, the reliance on it as a permanent placement has harmed children.⁷⁶ Although foster care was intended to be temporary, the reality for children entering the system in California is that 1 out of 4 will be in placement four years later.⁷⁷ In comparably large states, a majority of their foster-care

children are returned home within a year of entering care.⁷⁸ California does have a comparable reunification rate of approximately 47 percent, but we achieve it at the cost of children staying in foster care much longer than one year.⁷⁹

In 1997, of the approximately 105,000 children in foster care in California, 26,000 of them exited the system with permanent plans; of those, less than 9 percent were adopted.⁸⁰ According to the National Adoption and Foster Care Analysis and Reporting System, California's adoption rate for children in foster care is 2 percent lower than the national average.⁸¹ As compared to other states, the mean age of adopted foster children between April and September 1997 was 4.69 years in California as opposed to the national mean age of 7.09.⁸²

Infants stay longer in foster care than older children. Approximately one-third of all first entries into the system are infants (ages 0 to 6 months),⁸³ and while the median duration of a foster-care placement in California is 17.2 months, the median duration for children under 1 year is 24.4 months.⁸⁴ When infants are placed in foster care, their chances of reunification are approximately 1 in 3, whereas children ages 3 to 15 have reunification rates of 50 percent. Far too many of our young children who are removed from home at early ages are not returning home, nor are they being adopted. Statewide foster-care data show that, in 1994, 44 percent of the children who entered foster care under the age of 3 were in long-term foster care four years later.⁸⁵ This is in part because over the last decade, most of the growth in California's foster-care system has been in placements with relatives. Kin care has grown from about 20 percent of foster-care placements in the early 1980s to nearly 50 percent of all foster-care placements in 1997.⁸⁶ Children in kinship care stay in foster care longer than those in other foster-care homes.⁸⁷ While they reunify at slower rates than those in any other foster-care setting, their reunifications are more successful in that they have lower reentry rates.⁸⁸

We know, too, that when children grow up in the juvenile court system, they necessarily have multiple placements. The data on how often children are moved once they come into our system are as follows: Of the approximately 31,000 children who were in placement six months or less, 169 were moved more than five times, 402 were moved four times, and 1,565 were moved three times during their short six-month stay in care. Overall more than 3 percent of the children who have been living in foster care for over 60 months were moved more than five times.⁸⁹

Multiple placements can be the source of attachment disorder: many of these children grow up to discover that it is very difficult or nearly impossible to form intimate

relationships as adults. “Multiple placements” is a term of art in the field that refers to the agency action of moving a child from one caregiver to another or from one staff provider to another in the case of a group home. From the child’s perspective, “multiple placements” refers to the many times that he or she must carry his or her life-belongings (usually packed into shopping bags), walk away from adults and other children, and leave people and surroundings that have become familiar for another strange place to live. Change becomes the norm: without people and places to depend on, everyone and everything is transitory and uncertain.

In addition to moving from home to home, children in the system are all too often separated from their siblings. More than 60 percent of foster children are part of a sibling group, and 41 percent of those are not placed with their siblings.⁹⁰

Given the fate for many children who grow up in long-term foster care and have multiple placements, it should come as no surprise that the prognosis for many of these children is not good. Foster children are 50 percent more likely to be arrested as children, 40 percent more likely to be arrested as adults for violent crime, and 33 percent more likely to become substance abusers.⁹¹ All too often children who have lived in long-term foster care exit the system at age 18 to homelessness: a recent Orange County study found that 60 percent were homeless within one year of the court’s dismissal of their case.⁹²

Outcome measures for children in foster care are an indictment of our system and reveals the state as an unfit parent. As a parent, it neglects the health, education, and welfare of many of its children.⁹³ As a parent, it permits too many children to be shifted from home to home without any sensitivity to a particular child’s sense of time, connection to siblings, and need for one permanent loving family.⁹⁴ And as a parent, it abandons its children at age 18, expecting them to fend for themselves despite the fact that it has not given its children the necessary life skills to care for and financially support themselves.

In conclusion, an examination of rates of removal, inattention to much-needed services, extended stays in the system, multiple placements, and lack of permanency for children reveals that the court, acting as *parens patriae*, cannot be a substitute parent and oversee each case to make sure that each and every child under its care is well cared for. Nor can the system with its procedural safeguards ensure that each child’s interests remain paramount despite countervailing interests. What we know about the physical and emotional health of foster children in the system and the contributing role that the system plays in determining poor outcomes for them as they mature creates a moral imperative that we consider ways

of minimizing the harm the system inadvertently causes children.

At the same time, we recognize that the juvenile court system is overwhelmed by an impossible number of expectations: It is expected to protect children by helping their families, families who for generations have been worn down by poverty and substance abuse; it is expected to do this despite a dearth of community resources; and it is expected to find permanent homes for the children under its care when they cannot be safely returned to their parents and when adoptive families are not lining up at the courthouse door.

Resources targeted at any one of these problems would improve outcomes for children in the juvenile court system. Arguing for resources for independent counsel for children in no way minimizes the efforts local courts and their communities have made in attempting to address these problems; rather, it recognizes that the courts cannot do it alone: that they—and the child—need the assistance of an independent attorney who has special training in the legal and nonlegal advocacy skills required to properly represent a child client.

INDEPENDENT QUALITY REPRESENTATION FOR ALL CHILDREN WOULD AVERT SOME HARM AND WOULD BE COST-EFFECTIVE

There are basically three court-appointment practices in California: (1) limited appointments or no appointments for young children; (2) limited or no appointments for older children, *i.e.*, those growing up in long-term foster care; and (3) mandatory appointment without court rules or guidance on caseload standards. Some courts have opted for the first practice, figuring that if the child is too young to voice his or her wishes and direct the attorney, then there is no need to appoint an attorney for the child. In the second practice, courts have decided that the critical phases of a dependency case are from initial hearing through the permanency hearing, and that while it would be best to continue representation during the later hearings, the resources would be better spent on other services. The third practice, which is the most common, is where the court appoints an attorney for each child at the initial hearing and that attorney is expected to represent the child throughout the dependency.

In counties where very young children are not appointed independent attorneys, the prevailing wisdom is that attorneys are unnecessary because their clients cannot talk to them or direct them. In these counties, appointment practices have not caught up with the latest in child development research. We now have compelling evidence of the link between violent behavior and abuse and neg-

lect in the first two years of life. This same research shows that it is during infancy that both the physical and emotional foundations of trust, empathy and conscience, and lifelong learning and thinking are established. Given the abuse or neglect already endured by an infant prior to entry in the juvenile court system and the prognosis for this infant in foster care, an independent attorney charged solely with the protection of an infant's interests might be able to avert further harm during this critical window in the child's life.

Older children who are growing up in long-term foster care also require independent representation. Testimony from children in long-term foster care confirms that they rarely know their attorney, almost never are advised of their rights to attend and participate in their own hearings, and are generally unaware of their rights in out-of-home placement.⁹⁵ The recent report of the Little Hoover Commission found that "the State puts its investment and foster youth at risk by failing to help children 'aging out' of the child welfare system to successfully transition to self-sufficiency."⁹⁶ Many of these young people lack the financial and emotional support provided by families and cannot take care of themselves; some return to the very relative from whom the state had sought to remove them. Generally, children from intact families are not expected to emotionally and financially care for themselves by age 18; they have one or more parents and often other relatives to rely on. Yet the juvenile court system expects children who have suffered abuse and neglect from their parents and then have been revictimized by the system to fend for themselves at age 18 or 19 when eligibility for foster care terminates. Independent representation for these young people, along with services, would minimally ensure that they were not moved from their homes without their voices being heard and that they had someone on their side to explain their rights and options, counsel them, and advocate for their wishes and access services.

Recent legislation in Senate Bill 933⁹⁷ substantially increased county funding for Independent Living Skills programs, which are designed for youth 16 to 21 years of age. Unlike many other child welfare services, these programs do not require the county to match their funding. Unfortunately, many agencies and courts are currently unaware of the funding or how to access it. Similarly, young people, even if they know about this entitlement, will have difficulty accessing services without the assistance of an advocate. An attorney advocating for his or her child client should be able to obtain the following services:⁹⁸

- Programs that assist children in earning a high school diploma or its equivalent;

- Vocational training;
- Daily-living skills training;
- Career planning (job development assistance such as job referrals, job training, job fairs, workshops, conferences, career days, graduation ceremonies and retreats; payments to employer for on-the-job training; work related uniforms, transportation, tools, and supplies);
- A written transitional independent living plan that is incorporated in the child's case plan;
- Services to administer trust funds;
- Stipends or incentive payments to children for participation in independent living programs; and
- Any services or assistance that would improve the child's transition to independent living.

In some of the larger counties, it is difficult for the court to monitor the quality of legal services or the number of cases each attorney may have so as to ensure that the attorney is competently handling each case in his or her caseload. Courts that appoint counsel for children in all cases, but do not have caseload standards preventing the attorney or the attorney's firm from accepting more appointments than the firm can manage, compromise the very due process rights the courts have sought to protect. In some counties, attorneys representing children have caseloads that range from 200 to 500 cases.⁹⁹ The attorney with this kind of caseload is forced to triage cases in much the same way as the social worker, and consequently children are again neglected by the system.

While mandatory appointment of attorneys for all children in the juvenile court system will be costly, especially if minimum service requirements and maximum caseload standards are followed, in the long run it will save dollars. A study in Sacramento County conducted by the Child Welfare League of America (CWLA) supports this proposition. It found that there is a relationship between abuse and neglect and subsequent delinquent behavior in that children 9 to 12 years old known to the child welfare system were 67 times more likely to be arrested than other 9- to 12-year-olds.¹⁰⁰ An examination of the risk factors (parental incarceration, school truancy, substance abuse) revealed that they were present for children in the delinquency system in much higher proportions than children not arrested and not abused. Their profiles also closely matched those of older and more serious offenders at the California Youth Authority. The CWLA calculated that the per-child costs to the child welfare and juvenile justice systems were about \$500,000, while proven intervention early on with families cost only \$40,000.¹⁰¹ In order to ensure that abused and neglected children receive these interventions and services, we must take steps so that all

appointed counsel have manageable caseloads and all children have independent counsel who are trained, adequately compensated, and have manageable caseloads.

In conclusion, those of us who work in the system share responsibility for failing to carry out the moral imperative set forth at the beginning of this article: to ensure that children who have been abused, neglected, or abandoned are not revictimized by the very system established for their protection. An examination of the roles of the court, the agency attorney, and the parent's attorney reveals that they cannot be expected to assert the child's interests and protect the child from further revictimization by the state. Therefore, we have an obligation to ensure that children's rights are minimally protected through independent court-appointed counsel if we expect the juvenile court to fulfill its mission.

FINANCING BEFORE AND AFTER STATE TRIAL COURT FUNDING

Before the passage of Assembly Bill 233,¹⁰² the Trial Court Funding Act of 1997, the courts, like every county constituent, approached their financially strapped county governments on a regular basis and hoped their individual relationships with members of the board of supervisors would translate into sufficient funds. AB 233 was intended to provide local courts with a more stable and consistent funding source, enabling them to administer all court functions and to manage their own budgets. It is hoped that the change will foster collaboration among the local courts, the state, and the counties, thereby enabling them to engage in long-term planning.

HISTORICALLY, COURT-APPOINTED COUNSEL COSTS IN JUVENILE DEPENDENCY MATTERS HAVE BEEN THE RESPONSIBILITY OF THE STATE AND LOCAL COURTS

In 1987, the California Legislature mandated court-appointed counsel for children and parents as part of a major overhaul of the juvenile dependency system. Senate Bill 1195¹⁰³ required the Senate Select Committee on Children and Youth to convene a task force to study and recommend ways to achieve greater coordination among child abuse reporting statutes, child welfare services, and juvenile court proceedings. These reforms were adopted as part of Senate Bill 243¹⁰⁴ as a result of the task force's study and report:

- The vague language describing when the juvenile court could take jurisdiction was replaced with 10 specific grounds for declaring a child a dependent of the court;

- The fast-track procedure, with strict timelines for court review aimed at either reuniting parents with their children or terminating parental rights, was adopted; and
- Provisions were made for court-appointed attorneys representing parents and children.

The policies underlying these reforms were to “ensure more uniform application of the law throughout the state and to ensure that court intervention does not occur in situations the Legislature would deem inappropriate” and to eliminate “months and often years for the [dependent child to have the] opportunity to be placed with an appropriate family on a permanent basis.”¹⁰⁵ The Legislature recognized that “once court intervention [in dependency proceedings] is determined necessary, children and parents should receive appropriate legal representation.”¹⁰⁶ Owing to the constitutional concerns associated with removing children from parents, the new time-limited and clearly focused protective and/or reunification services, and permanency planning deadlines, the Legislature wanted to ensure appropriate legal representation for children and parents.¹⁰⁷ Additionally, costs of court-appointed counsel were defined as a court operational expense.

With the passage of AB 233, court-appointed-counsel costs were naturally maintained as a court operational expense. Legal representation in dependency cases is expressly included in the list of “court operations” defined by rule 810(a) of the California Rules of Court and is not within the meaning of “county-provided services” defined by Government Code section 77212.¹⁰⁸ While Government Code section 77212(a) lists “legal representation” as a county service, it defines county services as those “provided to the trial courts.” Court-appointed counsel in dependency proceedings is not a service “provided to the trial court,” but rather a service to a third party, the clients of the juvenile court. Where the statute includes “legal representation” as a county service, it is referring to city attorney–county counsel services to the court.¹⁰⁹ Furthermore, legal representation to court clients is semantically unrelated to the other county services listed in the statute: “auditor/controller services, coordination of telephone services, data-processing and information technology services, procurement, human resources services, affirmative action services, treasurer/tax collector services, county counsel services, facilities management, and legal representation.”¹¹⁰ The category of county services would not make much sense if it included legal representation to court clients, a nonadministrative function of the court, with these other court administrative functions.

The reason that indigent criminal and juvenile delinquency defense costs, unlike dependency legal representation costs, were excluded from “court operations” under

rule 810 has to do with the historical development of these areas of law. In a criminal case, the defendant's right to assistance of counsel derives from the Sixth and Fourteenth Amendments of the U.S. Constitution. There is a well-developed body of law dating back to the 1960s explaining the constitutional requirements of effective assistance of counsel.¹¹¹ The same is true in the delinquency context.¹¹² In contrast, the right to effective assistance of counsel in the dependency arena is relatively new. The Legislature, like the courts, understands that this is a unique area of the law.

The quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court. The presiding judge of the juvenile court plays a significant role in ensuring that a sufficient number of attorneys of high quality are available to the parties Court-appointed and public attorneys representing children in abuse and neglect cases, as well as judges, should be specially trained or experienced (citation omitted).¹¹³

It is likely for these two reasons that the Legislature believed that the courts were in the best position to evaluate attorneys and, thus, to ensure that competent attorneys were appointed.

**THE LEGISLATURE, JUDICIAL COUNCIL,
AND LOCAL SUPERIOR COURTS MUST
ENSURE ADEQUATE FUNDING FOR COURT-
APPOINTED COUNSEL**

Depending on the model of representation, California counties use one or more of the following methods to compensate court-appointed attorneys:¹¹⁴

- Flat fees
- Hourly fees
- Salaries
- Contractual fees

Historically, court-appointed counsel were paid on either a salary or an hourly basis. Over the past several years, counties have commissioned reports to identify ways to reduce these costs.¹¹⁵ Financial pressures have resulted in more counties turning to flat-fee and contractual arrangements in order to decrease and better predict overall costs. Attorneys in the field have criticized flat fees as fostering assembly-line legal services. Courts have condemned fixed fees as setting up an inverse relationship between compensation and attorney effort: those attorneys who plead early for their clients are relatively overcompensated, while those attorneys who contest the charges at trial are relatively undercompensated.¹¹⁶

Regardless of the fee arrangement a given court uses to pay for court-appointed counsel, the more salient question is whether or not it has adequate funding to attract and keep attorneys who are ethical and qualified to competently represent children. As noted in one court case, "low fees will attract only the most marginal counsel, making the juvenile court a magnet for attorneys unable to find any other type of employment."¹¹⁷ Many believe low fees force the more ethical attorneys out of practice, leaving those who take on more cases than they can possibly handle. Without court oversight of caseload standards, a given fee mechanism could result in the erosion of the practice of juvenile law. Experts agree that adequately funded and competent attorneys are key to the functioning of the juvenile court. The quality of legal representation is a critical dimension of the quality of the court process because attorneys determine the flow of information before the court.¹¹⁸

AB 233 is an opportunity, after many long years, to adequately fund this important court expense. Unfortunately, the allocation under AB 233 is based on each county's fiscal-year 1994 budget, an amount that is low for three reasons: (1) juvenile dependency cases have increased by 163 percent since the 1980s,¹¹⁹ specifically, filings have increased from 36,657 in 1994 to 37,816 in 1998; (2) costs have risen with inflation; and (3) the allocation was insufficient even by 1994 standards. It was insufficient because juvenile courts did not have the political clout to obtain adequate funding from their county boards of supervisors.

Section 24(c)(4) of the California Standards of Judicial Administration directs the juvenile court judge "in conjunction with other leaders in the legal community to ensure that attorneys appointed in juvenile court are compensated in a manner equivalent to attorneys appointed by the court in other types of cases." Section 24(b) describes the importance of the juvenile court and directs the presiding judge of the juvenile court in consultation with the presiding judge of the superior court to "work to ensure that sufficient ... financial resources are assigned to the juvenile court."¹²⁰ Thus, it is the responsibility of the entire court system to ensure that the juvenile court has the resources to adequately compensate attorneys who are appointed to represent children.

In conclusion, court-appointed-counsel costs in juvenile dependency matters should continue to be borne by the state and courts rather than by the counties in order to ensure uniformity in the application of the law, to eliminate inappropriate state intervention in the lives of families, to improve access to family reunification services and critical health and educational services for children, and to reduce the time children spend out of home so they may receive swift, permanent placements. It is time for

the Legislature to make good on its promise to adequately fund court operation expenses. Institutional memories have faded since SB 243, so it is incumbent on the Judicial Council to effectively lobby the Legislature for the funds necessary to implement appointment of counsel for all children. And it is up to the Judicial Council, working in collaboration with both the local superior courts and their juvenile court departments, to ascertain appropriate funding levels.

ADEQUATE FUNDING LEVELS ALONE WILL NOT ENSURE COMPETENT COUNSEL FOR ALL CHILDREN

Under state trial court funding, each superior court receives a block grant based on the court's fiscal-year 1994 budget. But even if the funding level is adequate because the local court provided the necessary information to properly ascertain costs and the Legislature made the necessary appropriation, there is still a risk that the amount allocated for court-appointed counsel will not be given to the juvenile court for its intended use. Historically, juvenile courts, when compared to the other superior courts, have not received their fair share of the court's resources. Evidence to support this claim is sadly apparent when one visits the juvenile courts and the other superior court facilities across the state. Indeed, the Chief Justice noted this disparity during his 1997 tour of the state's local courts.¹²¹ Juvenile court facilities are generally physically separate from the rest of the superior court, miles away and rundown. A comparison of court dockets reveals that juvenile court caseloads far exceed other civil caseloads; yet at the institutional level of the courts there is a marginalization of the juvenile court's work. Regardless of one's views on subordinate judicial officers, (*i.e.*, commissioners and referees), it is striking that in no other area of the court's business is it the norm for subordinate judicial officers to hear cases. Judges, on the whole, dread the assignment, and sometimes it is given to punish certain judges. Given that historically the work of a juvenile court has been marginalized, there is no guarantee that the superior court budget allocation, which is a block grant, will be equitably distributed so that juvenile court will receive its fair share.

Even if there were adequate funding and a way to control how the superior court spent the block grant, standards are lacking at both state and local levels to ensure that appointed counsel are competent. Rule 1438 of the California Rules of Court provided that on or before July 1, 1996, the superior court of each county would adopt local rules regarding the representation of parties in dependency proceedings.¹²² While the state court rule

defines competent counsel, requires minimum education and experience, and provides the very basic of standards, it stops short of mandating specific services to be provided by each attorney and does nothing to assist the local juvenile courts in the screening and appointment decisions they must make.

As of late 1999, 30 of the 58 counties have adopted local rules pursuant to rule 1438. For the remaining 28 counties there was no real consequence other than that they were instructed to obtain a letter granting an extension from the Chief Justice. Of those counties with rules, 18 adopted some version of the model rules promulgated by the National Association of Counsel for Children. Ten counties adopted some version of the rule proposed by the Juvenile Law Subcommittee of the Judicial Council's Family and Juvenile Law Advisory Committee. Six counties followed rule 1438's example by adopting similarly vague local rules in order to technically comply with the rule. Only two counties went beyond the two rules that were circulated as model rules and expanded on their already very specific rules on attorney standards, education, recruitment, screening, and appointment.¹²³ Without close judicial oversight and some mechanism to ensure statewide accountability, the effort in each county to prepare and adopt local rules has changed very little and amounts to pro forma due process.

Even if block grants can be crafted to ensure set-asides for juvenile court costs and local juvenile courts adopt specific rules regarding court-appointed counsel, a child's right to competent counsel may still be held hostage to local court politics. Imagine the following scenario. A small county has contracted with a firm of two attorneys, and the firm seeks to hire a part-time attorney to cover the court's growing caseload. With approval for funding from the superior court, the firm begins to recruit, whereupon the presiding judge of the superior court calls and directs the firm to hire a certain attorney for the job. While such scenarios were not unheard of before state trial court funding, the influence of the presiding superior court may become more manifest without certain statewide rules akin to regulations ensuring that politics do not enter into appointment-of-counsel decisions.

Consider another hypothetical case. A given court administration seeks to reduce costs by requiring the juvenile court to utilize video conference calls for all incarcerated parents rather than transport them to the dependency hearings. The presiding judge in charge of allocating funds might decide to disregard local juvenile court concerns for due process and divert the dollars saved to other juvenile court functions or other divisions of the superior court.

In conclusion, court-appointed-counsel costs should continue to be borne by the state as court costs. But it is not enough to simply provide adequate funding for independent representation. Specific state standards are also needed to ensure that attorneys provide minimum services to child clients. State funding must be adequate so that local courts can meet both state and local standards. Statewide accountability is necessary to ensure juvenile court allocations remain in the juvenile court budget and are not redirected as a result of local superior court decisions or politics. Accountability is needed to ensure that once the juvenile courts actually have the resources, they are spending the funding allocated on competent attorneys. It is the responsibility of the court system as an institution—both the local superior courts together with the Judicial Council—to bring about these reforms for the sake of the children who, through no fault of their own, find themselves revictimized by state intervention.

CONCLUSION

Due process and fundamental fairness cry out for a child's right to independent representation in dependency proceedings. National and state policies have consistently called for independent representation for children. Yet California's court-appointed-counsel statute in abuse and neglect proceedings is inconsistent with these due process principles and long-standing policy goals. Primarily for financial reasons, the California Legislature stopped short of requiring mandatory independent representation. By failing to address the nettlesome question of funding, the Legislature left the protection of abused and neglected children to local politics and financially strapped counties. The savings have been at too great a cost: children's lives.

Lack of resources in the juvenile court system results in the inability of the court, the attorneys for the agency, and the parent to always protect the child. Even with resources, they cannot be expected to always assert the child's interests. For financial reasons, the local juvenile courts have been unable to appoint attorneys for all abused and neglected children. Despite their best efforts, the courts have been unable to provide the necessary oversight to ensure that all children under their care are not further victimized by the very system that seeks to protect them.

In conclusion, we have an historic opportunity with the passage of state trial court funding to adequately fund this traditional court cost so that all children are appointed independent counsel who are appropriately trained and adequately compensated. The challenges will be to establish better lines of accountability between the local superior courts and the Judicial Council and to educate the Legislature on the necessity of spending more on court-

appointed counsel for children. It is the responsibility of the court system as an institution—the local superior courts, their juvenile departments, and the Judicial Council to make these reforms.

STEPS TO ENSURE INDEPENDENT REPRESENTATION WORKS FOR ALL CHILDREN IN THE DEPENDENCY SYSTEM

In order to avert some of the harm the juvenile court system inadvertently causes children under its jurisdiction, the following steps should be taken:

- The state should assume a leadership role in obtaining adequate funding for children and families in juvenile court;
- The state should pass legislation to provide for mandatory appointment of independent counsel for all children in the dependency system;
- The state should allocate sufficient funds to adequately compensate court-appointed counsel;
- The local courts should recognize and correct the long-standing neglect of the juvenile courts by allocating appropriate resources to them;
- The local courts should work with the Judicial Council to determine minimum legal service requirements, maximum caseload standards, and adequate funding levels to provide these services and adhere to standards;
- The Judicial Council, through its rule-making authority and the Trial Court Budget Commission, should mandate minimum legal service requirements and maximum caseload standards;
- The Judicial Council, through its rule-making authority and the Trial Court Budget Commission, should provide adequate funding to all of the local courts so that they can provide the mandated legal services and adhere to caseload standards;
- The Judicial Council, through the Trial Court Budget Commission, should create set-asides, *i.e.*, categorical funding for court-appointed-counsel costs;
- The Trial Court Budget Commission should allocate funding on the basis of each local court's proof that it is meeting minimum service and caseload standards; and
- The Judicial Council should assume statewide oversight to ensure accountability so that funding levels are appropriate and funds are not diverted by the local superior court away from the juvenile court.

1. "Independent representation," as used in this article, refers to an attorney for the child who is separate and independent of the petitioning agency attorney.
2. *Convention on the Rights of the Child*, G.A. Res. 44, U.N. GAOR, 44th Sess., U.N. Doc. A/44/736 (1989), reprinted in 28 Int'l Legal Materials 1456 (1989) Or see www.unhcr.ch/html/menu3/b/k2crc.htm.
3. *Id.* at 1461.
4. U.S. Const. amend. XIV, § 1.
5. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 32–34 (1981).
6. Richard R. Terzian et al., *Now in Our Hands: Caring for California's Abused and Neglected Children* 31–32 (Little Hoover Comm'n 1999).
7. *Id.* at 33–34.
8. *Id.*
9. *Lassiter*, 452 U.S. at 25–27.
10. *Mathews v. Eldridge*, 424 U.S. 319 (1976).
11. *Id.* at 335. See also *Lassiter*, 452 U.S. at 27, accord *Cynthia D. v. Superior Court*, 851 P.2d 1307 (Cal. 1993).
12. *In re Malinda S.*, 795 P.2d 1244, 1252 (Cal. 1990) (quoting *In re Jackson*, 233 Cal. Rptr. 911 (1987) (citing *People v. Ramirez* 599 P.2d 622)); *In re Walter E.*, 17 Cal. Rptr. 2d 386 (1992).
13. *Bellotti v. Baird*, 443 U.S. 622, 634–35 (1979).
14. *United States v. Kent*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967).
15. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (observing that the entire society benefits when the child is "safeguarded from abuses and given opportunities for growth").
16. *In re Marilyn H.*, 851 P.2d 826, 832 (Cal. 1993).
17. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "[T]he child and his parents have a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Compare the parent's right to "the companionship, care, custody and management of his or her children" (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) to the child's birthright.
18. *Marilyn H.*, 851 P.2d at 833 (citing *Adoption of Kay C.*, 278 Cal. Rptr. 907, 911 (1991)).
19. *Santosky v. Kramer*, 455 U.S. at 765.
20. See *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987).
21. *Cynthia D.*, 851 P.2d at 1313.
22. *Marilyn H.*, 851 P.2d. at 833 (citing *In re David B.*, 154 Cal. Rptr. 63, 71 (1979)).
23. Cal. Welf. & Inst. Code § 317.6 (West 1991).
24. 42 U.S.C. §§ 5106a(b)(6), 5106c(b)(1) (West Supp. 1992).
25. 45 C.F.R § 1340.14(g) (West 1991).
26. Cal. Welf. & Inst. Code § 317(c); Pennsylvania and Indiana do not receive CAPTA funds.
27. SB 600 (Costa) was enrolled and before the Governor for his signature, and it would have amended Welfare and Institutions Code section 326 so that California would be eligible to receive CAPTA funding.
28. See Cal. Welf. & Inst. Code §§ 317, 366.26(f) (West 1999); former Cal. Civ. Code § 237.5, now Fam. Code §§ 7860–7863 (West 1999); and Cal. Rules of Court Rule 1412(g)(h) (West 1999).
29. SB 243 (Stats. 1987, ch. 1485).
30. Leonard P. Edwards et al., *Significant Developments in Juvenile Dependency*, 1989 California Appellate Courts Inst. 2 (April 1989).
31. Senate Select Comm. on Children and Youth/Sb Task Force, *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* 9 (Jan. 1988).
32. Leonard P. Edwards et al., *supra* note 30, at 9.
33. Senate Select Comm. on Children and Youth, *supra* note 31, at 9.
34. *Id.*
35. Leonard P. Edwards et al., *supra* note 30, at 9.
36. Cal. Welf. & Inst. Code § 317.5 (West 1991).
37. See *id.* § 317(d).
38. Joseph Goldstein et al., *Beyond the Best Interests of the Child* 67 (Free Press 1973).
39. Howard Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255 (1991).
40. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*,

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41. *See* Cal. Welf. & Inst. Code § 317 (West 1991). All references to “agency” refer to the local child welfare agency in each county that files the petition describing the child as abused and neglected.
42. *Janet O. v. Superior Court*, 50 Cal. Rptr. 2d 57, 62. (1996) (citing *Santosky*, 455 U.S. at 760 and *In re Bryce C.*, 906 P.2d 1275, 1279 (Cal. 1995)).
43. *Adoption of Kay C.*, 278 Cal. Rptr. 907, 911 (1991). *See Smith*, 818 F.2d at 1411 (children who brought an action for the wrongful death of their father deemed to have a cognizable liberty interest in their familial relationship); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (the right to maintain the family relationship involves the “interest of the parent in the ‘companionship, care custody and management of his or her children’ (citation omitted), and of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association’ with the parent. . . .”)
44. *In re Emilye A.*, 12 Cal. Rptr. 2d 294 (1992).
45. *In re Bryce C.*, 906 P.2d 1275, 1279 (1995).
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47. Ann M. Haralambie, *Current Trends in Children’s Legal Representation*, Serving the Needs of the Child Client: Keeping Pace With the Practice of Law for Children 431 (National Ass’n of Counsel for Children 1998).
48. Cal. Welf. & Inst. Code § 317 (West 1991).
49. *See id.* §§ 307.4, 308, 311, 316, 335–36, 364–366.23.
50. Cal. Welf. & Inst. Code § 361(c) (West 1999).
51. *See id.* § 361.5.
52. *See id.* §§ 366.21 and 366.22.
53. *In re Melissa S.*, 225 Cal. Rptr. 195, 203 (1986).
54. 42 U.S.C. § 673b (1999).
55. For adoption placements by county, see California Dep’t of Social Services, Adoption Initiative at 1, 5 (Nov. 1998).
56. *Id.* at 1.
57. Cal. Welf. & Inst. Code § 361.5(a)(2) (West 1991).
58. Terzian, *supra* note 6, at 35.
59. *Id.*
60. Terzian, *supra* note 6, at 36.
61. According to an Aug. 1999 conversation with Dana Fabella, Director of Social Services, Contra Costa County, five of her social workers are paid exclusively with county funds.
62. Cal. Welf. & Inst. Code § 16501.1(f)(9) (West 1991).
63. National Center for State Courts, California Court Improvement Project 4 (Apr. 1997).
64. Center for Children and the Courts, Judicial Council of California, Court Profiles, prepared for Beyond the Bench IX (Dec. 1998).
65. National Center for State Courts, *supra* note 63, at 23–25.
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67. California Dep’t of Social Services, FCIS85, Foster Care Information System data prepared Apr. 9, 1999, and provided by Office of Data Analysis and Publications.
68. Margaret H. Tulley et al., *Treating Loss and Separation in Infant and Toddler Foster Care, in Zero to Three*, Dec. 1998/Jan. 1999, at 32.
69. *Id.*
70. Kristi A. Olson, *Children’s Health Under Medicaid, in American Bar Association 9th Nat’l Conference on Children and the Law* 32 (Apr. 1999).
71. Judith Silver, *Improving Access to Early Intervention and Health Care Services for Infants and Toddlers in Foster Care, in Zero to Three*, Dec. 1998/Jan. 1999, at 27 (citing Chernoff et al. 1994; Hochstadt et al. 1987; Simms 1989).
72. Terzian, *supra* note 6, at 81.
73. *Id.*
74. 42 U.S.C. § 1396(a) (West 1993).
75. Part C (formerly Part HO) of the Individuals With Disabilities Education Act (IDEA) 1991, 20 U.S.C. § 33

(funds are provided for states to develop statewide, comprehensive, coordinated, multidisciplinary, and interagency programs that provide eligible children and their families with an individualized family service plan).

76. Terzian, *supra* note 6, at 67.

77. *Id.*

78. *Id.*

79. Terzian, *supra* note 6, at 67, 91.

80. *Id.* at 91.

81. *Id.*

82. *Id.*

83. Robert M. Goerge & Fred Wulczyn, *Placement Experiences of the Youngest Foster Care Population: Findings from the Multi-state Foster Care Data Archive, in Zero to Three*, Dec. 1998/Jan. 1999, at 11.

84. *Id.* at 12.

85. Barbara Needell, et al., *Performance Indicators for Child Welfare Services in California: 1994*, 73 (Child Welfare Research Center, U.C. Berkeley, 1995).

86. Terzian, *supra* note 6, at 75.

87. *Id.*

88. *Id.*

89. California Dep't of Social Services, *Foster Care Information System data (June 30, 1997, to June 30, 1998)*, provided by the Office of Data Analysis and Publications.

90. *Id.* for fiscal year 1997–1998.

91. National Council of Juvenile and Family Court Judges Centennial press packet citing White House statistics (1999).

92. *Orange County Emancipation Programs (1997–98)*, grand jury report from James P. Kelly, foreman, at 408.

93. Cal. Dep't of Social Services, *supra* note 55, at 1, 81.

94. *Id.* at xii.

95. Child Welfare League of America, www.cwla.org/cwla/publicpolicy/1999nationalfactsheet.html, n.26 (citing CWLA 1997). Sacramento County Study Community Intervention Program: Findings from a Comprehensive Study by Community Partners in Child Welfare, Law Enforcement, Juvenile Justice, and the CWLA (Washington, D.C. 1996).

96. Terzian, *supra* note 6, at 99.

97. SB 933 (Stats. 1998, ch. 311).

98. 42 U.S.C. § 677; Draft Guidelines for the Independent Living Program (Cal. Dep't of Social Services, June 1999).

99. Informal discussions with practitioners in Los Angeles and Santa Clara Counties (June–July 1998).

100. Child Welfare League of America, *supra* note 95.

101. *Id.*

102. Lockyer-Isenberg Trial Court Funding Act of 1997 (Stats. 1997, ch. 850).

103. SB 1195 (Stats. 1986, ch. 1122).

104. SB 243 (Stats. 1987, ch. 1485).

105. Senate Select Comm. on Children and Youth, SB 1195 Task Force Report on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services 10 (Jan. 1988).

106. Senate Select Comm. on Children and Youth, *supra* note 105, at ii.

107. *Id.*

108. Cal. Gov't Code § 77212(A) (West Supp. 37A pt. 2 1999). See drafter's intent as expressed in the "Questions and Answers Concerning Implementation of AB 233" in the *Trial Court Funding Act Resource Manual*, 2d ed. (Judicial Council of California/Administrative Office of the Courts 1998).

109. Cal. Gov't Code § 77212(A) (West Supp. 37A pt. 2 1999).

110. *Id.*

111. *Douglas v. California*, 372 U.S. 353 (1963).

112. *In re Gault*, 387 U.S. 1 (1967).

113. See Cal. Standards Jud. Admin. Section 24(i), Advisory Committee Comment.

114. Informal survey by Center for Children and the Courts, Judicial Council of California/Administrative Office of the Courts, June–July 1998.

115. Bar Ass'n of San Francisco, *A Study of Appointed Representation in Juvenile Dependency Cases in San Francisco* (Feb. 1996); Jaime Green, *Dependency Costs and Caseload* (Coro Found., Oct. 5, 1995); Linda Dobb et al., *Findings and Recommendation Regarding Cost Containment for Dependency Representation in the San Francisco Superior Court* (City Focus Program, Coro Found., Apr. 4, 1994).

116. See *In re Recorder's Court Bar Ass'n v. Wayne County Circuit Court*, Mich Sup. Ct., No 86099, Aug. 3, 1993.

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117. *See* Trask v. Superior Court of Los Angeles County, 27 Cal. Rptr. 2d 425, 427-29 (1994).
118. Mark Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases, in* The Future of Children (Winter 1996), at 111, 118.
119. Goerge & Wulczyn, *supra* note 83, at 9.
120. Cal. Standards Jud. Admin., *supra* note 113.
121. Chief Justice Ronald M. George, State Judiciary Address to a Joint Session of the California Legislature (Feb. 23, 1998), at 10, 11 (Judicial Council of California/Administrative Office of the Courts).
122. Cal. Rules of Court, Rule 1438 (West 1999).
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Lay Representation of Abused and Neglected Children

Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy

Abused and neglected children may be represented in court by an attorney, an attorney guardian ad litem, a nonlawyer guardian ad litem, and/or a trained volunteer acting as the guardian ad litem or Court Appointed Special Advocate (CASA). There are many questions about the roles and effectiveness of each of these forms of representation, such as whether their efforts are duplicative and how the representatives relate to each other when more than one is appointed to represent the same child. Advocates for attorneys point out that children are at a disadvantage if they are not represented by qualified legal counsel in dependency proceedings. Advocates for nonlawyer volunteers claim that they have more time to get to understand the child's circumstances and are better able to meet the child's need for non-legal advocacy.

It is the contention of this article that the roles of attorney and volunteer advocates are complementary, that neither adequately replaces the other, and that the weaknesses of each approach dovetail with the strengths of the other. Although communities have developed varied approaches to representation, one of the strongest is the teaming of attorneys and volunteers, in which both advocates have equivalent status but unique roles and both participate directly in the legal proceedings.

HISTORY OF VOLUNTEER CASA AND GUARDIAN AD LITEM PROGRAMS

A guardian ad litem (GAL) is "a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward, or incompetent person in that particular litigation."¹ The idea is an old one, dating as far back as the Roman Empire, when the law viewed guardianship as an extension of paternal authority. English common law first used the term, associating it with the courts' duty to protect youth.²

Normally, when a child is involved in litigation, the child's parents will perform the duties of a guardian ad litem. However, parents cannot be expected to promote the child's interest when there is a conflict between the parents and the child, and in those circumstances courts can appoint a guardian to perform this duty.³

This guardian derives his or her authority from the court's responsibility to protect children, originally part of the inherent powers of equity courts.⁴ In fulfilling this duty, courts have broad discretion to weigh the facts relating to the child's best interest in order to protect him or her from harm.⁵ However, because the judge must also

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Although communities have developed varied approaches to the representation of children, one of the strongest is the teaming of attorneys and volunteers, in which both advocates have equivalent status but unique roles and both participate directly in the legal proceedings. Many courts now appoint Court Appointed Special Advocate (CASA) volunteers to represent abused and neglected children. While these volunteers do not provide legal services, they do fill a unique role that has proven helpful in moving children into safe, permanent homes.

It is the contention of this article that the roles of attorney and volunteer advocates are complementary, that neither adequately replaces the other, and that the limitations of each approach dovetail with the strengths of the other. CASA volunteers are particularly effective in developing an in-depth understanding of the child's circumstances, identifying the child's needs, and monitoring the child's progress toward permanency. Attorneys are effective at providing a high level of legal protection for children. A better understanding of and respect for the roles of both lawyers and CASA volunteers would improve collaboration on behalf of abused and neglected children. ■

be impartial, the court can fulfill its duty to protect children partly through the appointment of a guardian ad litem.⁶ The guardian ad litem has been described as a surrogate for the court in performing this task, and today, guardians ad litem are considered officers of the court.⁷

Although the term "guardian ad litem" is sometimes used to refer to the child's attorney, the role differs from that of the traditional attorney. The core function of a guardian ad litem is to help the court understand the child's true circumstances and needs.⁸ While legal counsel can help fulfill this function, legal advocacy does not fully encompass the unique and important role of the guardian ad litem as a fact-finder and reporter on behalf of the court. Legal representation is a necessary but not sufficient ingredient of guardian ad litem advocacy.

For years, attorneys and others interested in the representation of abused and neglected children in court have recognized the need for quality representation but debated how attorneys should fulfill the guardian ad litem role. While legislation, court rules, and practice standards have helped clarify expectations for attorneys appointed to represent abused and neglected children, the attorney's role is still the subject of both debate and confusion.⁹

The appointment of guardians ad litem for children in child protection proceedings throughout the United States received a boost in 1974 with the passage of the Child Abuse Prevention and Treatment Act (CAPTA).¹⁰ The act required, as a condition of receiving federal funds under the act, that "in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child."¹¹ The legislation did not describe the guardian's duties, nor did it dictate whether the role had to be performed by a lawyer, although the tradition of appointing lawyers to perform this function continued in many courts. Most states did not fully meet the act's requirements,¹² and quality representation remains an unfulfilled aspiration for many abused and neglected children.

In 1977, a Seattle judge recognized that attorneys for children were unable to provide the in-depth fact-finding necessary to help the court make a fully informed decision on placement of abused and neglected children. Superior Court Judge David Soukup formed the first Court Appointed Special Advocate (CASA) program using trained community volunteers as guardians ad litem. A social worker supervised the volunteers, who were represented by legal counsel in court. Based on the early success of the King County program, the National Council of Juvenile and Family Court Judges endorsed this use of volunteers and encouraged the replication of the program in other jurisdictions. Even at this early stage, replications

of the King County program took varying forms, with volunteers in the new locations either acting as guardians ad litem themselves or supplementing the work of children's attorneys.

The National Council of Juvenile and Family Court Judges also helped establish the National Court Appointed Special Advocate Association (National CASA), incorporated in 1984 to promote the growth and development of quality CASA and volunteer guardian ad litem programs nationwide. In 1991, further federal legislation authorized the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, to enter into a cooperative agreement with National CASA to "expand the court-appointed special advocate program."¹³ The cooperative agreement remains in effect, providing technical assistance, training, and funding of CASA and volunteer guardian ad litem programs. The CASA and guardian ad litem network has now grown to approximately 843 programs serving over 900 jurisdictions in 49 states, the District of Columbia, and the Virgin Islands. In 1998, over 47,000 volunteers served an estimated 183,000 children. This expansion has been fueled by widespread recognition that "each child involved in judicial proceedings needs an independent voice to advocate for his/her 'best interests.'"¹⁴

APPROACHES TO VOLUNTEER REPRESENTATION

CASA programs recruit, train, and supervise volunteers to conduct investigations and make recommendations to courts in child abuse and neglect proceedings. These programs are locally administered and have been individually designed to accommodate local preferences as well as fulfill federal and state statutes and court rules. For those reasons, there are varying approaches to program administration and operation issues such as the definition of the volunteer's role (including whether the volunteer is a full and independent party to the case), the formal status of the volunteer, the administrative responsibility for the program, forms of attorney representation, the formal relationship between the volunteer and attorney for the child (including definitions of the attorney's role), types of cases accepted, and mechanisms for establishing and ensuring compliance with program standards.

Various efforts have been made to identify the key models for representation of abused and neglected children. Hertz and Cooke identify the following five models of volunteer and attorney interaction:¹⁵

1. An attorney as the guardian ad litem, sometimes assisted by a Court Appointed Special Advocate;

2. An attorney guardian ad litem and independent volunteer representative;
3. Either an attorney, a Court Appointed Special Advocate, or another nonlawyer as the guardian ad litem;
4. A volunteer serving as the guardian ad litem but operating as part of a team with an attorney; and
5. A volunteer serving as the guardian ad litem, with an attorney representing the volunteer.

Ventrell describes six models of legal representation:¹⁶

1. An attorney guardian ad litem representing the child's best interest by substituting judgment;
2. A nonattorney guardian ad litem communicating the child's best interest through substituting judgment;
3. The traditional attorney acting as a zealous advocate of the child's position and interests;
4. A combination of attorney and lay guardian;
5. An attorney representing a lay guardian; and
6. An attorney for the child acting as a zealous advocate of the child's objective interests.

A national study conducted by the U.S. Department of Health and Human Services on the effectiveness of guardian ad litem representation (referred to herein as "the national study")¹⁷ identified a different set of five models of guardian ad litem representation:

1. Private attorneys appointed and paid by the court;
2. Staff attorneys, perhaps from a legal aid society under contract with the county, or a county office such as the district attorney's office;
3. Law students supervised by a law school clinic or public defender's office;
4. Lay volunteers teamed with paid attorneys; and
5. Lay volunteers acting as the guardian ad litem.

Some of the models describe variations in practice or represent accommodations to limited resources. There are few pure examples of any one of these models; for practical reasons, combinations of these models may exist even within a single court jurisdiction.

These models can be sorted into three approaches to representation: (1) attorney-centered approaches, in which an attorney acts as the representative either alone or with volunteer assistance; (2) volunteer-centered approaches, in which the volunteer is an independent participant in the case; and (3) attorney-volunteer team approaches, in which attorneys and volunteers act as coequal partners, each with a unique and clearly understood role. Where an attorney

acts as the guardian ad litem, a volunteer may only be involved if the attorney requests it. Under that approach, the volunteer may not appear in court, although the national study recommended that CASA volunteers attend hearings if only to present evidence. Under the second approach, where the volunteer is not appointed as assistant to the attorney, the court may receive conflicting recommendations from the volunteer and the guardian ad litem, although disagreements of this kind are unusual.¹⁸

Both the attorney- and the volunteer-centered approaches have inherent limitations. Attorney-centered systems of representation can, at their best, provide a high level of legal protection for children, a moderate level of nonlegal advocacy, and a high likelihood of role confusion. Volunteer-centered systems provide a high level of nonlegal advocacy and at least a moderate level of legal protection. Evaluations of systems of representation suggest that the strengths of each approach balance the weaknesses of the other. For that reason, the strongest approach to representation of abused and neglected children is the effective teaming of volunteers and attorneys, in which each advocate has equal status and participates directly in the legal proceedings. This approach is best demonstrated by the coappointment of lawyers and volunteers. To make this model work, the participants must understand and respect the differences between nonlegal representation and legal representation, and there must be regular and effective communication between volunteer and attorney.

Much of the writing about the representation of children does not acknowledge that two different functions are involved: legal representation and nonlegal representation. Traditional representatives of children's interests—caseworkers and attorneys—have often been unable to adequately conduct nonlegal representation duties such as investigations, monitoring, and follow-up of cases. The fundamental reason is a lack of time and resources. Rates of pay tend to be low, caseloads are almost always high, and supervision and training are sometimes spotty.

There are variations within these functions, including whether an attorney or a volunteer conducts the nonlegal activities traditionally associated with the guardian ad litem, how purely legal representation is provided for the child, the volunteer's status and relationship to the legal representative, and methods of program administration, including related levels of training and supervision for the advocate. The variations summarized in Table 1 represent structural differences that can affect the nature and quality of legal and nonlegal advocacy for abused and neglected children.

Table 1. Representation Models

| Nonlegal Representation | Legal Representation |
|--|---|
| Attorney acting as combined attorney and GAL | Staff attorney |
| Attorney acting as GAL only | Private attorney paid under contract with the court |
| Nonlawyer volunteer | Private attorney on pro bono basis |
| Other nonattorney ¹⁹ | |
| Joint appointment of volunteer and attorney | |

STATUS AND ROLE OF THE VOLUNTEER

There are four essential variations on the role and status of the volunteer representative:

1. Dependent, reporting to the guardian ad litem;
2. Independent, reporting to the court as a friend of the court;
3. Independent, acting as a full party to the case; and
4. Independent, acting as a monitor of court activity and the case plan.

The fourth variation does not provide a strong mechanism for fulfilling the fact-finding role and is not a common approach among CASA and volunteer guardian ad litem programs.

State laws, regulations, or court rules in most states currently provide for the appointment of guardians ad litem in dependency proceedings. Though most states make this appointment mandatory,²⁰ few provide guardian ad litem representation for all children in dependency proceedings. Some states make the appointment discretionary. Washington, for example, permits a court to decide not to appoint a guardian ad litem where there is good cause showing that the appointment is not necessary.²¹

National standards promulgated by the National Court Appointed Special Advocate Association direct CASA and volunteer guardian ad litem programs to ensure role clarity, if not by statute, by internal policies that specify the role.²² States generally have not provided this role clarity by statute. Most state legislation provides only general statements about the appropriate role of the guardian ad litem, typically indicating only that the guardian ad litem should advocate for the best interest of the child. These statements often do not specify whether the guardian also acts as the child's legal representative, an oversight that perpetuates much of the discussion about role confusion

for attorneys representing children in dependency proceedings. Some state statutes contain detailed statements of the duties of the guardian ad litem and Court Appointed Special Advocate.²³ Others contain confusing role statements. Washington, for example, provides that independent legal counsel for the child will be deemed to be the guardian ad litem, even though the role of legal counsel is to advocate for the child's expressed wishes.²⁴

Recent revisions of the federal legislation on appointment of guardians ad litem have clarified some aspects of the guardian ad litem requirement. CAPTA now includes a provision that the guardian ad litem may be "a lawyer, a court appointed special advocate, or both" and states that the role of a guardian ad litem is "to obtain first-hand, a clear understanding of the situation and needs of the child, and to make recommendations to the court concerning the best interests of the child."²⁵ Nevertheless, there is still a lot of variation in whether volunteers can serve as guardians ad litem and whether they have the status of a full party to the case.

In some states and localities, the Court Appointed Special Advocate program is the guardian ad litem program, and the volunteers may have that status in the legal proceedings. In the state of Washington, 11 of 27 programs have this designation. North Carolina operates a statewide guardian ad litem program under the auspices of the state courts. The program uses a team approach in which lawyers are paired with volunteers. Some state statutes require that the guardian ad litem be an attorney.²⁶ Some allow the appointment of a nonattorney volunteer as the guardian ad litem,²⁷ and some state statutes also allow courts to appoint attorneys who do not function as guardians ad litem.²⁸

In 1994, approximately 60 percent of CASA volunteers served as the guardian ad litem, and 34 percent served as a friend of the court. Some states define the volunteers' status as officers of the court but not as parties to the case.²⁹ This status, however, can confer rights similar to those of a formal party, such as the right to receive notice of hearings, to be present at those hearings, to have access to information, and to present evidence at the hearing.

Regardless of the program model, lay volunteers do not participate in the case as legal counselors to the child but as individuals appointed to represent the child's best interest, just as a parent would in a case not involving parental child abuse or neglect.³⁰ Legal knowledge is not necessary for the volunteer's most important functions: gathering information to develop an understanding of the child's needs, reporting that information, and acting as nonlegal advocate both during the processing of the case and in the community. Nor does the volunteer provide legal services in fulfilling that role. The National CASA training

curriculum for volunteers notes that they are recruited not for their legal knowledge, but for their “unique qualities, community perspective, common sense approach and excellent training.”³¹ Included in the national standards is a provision that the volunteer does not give legal advice.

It may sometimes be inappropriate for attorneys to perform some of these functions. At the very least, attorneys need special nonlegal training to perform these functions well. As noted in the Florida Rules Regulating the Florida Bar, “As guardians ad litem ... lawyers are called upon to fulfill significantly different roles in the litigation process than they fulfill as lawyers, and their conduct is regulated by other rules. Often guardians ad litem are required to act in the best interests of children even if this conflicts with the children’s wishes, to serve as investigators for courts, or both. Neither of these functions is compatible with a lawyer’s normal responsibility to be a zealous advocate for a client.”³² Moreover, rules of ethics may prohibit attorney guardians ad litem from testifying.³³

The nonlawyer volunteer fulfills these roles even if appointed as the child’s guardian ad litem. The guardian’s authority derives from the court’s responsibility to protect children, originally part of the inherent powers of equity courts.³⁴ The court has broad discretion to weigh the facts relating to the child’s best interest in order to protect the child from harm.³⁵ However, because the court must also be impartial, this duty to protect children may be accomplished in part through the appointment of a guardian ad litem.³⁶ The guardian ad litem may even be considered as a surrogate for the court in performing this task.³⁷

The function of the guardian ad litem is to help the court understand the true needs of the child.³⁸ Legal knowledge is not required to develop this understanding of a child’s needs, although legal assistance may be needed to help in the process of presenting information to the court or ensuring that the court processes operate effectively on behalf of the child.

The national study of the effectiveness of legal representation for children found that citizen volunteers provide a different style of advocacy and perform many activities in ways that attorneys do not, especially in the areas of investigation, monitoring, and resource brokering. “Resource brokering” refers to the ability to make support services within the community available to the child. CASA volunteers also often place greater emphasis on promoting cooperation among the parties to a case. These are particularly important activities in court cases, where the adversarial nature of and frequent delays in the proceedings can be devastating to children. The volunteer’s involvement can help reduce this damage to children.

The national study identified five activity areas associated with the guardian ad litem role. The first is fact-

finding or information gathering: meeting with, interviewing, and observing the child repeatedly over a period of time; visiting both the child’s and the parents’ homes; contacting caseworkers; reading the petition; reviewing the case record; and contacting other adults who may have pertinent information. These are the kind of activities that help the advocate gain insight into what is best for a child, what kinds of services may be helpful, and what support is needed to move toward permanency.

The fact-finding function does not require legal skills, and, in fact, most attorney guardians ad litem do not perform these activities. The national study found that volunteer representatives were much more likely than lawyers to engage in them. About two-thirds of Court Appointed Special Advocate volunteers reported they observed parent-child interactions, while only 40 percent of staff attorneys and 38 percent of private attorneys did so.³⁹ Noting that “observation is necessary in making placement assessments,” the same study found that 90 percent of CASA volunteers visited the home while only one-third of attorneys did so.⁴⁰ One of the study’s conclusions was that “CASAs perform additional, important activities on cases that are not performed by private or staff attorneys, especially in investigation, monitoring, and brokering.”⁴¹ Other studies have also found that these nonlegal activities are a particular strength of the CASA model.⁴²

The second activity area is legal representation. This was defined in the national study to include appearance at hearings, filing of motions and other legal papers, and advising the child client on legal issues. The study also included within this activity area the role of reporter to the court, though this could be considered a separate role because it does not require legal knowledge. In the reporter role, the volunteer or guardian ad litem may be called at trial to present testimony, because the guardian has firsthand knowledge of key facts the court needs to make a decision. Effective performance of this role requires common sense and firsthand knowledge of the child. It may involve various recommendations for the case plan, including placement of the child, and recommendations for services and on visitation issues. The focus of this part of the guardian’s work and report is the social, not the legal, aspect of the case. The national study found that attorneys performed legal representation activities, except for reporting, much more often than volunteers.

The third activity area is mediation and negotiation, including the development of agreements and stipulations. While the national study found that attorneys were much more likely to initiate negotiations, all representatives participated in negotiations at about the same rate.

The fourth area is case monitoring: maintaining contact with the child and other parties, monitoring the

child's special needs, and following up on court orders. Much of these activities are nonlegal in nature, and again, the national study found that volunteer models were much more likely to engage in them. This fourth area extends the role of the nonlegal advocate. What happens between court appearances is crucial to a successful placement decision. According to Mark Soler of the Youth Law Center, "[p]articularly in the early stages of dependency proceedings, the legal aspects of the case are outweighed by psychological or sociological considerations, and the effective use of experts is essential to good representation."⁴³

The fifth activity area is resource brokering, including work within the community to help the child obtain needed services. The national study did not find consensus about whether representatives should perform this role within the jurisdictions studied, nor did it find significant differences among the models of representation with respect to these activities.

Table 2 summarizes the findings of the national study concerning attorney and volunteer activities in representing abused and neglected children.⁴⁴

Table 3 lists strengths and weaknesses of each model as reported in the findings of several evaluations of representation.

ADMINISTRATION OF VOLUNTEER REPRESENTATION PROGRAMS

Some variations in administration of volunteer programs are quite apparent but have little impact on the effectiveness of representation. For example, volunteer representation programs are known by many different names, even though most are members of the National Court Appointed Special Advocate Association. Approximately 63 percent of these programs currently use the name "CASA." Many use the name "guardian ad litem." Of course, name differences do not necessarily denote major differences in approach. Different approaches to state oversight of volunteer representation programs and other such variations in administrative structures can, however, have a great effect on the nature of representation provided to children. In a few states,⁴⁵ a state agency, usually the Administrative Office of the Courts, administers and operates the program throughout the state. Some of these state offices, such as in North Carolina and Utah, oversee both volunteers and attorneys representing children. Four other states⁴⁶ have a state agency with responsibility for oversight and coordination of independently operated CASA-member programs in the state, though these state agencies do not directly operate the programs.

When a state agency oversees the CASA or volunteer guardian ad litem program, concerns may arise that the

Table 2. Guardian ad Litem Activities as Defined in National Study

| Activities | Attorney GALs | Nonattorney Volunteers |
|---------------------------------------|---|---|
| Fact-finding and investigation | Few client contacts | Many client contacts |
| | Most do not visit home or contact other adults | Most visit the home and contact other adults |
| Legal representation | 95% attend all hearings | 53% attend all hearings |
| | 11% submit written reports to court | 67% submit written reports to court |
| | 86% rated their legal representation as effective | 45% rated their legal representation as effective |
| Mediation and negotiation | 85% initiated negotiations | 38% initiated negotiations |
| | Most were very involved in negotiations | Most were very involved in negotiations |
| Case monitoring | Fewer than half maintained contact with the child | 95% maintained contact with child |
| | Fewer than half contacted caseworker after review hearing | 80% contacted caseworker after review hearing |
| Resource brokering | No major differences | |

volunteer advocacy cannot be truly independent. This is especially true if the program is operated under the auspices of the social services department, an unusual but not unknown arrangement. Such an administrative arrangement is likely to impinge upon the program's independence, especially given the frequency of perceived conflicts between guardian ad litem and caseworker recommendations.⁴⁷

Similar questions also arise when the program is administered under the auspices of the court, though the concerns are less serious than with administration by the social services department. The CASA or guardian ad litem volunteer is performing as an officer of the court, fulfilling a delegated duty that was originally part of the court's responsibility to children. Courts administering volunteer representation programs must therefore be diligent to encourage and maintain program independence. Systems that use court administration for these programs must ensure that court administrators understand the program's role, and judges must have a strong commitment to independent advocacy.

Table 3. Key Strengths and Weaknesses of Advocates**Strengths:**

| Staff Attorney | Private Attorney | Volunteer |
|-----------------------|--|--|
| Courtroom performance | Courtroom performance Negotiation ⁴⁸ | Comprehensive training Investigation ⁴⁹ Monitoring Supervision |

Weaknesses:

| Staff Attorney | Private Attorney | Volunteer |
|----------------------|---|---|
| Nonlegal activities | Fact-finding, monitoring | Timeliness of appointment |
| High caseloads | Inadequate time and support | Attendance at all hearings |
| Formal training | Supervision and feedback | Legal representation in court ⁵⁰ |
| Performance feedback | GAL-specific training Lack of independent organizational structure Compensation | |

Nonprofit organizations administer the majority of Court Appointed Special Advocate and volunteer guardian ad litem programs. In Connecticut and New Hampshire, nonprofit organizations operate statewide multisite systems. In many other states,⁵¹ nonprofit statewide organizations provide technical assistance and other services, and sometimes funding, to independently operated CASA programs. Programs in those states may be operated by a local nonprofit organization or as part of county government. A few states⁵² do not currently have a formal statewide CASA-member program or organization, operating instead at the state level as an informal network of programs.

Some state organizations monitor programs for compliance with state program standards. These standards may be established through general legislation authorizing the use of CASA programs in the state or through court rules or directives. Monitoring by state organizations may be ongoing, on an annual basis, or every two to three years. In 1997, 20 state organizations indicated that they provided one of these forms of program monitoring.

Over the last five years, an increasing number of CASA programs have been developed by nonprofit organizations. In 1997, over 60 percent of National CASA-member programs were nonprofit organizations, almost twice their

ratio only a few years earlier. Government-operated programs are not apparently being developed nearly as fast as privately operated programs. Another growing trend in recent years has been the startup of new CASA programs under the auspices of another umbrella organization. While effective for the developmental stages of a new program, these administrative structures can lead to questions about independence, particularly if the umbrella organization is also a service provider under contract to the county or state.

Local practices, including the understanding and wishes of local judges, can greatly affect the way a volunteer representation program operates. Most fundamentally, the volunteers' ability to operate as independent advocates requires the commitment and support of the judge. Because resources are universally scarce, there are also differing approaches to case selection. In some jurisdictions, nonlegal advocates tend to be assigned to cases involving younger children, either because it is believed that the impact of faster permanency can be greater for these children or because it is felt that these children cannot direct an attorney, so that nonlegal representation is more important for them. Volunteers may also be assigned when the child's attorney perceives a conflict between the child's wishes and what appears to be in the child's best interest. In other jurisdictions, judges may reserve volunteer appointments for the more difficult and complex cases as they are the ones in which additional sources of information are most needed.

Appointment of legal representatives varies as well. Lawyers may be appointed as a backup option when lay volunteers are not available, or they may be appointed to represent all children over a certain age (often 12). Judges may appoint lawyers when requested by such a child or when there is a conflict between the guardian ad litem and the child.

CONCLUSION

All abused and neglected children involved in the court system deserve high-quality representation that helps meet both their legal and their nonlegal needs. Representation by attorneys can be highly effective in ensuring that a child's best interest is served, that the child's desires are clearly presented to the court, and that the child is appropriately involved in the proceedings. Representation by nonattorney volunteers is particularly effective in developing a detailed understanding of the child's unique circumstances and in providing nonlegal advocacy for the child during the court process and in the community. By more effectively combining these forms of representation, with appropriate regard for the independence and the

unique contributions of each, all decision-makers in the child protection system can be better equipped to arrive at decisions that help each child find a safe, permanent home as quickly as possible.

NOTES

1. Black's Law Dictionary 706 (6th ed. 1990).
2. See Charles P. Sherman, *The Debt of the Modern Law of Guardianship to Roman Law*, 12 Mich. L. Rev. 124 (1913).
3. *In re Lisa G.*, 504 A.2d 1, 5 (N.H. 1986).
4. *McRae v. McRae*, 52 So. 2d 908 (Fla. 1951).
5. *Risener v. Risener*, 9 So. 2d 108 (Fla. 1942).
6. *James v. James*, 64 So. 2d 534 (Fla. 1953).
7. Brian Fraser & Harold P. Martin, *An Advocate for the Abused Child*, in *Child Abuse and Neglect: The Family and the Community* (Ray E. Helfer & C. Henry Kempe eds., Ballinger 1976).
8. Marshall A. Levin, *The Guardian Ad Litem in a Family Court*, 34 Md. L. Rev. 341, 362 (1974).
9. See Symposium, *Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. (1996); Abigail B. Sivan & Mary Quigley-Rick, *Effective Representation of Children by the Guardian Ad Litem: An Empirical Investigation*, 19 Bull. Am. Acad. Psychiatry L. 53 (1991).
10. 42 U.S.C. §§ 5101-5107 (1998).
11. 42 U.S.C. § 4(b)(2)(g)(1998).
12. U.S. Dep't of Health and Human Services & CSR, Inc., National Study of Guardian Ad Litem Representation 1 (1990) (hereinafter Guardian ad Litem Study).
13. 42 U.S.C. § 13013 (1998).
14. U.S. Dep't of Health and Human Services, Admin. for Children and Families, Admin. on Children, Youth and Families, Nat'l Center on Child Abuse and Neglect, Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem 1-2 (1995) (hereinafter Final Report).
15. Rebecca H. Hartz & Irene Cooke, *CASA Volunteers and Attorneys: A Partnership That Works* (National CASA Ass'n 1995).
16. Marvin R. Ventrell, *Models of Child Advocacy: Achieving a Balance of Beneficence and Autonomy*, in *Child Advocacy at a Crossroads: The Development and Direction of Children's Law in America* 135, 138-40 (Nat'l Ass'n of Counsel for Children 1996).
17. Final Report, *supra* note 14.
18. Guardian ad Litem Study, *supra* note 12, at 6-13.
19. May be a staff member of the CASA program in some jurisdictions.
20. National Council of Juvenile and Family Court Judges, Permanency Planning for Children Project, *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice* 66 (1998).
21. Wash. Rev. Code § 13.34.100 (1998).
22. Standards for Court Appointed Special Advocate (CASA) Programs Affiliated with the National CASA Association (NCASAA) Requirement VIII.E.(2) (National CASA Ass'n 1997).
23. *E.g.*, La. Ch. C. Art. 424 (1995).
24. Wash. Rev. Code § 13.34.100(1) (1998).
25. 42 U.S.C. § 5106a(b)(2)(A)(ix) (1998).
26. *E.g.*, D.C. Code Ann. § 16-2304(b)(3) (1989).
27. See Ohio Rev. Code Ann. § 2151.281 (Banks-Baldwin 1998).
28. Cal. Welf. & Inst. Code § 317(c) (West Supp. 1995).
29. *E.g.*, Wash. Rev. Code § 13.34.105(2) (1998).
30. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 Fordham L. Rev. 4 (1996).
31. National Court Appointed Special Advocate Ass'n, *Comprehensive Training for the CASA/GAL, Unit 7*, 42 (1989).
32. Stuckey, *supra* note 30, at 4.
33. Florida Rules Regulating the Florida Bar Rule 4-3.7 (West 1991).
34. *McRae v. McRae*, 52 So. 2d at 908.
35. *Risener v. Risener*, 9 So. 2d at 108.
36. *James v. James*, 64 So. 2d at 534.
37. Fraser & Martin, *supra* note 7.
38. Levin, *supra* note 8.
39. Final Report, *supra* note 14, at 6-6, 6-7.
40. *Id.* at 6-7.
41. *Id.* at 6-4.

NOTES

42. Trina G. Bogle et al., Evaluation of the Virginia Court-Appointed Special Advocate (CASA) Program (Criminal Justice Research Ctr. 1996); Karen C. Snyder et al., A Report to the Ohio Children's Foundation on the Effectiveness of the CASA Program of Franklin County: Phase II, the Strategy Team (Ohio Children's Found. 1996).
43. Mark I. Soler et al., Representing the Child Client 4-5 (Matthew Bender 1988).
44. Guardian ad Litem Study, *supra* note 12.
45. Including Arizona, Delaware, Florida, Hawaii, Iowa, Maine, North Carolina, South Carolina, and Utah.
46. Arkansas, Indiana, Oregon, and Virginia.
47. *See* Guardian ad Litem Study, *supra* note 12, at 5-23.
48. Snyder found that Court Appointed Special Advocates and attorneys performed similarly in mediation and negotiation.
49. Guardian ad Litem Study, *supra* note 12, at 5-49; Bogle, *supra* note 42; Snyder, *supra* note 42.
50. Other studies do not confirm this weakness. *See, e.g.*, Snyder, *supra* note 42.
51. Including Alaska, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, Ohio, Oklahoma, Texas, Virginia, Washington, and West Virginia.
52. Including Kentucky, New Jersey, South Dakota, Wisconsin, and Wyoming.

Prosecuting Attorneys in Dependency Proceedings in Juvenile Court

Defining and Assessing a Critical Role in Child Abuse and Neglect Cases

Significant legal scholarship has identified and examined various issues related to legal representation for children, parents, and social services agencies in civil dependency proceedings.¹ Efforts to define the characteristics of the various legal roles are essential to achieving appropriate social services goals and for the care and protection of abused and neglected children.

One critical piece of the child protection mosaic remains relatively unexplored, however: the role of the prosecuting attorney. The prosecuting attorney's role has important ramifications in dependency cases. The prosecuting attorney can potentially affect social services goals, the time spent by children and families in the child welfare system, and the specific objectives of each particular proceeding.² Thus, an accurate and succinct analysis of the role of the prosecuting attorney in dependency proceedings and a comprehensive discussion of the salient issues and concerns that emerge from that role are needed.³

To that end, this article will draw on a number sources: state statutes and case law, which describe the duties and responsibilities of the prosecuting attorney; legal literature and social science research; and data provided by prosecuting attorneys and other child welfare professionals nationwide who responded to a survey questionnaire by the National Center for Juvenile Justice during Fall 1998, hereinafter referred to as the NCJJ survey.⁴ Anecdotes and opinions from practitioners are provided throughout to illustrate the various topics under consideration. By combining formal legal research and practical insight this article provides a snapshot of the role of the prosecuting attorney in dependency proceedings and a detailed analysis of the issues accompanying that role.

THE PROSECUTING ATTORNEY

The prosecuting attorney is the officer appointed or elected in each state or county to represent the state or county in judicial proceedings. Various titles and designations exist in state statutes and constitutions. See Table 1 for the title of the prosecuting attorney in each state.

With respect to criminal matters, a prosecuting attorney is "the foremost representative of the executive branch of government in the enforcement of criminal law in his county."⁵ As such, the prosecuting attorney is responsible for prosecuting all criminal violations on behalf of the state or county in which he or she is elected or appointed.

With respect to civil matters, depending on local law or policy, the prosecuting attorney may represent the state or county in civil matters, including the local



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Significant legal scholarship has identified and examined issues and concerns related to legal representation for children, parents, and social service agencies in civil dependency cases in juvenile court. However, one critical piece of the mosaic of child protection remains largely unexplored: the role of the prosecuting attorney. Because actions by prosecuting attorneys may significantly influence the initiation, direction, and progress of both civil dependency cases and parallel criminal child abuse prosecutions, a detailed and comprehensive discussion of the prosecuting attorney's role in such cases is important in efforts aimed at improving the child welfare system.

Using state statutes, case law, legal and social sciences literature, and the responses of prosecuting attorneys, judges, agency attorneys, and other child welfare professionals to an exploratory survey, this article defines and assesses the role of the prosecuting attorney. Combining formal research and practical insight, the article describes and examines prosecutors' involvement in both civil

and criminal child protection proceedings. The result is a snapshot of the prosecutorial models used in various jurisdictions and a discussion of the complex issues and concerns that may accompany each structure. ■

Table 1. Title of Prosecuting Attorney by State

| Title | State(s) |
|--|--|
| Prosecuting Attorney | Arkansas, Hawaii, Indiana, Michigan, Missouri, Ohio, Washington, West Virginia |
| District Attorney | Alabama, Alaska, California, Colorado, Georgia, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas, Wisconsin |
| State's Attorney | Connecticut, Florida, Illinois, Maryland, North Dakota, South Dakota, Vermont |
| Commonwealth's Attorney | Kentucky, Virginia |
| County Attorney | Arizona, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, Texas, Utah |
| County and Prosecuting Attorney | Wyoming |
| Attorney General | Delaware, Rhode Island, Tennessee |
| Circuit Solicitor | South Carolina |

Source: NCJJ Survey, Fall 1998; NATIONAL DIRECTORY OF PROSECUTING ATTORNEYS, 1998.

department of social services in child protection proceedings, otherwise known as dependency proceedings. See Figure 1 for a description of the legal authority of the prosecuting attorney by state.

CHILD PROTECTION PROCEEDINGS

When the child protection division of the social services agency receives information regarding an incident of suspected child abuse or neglect, it conducts an investigation into the allegations. In 1997, nearly 3.2 million children were reported to child protective services agencies in the United States regarding child abuse and neglect.⁶ Child protective services agencies confirmed that just over 1 million (1,054,000) children were victims of child maltreatment, a figure that represents 15 out of every 1,000 children in the United States.⁷

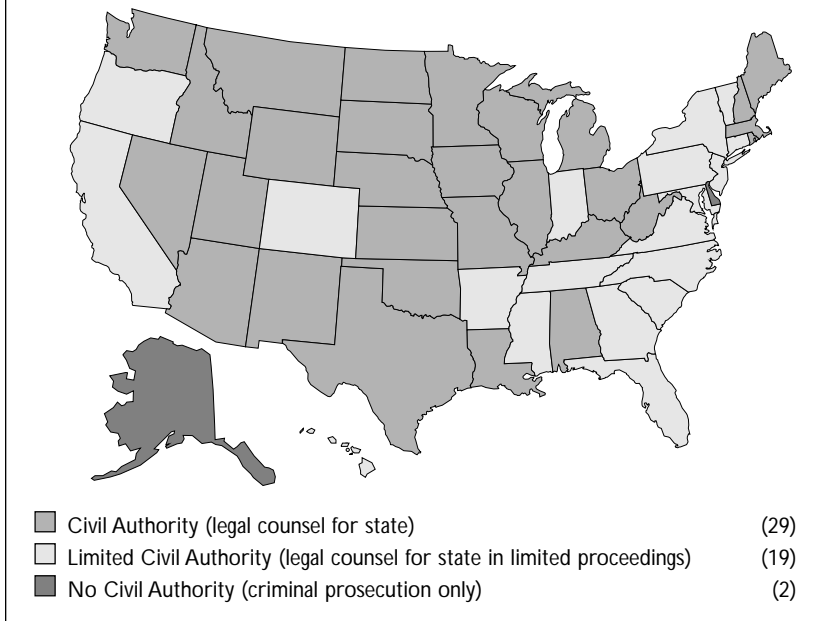
These cases illustrate the nature of child abuse in 1997: physical abuse (22 percent), sexual abuse (8 percent), neglect (54 percent), emotional maltreatment (4 percent), and other forms of maltreatment (12 percent).⁸ Current data on child maltreatment fatalities indicate that child protection agencies confirmed 1,185 deaths related to child abuse and neglect in 1996.⁹ Although the percentage of confirmed child sexual abuse cases appears relatively low, this number represents approximately 84,320 new cases of child sexual abuse in 1997, which is a substantial threat to the child's well-being.¹⁰

JUVENILE OR FAMILY COURT PROCEEDINGS

Although initially an agency typically attempts to address issues of abuse or neglect by offering voluntary services to the family, it may file a petition for supervision over the child seeking the jurisdiction of the juvenile court.¹¹ Different jurisdictions use different nomenclature to define these proceedings: "dependency," "children in need of assistance," "child in need of protection," "care and protection," or

Figure 1. Authority of Prosecuting Attorney

Source: NCJJ Survey, Fall 1998



“wardship” proceedings. The term “dependency proceedings” will be used hereinafter to describe these child abuse and neglect proceedings.

CRIMINAL COURT PROCEEDINGS

Incidents of child abuse and neglect may also result in parallel proceedings in criminal court.¹² Examples of such cases include sexual abuse and extreme cases of physical abuse and neglect that result in long-term trauma, permanent injuries, and death.¹³ A detailed and comprehensive collection of criminal child abuse laws can be found in Volume V (*Crimes*) of the *Child Abuse and Neglect State Statute Series* (1998), a publication of the National Center for Prosecution of Child Abuse. Criminal proceedings arising from such incidents are primarily designed to determine the guilt or innocence of the alleged perpetrator and, if the perpetrator is found guilty, to impose punishment.¹⁴

A STATISTICAL FRAMEWORK FOR DISCUSSING CIVIL AND CRIMINAL CHILD PROTECTION PROCEEDINGS

Most child abuse and neglect cases are handled by child welfare agencies without the courts' assuming jurisdiction over the child victims.¹⁵

Data from studies in local jurisdictions suggest that the vast majority of reports do not result in court involve-

ment.¹⁶ For example, a recent study conducted in Denver, Los Angeles, and New Castle County, Delaware, found that dependency petitions seeking formal juvenile court jurisdiction were filed in only 21 percent of the substantiated cases of child abuse and neglect in that county.¹⁷ Applying this figure to the number of child abuse cases confirmed by child protective services agencies nationwide in 1997 (1,054,000) yields an estimated 220,000 dependency petitions filed annually, or 3 for every 1,000 children, assuming one petition per child.

According to a recent study funded by the National Institute of Justice and conducted by Educational Development Center, Inc., and the American Bar Association's Center on Children and the Law¹⁸ that surveyed 103 criminal prosecutors and 59 child protection agency

attorneys nationwide,¹⁹ prosecutors estimated that 60 percent of their child maltreatment cases were concurrently involved in juvenile court proceedings; in the same study, child protection agency attorneys estimated that 13 percent of their cases had parallel criminal proceedings.²⁰ Thus, it is much more likely that a petition will be filed in juvenile court when there are also criminal charges of abuse.

PROSECUTORIAL STRUCTURE OF CHILD PROTECTION COURT PROCEEDINGS

As indicated previously, incidents of child abuse and neglect may result in two separate court proceedings based on the same circumstances.²¹ These cases are distinct proceedings in separate court systems. Involvement by the prosecuting attorney in one or both types of cases may assume different forms and varies from jurisdiction to jurisdiction.

SINGULAR INVOLVEMENT BY THE PROSECUTING ATTORNEY

In some states, the prosecuting attorney handles adult criminal proceedings against parents or guardians only when the child abuse or neglect constitutes a crime. He or she is not involved in civil dependency proceedings in the juvenile or family court. Typically, agency attorneys,

either employed by the social services agency or provided by the local government, will be responsible for civil dependency proceedings and act as legal counsel for the agency in the proceedings.²² The agency attorney may represent the interests of the child protection agency or the interests of the state.

Note, however, that even under these circumstances, the prosecuting attorney may still have limited involvement in dependency proceedings. For example, most states require child protection agencies to provide prosecuting attorneys with notice of all reports alleging child abuse or neglect. In addition, legislation in many states requires the prosecuting attorney to participate in multidisciplinary team meetings to review cases of child abuse and neglect.²³

Because the criminal prosecutor in almost every jurisdiction has a statutory means of acquiring all records in the dependency case file,²⁴ parents may be reluctant to

child welfare system and the criminal justice system without undermining the integrity of either.

DUAL INVOLVEMENT BY THE PROSECUTING ATTORNEY

In other states, the prosecuting attorney is responsible for presenting civil dependency proceedings as well as prosecuting criminal cases against parents. Jurisdictions vary with respect to the organization of the office of the prosecuting attorney. For example, in some jurisdictions, the office of the prosecuting attorney contains separate units or divisions that prosecute the respective cases.²⁵ In smaller or more rural jurisdictions that have fewer prosecuting attorneys, prosecutors may handle both types of cases.²⁶

Jurisdictions also vary with respect to the interests represented by the prosecuting attorney. In some areas, the prosecuting attorney represents the interests of the agency;²⁷ in other areas, the prosecuting attorney represents the interests of the state.²⁸

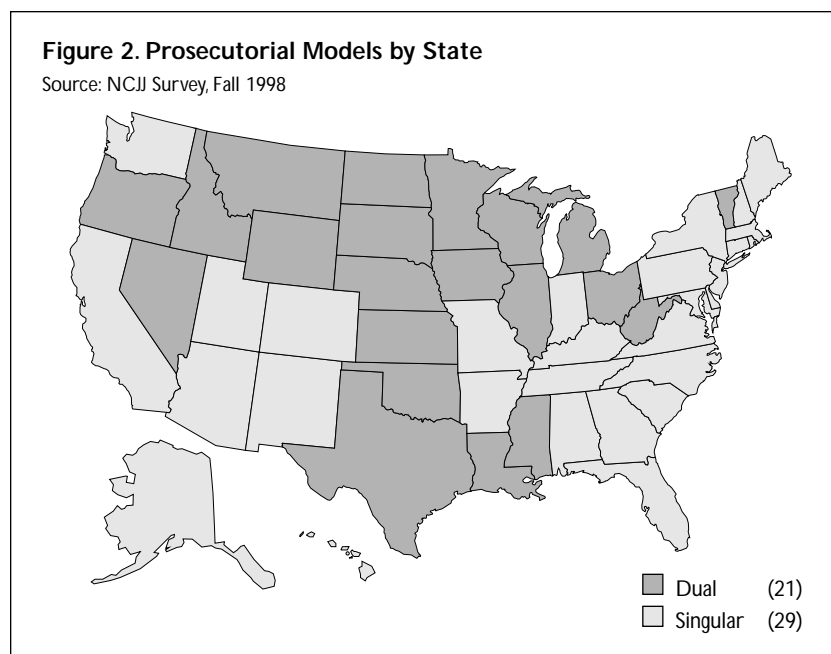
In jurisdictions where the prosecuting attorney is involved in both the civil and the criminal proceedings, he or she may face a serious dilemma. As legal counsel for the department of social services or as representative of the state's interests, the prosecuting attorney must strive to resolve cases by settlement with parents who cooperate fully and honestly with the social services providers. Such cooperation could involve parents admitting to criminal acts, such as sexual abuse and driving under the influence. However, the prosecuting attorney is bound by oath to prosecute all crimes on behalf of the state.

The conflict is easily understood but not easily remedied. Issues of child protection, fairness to parents, reconciliation of diverse interests,

and effective legal advocacy become especially significant. The prosecuting attorney must reconcile the different goals that underlie the criminal and civil system. He or she must also balance the parents' constitutional right to preserve the integrity of the family unit and to be protected from self-incrimination against the child's best interest. Finally, the prosecuting attorney must define the client and the interests being represented during court proceedings. Figure 2 illustrates prosecutorial models by state.

Figure 2. Prosecutorial Models by State

Source: NCJJ Survey, Fall 1998



comply with social services for fear that incriminating information will be available to the prosecuting attorney for the later criminal proceedings. Moreover, although criminal prosecution and incarceration of an abusive parent may serve the interest of the public in punishing individuals who commit crimes, it may not always serve the best interest and welfare of a child. Participating in a criminal investigation and trial may be traumatic for a child, and there is no guarantee of a guilty verdict. The prosecuting attorney must therefore fulfill the goals of both the

CONSIDERATIONS RELATED TO PROSECUTORIAL STRUCTURE

Actions by the prosecuting attorneys in both contexts have the potential to significantly affect the direction, progress, and resolution of both types of cases. Both prosecutorial structures raise similar important considerations regarding the efficient, effective, and fair processing of both civil and criminal child protection cases.

FUNDAMENTAL PHILOSOPHICAL DIFFERENCES IN GOALS AND OBJECTIVES

Fundamentally different philosophies form the basis for the criminal justice system and the child welfare system. In criminal proceedings, the prosecuting attorney seeks to protect the public safety and ensure social order. As Edwards notes, “In the criminal court, the judge, prosecutor and other participants are focusing upon the offending parent and determining the degree to which the aims of the criminal law should be applicable to him.”²⁹

In contrast, in dependency proceedings, the social services agency seeks to protect children and assist families in need by providing critical social, economic, and medical services. “In the juvenile court, the judge and other participants in the legal process attempt to structure a program that will be in the best interests of the child.”³⁰ While the criminal system looks at what happened and what sanctions may apply, the civil system looks at why it happened and what preventative measures should be implemented.³¹

This marked difference in philosophy underlies the goals and objectives of each system. As Curran puts it, “Just as the courts are different, the expectations and roles of attorneys who represent abused children are also very different.”³² In the criminal justice system, the goal of the state is punishment for individuals who behave in ways that society has deemed unacceptable and deterrence of similar behavior by others. The prosecuting attorney uses evidence proving that particular events or incidents occurred and holds people accountable for their behavior.

In contrast, the goal of the child welfare system is protection for children and treatment and rehabilitative services for families. The social services agency uses information about families and their members to evaluate situations and provide the appropriate assistance to enable families to resolve the issues that led to agency intervention and court supervision.

However, scholars have criticized this distinction of treatment versus punishment as manufactured. Besharov, for example, argues:

The dichotomy between “treatment” and “punishment” is somewhat artificial. A criminal prosecution can provide important rehabilitative services. Conversely, a civil child protection proceeding, which can involve the child’s forced removal from the parents’ custody and the parents’ involuntary treatment, has indisputably punitive aspects.³³

Nonetheless, when the prosecuting attorney is involved in both proceedings, he or she faces a difficult challenge: reconciling basic differences in perspective and approach to effectively fulfill both roles simultaneously.

Unique evidentiary rules, different time frames, and distinct standards of proof govern each proceeding. Each proceeding serves different interests and considers different factors. For example, the best interest of the child may not be served by incarceration of the abusive parent.³⁴ As one scholar notes:

Prosecutors generally are sensitive to the welfare of child victims. Indeed, many prosecutors view the child as their second client—the first client being the citizens of the community. Nevertheless, the prosecutor in a criminal case is not the child’s attorney, and cases arise in which the prosecutor’s strategic decisions are not in the child’s best interest.³⁵

Moreover, compliance by parents who receive treatment has great significance in civil proceedings and less importance in parallel criminal proceedings. The same is true for the myriad of social, economic, and emotional factors that affect families. Mental illness, substance abuse, addiction, unemployment, domestic violence, lack of education—these are often primary considerations in civil dependency proceedings and are properly considered in court decisions.³⁶ However, such extenuating circumstances are not necessarily considered in criminal prosecutions. When considered, they are often seen as secondary mitigating factors for purposes of sentencing.

This challenge may also create internal conflict for prosecuting attorneys. A prosecutor swears an oath to prosecute all crimes that have been committed within his or her jurisdiction and to protect the public interest. The prosecuting attorney also represents the state’s interests in preserving the integrity of the family and providing for the welfare of children. If while attending a multidisciplinary treatment team meeting or a case staff meeting where a father is encouraged to cooperate with treatment objectives and subsequently confesses to sexually molesting his daughter, how can the prosecutor then initiate criminal charges against him? How can the prosecutor not?

A number of respondents to the NCJJ survey commented on the fundamental philosophical difference between civil dependency proceedings and criminal prosecutions:

Criminal prosecution's goal is to seek justice on behalf of the state against one who is alleged to have violated a state law, whereas the dependency proceeding is strictly focusing on the best interest of the child. The goals are different, as well as the party on whom the proceeding is focused. (Commonwealth's Attorney, Virginia)

The same attorney should not be involved in both proceedings on account of the fact that the interest of the two agencies—one involved in criminal prosecution and the other involved in dependency proceedings—have different goals and objectives and client interests. Accordingly, it would be difficult, if not virtually impossible, for one attorney to "wear both hats" at the same time. (County Attorney, New Hampshire)

The issues in both proceedings are different. The issue in the civil matter is "the best interest of the child" while the issue in the criminal matter may be the best interest of society, punishment, or rehabilitation. It is possible, if the same attorney handled both matters, that the issues could become blurred. (Assistant District Attorney, Maine)

The prosecutor represents the community at large, not just the victim. The attorney in the dependency cases is concerned only about the child's best interests. (Assistant State's Attorney, Maryland)

As a prosecutor, our concerns are not always the same as the attorney involved in a dependency and neglect action which may be focused on reunification, etc. (District Attorney, Colorado)

In a criminal case, there is more than simple neglect at issue. There are different, and equally important, agendas to serve. (District Attorney, Colorado)

The goals of the two proceedings are generally different or at least vary from case to case. When one attorney has both proceedings, one or both may be compromised. (State's Attorney, Connecticut)

Different proceedings require different procedures and different outlooks. (State's Attorney, Florida)

FAIRNESS CONSIDERATIONS FOR PARENTS

Although numerous states have enacted statutes that criminalize certain acts of child abuse and neglect, the majority of dependency cases do not have a related criminal proceeding pending against the parent or guardian. However, in recent years, the criminalization of child abuse and neglect has increased significantly. Dorcas Hardy, former Assistant Secretary of the U.S. Department of Health and Human Services, articulated one possible reason for this increase in testimony given before the Seventh National Conference on Child Abuse and Neglect in Chicago in 1985:

Let us make one thing clear when we are talking about child abuse. We are talking about cruelty, we are talking about a violent action that is a crime. Child abuse is a crime, and the more people know that, the more they might think twice about committing such a crime. The campaign against drunk drivers is effective in some states because the accused knows that an angry society, an angry victim or his family, and an angry court system won't let the driver get away with it.³⁷

This attitude and the resulting changes in legislation have profound implications for the rights of parents, who face an increased likelihood of criminal charges and involvement by the prosecuting attorney.

The Fifth Amendment and the Privilege Against Self-Incrimination

The Fifth Amendment grants all persons a constitutional protection against self-incrimination: "No person shall be compelled in any [criminal case] to be a witness against himself."³⁸ Each person has the privilege not to be called as a witness and not to testify and to refuse to disclose any matter that may tend to incriminate him or her. It is well settled in case law that the privilege against self-incrimination extends to any proceeding, civil or criminal, where answers to official questions may incriminate the individual.³⁹ Thus, parents may refuse to testify in a dependency proceeding or to cooperate with treatment providers by providing information that might incriminate them.

Nearly a decade ago, legal scholars began discussing the potential unfairness to parents in child protection proceedings, especially when the prosecuting attorney is involved in both the civil dependency proceeding and the criminal prosecution. One writer notes:

There is a growing disagreement among the states on whether forcing a parent to confess to child abuse in court-ordered therapy as a condition of family reunification violates the parents' privilege against self-incrimination. In most jurisdictions, either the same prosecutor represents the government in both the dependency and criminal child abuse proceedings, or at least the criminal prosecutor has access to the parent's court-ordered therapy statements.⁴⁰

Thus, parents confront a situation where the state has considerable power to persuade and compel compliance with social services and treatment provisions as well as to punish parents when the child abuse or neglect constitutes a crime.

Parents face a very serious dilemma. If they cooperate with the social services agency, they are more likely to maintain contact with their children, but they risk providing the prosecuting attorney with incriminating infor-

mation for any potential criminal prosecution. If they refuse to comply with treatment and services, they preserve their constitutional right against self-incrimination but risk loss of custody or contact with the children.⁴¹ Similarly, Patton notes:

The message to parents is clear from all sources: dependency court is an informal environment in which cooperation is critical and formal legal rules are impediments. Yet parents who cooperate risk helping district attorneys convict them of criminal child abuse.⁴²

Patton explains why parents have reason to be concerned: “In almost every jurisdiction, the criminal prosecutor has a statutory means of acquiring all records in the dependency court file.”⁴³ Patton further notes: “Unlike just a few years ago, the criminal prosecutor can now discover almost all confidential data in the juvenile dependency court file, including parents’ statements that the prosecutor cannot directly discover in the criminal case.”⁴⁴

The results of putting parents to such a choice are unfortunate. Parents who fear incrimination from testifying in civil dependency proceedings or participating in therapy may be less likely to cooperate with the social services agency until the pending criminal matter is resolved. Because successful treatment often depends on acknowledging incidents of abuse or neglect, this dilemma undermines efforts to address the issues that brought the family to the attention of the agency and the actual progress toward reunification of the family.

Case Law Interpreting the Fifth Amendment Privilege Against Self-Incrimination for Parents in Civil Dependency Proceedings

In 1986, a Minnesota trial court adjudicated 11-week-old twin girls as dependents of the court after physicians reported serious physical injuries, including retinal hemorrhage, bruises, chip fractures in both arms and legs, and rib fractures in both girls to the Department of Human Services.⁴⁵ Neither parent offered any explanation for the children’s injuries in their testimony.⁴⁶

The trial court found as a fact that “the parents need to acknowledge the causes of the children’s injuries before any meaningful change will occur in the care and treatment they provide to the children”⁴⁷ and ordered that the parents cooperate fully in a psychological and psychiatric evaluation process.⁴⁸ The father appealed, claiming that required cooperation with a psychological evaluation compelled him to incriminate himself and enhanced the threat of criminal prosecution.⁴⁹

On appeal, the Minnesota appellate court acknowledged that the privilege against self-incrimination applies in civil as well as criminal proceedings⁵⁰ and that “if testi-

mony in a civil action would enhance the threat of criminal prosecution, the privilege may be invoked.”⁵¹ The court further noted that “an individual may not be compelled to testify absent a grant of immunity from use of the statements in any subsequent prosecution.”⁵²

However, the court found that the state was not attempting to impose an unconstitutional penalty on the father or posing an unconstitutional choice.⁵³ The court explained:

Appellant has not been threatened with sanctions for refusing to waive his privilege. Appellant has not been placed in a situation in which the state has required him to either waive immunity and testify or suffer dire consequences. In fact, appellant has not demonstrated that he has been faced with a situation in which he has sought to exercise his privilege.⁵⁴

The court continued:

While recognizing appellant’s rights in this matter, we also recognize the state’s interest and the children’s rights. The state has both a strong interest and a mandate to protect these children from an environment where they have suffered brain damage and repeated fractures. The state is required to work with the parents to correct the conditions which caused the abuse with the aim of returning the children to the parents as soon as this can be done safely.⁵⁵

According to the court, if the appellant is unable or unwilling to address behavior that led to abuse, the children cannot be safely returned to his or her custody.⁵⁶ The appellate court affirmed the decision of the trial court, reasoning that “the trial court’s finding that the parents need to recognize the cause of the children’s injuries before any meaningful change can occur recognizes that a parent who acknowledges the need for professional help is more amenable to treatment than one who denies the need for help.”⁵⁷ Therefore, if termination of parental rights should be the ultimate result, it is not “a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies.”⁵⁸

The dissent proposed an alternative solution—granting use immunity to the appellant:⁵⁹

The simplest solution would be to grant use immunity to appellant. This would achieve the desired effect of allowing appellant to discuss freely with therapists, doctors, and the welfare department his conduct and actions pertaining to his children, his feelings about them, and what course of conduct he perceives himself pursuing in the future to better the parent/child relationship.⁶⁰

According to the dissent, “[N]o good purpose can be served by withholding immunity if the trial court and respondent State are serious that an affirmative admission

by appellant that he caused the injuries is a prerequisite to therapy.”⁶¹

In 1988, the Iowa appellate court considered whether a requirement that the parents complete a sexual abuse treatment program in which an admission of sexual abuse was required amounted to denial of due process because such a requirement conditioned the preservation of one constitutional right, that of preserving the integrity of the family unit, on the forfeiture of another constitutional right, that of protection against self-incrimination.⁶² The appellate court upheld the requirement, holding that “the requirement that the parents acknowledge and recognize the abuse before any meaningful change can occur is essential in meeting the child’s needs.”⁶³

Ten years later, a Nebraska trial court terminated the parental rights of the mother of three children solely because she refused to acknowledge sexual contact with them. The mother appealed the order, claiming a violation of her right against self-incrimination.⁶⁴ The appellate court acknowledged the validity of the claim:

Suzette accurately characterizes the dilemma with which the juvenile court presented her: either acknowledge that she sexually abused her children so that she can become enrolled in Parents United, while at the same time potentially incriminating herself for sexual abuse of her children, or refuse to incriminate herself and have her parental rights terminated because she exercised her right not to incriminate herself. Our review of the court’s rehabilitation orders, coupled with the court’s knowledge that Suzette’s acknowledgment of sexual conduct with the children was a prerequisite to satisfying the rehabilitation plan, and review of the motion to terminate Suzette’s parental rights and the court’s order terminating her parental rights, leads us to conclude that the court presented Suzette with precisely that dilemma.⁶⁵

The appellate court sought guidance for its decision in the case law of other jurisdictions:

A review of the authority in other states indicates that there is a very fine, although very important, distinction between terminating parental rights based specifically upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent’s failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent’s failure to acknowledge past wrongdoing inhibits meaningful therapy. The latter is constitutionally permissible; the former is not.⁶⁶

The court reversed the termination order of the lower court because the unconstitutional choice represented an impermissible singular basis for the decision to terminate parental rights.⁶⁷ However, the court specifically limited the holding to situations in which a court terminates

parental rights on the sole basis of a parent’s refusal to waive his or her right against self-incrimination.⁶⁸

PROCEDURAL SAFEGUARDS

As the preceding discussion makes clear, parents face a serious dilemma: either cooperate with treatment recommendations and risk incrimination with respect to any future criminal prosecution, or refuse to cooperate with services and risk loss of custody and possibly visitation with the children. Such a choice could inhibit candid discussion regarding abuse or neglect, thus undermining the social services agency’s efforts to address the issues that led to its involvement. The unfortunate result is delay in all phases of the proceedings: in the identification of important family concerns; in the determination of appropriate services for resolving those concerns; in the implementation and completion of such services or the determination that such services are unsuccessful; and, finally, the achievement of safety and permanence for children, whether through continued placement or reunification with biological families or in another placement capable of providing care and protection.

Numerous respondents to the NCJJ survey addressed this issue of fairness to parents. For many prosecutors, in the context of protecting children, such fairness concerns must yield.

Children are the most vulnerable members of our society. When criminal prosecution is necessary to protect them, our hands should not be tied by further limiting our ability to introduce evidence in court to convict an abusive or neglectful parent. (Prosecuting Attorney, Michigan)

It is a grave injustice to the children to artificially put up barriers around the prosecutor’s access to information in some naïve belief that parents who are also criminal perpetrators would somehow magically cooperate more fully with social services agencies and therapists to become “good” parents. (County Attorney, Minnesota)

Paramount interest should be protecting the children. (Other, Michigan)

The ultimate goal, the best interest of the child, achieved by knowing as much information as possible, clearly outweighs any prejudicial effect. (Assistant County Attorney, Texas)

Considering the unique purpose of the child welfare system and the vulnerable population that it serves, the best interest of the child is most effectively served when all the relevant information is available to all the professionals involved in the cases. Many prosecutors also reported that the flow and exchange of pertinent information is essential for the care and protection of children.

Complete information is the best way to enable children to be protected. (Deputy District Attorney, Wisconsin)

A full picture of what's going on is important—whether the information is usable or not. (Deputy District Attorney, Oregon)

It is important to have as much information as possible to protect the child. (District Attorney, Oregon)

Exchanging information and ideas is best for the child. (District Attorney, Texas)

Respondents to the NCJJ survey also indicated that the presence of procedural safeguards provided adequate protection for parents' rights in dependency proceedings. Indeed, respondents argued that procedural safeguards such as appointing counsel for parents, use immunity provisions, confidentiality provisions, and rules of ethics effectively address fairness concerns.

[Parents] accused of abuse do not lose [their] Constitutional rights just because they have civil and criminal proceedings occurring at the same time. They have the option of not providing incriminating information. (Other, Michigan)

Conflicts are not overly complex if rules of evidence and rules on privilege and confidentiality are known and observed by the attorney. (County Attorney, Minnesota)

It is not inappropriate for the same attorney to handle both roles (civil/criminal) provided safeguards exist to keep any confidential information out of the criminal court. (Deputy District Attorney, Utah)

A comprehensive discussion of these procedural safeguards and their importance in dependency proceedings would require considerable specialized in-depth research and thus is outside the scope of this article. However, a brief overview of such safeguards is necessary here because many prosecuting attorneys view these mechanisms as adequate protection for parents in dependency proceedings.

Negative Inference

Several states permit a parent who is called to testify in a civil dependency proceeding to invoke his or her Fifth Amendment right. The court is then permitted to infer that the testimony would have been adverse to the parent's position. Based on this negative inference, the court may adjudicate a child dependent and order treatment or services for the family. In this way, the court respects the parent's constitutional privilege against self-incrimination but protects the child and provides assistance to families.

Counsel for Parents

In almost every jurisdiction, a parent must be notified of his or her right to counsel and provided with counsel if he

or she is unable to afford it. Like many of these procedural safeguards, the appointment of counsel for parents constitutes a distinct topic for in-depth research and discussion, and, as such, it is beyond the scope of this paper. However, it is briefly mentioned here because so many respondents reported it in their survey responses.

From beginning to end, civil dependency proceedings implicate numerous important interests for parents.⁶⁹ Individuals have a fundamental right to the custody and care of their children. Agency involvement, state custody and court supervision directly impact the right to preserve the integrity of the family unit. Further, if criminal proceedings also result, a parent may confront a loss of liberty through incarceration. Thus, the need for counsel in civil dependency proceedings is essential. To adequately protect parents' rights and interests, it is imperative that an attorney be available to assist parents in understanding the nature of the proceedings, their rights under the law and the consequences of various legal directives.

Use Immunity

In addition, many states have instituted "use immunity" provisions, which prohibit the prosecuting attorney from using testimony obtained in dependency proceedings against a parent in a parallel criminal prosecution.⁷⁰ Importantly, in every decision found where a court has allowed a civil state intervention case and criminal proceedings to go forward simultaneously, the parent has been granted or has been assumed to be entitled to immunity to protect him or her from being forced to choose between the privilege and the opportunity to be heard.⁷¹

The benefits of immunity have been clearly emphasized in case law:

Without immunity, the parent is forced to choose between incriminating himself or having little chance to complete reunification with his child. The consequences flowing from this are severe. The dependency proceedings are not pursued for the purpose of marshaling evidence of guilt but are designed to facilitate reunification of the family and to assemble all relevant evidence for the court to make an informed disposition. The burden of the prosecution of proving the defendant guilty beyond a reasonable doubt in the criminal proceedings will be substantially lightened if allowed to take advantage of evidence from a dependency proceeding. If the parent continues to remain silent in the dependency proceeding on the issue of his intentional abuse, he not only loses his opportunity to present a convincing case for reunification in the dependency proceeding, but also risks that his position of silence on the issue is an indication that he is not cooperating in the reunification process. To force an individual to choose such unpalatable alternatives runs

counter to our historic aversion to cruelty reflected in the privilege against self-incrimination.⁷²

Confidentiality Provisions

Many states have confidentiality provisions that protect information between parents and treatment providers, especially mental health professionals. Although the number of states that provide an exception for the prosecuting attorney is growing,⁷³ many states have procedural mechanisms for obtaining that material, including requiring an in camera review by the juvenile court judge before release of dependency records.⁷⁴

COERCIVE POWER OF THE STATE

It is an unfortunate fact that some parents who commit crimes of abuse or neglect against their children will not cooperate with the child protection agency without a credible threat of criminal penalties.⁷⁵ Thus, in certain situations, the threat of criminal prosecution may be an effective way to compel parents to cooperate with services and treatment plans established by the child protection agency. In fact, sometimes even a simple warning can achieve substantial results.⁷⁶ Note Sprague and Hardin, "Criminal sanctions can be used not only to punish and deter the perpetrator, but also to protect the child and reinforce family rehabilitation."⁷⁷ For example, the filing of criminal charges may be used to encourage abusive parents to obtain needed treatment. Moreover, says Edwards, "[T]he fear of incarceration can be effectively used to insure compliance with rehabilitative orders."⁷⁸ Indeed, in some cases, the authority of the court may provide the only assurance the treatment is pursued.⁷⁹ Thus, actual and potential criminal proceedings may help protect the child from further harm by the perpetrator.⁸⁰

Criminal proceedings, or the threat of those proceedings, [are] a powerful motivation for the parent to comply with the case plan developed by the Department of Health and Welfare. (Prosecuting Attorney, Idaho)

It is more likely to achieve basic changes in a parent's mode of living where a probation agent (after criminal conviction) and a child welfare worker are able to form a working relationship than in those cases where there is a juvenile court order only. The probation agent has immediate enforcement powers that the juvenile court can exercise only after cumbersome contempt proceedings. When there is a working relationship between the criminal and juvenile systems, the child welfare worker can provide the services while the probation officer can demand compliance much more effectively. (Deputy District Attorney, Wisconsin)

However, there is a fine line between good-faith prosecution of criminal child abuse and an abuse of prosecuto-

rial discretion. Rule 3.8(a) of the ABA Model Rules of Professional Conduct, titled "Special Responsibilities of a Prosecutor," prohibits the prosecutor on a criminal case from prosecuting a charge that the prosecutor knows is not supported by probable cause.⁸¹ The comment to Rule 3.8 explains:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction varies in different jurisdictions.⁸²

Despite this obligation, such an approach may be appropriate in certain situations. Besharov notes:

Many police and prosecutors are tempted to file charges in the hope of "straightening out" the parent by the sobering experience of pre-trial arraignment and perhaps, pre-trial detention. And some police and prosecutors use the threat of potential charges to "encourage" the accused to seek out-of-court help or treatment. By this tactic, they hope to obtain at least some rehabilitative treatment for the juvenile. While one must question this practice, its reality must be kept in mind.⁸³

Similarly, Austin observes: "[W]hile the possibility of criminal prosecution by itself is not the solution to abuse, it is an important part of effective child abuse legislation."⁸⁴

EFFICIENT AND EFFECTIVE CASE PROCESSING

Professionals working in both the criminal justice system and the child welfare system consistently attempt to initiate, advance, and resolve cases efficiently and effectively. Advantages and disadvantages attach to each prosecutorial structure. When these two systems interact at the crossroads of criminal child abuse and neglect cases, these advantages and disadvantages become especially significant.

The Same Attorney Handles Both Civil and Criminal Proceedings

Numerous benefits accrue when the same attorney has both civil and criminal authority, assuming prosecutorial responsibility for both civil dependency proceedings and adult criminal violations. This structure has the potential to conserve tremendous resources in terms of time, energy, manpower, and supplies as well as to reduce delay in the processing of each respective case.

For example, potential witnesses, including child victims, will not be subjected to multiple interviews. This protects the child from additional trauma and lends credibility to his or her story. Likewise, with fewer entities

pursuing the same or similar information, there is less chance for loss or miscommunication of important information. In addition, all the necessary information regarding potential criminal liability for acts of child abuse or neglect is located in the same office under the supervision of one individual. Thus, there is no need to duplicate information in the child protection file for delivery to the criminal prosecuting attorney.

Having the same attorney do both cases insures better handling of each and guarantees coordination of the files. (County Attorney, Kansas)

If both proceedings are handled by the same attorney, then the child victims will not have to be re-interviewed by a different attorney and the child will be more secure and comfortable in the courtroom. (Deputy District Attorney, California)

This would seem to be a more efficient system, that would involve less duplication of efforts, a greater familiarity with all aspects of the case and more consistent results. (District Attorney, New York)

Furthermore, applying or utilizing certain prosecutorial methods in dependency proceedings may provide a benefit to the case. One legal scholar notes:

While the rehabilitative orientation of child protective proceedings should be preserved, it is a mistake to ignore, or deny, the essentially prosecutorial function of the attorneys who assist petitioners. First, the preparation and presentation of child abuse and child neglect cases often require hard-nosed prosecutorial methods. Field investigations, in cooperation with the police as well as the child protective agency, may be needed. Recalcitrant witnesses may have to be identified and pressured into telling what they know. Opposing witnesses may have to be cross-examined effectively. These are the functions, and the skills, of a prosecutor.⁸⁵

However, child welfare law is a complex legal specialty that requires familiarity and experience with the unique interdisciplinary concerns of the child welfare system.⁸⁶ An assortment of issues, such as child development, domestic violence, substance abuse, and mental health, suffuse the area of child welfare law. Also, unique evidentiary rules, different time frames, and distinct standards of proof govern child protection proceedings.⁸⁷

These are completely different types of cases which require different skills and abilities. (Deputy State's Attorney, Maryland)

Oftentimes, the fact that the prosecutor's office is involved in both proceedings facilitates prompt, appropriate resolution of both cases because dispositions can be coordinated through

plea bargaining and case settlement in both cases. (Other, Michigan)

Greater potential for the prosecutor to gain more evidence, eliminate duplication of effort, less stress on child witnesses, and greater chance for plea bargain short of trial. (Assistant Prosecuting Attorney, Michigan)

If the custodian is the perpetrator, a criminal conviction and sentence which incorporate the terms of the child protection order strengthen the protection order. (District Attorney, Wisconsin)

Because of varied expertise, training, and education, different individuals or agencies are better equipped to handle different responsibilities. (Other, Arizona)

Thus, when the same attorney prosecutes both the civil dependency proceeding and the related adult criminal proceeding, what is gained through the conservation of resources and the techniques of prosecutors may be lost through the lack of experience and specialization. To compound this difficulty, there is a high turnover rate for both prosecuting attorneys and child protective services agency attorneys. Donald Duquette, a distinguished legal scholar in the field of child welfare law, explains:

For many years, and continuing today in some jurisdictions, no attorney appeared on behalf of the social services agency or the individual that filed the petition alleging child abuse or neglect and seeking to protect a particular child from harm. In the recent past, if an attorney did appear in child protection cases, he or she was likely to be a young assistant prosecutor or assistant county corporation counsel with little preparation, time, limited experience in such cases, and little familiarity with either the juvenile court or child protection law. The child neglect attorney, if there was one, was often the staff member most recently hired by the county prosecutor's office. And the juvenile court was seen in those days as a good place for lawyers to get experience before moving up to bigger and more important cases in other courts.⁸⁸

Laver made similar observations in a recent series of articles on improving agency attorney practice: "[O]ften, the attorneys in these offices are new and choose to work in the prosecutor's office to practice criminal. They rotate out of dependency cases quickly, and therefore never get proper training."⁸⁹

These issues are significant in light of the powerful position that the agency attorney may occupy in child protection proceedings. Indeed, remark Hardin et al., "[T]he quality of justice in child protection cases is closely linked to the performance of government attorneys."⁹⁰

Most factual information in child protection cases is gathered by the agency, and that information is presented largely through the government attorney. In many

courts the government attorney largely controls what information is presented to the judge. It is the government, i.e., the public child protection agency, that takes most of the initiative in child protection cases, including removing children from their homes, filing petitions, recommending their return home, and seeking the termination of parental rights. Government attorneys should play a major role in these decisions, by determining whether there is a legal basis for the agency's action and counseling the agency on legal strategy.⁹¹

Furthermore, "[G]overnment attorneys have an important role in helping to guide agency employees in their handling of cases before and between court hearings."⁹²

Prosecuting attorneys who are involved in both proceedings may not be able to efficiently serve the interests involved, and one proceeding may ultimately take precedence over the other. Various states may therefore opt to enact specific legislation or court rules to prevent this result. For example, under the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, civil protection proceedings are not to be delayed pending the status of any other proceedings. Rule 5 provides: "Under no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings."⁹³

Provisions like these reflect findings such as those of the West Virginia Supreme Court in *Matter of Taylor B.*, where the court held that "a civil child abuse and neglect petition initiated by the Department of Health and Human Resources is not subject to the terms of a plea bargain between a county criminal prosecutor and a criminal defendant in a related child abuse prosecution."⁹⁴ The court explained: "[C]ivil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions."⁹⁵

Such provisions create obstacles for prosecuting attorneys who are involved in both civil and criminal proceedings and who seek efficient methods of resolving both.

Different Attorneys in the Same Office Handle Civil and Criminal Proceedings

Similar advantages may accompany a prosecutorial structure where different attorneys within the same office prosecute the civil and criminal cases. There is less chance for duplication of services, inconsistent court orders, and miscommunication and misunderstanding between the parties and the court. The close proximity of the civil and criminal attorneys facilitates communication regarding the respective status of each case and provides them with regular opportunities to discuss aspects of each case that

may be relevant to the other proceeding. These aspects may include case history, case goals, current court orders, services, and treatment.

For example, the attorney prosecuting a civil dependency case may discover a parental drug abuse problem through information obtained by the criminal prosecutor. If the parent is not incarcerated or completes a short prison sentence, conditions of probation or parole could include cooperation with a social services plan that requires consistent participation in alcohol treatment.

In a number of jurisdictions the office of the prosecuting attorney contains divisions that prosecute the child welfare cases exclusively while another section of the office handles the adult criminal cases. This prosecutorial structure accommodates the specific legal knowledge and skills needed for operating in and accomplishing the goals of the child welfare system without sacrificing opportunities to communicate and coordinate proceedings where appropriate by closely aligning the attorneys.

Different Attorneys in Different Offices Handle Civil and Criminal Proceedings

These same advantages may also apply to a prosecutorial structure in which the prosecuting attorney prosecutes the adult criminal proceedings when the child abuse or neglect constitutes a crime but does not participate in civil dependency proceedings.⁹⁶ For example, although the prosecuting attorney should be aware of various child welfare and child protection issues, it is not essential that he or she develop two distinct sets of legal skills and knowledge in order to fulfill the role of prosecuting attorney. Likewise, although the attorney representing the interests of the state or the social services agency should have some knowledge of the adult criminal justice system, it is not necessary that he or she be versed in criminal law in order to be an effective advocate in dependency proceedings.

As indicated previously, the different rules of evidence, rules of discovery, standards of proof, and time restrictions that govern criminal and civil proceedings create a significant hurdle for attorneys. Both types of proceedings require specific evidence to support the contentions offered by the prosecuting or agency attorney. If different entities have jurisdiction over each type of proceeding, the attorney does not face the daunting task of preparing and presenting two distinct cases.

However, one criticism raised by commentators to the Juvenile Justice Standards, a multivolume set published by the Institute of Judicial Administration and the American Bar Association, is that "the current, overlapping regime of child protective and penal laws itself has a particularly exacerbating quality: each system is controlled by different personnel with different perspectives, and each system

too readily may be invoked, without attention to the consequences for the other.⁹⁷ Agency attorneys in civil dependency proceedings may submit agency recommendations that are agreed to by all the parties, that involve parents in therapy and services, and that contain specific instructions regarding visits with the child or children. However, if the criminal prosecutor is seeking incarceration of the offending parent, the actions of the judge and prosecutor in the criminal court may make much of the agency's plan unworkable.⁹⁸

Thus, "it is necessary to have coordination and communication between the various decision makers in the juvenile and criminal courts concerning the disposition of child abuse cases."⁹⁹ Indeed, cooperative efforts are essential to the effective and appropriate resolution of both types of proceedings. Sprague and Hardin recently described the important connection:

Criminal court information regarding incarceration, pre-trial release conditions, plea bargain terms, sentencing terms, and treatment is directly relevant to the safety, and therefore, the placement, of the child and services offered pursuant to the juvenile court case plan. In turn, the juvenile court case plan, reports, court orders, child placement, and general status of the proceeding may be relevant to setting pretrial release conditions, sentencing terms, and treatment requirements.¹⁰⁰

In order to fully serve the best interest of the child, decision-makers in the criminal courts must be aware of the status of the case in the juvenile court so they may ensure that respective court orders are not contrary or inconsistent with one another.¹⁰¹ If properly informed of relevant information from the dependency case, the criminal court can assist the entire case by reinforcing or bolstering the order of the juvenile court.¹⁰² Edwards provides this illustration:

For example, the judge who hears the offending parent's motion for bail reduction or for release on his own recognizance should be aware of the agreements reached between the police, the CPS workers, the juvenile court and the family regarding placement of the child pending disposition of the case. If the juvenile court is satisfied with the family placement, and if the criminal court is otherwise satisfied that release is appropriate, that court can be helpful to the entire case by releasing the parent with specific instructions, such as a no contact order.¹⁰³

Therefore, it is clear, say Sprague and Hardin, that "a good working relationship between the criminal prosecutor and the agency attorney contributes to the successful prosecution of both criminal and juvenile court proceedings."¹⁰⁴ A number of respondents to the NCJJ survey emphasized this point.

An effective cooperative relationship maximizes protection of the child and serves justice and due process. (Assistant District Attorney, Pennsylvania)

The key to balancing the criminal and civil end of child abuse and neglect cases is to get the agencies talking and cooperating with one another. (Deputy County Prosecuting Attorney, Idaho)

Methods of Coordination and Cooperation Between Civil and Criminal Child Abuse Proceedings

There are a number of ways in which professionals in both proceedings can successfully coordinate civil and criminal proceedings, maximizing the utility of each proceeding while minimizing the difficulties described in the preceding sections. Communication, both formal and informal, between the professionals involved is essential. Attendance and participation in case conferences or staff meetings provide opportunities for exchanging information about the status of cases and the court directives currently in force, thereby reducing the likelihood of inconsistent court orders.

Such meetings also provide opportunities for child protective services, law enforcement, prosecuting attorneys, and medical personnel to discuss issues related to cases and offer interdisciplinary input ensuring not only that necessary and appropriate services are in place, but also that important information is available to all the professionals involved with the case. However, coordination and cooperation of court proceedings should not be limited to parallel cases of child abuse and neglect but rather should be a regular occurrence in all child protection proceedings,¹⁰⁵ including initial reports and investigations. As Phipps observes, "Child abuse cases involve legal, social and psychological issues that must be addressed by a variety of professionals ranging from prosecutors and law enforcement personnel to child protection workers, psychologists and physicians."¹⁰⁶ Thus, "legislation passed throughout the past 10 years has recognized the crucial role multidisciplinary teams play in the prompt and thorough investigation and prosecution of criminal child abuse and neglect."¹⁰⁷

Currently, 30 states have legislation mandating the establishment of multidisciplinary teams, 11 states have legislation permitting the establishment of such teams, 6 states have no legislation regarding multidisciplinary teams, and 3 states use regulations and directives within the local child protection agency.¹⁰⁸

Untalan and Mills note that "[l]iterature on the use of multidisciplinary teams in child abuse and neglect shows the effectiveness of this approach in addressing the myriad of issues related to child protection."¹⁰⁹ Moreover, a

recent study by Kolbo and Strong found that an increasing number of child welfare professionals are recognizing multidisciplinary teams as a valuable and viable method of ensuring that child abuse and neglect victims are not subjected to additional systemic harm.¹¹⁰

Multidisciplinary teams are organized for the purpose of coordinating child protection investigations and proceedings.¹¹¹ Such teams may be responsible for a number of activities, including “investigation of reported cases, treatment planning, provision of direct service to victims, advising and consultation for prosecution decisions and treatment planning, community education, monitoring of case resolution, or social planning to identify gaps in the service delivery system.”¹¹²

Kolbo and Strong also report that “respondents identified the investigation of reported cases, treatment planning, and advising and consultation as the most common functions.”¹¹³ Kolbo and Strong found that individuals involved in law enforcement and other legal services have assumed greater roles in multidisciplinary teams than professionals in mental health, health care, and education.¹¹⁴

A major focus of the multidisciplinary team should be the coordination of proceedings.

Case-specific team goals might include (1) interagency and interprofessional cooperation; (2) case management coordination; (3) evidence gathering for both proceedings; (4) minimizing the number of victim interviews; (5) treatment program coordination; (6) training skilled professional victim interviewers; and (7) developing priorities for addressing an individual case.¹¹⁵

Such collaboration helps reduce duplicate efforts to gather and review relevant information, which in turn may reduce the trauma to children and increase the credibility and accuracy of case information. As Kolbo and Strong report:

A broader range of viewpoints on problems is considered in the decision-making process, more decisions are made jointly, otherwise unknown resources are identified, and ultimately, better assessments, treatment plans, and services are provided. In addition, more cases are actually reviewed, fewer cases “fall through the cracks,” and more cases reach successful resolution.¹¹⁶

Many respondents to the NCJJ survey offered similar positive remarks about the benefits of participating in multidisciplinary teams. For example, one respondent replied:

The key to balancing the criminal and civil end of child abuse and neglect cases is to get the agencies talking and cooperating with one another. Interdisciplinary team meetings have really helped iron out the concerns of each agency as the cases progress, and on a weekly basis. Each agency can hear the concerns of the other agencies and learn to recognize

the limits and motives of each of the agencies involved.
(Deputy County Prosecuting Attorney, Idaho)

Participation on a multidisciplinary team also has the additional, though less obvious benefit of education for attorneys, observes Bross.¹¹⁷ “Since child development, pediatrics, social work, and psychiatry and psychology are not taught in law school, most attorneys know little about children, poverty, or abuse and neglect.”¹¹⁸ Thus, “an extended tenure on a child protection team provides the best possible education about children and parents.”¹¹⁹

Effective Coordination of Court Proceedings: The San Diego Case Study

A 1993 national survey sponsored by the National Center on Child Abuse and Neglect revealed that although more incidents of child physical abuse than child sexual abuse are reported annually, prosecuting attorneys’ offices prosecute far fewer cases of child physical abuse annually.¹²⁰ To evaluate this situation, the National Institute of Justice and the Office of Juvenile Justice and Delinquency Prevention sponsored a study of one San Diego prosecutor’s office that aggressively pursues child physical abuse and neglect cases through coordination with other agencies and the use of specialized staff.¹²¹ In the six-year period from 1986 to 1992, the prosecutor’s office averaged an 85 percent felony conviction rate for cases of serious child physical abuse and neglect.¹²²

San Diego’s multiagency approach involves coordination among child protective services, the police, the medical community, and the prosecutor’s office.¹²³ The San Diego District Attorney’s office contains a specialized unit, called the “Family Protection Unit,” for the prosecution of child abuse and neglect.¹²⁴ Moreover, the Child Protection Center at San Diego’s Children’s Hospital and child protective services department cohost a weekly meeting for representatives from the police department, child protective services, the district attorney’s office, and the health and medical community to discuss problematic cases and share expertise.¹²⁵

The study illustrates the need for prosecutors to communicate to law enforcement and child protective services their willingness to pursue prosecutions for child physical abuse when appropriate.¹²⁶ Researchers offered a number of valuable recommendations designed to facilitate such communication—for example, increased referral of child abuse and neglect cases to prosecutors for review; greater coordination in response by child protective services, police, medical personnel, and prosecutors; specialization and training for law enforcement and prosecutors; and increased public awareness and education regarding the nature of child abuse and neglect.¹²⁷

SPECIAL CONCERNS FOR PROSECUTING ATTORNEYS WHO ALSO REPRESENT THE AGENCY IN CIVIL DEPENDENCY PROCEEDINGS

Potential for significant confusion exists regarding a precise definition of the client and a comprehensive understanding of the interests when the prosecuting attorney represents a party in dependency proceedings. "Within each model," Laver observes, "the view of who the client is differs. Some represent the agency as an entity, relying on the caseworker's opinions, but keeping the interests of the agency in mind at all times, and some, as in the prosecutor model, represent the 'people.'"¹²⁸ Defining the client is important because "many conflicts between attorney and social workers stem from a misunderstanding of who the attorney represents."¹²⁹

Considerable ambiguity exists in the statutory language, and case law has only just recently begun to address the issue of the relationship between the social services agency caseworker and the prosecuting attorney. The State of West Virginia provides an excellent case study for the issue of defining the client and clarifying the interests being represented. In fact, the West Virginia Court Improvement Oversight Board made specific findings on these issues with respect to the prosecuting attorney in 1996:

In the broad perspective, the prosecutor's role is to represent the "State's interests in the safety and well being of any child suspected to be at-risk." In this role the prosecutor has an important function in assisting the petitioner, normally DHHR [Department of Health and Human Resources] employees, in the preparation and handling of cases brought before the court. The basic concern of the Oversight Board with respect to the role of the prosecutors in this State is the absence of a clear definition relating to who they represent in court in these abuse and neglect cases.¹³⁰

To understand the concerns of the West Virginia Court Improvement Oversight Board, it is necessary to review the relevant state statutory provisions. The West Virginia Code specifically requires the prosecuting attorney to cooperate with persons seeking relief in cases of suspected child abuse; to assist such persons in the preparation of applications and petitions; to investigate reported cases of suspected child abuse and neglect for possible criminal activity; and to report annually to the grand jury regarding the discharge of these duties.¹³¹ Thus, although the prosecuting attorney represents the interests of the state in civil matters, the law regarding the role of the prosecuting attorney in dependency proceedings specifically mandates that the prosecuting attorney represent the petitioner.¹³²

In West Virginia, the petitioner is often the Department of Health and Human Resources. In such cases, the code requires that the prosecuting attorney represent the department: "The prosecuting attorney shall render to the state department of welfare [division of human services], without additional compensation, such legal services as the department may require."¹³³

However, as the next subsection illustrates, conflict between the prosecuting attorney and the social services agency can potentially arise when they disagree about appropriate case recommendations and resolution.

CONFLICT WITH THE CHILD WELFARE AGENCY

An agency attorney must be mindful of both the policies of the agency and the viewpoints of individual caseworkers. When the two positions are in conflict, caseworkers may feel that their professional judgments and recommendations are not zealously represented in court.¹³⁴

As Laver notes, "several concerns about the prosecutor model make this method of representation particularly problematic."¹³⁵ For example, "with this method the attorneys generally get the final word on whether a petition should be filed. ... [T]his leaves the caseworker feeling as if her professional opinion is not considered."¹³⁶ In addition, "[C]aseworkers may also fear that with attorneys making decisions about the caseworkers' clients, best social work practice will be ignored."¹³⁷

The Supreme Court of West Virginia has recently addressed the relationship between the prosecuting attorney and DHHR. In *In re Jonathan G.*, DHHR and the prosecuting attorney disagreed over the appropriate disposition of the case: "[T]he prosecutor apparently believed that reunification was possible, whereas DHHR fervently believed that termination of parental rights was in Jonathan G.'s best interests."¹³⁸

Perceiving a potential conflict of interest, the prosecuting attorney requested that the Attorney General become involved by representing DHHR. However, following the appearance of an attorney from the Attorney General's office, the prosecuting attorney continued to actively participate in the proceedings, representing the interests of the state.¹³⁹ The court phrased the issue as follows: "[S]hould the role of the prosecutor be comparable to her role in criminal proceedings, requiring her to independently weigh the evidence before proceeding on a complaint, or should it be that of a traditional lawyer-client relationship, requiring her to present evidence in accord with the client's wishes within confines of the law?"¹⁴⁰

In formulating its response, the court considered section 49-7-26 of the West Virginia Code, which states that

"the prosecuting attorney shall render to the state department of welfare [division of human services], without additional compensation, such legal services as the department may require."¹⁴¹ The court opined, "This statutory provision supports the view that the prosecuting attorney stands in the traditional role of a lawyer when representing DHHR in connection with abuse and neglect proceedings."¹⁴² The court concluded that such an attorney-client relationship precluded the prosecuting attorney from independently formulating or advocating positions separate from DHHR in abuse and neglect proceedings.¹⁴³ However, in a footnote, the court acknowledged that this relationship creates a conflict for the prosecuting attorney:

[T]he same statute that directs the prosecutor to assist in the prosecution of child abuse and neglect laws also authorizes the prosecutor "to investigate reported cases of suspected child abuse and neglect for possible criminal activity. "These investigatory and enforcement rights are clearly outside the scope of the traditional attorney-client relationship. Thus, the prosecutor ... clearly has a dual role in the area of civil/criminal abuse and neglect cases that requires him or her to provide representation to those seeking to file child abuse and neglect complaints and also to investigate and enforce child abuse and neglect laws of this State.¹⁴⁴

Despite recognizing this conflict, one year later the West Virginia Supreme Court decided *State ex rel. Diva P. v. Kaufman*. The court, reiterating the holding of *In re Jonathan G.*, further held that the representation continued even if the prosecutor believed that the recommendations of the department were contrary to the best interest of the child.¹⁴⁵

In *Diva P.*, the prosecuting attorney representing DHHR disagreed with the agency's recommendations regarding the disposition of the child, Diva P., and appealed the order entered by the circuit court, which was based on the recommendation of DHHR. The Supreme Court considered the issue in light of its recent decision in *In re Jonathan G.* and concluded that the prosecuting attorney could not appeal a decision based on the agency's recommendations without the express consent and approval of DHHR.

In its opinion, the Supreme Court stated:

In civil abuse and neglect cases, the legislature has made DHHR the state's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has indicated through W. Va. Code § 49-6-10 (1996) that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and the county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to lit-

igate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.¹⁴⁶

Therefore, the prosecuting attorney is prohibited from advocating a position that is separate from or contrary to that of DHHR.¹⁴⁷ Clearly, for prosecutors in West Virginia, there is a great potential for interprofessional and personal conflict.

RECENT RESEARCH PROJECTS REGARDING REPRESENTATION

Two recent research projects in Michigan and Florida have attempted to examine and address a significant number of the aforementioned issues relating to legal representation in child protection proceedings and the prosecuting attorney's involvement. Although each project emphasizes selected issues, both nonetheless provide immensely valuable and informative illustrations of the role of the prosecuting attorney in child protection proceedings.

MICHIGAN: THE CHILD ADVOCACY LAW CLINIC

In 1989, the Child Advocacy Law Clinic at the University of Michigan Law School conducted a federal grant project to achieve timely permanence decisions for dependent children by improving the legal representation provided to the social welfare agency in civil child protection proceedings.¹⁴⁸ Clinic faculty and law students were deeply concerned about the substantial harm being inflicted on children by the drawn-out proceedings that were so common in the most serious cases of child abuse and neglect.¹⁴⁹

Clinic participants also observed many examples of delayed court proceedings that were "directly or indirectly attributable to the legal representation provided to DSS by the local prosecutors' offices."¹⁵⁰ In particular, prosecutors failed to appear at court hearings beyond initial trials and termination of parental rights hearings if DSS recommended to terminate parental rights.¹⁵¹

Clinic members also observed a lack of active legal consultation provided to DSS. For example, "it often was obvious that the prosecutor had not talked to the DSS social worker or looked at the case file prior to the day of the court proceeding."¹⁵² In addition, "prosecutors actually undermined the social worker's position in some cases" by either refusing to pursue petitions that they felt were too difficult to prove or negotiating with opposing counsel to strike portions of the petition in return for a no-contest

plea, thus eliminating the need for a trial.¹⁵³ “These amendments to the petition were sometimes made over the objections of the social worker and without considering the effect such amendments could later have on achieving permanence for a child or effective treatment for a parent.”¹⁵⁴

However, clinic participants also noted a number of reasons for the lack of effective legal representation being provided to DSS. Limited resources are available to the office of the prosecuting attorney as a whole, and the bulk of those resources are allocated to criminal prosecutions.¹⁵⁵ The attitude, training level, and inexperience of the assistant prosecutors assigned to juvenile dependency matters compound this lack of resources.¹⁵⁶ Finally, the prosecutors’ perception of their role as representatives of the state’s interests fostered the attitude that DSS social workers are not truly clients but merely witnesses or investigating officers.¹⁵⁷ Thus, the project hypothesized “that many delays in achieving a permanency decision for a child placed by the courts in temporary foster care can be reduced significantly by employing a private model of legal representation, rather than the public model of legal representation currently used in most jurisdictions.”¹⁵⁸ In other words, “permanency for children could be achieved much more effectively under an alternative to the public model of legal representation for DSS.”¹⁵⁹

The project distinguished the “public model” from the “private model” based on the type of attorney providing legal representation to DSS. In the public model, the county prosecuting attorney represents DSS during dependency proceedings, while in the “private model,” the project attorney represents the agency. Most importantly, though, “this private model would apply the ethical rule and duties applicable in the usual private client/attorney relationship.”¹⁶⁰ This meant that the project attorney would “be available at all times to provide legal consultation to the social worker clients”;¹⁶¹ “follow the social worker’s goals in the case”;¹⁶² “accompany the social worker to the preliminary hearing, the pretrial and trial, the dispositional hearing, the review hearings, the permanency hearing and the TPR [Termination of parental rights severs the legal relationship between the parents and child]”;¹⁶³ and “consult and meet with social worker clients beyond court appearances.”¹⁶⁴

Project attorneys received training in various areas outside the law, including psychiatry, social work, and pediatrics, and learned basic concepts of child development, causes and symptoms of abuse and neglect, a child’s need for a permanent family home, and available family services.¹⁶⁵ Project coordinators felt that such training was necessary “so that the attorney could effectively communicate with the social workers and could provide the

insight needed to counsel them on developing and implementing a case plan.”¹⁶⁶ As the project summary states:

The importance of this interdisciplinary training cannot be overemphasized. The agency attorney must have this background to be able to provide the counseling, support and zealous advocacy required by the private model of legal representation. If the attorney is to help the social worker to make a timely permanency decision, the attorney must speak the language of the social worker and must have the basic knowledge required to assist in developing and assessing the social worker’s case plan.¹⁶⁷

Two major products emerged from Child Advocacy Law Clinic research project: a comprehensive analysis of objective and subjective data gathered from attorneys and social workers in the project courts and a training manual for attorneys representing the state agency in child abuse and neglect matters under the private model of legal representation.¹⁶⁸ The data generated by the research project were analyzed and the results published in a 1993 article in the *University of Toledo Law Review*.¹⁶⁹

In a detailed discussion of the project, the article addresses and reiterates a number of the issues presented by this article, including the special concerns identified for prosecuting attorneys who are involved in both civil dependency and criminal prosecution proceedings. Consider the following example:

Beyond these observed shortcomings of agency social work practice and agency legal representation that impacted directly on children, the Clinic students and attorneys observed subtle dynamics within the juvenile court system that were worrisome. It has been well documented that there is a deep, inherent conflict between the fields of social work and law and between social workers and attorneys. Social workers and the agency utilize conciliatory methods, working with the client in a cooperative effort to achieve goals and solve problems for the individuals and families. In contrast, attorneys and the courts utilize the adversarial process to find the truth, to resolve disputes and to make decisions concerning the parties involved in civil child protection proceedings.¹⁷⁰

The study recognized the distinct perspectives and objectives of the child welfare and criminal justice systems and notes the unfortunate potential result: “This stark difference in approach to resolving problems of individuals and families in the child welfare system leads to a substantial degree of misunderstanding and miscommunication.”¹⁷¹

FLORIDA

Another pilot project began in Florida in 1995 to examine similar issues regarding legal representation for the social services agency, the Department of Children and

Families.¹⁷² To fully understand and appreciate the initiative for the project requires a brief background discussion.

Prior to 1989, the state's attorney represented the Department of Health and Rehabilitative Services in court. However, the state's attorney became involved only in contested cases and proceedings to terminate parental rights. Otherwise, caseworkers were filing motions, appearing in court, and presenting evidence without assistance from the state's attorney.

Concerned by the caseworkers' quasi-legal role, the Department of Health and Rehabilitative Services (HRS) petitioned the Florida Bar Standing Committee on the Unlicensed Practice of Law for an advisory opinion on the following issue: "Is the preparation of documents by lay counselors and the presentation of noncontested dependency court cases by lay counselors, including the filing of the documents, presentation of the case, request for relief and testimony of counselors the unauthorized practice of law?"¹⁷³

The bar committee found that "HRS lay counselors are engaged in the unauthorized practice of law by drafting pleadings and legally binding agreements, and representing another in court."¹⁷⁴ The Florida Supreme Court reviewed the recommendations of the bar committee but ordered the creation of an ad hoc committee under the supreme court to study the problem and make recommendations to the court. The court explained its decision as follows:

While we agree with the Committee that HRS lay counselors are engaged in the unauthorized practice of law, we are not convinced that such practice is the cause of the alleged harm, or that enjoining this practice is the most effective solution to this complex problem.¹⁷⁵

Approximately 15 months later, the Florida Supreme Court reviewed the report and recommendations of the Supreme Court Committee on Health and Rehabilitative Services Nonlawyer Counselors.¹⁷⁶ The Supreme Court committee determined that insufficient involvement by lawyers in the juvenile process contributed in part to the problems within the juvenile dependency system.¹⁷⁷ Moreover, the committee recommended a requirement that an attorney supervise the preparation of and sign all legal documents and that an attorney be present at all court proceedings.¹⁷⁸

Based on these recommendations, the Supreme Court held: "[A]dequate legal representation on behalf of HRS is required at every stage of juvenile dependency proceedings conducted pursuant to part III, chapter 39, Florida Statutes (1987)."¹⁷⁹

One Florida state's attorney prosecutor suggested potential difficulties in this new arrangement for legal representation of the Department of Children and Families by

the state's attorney.¹⁸⁰ Before 1989, the state's attorney presented dependency cases and had discretion to decide case goals and recommendations. Under the present structure the state's attorney represents the department and must follow any lawful directives of the department caseworker. This represents a significant departure from prior years. Unfortunately, the bureaucratic nature of the Department of Children and Families makes it challenging for caseworkers to be able to deliver necessary evidence and information in a timely manner to the state's attorney.

The state's attorney also reported as a source of frustration the lack of a clear definition of the client and confusion regarding which individual within the department is represented by the state's attorney: the caseworker, his or her supervisor, or the head of the department. Although the Department of Children and Families provides policy and procedure manuals, the state's attorney is legal counsel for the department but not a department employee, so such policy readers do not apply.

Finally, state's attorneys may still encounter conflicts of interest. For example, there is a conflict when the recommendations of the Department of Children and Families conflict with the goals of the state's attorney prosecuting a parallel criminal case. Also, if a parent is a witness in another unrelated case, the state's attorney cannot claim the parent is a credible witness for purposes of the unrelated case and then suggest that he or she is an unfit parent in the dependency case. Finally, if the state's attorney argues in good faith against the recommendations of the Department of Children and Families, then the state's attorney has a conflict of interest.

However, there is a resolution for such conflicts available to the state's attorney. Prior to transferring jurisdiction for representation for the department to the state's attorney, the department had 11 attorneys as in-house counsel. When jurisdiction was transferred to the state's attorney, the department relocated only 10 attorneys and maintained 1 attorney as a conflict attorney in the department. Thus, in the event of situations such as those described above, the case may be assigned to the conflict attorney who remains with the department.

The same solution is available when parallel criminal proceedings are pending and the criminal and the civil state's attorneys disagree on an appropriate resolution of either case. Otherwise, the two attorneys communicate regularly in order to update each other on the status of each case.

FINDINGS AND IMPLICATIONS OF THE NCJJ SURVEY

It is essential that attorneys in both civil and criminal child protection proceedings have experience in their

respective fields. As discussed in prior sections, such specialization directly affects the timely and appropriate processing of both cases, in and out of the courtroom.

The NCJJ survey results suggest that practitioners appreciate the difficulty of the choice between prosecutorial models. When asked whether the prosecuting attorney should be involved in both civil and criminal proceedings, respondents were fairly evenly divided in their opinions.

The survey results also suggest that practitioners recognize the complexity of the issue of the role of the prosecuting attorney. Respondents' reasons for their answers to the question regarding the appropriate role of the prosecuting attorney in child protection proceedings seemed to fall naturally into general categories.¹⁸¹ See Table 2 for a summary of responses to the NCJJ survey. See Appendix for a copy of the survey questionnaire.

Table 2. Summary of NCJJ Survey Responses

| Question: Do you think that the same attorney should be involved in both dependency proceedings and adult criminal prosecutions? | | | | |
|--|-------|-----|-----|-----------|
| | TOTAL | Yes | No | No Answer |
| TOTAL | 255 | 103 | 111 | 41 |
| Judges | 14 | 4 | 7 | 3 |
| Prosecuting Attorneys | 203 | 91 | 85 | 27 |
| Agency Attorneys | 19 | 4 | 11 | 4 |
| Other | 19 | 4 | 8 | 7 |
| If yes, why? | | | | |
| Context of Protecting Children | | | 46 | |
| Efficient & Effective Case Processing | | | 48 | |
| Accountability | | | 13 | |
| Procedural Safeguards | | | 20 | |
| If no, why not? | | | | |
| Fundamental Philosophical Differences | | | 68 | |
| Efficient & Effective Case Processing | | | 29 | |
| Fairness | | | 14 | |
| Potential to Undermine Reunification Efforts | | | 11 | |

Source: NCJJ Survey, Fall 1998.

Note: The first group of numbers correspond to the number of surveys. However, the second group of numbers reflect the number of times that respondents offered a particular reason for their opinion. Respondents frequently cited more than one reason for their answer.

When these preliminary results are considered in the context of the preceding discussion, the case for a prosecutorial model in which different attorneys handle civil and criminal child abuse and neglect proceedings begins to emerge. First, overall, more respondents answered no than yes to the survey question about whether the same attorney should be involved in both civil and criminal child abuse proceedings. The pattern was repeated for every respondent group except the prosecuting attorneys. Second, for those respondents who answered no, the reasons most frequently cited concerned the fundamental philosophical differences between the child welfare system and the criminal justice system. The next most frequently reported category of reasons was efficient and effective case processing, which is undermined when prosecutors lack experience or knowledge of child protection. Thus, it seems that the most appropriate prosecutorial model may be one in which different attorneys handle civil and criminal proceedings and that emphasizes cooperation, coordination, and communication between the various professionals.

Clearly, more formal, in-depth research on these issues is needed before significant conclusions can be drawn. However, these initial results are very important because they represent the practical knowledge and experience of a variety of professionals able to offer valuable insight into the reality of the law.

CONCLUSION

The significance of the role of the prosecuting attorney in dependency proceedings cannot be overstated. Furthermore, the tension between the roles of a prosecuting attorney in a criminal case and that of a state's attorney in a civil dependency proceeding is clear. Decisions relating to the initiation and prosecution of parallel criminal cases against parents will very likely influence the effective and appropriate resolution of dependency proceedings. For this reason, more comprehensive research on the subject would be appropriate and immensely valuable to present and future efforts to improve the function and performance of the child welfare system.

1. See generally Gene D. Sarkin, *The Role of the Child Protective Agency's Attorney in Family Court Child Protective Proceedings*, 171 Practicing L. Inst./Crim. L. 431 (Mar. 1995); Donald N. Duquette, *Independent Representation of Children in Protection Proceedings*, in *The State as Parent 9* (Joe Hudson & Burt Galaway eds., International Research Perspectives on Interventions With Young Persons (NATO) Asi Series D, Behavioral & Social Sciences,

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- vol. 53, 1989); Donald N. Duquette, *Lawyers' Roles in Child Protection*, in *The Battered Child* 460 (Mary Edna Helfer et al. eds., University of Chicago Press, 5th rev. ed., 1997); Jacob Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in *Helping the Battered Child and His Family* 225 (C. Henry Kempe & Ray Helfer eds., 1972); Mark Hardin, *Families, Children, and the Law*, in *A Handbook of Child Welfare: Context, Knowledge and Practice* 213 (Joan Laird & Ann Hartman eds., Free Press 1985); American Bar Ass'n, *Lawyers for Children* (ABA Center on Children and the Law 1990); Gary Solomon, *The Role and Ethical Responsibilities of the Law Guardian*, 171 *Practicing L. Inst./Crim. L.* 501 (Mar. 1995); West Virginia Court Improvement Oversight Board, *Court Performance in Child Abuse and Neglect Cases: Assessment Report and Improvement Plan* 58 (Supreme Court Administrative Office, W. Va., July 18, 1996) (describing the essential roles performed by prosecutors, parents' attorneys, children's attorneys, and CASA volunteers throughout abuse and neglect cases; the responsibilities of each group with respect to their particular clients; and the importance of each advocate to the judicial process: "Each of these advocacy roles carries with it the commonly shared responsibilities to serve their respective client interests by: a) being adequately trained in the law and knowledgeable in their roles; b) devoting sufficient time and effort in case investigation, preparation and resolution; and actively taking part in every hearing and case review directly or indirectly involving their client. At the same time, each of these advocacy roles contributes a different perspective to the case in conjunction with protecting their client's interest. The ability of the judge to carry out the court's neutral role, as an informed decision-maker, is to a large degree a function of how well these advocates collectively and individually perform their obligations.")
2. See, e.g., Theodore P. Cross et al., *The Criminal Justice System and Child Placement in Child Sexual Abuse Cases*, in 4 *Child Maltreatment* 32-44 (Feb. 1999). Cross et al. conducted a study that examined the relationship between declining to prosecute child sexual abuse and child placement and found that one of the strongest indicators of child placement in child sexual abuse cases is the decision to criminally prosecute.
3. See, e.g., Hunter Hurst, Jr., et al., *Pennsylvania Court Improvement Project Final Report* 151 (National Center for Juvenile Justice 1998): "The qualifications, training and experience of attorneys responsible for the prosecution of dependency cases varies widely in Pennsylvania and was a particular issue of concern among interview respondents in Philadelphia and Allegheny Counties. Interview data also suggest that some conflict and confusion exists among prosecutors and agency officials with regard to the proper role of prosecutors for dependency cases in the Commonwealth. Specifically, where county law departments assign solicitors to prosecute the cases, questions arise as to whether they represent the interests of the county and the state to protect children from neglect and abuse or do they represent the child protection agency? If the former, what is the legal standing of the caseworker in a child protection proceeding?"
4. Between September 1998 and February 1999 the National Center for Juvenile Justice conducted an informal exploratory survey of prosecuting attorneys, agency attorneys, judges, and other child welfare professionals as part of a research project on the role of the prosecuting attorney in civil child abuse and neglect cases. The primary source of survey recipients was the *1998 National Directory of Prosecuting Attorneys*, published annually by the National District Attorneys Association. Questionnaires were sent to prosecuting attorneys in each state, randomly selected from the directory, from both urban and rural jurisdictions. Other sources include the 1997 (Fall edition) *Membership Directory of the National Council of Juvenile and Family Court Judges* and the 1998 *National Directory of Children, Youth and Family Services*. In addition, numerous respondents in each group returned surveys containing suggestions for additional contacts. Follow-up telephone calls were conducted when necessary to clarify information. Approximately 700 surveys were mailed, and 255 surveys were returned from the following groups of participants: prosecuting attorneys, 203; agency attorneys, 19; judges, 14; and other, 19.
5. 27 C.J.S. *District & Pros. Att'ys* § 10 (1976).
6. Child Abuse and Neglect Statistics, National Committee to Prevent Child Abuse 1 (Apr. 1998) www.childabuse.org/facts97.html (citing C.T. Wang & D. Daro, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1997 Annual Fifty State Survey* (National Committee to Prevent Child Abuse 1998)).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Richard P. Barth, Ph.D., *The Juvenile Court and Dependency Cases*, 6 *The Future of Children* 100, 101 (Winter 1996).
12. Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Pro-*

ceedings, 35 U. Louisville J. Fam. L. 239, 242 (Spring 1996).

13. *Id.* at 245.

14. Sprague & Hardin, *supra* note 12, at 243.

15. Barth, *supra* note 11, at 100.

16. *Id.* at 102.

17. *Id.*

18. Debra Whitcomb & Mark Hardin, *Coordinating Criminal and Juvenile Court Proceedings in Child Maltreatment Cases*, in Nat'l Inst. Just. Res. Preview 1 (U.S. Dept of Justice, Oct. 1996).

19. *Id.*

20. *Id.*

21. Sprague & Hardin, *supra* note 12, at 242.

22. Douglas Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 Vt. L. Rev. 403 (1981): "The increase in the number and formality of court proceedings has led a growing number of states to provide attorneys to assist petitioners in the preparation and presentation of cases. In a few states, legislation requires the presence of an attorney to assist the petitioner. Such statutes generally require that an attorney be provided by a local public law officer, either the local criminal court prosecutor or the local county attorney or corporation counsel. In other states, the law merely provides that the judge may request the local public law official to assist the petitioner. In states where the law is silent on the subject, counsel is often made available through administrative arrangements with a local public law office, either criminal or civil. Occasionally, the local child protective agency uses its own internal legal staff or hires outside counsel to represent its workers."

23. *See, e.g.*, Ark. Code Ann. § 20-82-206 (Michie 1991); Cal. Welf. & Inst. Code § 18961.5(d) (West Supp. 1990); Conn. Gen. Stat. Ann. § 17a-106a (West 1992); Okla. Stat. Ann. tit. 10, § 7110 (West 1998); W. Va. Code § 49-5D-2 (Lexis 1998).

24. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. 473, 521, n.222 (Spring 1990). *See also, e.g.*, Cal. Welf. & Inst. Code § 827(a) (West Supp. 1990); Colo. Rev. Stat. § 19-3-207 (Supp. 1989); Ky. Rev. Stat. Ann. §§ 625.080(1) and 625.100(2) (Banks-Baldwin 1987); Neb. Rev. Stat. §§ 43-2, 108(2) and (3) (1988).

25. *E.g.*, 1st Judicial Circuit, Alabama; Story County, Iowa; Sumner County, Kansas; Madison County, Ken-

tucky; 14th Judicial District, Louisiana; Oakland County, Michigan; Pennington County, South Dakota; Marion County, Illinois.

26. *E.g.*, Gem County, Idaho; Rooks County, Kansas; Hughes County, South Dakota; Ohio County, West Virginia; Columbia County, Wisconsin.

27. *E.g.*, Minnesota, Ohio, Oregon, South Dakota, and West Virginia. This information is based on responses to the NCJJ survey from individuals in each state.

28. *E.g.*, Idaho, Kansas, Michigan, Nebraska, and Wisconsin. This information is based on responses to the NCJJ survey from individuals in each state.

29. Leonard Edwards, *Dealing with Parent and Child in Serious Abuse Cases*, in *Protecting Children Through the Legal System* 214 (American Bar Ass'n 1981).

30. *Id.*

31. T. Curran, *An Attorney's View: Representing the Abused Child in the Dependency Court System*, in Nat'l Child Advoc. 4 (Winter 1997-1998).

32. *Id.*

33. Douglas Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 Am. Crim. L. Rev. 315, 318 (Fall 1986).

34. *See generally Children With Parents in Prison*, Child Welfare: J. Pol'y, Prac. & Program (Special Issue) (Child Welfare League of America, Sept./Oct. 1998).

35. John E.B. Myers, *Legal Issues in Child Abuse and Neglect* 19 (Sage Publications 1992).

36. Curran, *supra* note 31, at 6 ("Attorneys quickly learn that most of the cases presented in dependency court proceedings have both legal and psycho-social components, and the psycho-social components often significantly outweigh the legal ones").

37. Besharov, *supra* note 33, at 322.

38. U.S. Const. amend. V.

39. *See generally* Malloy v. Hogan, 378 U.S. 1 (1964); Kastiger v. U.S., 406 U.S. 441 (1972); Lefkowitz v. Turley, 414 U.S. 70 (1973), U.S. v. Sharp, 920 F.2d 1167 (1990); and Chan v. City of Chicago, 916 F. Supp. 804 (1996).

40. Patton, *supra* note 24, at 511.

41. Jinanne S.J. Elder & Jean C. McEwen, *The Interrelation Between Criminal and Civil Child Abuse Proceedings*, in *Law for Children* 238, 239 (ABA Center on Children and the Law ed., 1990).

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42. William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. Louisville J. Fam. L. 37, 57 (1992).
 43. *Id.*
 44. *Id.* at 45.
 45. Matter of the Welfare of S.A.V. and S.M.V., 392 N.W.2d 260, 261 (Minn. App. 1986).
 46. *Id.*
 47. *Id.* at 262.
 48. *Id.*
 49. *Id.* at 263.
 50. *Id.* (citing Parker v. Hennepin County Dist. Ct., 285 N.W.2d 81, 82–83 (Minn. 1979)).
 51. *Id.*
 52. *Id.*
 53. *Id.* at 264.
 54. *Id.* (citing Lefkowitz v. Turley, 414 U.S. 70, 77–78 (1973) (citing Kastigar v. United States, 406 U.S. 441 (1972))).
 55. *Id.*; see *In re* Welfare of Solomon, 291 N.W.2d 364 (Minn. 1980); Minn. Stat. § 260.221(b)(5) (1984).
 56. *S.A.V. and S.M.V.*, 392 N.W.2d at 260, 261.
 57. *Id.*
 58. *Id.*
 59. Matter of the Welfare of S.A.V. and S.M.V., 392 N.W.2d 260, 268 (Randall, J., dissenting).
 60. *Id.*
 61. *Id.*
 62. *In the Interest of* H.R.K., R.M.A.C., and R.L.C., 433 N.W.2d 46 (Iowa Ct. App. 1988).
 63. *Id.* at 50.
 64. *In re* Interest of Clifford M. et al., 577 N.W.2d 547, 551 (Neb. Ct. App. 1998).
 65. *Id.* at 554.
 66. *Id.*; Mullin v. Phelps, 647 A.2d 714 (1994); Matter of Welfare of J.G.W., 433 N.W.2d 885 (Minn. 1989); Matter of Welfare of J.W., 415 N.W.2d 879 (Minn. 1987).
 67. *In re* Interest of Clifford M. et al., 577 N.W.2d 547, 558 (Neb. Ct. App. 1998).
 68. *Id.* at 559.
 69. Patton, *supra* note 24, at 485–86.
 70. See, e.g., Cal. Welf. & Inst. Code § 355.1(d) (West Supp. 1992): “Testimony by a parent, guardian, or other person who has either the care or custody of a minor ... shall not be admissible as evidence in any other action or proceeding.”
 71. Elder & McEwen, *supra* note 41, at 252.
 72. *Id.* at 253 (citing *In re* Jessica B., 254 Cal. Rptr. 883, 893 (1989)).
 73. See Cal. Welf. & Inst. Code § 827(a) (West Supp. 1992).
 74. Sprague & Hardin, *supra* note 12, at 256.
 75. *Id.* at 244.
 76. Besharov, *supra* note 33, at 356.
 77. Sprague & Hardin, *supra* note 12, at 249.
 78. Edwards, *supra* note 29, at 224. Judge Edwards also describes a 1980 study conducted by Dr. Inger Sagatun, in which results showed that court-ordered therapy is much more effective than therapy voluntarily undertaken. See n.12 (Dr. Inger Sagatun, *The Effects of Court-Ordered Therapy on Incest Offenders*, in 17 In Brief 28–39 (Santa Clara County Bar Ass’n 1980).
 79. Besharov, *supra* note 33, at 355.
 80. But see Judge James J. Delaney, *The Battered Child and the Law*, in *Helping the Battered Child and His Family*, *supra* note 1, at 187, 192: “[T]he criminal process as a solution to child abuse is usually totally ineffective. Probably it has some deterrent effect on the parent capable of controlling his conduct, but its chief value lies in satisfying the conscience of the community that the wrong to a child has been avenged. That the true causes of the battering parent’s conduct have not been sought out is of little concern.”
 81. ABA Model Rules of Professional Conduct Rule 3.8(a) (1988).
 82. *Id.* at Rule 3.8(a) cmt.
 83. Besharov, *supra* note 33, at 337.
 84. F. Chris Austin, *Missing Tools in the Federal Prosecution of Child Abuse and Neglect*, 8 BYU J. Pub. L. 209 (Jan. 1993).
 85. Besharov, *supra* note 33, at 408.
 86. Curran, *supra* note 31, at 5: “Representing dependent children involves much more than knowledge of statutes, cases and rules of evidence. In fact, it is a unique, multi-faceted area of the law which also requires attorneys to have a knowledge of the behavioral and social sciences, such as psychology and sociology, as well as specialized

areas such as child development, children's memory and suggestibility, trauma and its effects on children, language and development, and of course, a sound understanding of current child maltreatment research." See also National Council of Juvenile and Family Court Judges, Resources Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 23 (NCJFCJ 1995); Jacob Isaacs, *The Role of the Lawyer, in Helping the Battered Child and His Family*, *supra* note 1, at 225, 238: "It is apparent that counsel in child abuse cases must be thoroughly familiar with both the substantive and procedural law which governs the proceeding in which he is participating. In addition he must know how to read and evaluate, at least to a limited degree, medical diagnostic reports and the reports of psychiatrists, psychologists and probation officers. He must have at least a passing familiarity with the medical and psychiatric literature in the field of child abuse and be acquainted with treatment techniques and their potentials and limitations. He must know the range of alternative dispositions which are available to the court and have at least general knowledge as to the community resources and facilities which may be called upon as therapeutic resources."

87. See generally Sprague & Hardin, *supra* note 12, at 239.

88. Donald N. Duquette, *Lawyers' Roles in Child Abuse Proceedings, in The Battered Child*, *supra* note 1, at 460, 471.

89. Mimi Laver, *Advice for Agency Attorneys and Caseworkers: Working Well Together*, ABA Child L. Prac. 98 (Sept. 1998).

90. M. Hardin et al., Draft Monograph on the Results of State Court Assessments 36 (ABA Center on Children and the Law, Aug. 3, 1998).

91. *Id.* at 36.

92. *Id.* at 37.

93. West Virginia Child Abuse and Neglect Proceedings Rule 5.

94. Matter of Taylor B., 491 S.E.2d 607, 613 (W. Va. 1997).

95. *Id.*

96. However, the criminal prosecuting attorney will generally review all investigative reports concerning incidents of child abuse or neglect for potential criminal liability.

97. Institute of Judicial Administration-American Bar Ass'n, IJA-ABA Standards Relating to Abuse and Neglect, Part IX: Criminal Liability for Parental Conduct 164 (Ballinger Publishing Co. 1977).

98. Edwards, *supra* note 29, at 222.

99. *Id.* at 221.

100. Sprague & Hardin, *supra* note 12, at 255.

101. Edwards, *supra* note 29, at 222.

102. *Id.*

103. *Id.*

104. Sprague & Hardin, *supra* note 12, at 267.

105. See generally *id.*

106. Charles A. Phipps, *Child Abuse Legislation in the 1990s*, 32 APR Prosecutor 26, 28 (1998).

107. *Id.*

108. J. Kolbo & E. Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey, in Child Maltreatment* 65, tbl.1 (Feb. 1997).

109. Faye F. Untalan & Crystal S. Mills, *Multidisciplinary Approaches in Child Abuse and Neglect, in Interdisciplinary Perspectives in Child Abuse and Neglect* 1, 10-13 (Faye Untalan & Crystal Mills eds., Praeger Pub. Text 1992).

110. Kolbo & Strong, *supra* note 108, at 61.

111. W. Va. Code §§ 49-5D-2 and 49-5D-3 (1996).

112. Kolbo & Strong, *supra* note 108, at 65.

113. *Id.*

114. *Id.* at 68, 70.

115. Sprague & Hardin, *supra* note 12, at 260.

116. Kolbo & Strong, *supra* note 108, at 67.

117. Donald C. Bross, *Multi-disciplinary Child Protection Teams and Effective Legal Management of Abuse and Neglect, in Protecting Children Through the Legal System* 506 (American Bar Ass'n 1981).

118. *Id.*

119. *Id.*

120. Barbara E. Smith, *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience, in National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, Research in Brief* 1 (June 1995). The National Institute of Justice also published a research update (with the same title) discussing the same research study in May 1995. *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, National Institute of Justice Update (May 1995).

121. *Id.* at 2.

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122. *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, National Institute of Justice Update 1 (May 1995).
123. *Id.*
124. Smith, *supra* note 120, at 4.
125. *Id.* at 9.
126. *Id.* at 10.
127. *Id.* at 9.
128. Laver, *supra* note 89, at 97.
129. *Id.*
130. West Virginia Court Improvement Oversight Board, *Court Performance in Child Abuse and Neglect Cases: Assessment Report and Improvement Plan 59* (Sup. Ct. Admin. Office, W. Va., July 18, 1996).
131. W. Va. Code § 49-6-10 (1996).
132. W. Va. Code § 49-5-12 (1996).
133. W. Va. Code § 49-7-26 (1996).
134. Laver, *supra* note 89, at 97.
135. *Id.* at 98.
136. *Id.*
137. *Id.*
138. *In re Jonathan G.*, 482 S.E.2d 893, 909 (W. Va. 1996).
139. *Id.* at 901 n.13.
140. *Id.* at 909.
141. *Id.* (citing W. Va. Code § 49-7-26 (1996)).
142. *Id.*
143. *Id.*
144. *Id.* at n.34.
145. State *ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 564, 490 S.E.2d 642, 651 (1997).
146. *Id.*
147. *Id.*
148. David J. Herring, *Agency Attorney Training Manual: Achieving Timely Permanence for Children by Implementing the Private Model of Legal Representation for the State Agency in Child Abuse and Neglect Matters*, University of Michigan Law School, Child Advocacy Law Clinic I-1 (1988-1991).
149. *Id.* at I-4.
150. *Id.* at I-5.
151. *Id.*
152. *Id.* at I-6.
153. *Id.*
154. *Id.*
155. *Id.* at I-7.
156. *Id.*
157. *Id.* at I-8.
158. *Id.* at I-1.
159. *Id.* at I-8.
160. *Id.* at I-9.
161. *Id.*
162. *Id.* at I-10.
163. *Id.*
164. *Id.* at I-13.
165. *Id.*
166. *Id.*
167. *Id.* at I-14.
168. *Id.* at I-17.
169. David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. Tol. L. Rev. 603 (1993).
170. *Id.* at 610-11.
171. *Id.* at 611.
172. Telephone interview with Florida Child Welfare Legal Services attorney, Dec. 1998.
173. The Florida Bar *in re* Advisory Opinion HRS Lawyer Counselor, 518 So. 2d 1270 (Fla. 1988).
174. *Id.* at 1271.
175. *Id.* at 1272.
176. The Florida Bar *in re* Advisory Opinion HRS Non-lawyer Counselor, 547 So. 2d 909 (Fla. 1989).
177. *Id.* at 910: "Among the conclusions reached in the course of this Committee's inquiry into the harm that occurs to children under the aegis of the child welfare court system, perhaps the most direct conclusion is that a greater investment of time by the lawyers in the system is necessary, if we are to protect the rights of the children and families whose lives come under the control of the system. As the system is arranged now, HRS counselors of necessity fail their clients in two ways. First, they are made to assume the role of legal advocate for their clients; since counselors' experience and training have prepared them for social work and not legal practice, their clients suffer through inadequate legal representation. Second, the time

invested by counselors in preparing inadequate legal cases is time that could far better be spent improving their performance of the social services for which they are trained. The reasonable answer for the good of Florida's children is to provide additional training to counselors in the aspects of the legal process for which they *must* take responsibility, and assure that those aspects of the process which require legal judgment, or where important rights are at stake, are left in the hands of proper legal counsel."

178. *Id.*

179. *Id.* at 911.

180. Telephone interview with Florida State's Attorney, Dec. 1998.

181. Please note that these numbers do not correspond to the number of surveys. Rather, these figures reflect the number of times that respondents offered a particular reason for their opinion. Respondents frequently cited more than one reason for their answer.

NOTES

APPENDIX

| | |
|--|------------------|
| NCJJ Exploratory Survey Questionnaire | |
| Name: _____ | Office: _____ |
| Title: _____ | Telephone: _____ |
| State: _____ | Address: _____ |

1. What is the title of the prosecuting attorney? (e.g., District Attorney, County Attorney, Prosecuting Attorney, etc.)

2. Please indicate and describe the authority granted to this prosecuting attorney under the law.
 - ____ Criminal Authority (please describe)

 - ____ Civil Authority (please describe)

3. Approximately what percentage of the workload is attributable to each category?
 - ____ Criminal matters ____ Civil matters

4. Is this prosecuting attorney responsible for the criminal prosecution of a parent or guardian in cases of criminal abuse or neglect?
 - ____ Yes ____ No

5. Is this prosecuting attorney also involved in civil abuse, neglect and dependency proceedings?
 - ____ Yes ____ No

- 5(a). If yes, in what capacity? (e.g., providing representation to the social services agency, representing the interests of the state, etc.)

- 5(b). If yes, how is this involvement arranged? (e.g., it is the same attorney handling both the criminal and the civil cases, it is different attorneys in the same office handling the two cases separately, etc.)

- 5(c). If two attorneys in the same office or department are handling the civil and the criminal cases, what type of interaction occurs between them? (e.g., sharing case files and information, attending hearings and meetings for both cases, etc.)

- 5(d). Is this interaction a conflict for the attorneys? If so, how is it resolved?

Questions 6 and 7 refer to situations where the prosecuting attorney is involved in dependency proceedings as well as to situations where the prosecuting attorney is only responsible for the adult criminal prosecution. In both contexts, what happens in one case can potentially influence or affect what happens in the other case.

6. What happens if the prosecuting attorney is proceeding in a way that the agency feels is contrary to the best interests of the child? (e.g., pursuing a criminal conviction when the parent is cooperating with the social services agency plan, etc.)

7. What happens if the social services agency is proceeding in a way that the prosecuting attorney feels is contrary to the best interests of the child? (e.g., the prosecuting attorney disagrees with a recommendation for increased visitation, etc.)

8. Based on the answers provided above, please consider and respond to the following:

It has been suggested that when the same attorney or the same attorney's office is involved in both the civil dependency proceeding and the adult criminal proceeding, a potential exists for accessing information that would not otherwise be available in criminal discovery. If a parent recognizes that the information they provide to the social services agency could ultimately incriminate them, they may be less likely to cooperate with the social service agency goals and objectives. Agency efforts to address issues in the family are undermined and remain unresolved, to the detriment of the children.

It has also been proposed that in the context of protecting children from abuse and neglect, access to as much information as possible is critical for determining the best interests of the children. The issue may not be so much what the attorney knows, but what the attorney may introduce into evidence in court.

Do you think that the same attorney should be involved in both the dependency proceeding and the adult criminal prosecution?

_____Yes

_____No

Why or why not?

Please feel free to include any additional notes or information that you think is relevant. Thank you very much for your assistance!

Representing Children in Mental Disability Proceedings

This article explores the legal and ethical issues arising from the representation of children in mental disability proceedings. The article begins by identifying the different types of these judicial and administrative proceedings in California and then briefly discusses the child's due process rights under the California Constitution and state laws in each context. However, the primary focus of the article is on the special ethical issues facing the lawyer/advocate who represents the child in mental disability proceedings: What is the role of the lawyer/advocate for the child? How are professional obligations to advance the client's interests and preserve client confidences affected by the fact that the client is a child or may have a mental illness or other mental disability? How should the lawyer/advocate determine the client's competency to instruct him or her? If the lawyer concludes that the child client's competency indeed is impaired, should he or she make decisions in the client's "best interest" as would a guardian ad litem?

In considering these questions, the article draws upon professional responsibility standards for the representation of clients with mental disabilities¹ and clients who are children.² Particular use is made of the extensive literature on the role of counsel for children. The article also discusses the attorney's obligation under California state law to "advocate for the protection, safety and physical and emotional well-being" of a child client³ in dependency court and its implications for the attorney providing representation in mental health proceedings.

The discussion next turns to the emerging field of therapeutic jurisprudence.⁴ In what ways can or should the lawyer/advocate act "therapeutically" to promote the child client's mental health? Legal representation of children in mental disability proceedings has been criticized as counter-therapeutic, reinforcing the child's denial of mental disability and increasing conflict with parents and therapists. The article explores the difficulty of determining the child client's "therapeutic" needs, as opposed to legal interests, and considers whether effective legal representation, by empowering child clients, can be therapeutic.

The article concludes by proposing principles for representing children in mental disability proceedings. The advocate's need to address client's and family's attitudes toward mental disability and resist the temptation to play therapist rather than lawyer is discussed. Finally, the article recommends and outlines special training to qualify lawyers/advocates for this important and challenging work.

DEFINITIONS

"Mental disability proceeding" is a broad term referring to any judicial or administrative proceeding in which a key issue is whether an individual (in this article a child) has a "mental disability" or "disorder" as defined under relevant law. That key issue may arise in any of several ways:



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This article explores the legal and ethical issues arising from the representation of children in mental disability proceedings, focusing on the attorney's special obligation under California state law to "advocate for the protection, safety and physical and emotional well-being" of a child client in dependency court and its implications for the attorney providing representation in mental disability proceedings. The article also discusses the emerging field of therapeutic jurisprudence and the difficulty of determining the child client's "therapeutic" needs, as opposed to legal interests.

The article concludes by discussing special concerns when representing children in mental disability proceedings: addressing the client's and family's attitudes toward mental disability and resisting the temptation to play therapist. ■

- The state asserts that a child has a mental disability and, because he or she is dangerous to self or others “or ‘gravely disabled,’” requires treatment in a hospital or other secure setting.
- A child who is already the subject of juvenile court jurisdiction may, upon either the court’s or his or her own initiative, be referred for mental health evaluation and treatment.
- A child, acting through a parent or another legal representative, may seek to establish that he or she has a mental disability and is therefore entitled to receive appropriate treatment and services—as part of a special education program, for example. This category includes a parent’s application for the child to be a “voluntary” patient at a public or private institution.

Thus, depending upon the context, a finding that a child is mentally disabled may help establish entitlement to a benefit that the child voluntarily seeks or may authorize involuntary detention and treatment against the wishes of the child and even his or her parents.

“Legal representation” or “legal advocacy” may be performed by either a lawyer or a lay advocate, depending upon the situation. Legal representation in court normally requires a lawyer; however, advocacy in administrative hearings and hospital contexts may be performed by either a lawyer or a lay advocate. In California a number of advocacy organizations employ both lawyers and advocates who represent children in administrative hearings.⁵ This article uses the term “lawyer/advocate” to refer to both types of representatives. The text also indicates where a child’s right to counsel refers solely to representation by a lawyer.

MENTAL DISABILITY PROCEEDINGS FOR CHILDREN IN CALIFORNIA

As a general rule, children do not have the same rights as adults to consent to or refuse mental health treatment. California, like other states, permits parents to place their children in public and private mental hospitals or other secure facilities. The state may also commit children by virtue of a different set of criteria from those required for adults and fewer procedural due process protections. Nevertheless, both the California courts and the Legislature have long recognized that children have liberty and privacy rights that are significantly affected by placement and treatment in a mental health facility, and that children may need both state assistance to obtain mental health care and legal protection against inappropriate hospitalization.⁶ Thus, in some instances, California statutory or constitutional law provides children with greater due

process rights than have been required by the U.S. Supreme Court interpreting the federal Constitution.⁷

Moreover, the Legislature has tried to balance parents’ well-established right and duty to seek needed mental health treatment for a child with the state’s interest in protecting the child against the unnecessary loss of liberty and stigmatization resulting from erroneous commitment. California judicial and administrative proceedings affecting mentally disabled children include actions under the state children’s civil commitment and mental health treatment act; dependency or juvenile court proceedings where treatment of a mental illness or disorder is proposed, either on a voluntary or an involuntary basis; preadmission hearings before parents may place a child in a *public* mental health facility; and postadmission independent clinical reviews requested by a child placed by parents in a *private* facility. In addition, administrative advocates and attorneys provide representation in administrative and judicial proceedings to establish and enforce a mentally disabled child’s right to special education or public benefits.

INVOLUNTARY TREATMENT UNDER THE CHILDREN’S CIVIL COMMITMENT LAW

The Children’s Civil Commitment and Mental Health Treatment Act (hereinafter Children’s Commitment Act),⁸ enacted in 1988, governs the short-term involuntary detention and evaluation of minors under the Lanterman-Petris-Short Act (hereinafter LPS Act).⁹ “Civil commitment” properly refers to judicial action, but the term tends to be used more broadly in California to apply to any involuntary hospitalization under the LPS Act.

The LPS Act permits involuntary detention and evaluation for 72 hours of an individual who has a “mental disorder” and, as a result of that mental disorder, is a danger to self or others or is “gravely disabled.”¹⁰ The act does not define “mental disorder,” perhaps acknowledging that the mental health professions are constantly evolving and updating definitions and diagnostic terminology. In California “courts have typically interpreted ‘mental disorder’ to include any significant mental disorder identified in the current edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*.”¹¹ However, mental disorder or disability alone is not sufficient to authorize involuntary detention under the LPS Act: mental disorder *plus* dangerousness to self or others *or* “grave disability” must be found.

The Children’s Commitment Act defines “gravely disabled minor” as one who, “as a result of a mental disorder, is unable to *use* the elements of life which are essential to health, safety, and development, including food, clothing,

and shelter, even though provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder.”¹² (A “gravely disabled” adult is one who is unable to *provide* him- or herself with the essential elements of life. Because a child is normally not expected to do this, but rather depends upon adults, typically parents, to provide food, clothing, and shelter, the definition of “gravely disabled minor” in the Children’s Commitment Act reflects this difference.)

The LPS Act authorizes a peace officer or a mental health professional designated by the county, upon finding probable cause that a minor meets the above criteria, to initially detain him or her for up to 72 hours. The act provides no administrative or judicial review of this first 72-hour hold. The facility must make every effort to notify the minor’s parent or legal guardian as soon as possible after detention¹³ and to involve the parent or guardian in the clinical evaluation required.¹⁴ That clinical evaluation consists of a “multidisciplinary professional analysis of the minor’s medical, psychological, developmental, education social, financial and legal conditions” as well as “a psychosocial evaluation of the family or living environment or both.”¹⁵ Despite this proviso, parental consent is not required for detention and evaluation or for involuntary treatment under the Children’s Commitment Act.¹⁶ After the initial 72 hours, the minor may be subjected to further involuntary treatment *only* in accordance with the provisions of the LPS Act. Thus, except where the LPS Act indicates to the contrary, minors are entitled to the same statutory due process rights as adults.

Under the LPS Act, after 72 hours an individual (adult or child) may be “certified” for up to 14 additional days of intensive treatment if he or she is still gravely disabled or dangerous to self or others. Such an individual is entitled to an administrative “certification review” (sometimes also called a “probable cause”) hearing, conducted by a court-appointed commissioner or referee or a hearing officer. The individual is entitled to assistance by a lawyer or a patients rights advocate.¹⁷ A second 14-day hold for intensive treatment may be authorized for an individual who has made a suicide threat or attempt and continues to pose an imminent danger of suicide;¹⁸ in a limited number of counties a 30-day hold may be authorized for an individual who is gravely disabled and unwilling or unable to accept treatment as a voluntary patient.¹⁹ Both of these extensions to the initial commitment require administrative hearings. An individual who poses a danger of substantial physical harm to others may be held for 180 days;²⁰ this type of extension requires a judicial hearing. In addition, the LPS Act gives individuals the right to

challenge the legality of any of these additional holds by petitioning for a writ of habeas corpus. A hearing on the writ petition must be held within two days of the request, and the individual is entitled to representation by counsel.²¹

Long-term involuntary confinement of a person with a mental disability in a psychiatric facility may be accomplished in the civil system only through an LPS conservatorship.²² If a court finds that the individual is gravely disabled beyond a reasonable doubt, it may appoint a conservator. The conservator may be authorized by the court to give or refuse consent to treatment related to the grave disability and to place the conservatee in a facility for such treatment.²³ A judge most frequently decides the conservatorship petition; however, there is a right to a jury trial.²⁴ The standard of proof used is beyond a reasonable doubt.²⁵

A conservatee who wishes to challenge the necessity either for the conservatorship or for confinement in a treatment facility may do so in either of two ways. First, under the conservatorship statute itself, the conservatorship must be renewed on a yearly basis,²⁶ and the conservatee has the right to oppose renewal at a hearing.²⁷ Second, the conservatee has a constitutional as well as a statutory²⁸ right to petition for a writ of habeas corpus.

The LPS Act also governs the involuntary use of antipsychotic or other psychotropic²⁹ medication.³⁰ The act provides for hearings to determine committed individuals’ competency to give or withhold consent to the use of these drugs. These “capacity hearings,” or *Riese* hearings, were established after the California Court of Appeal, in *Riese v. St. Mary’s Hospital and Medical Center*,³¹ found that individuals committed under the short-term detention provisions of LPS³² are presumed competent and have a right to refuse medication in nonemergency situations. Whether minors committed under the same sections are entitled to capacity hearings is an unsettled area of law.³³ Neither the *Riese* court nor the Legislature in subsequently enacting the capacity-hearing provisions distinguished minors from adults, but rather referred generally to individuals committed under the short-term detention and evaluation sections³⁴ of the LPS Act. At present only a minority of counties hold capacity hearings for minors.

Moreover, in addition to any statutory right, children who are in fact competent to give or withhold consent to psychotropic medication may have a right to a review of their capacity under the California Constitution. The California Supreme Court recently confirmed that, under the privacy right of the California Constitution, a child who is in fact competent to give or withhold informed consent to an abortion has the right to do so.³⁵ Even the dissenting justices acknowledged that a competent child

had such a right; they believed, however, that due process was satisfied by offering the child the opportunity to prove his or her competency to a juvenile court.³⁶ Like the choice whether or not to have an abortion, the decision to give or refuse consent to antipsychotic medications is time-sensitive, has critical importance to the child's future life, and is inextricably linked to the child's personal values.³⁷ Therefore, a child who has been involuntarily committed by the state and believes him- or herself capable of making an informed decision about antipsychotic medication may well have a right to prove competency in a *Riese*-type hearing.³⁸

One of the stated purposes of the Children's Commitment Act is "to safeguard the rights to due process for minors and their families through judicial review."³⁹ Consistent with this purpose, under the LPS Act minors, just like adults, have the due process rights to certification review hearings (and in a minority of counties, to capacity hearings), including representation by an advocate, and to judicial hearings if confined for 180 days as "dangerous to others" or for one year as "gravely disabled" under an LPS conservatorship. Children are entitled to representation by court-appointed counsel in all such judicial proceedings, as well as in habeas corpus proceedings.

TRANSFER FROM JUVENILE OR DEPENDENCY COURT PROCEEDINGS

A child may be found a "dependent" of the juvenile court if he or she is abused, neglected, or abandoned, or if his or her parents are unwilling or unable to provide proper custody and care.⁴⁰ A child may be found to be a "ward" of the juvenile court as either a "status offender"⁴¹ or a "delinquent."⁴² A "status offense" is an act such as truancy, curfew violation, or habitual disobedience of parents that is unlawful only for a child. A "delinquent" is a child who has committed an act that would be a crime if committed by an adult.

Hospitalization of a dependent child or a juvenile court ward for evaluation and treatment of a mental illness or disorder may be proposed, either by the court or by the child.

*Court-Ordered Evaluation (Welf. & Inst. Code § 6551)*⁴³

"If the court is in doubt as to whether the [child] is mentally disordered or mentally retarded," the judge can order the child to be taken to a designated LPS facility and evaluated for 72 hours, consistent with LPS procedures.⁴⁴ The California Supreme Court, in *In re Michael E.*,⁴⁵ held that county representatives, such as caseworkers or probation officers, do *not* have the authority to hospitalize minors under "voluntary" status as a parent could do. Therefore,

any ward or dependent of the court may be involuntarily hospitalized only in accordance with the provisions of the LPS Act.

Once the child has been referred for a 72-hour evaluation, the juvenile court proceeding is continued. The evaluation must be completed within 72 hours and a report made to the juvenile court. If the LPS evaluating mental health professional concludes that the child "is not affected with any mental disorder requiring intensive treatment or mental retardation,"⁴⁶ the child must be returned to the court promptly and the juvenile court case can proceed. If the evaluating professional finds that the child, as a result of a mental disorder, *is* in need of intensive treatment, he or she can certify the child for 14 days⁴⁷ or accept the child's application, on the advice of counsel, for voluntary treatment.⁴⁸ Thereafter the child must be treated like any other person involuntarily confined under the relevant sections of LPS.⁴⁹ The juvenile court proceedings are suspended during the child's confinement under LPS.

Child's Voluntary Application for Commitment (Welf. & Inst. Code § 6552)

A child found to be a dependent or a ward of the juvenile court may "with advice of counsel, make a voluntary application for inpatient or outpatient mental health services."⁵⁰ The court may authorize the child's application if it is satisfied that the "minor suffers from a mental disorder which may reasonably be expected to be cured or ameliorated by a course of treatment offered by the hospital, facility or program in which the minor wishes to be placed; and that there is no other available hospital program or facility which might better serve the minor's medical needs and best interests."⁵¹ Once the child is accepted for treatment by a hospital, facility, or program, the juvenile court proceedings are suspended. Because the child is a *voluntary* patient, he or she can demand to leave the facility or program prior to discharge; if so, the child must be returned to the juvenile court for further disposition of the case.

It is well established that, in any dependency proceeding where the child would benefit from the appointment of counsel, the court must appoint counsel.⁵² A child alleged to be a status offender or delinquent is entitled to representation by counsel, either furnished by a parent or guardian or appointed by the court.⁵³ If the parent or guardian does not furnish counsel and could afford to do so, the court can appoint counsel at his or her expense.⁵⁴ The lawyer representing a child in dependency or juvenile court proceedings must advise the child client concerning the option of becoming a voluntary patient: the statute explicitly states that the child's voluntary application may be made only "with advice of counsel."

A child who becomes a voluntary patient based upon his or her own application for treatment is treated like any other voluntary patient under the provisions of the LPS Act. Somewhat confusingly, however, children may also become voluntary patients upon the application of their parents. Children whose *parents* have volunteered them⁵⁵ do not have the rights of true voluntary patients to refuse treatment and to leave a program or facility prior to discharge or against the advice of the treating mental health professionals. However, while a child whose parents have applied for voluntary status can be confined and treated in a mental health facility against his or her will, California law does provide some due process procedures for older children facing such confinement.

**PREADMISSION HEARINGS BEFORE
HOSPITALIZATION IN A PUBLIC MENTAL
HOSPITAL UNDER *IN RE ROGER S.*,
19 CAL. 3D 921 (1977)**

In *In re Roger S.*, the California Supreme Court held that a child age 14 or older is entitled to a preadmission hearing when a parent seeks to place him or her in a *public* mental health facility.⁵⁶ In such a case, the hearing officer must determine, based upon a preponderance of the evidence, whether the child is “mentally ill or disordered and whether, if the [child is] not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him.”⁵⁷

This language permits a mentally disordered child to be hospitalized even if not gravely disabled or dangerous to self or others—in other words, even if he or she does not meet the criteria for involuntary detention and treatment of an adult *or* a child under the LPS Act. As long as the child has a mental disorder and is “likely to benefit” from hospitalization, his or her voluntary admission by a parent is lawful under *Roger S.*

However, because hospitalization and treatment deprive a child of liberty and subject him or her to stigma as mentally ill, the Court found that under both the California and U.S. Constitutions due process protections must be provided. The child is entitled to a hearing by a neutral decision-maker, an opportunity to appear in person and present evidence at the hearing, an opportunity to cross-examine adverse witnesses, and to assistance of counsel.⁵⁸

Roger S., the plaintiff, was 14 years old; reasoning by analogy from juvenile court proceedings in which children of that age were able to waive constitutional rights, the Court concluded that a child age 14 or older has the ability to decide whether to assert or waive such due process rights.⁵⁹ Therefore a child may waive his or her *Roger S.* rights and agree to placement in the hospital

without a hearing. Such a waiver, to be valid, must be knowing and voluntary and must be based upon consultation with an attorney. The effect of the waiver is that the child is a voluntary patient but, unlike an adult with such status, cannot leave the facility or refuse treatment.

In re Roger S., grounded in the California as well as the U.S. Constitution, provides a minor age 14 and older with greater procedural due process than the U.S. Supreme Court found sufficient in *Parham v. J.R.*⁶⁰ In *Parham* the Court upheld as constitutional a Georgia statute authorizing commitment of children to state mental institutions upon the application of a parent or (in the case of state wards) the juvenile court or custodial agency. In *Roger S.* the California Supreme Court found that a similar California statute denied due process to 14-year-old Roger S., who was committed to a state mental hospital on the application of his parent. Both courts found that commitment to a *public* mental hospital, even through the application of a parent, was state action, causing a deprivation of the child’s liberty interest and triggering a right to due process protections.⁶¹

However, the U.S. and California Supreme Courts reached very different conclusions about what process was due. The Court in *Parham* found that due process was satisfied by a review of the appropriateness of the minor’s admission by a neutral fact-finder, who could be an employee of the state hospital. A traditional “intake examination” by an employee who had the power to grant or deny admission would suffice.⁶² A periodic review of the continuing need for hospitalization was also required, at least for a ward of the state who had been referred by a court or public custodial agency.⁶³ The U.S. Supreme Court reasoned that the risk of erroneous hospitalization was low, since history teaches that the majority of parents act in their children’s best interest. If a parent acting in bad faith tried to place an “emotionally normal, healthy” child in a state hospital, the mental health professionals would realize this and either refuse to admit the child or discharge him or her once their evaluation was complete.⁶⁴ As to those children who were appropriately hospitalized, the parents’ natural affection would also prompt them to seek the child’s speedy discharge and return home, thus reducing the risk of unnecessarily long periods of confinement; the wards of the state had no such natural advocate, hence the need for a periodic review.⁶⁵

Although the *Parham* Court acknowledged the loss of liberty and stigma involved in mental hospital confinement,⁶⁶ Chief Justice Burger, writing for the majority, opined that what is truly stigmatizing is the behavior of a mentally ill minor whose condition goes untreated.⁶⁷ Because parents have the right and indeed the high duty to seek treatment for their mentally ill children, the Chief Jus-

tice was reluctant to require more “time-consuming procedural minuets” before state hospitalization could occur.⁶⁸

The California Supreme Court, faced with the identical issue, reached a different conclusion. While it shared the assumptions that most parents sought hospitalization for their children in good faith,⁶⁹ it considered erroneous admission a more serious problem, for two reasons. First, it discussed at length the stigma associated with mental illness⁷⁰ and especially with hospitalization in a public facility whose patient population includes severely mentally ill and dangerous individuals.⁷¹ Second, it defined “erroneous admission” much more broadly to include hospitalization of a mentally ill child who could appropriately be treated in a less restrictive setting.⁷² The hearing officer, in determining whether the child can “benefit from” hospitalization, is supposed to consider less restrictive alternatives, especially those resources that would permit the child to remain in his or her home community.

Significantly, the *Roger S.* majority, in establishing a right to counsel, refers to the importance of exploring alternatives to hospitalization that may meet the minor’s treatment needs:

Inasmuch as a minor may be presumed to lack the ability to marshal the facts and evidence, to effectively speak for himself and to call and examine witnesses, or *to discover and propose alternative treatment programs*, due process also requires that counsel be provided for the minor.⁷³ (Italics added.)

The lawyer/advocate may counsel a child prior to waiver or represent him or her in the *Roger S.* hearing. There is considerable variation among counties about what form *Roger S.* hearings take, where they take place, and who is appointed to counsel or represent the child.⁷⁴

INDEPENDENT CLINICAL REVIEW REQUESTED BY THE CHILD (WELF. & INST. CODE § 6002.15)

The facts and holding in *Roger S.* involved a *public* mental hospital. Different (and lesser) procedural protections, established by statute, are available to children age 14 or older placed by a parent in a *private* facility. The child must be admitted with a diagnosis of either a mental disorder or a mental disorder plus a substance abuse disorder. If the child is age 14 or older and requests it, he or she is entitled to an *independent clinical review* by a neutral mental health professional. The review must be held within five days of the child’s request. To authorize any further confinement and treatment of the child, the independent evaluator must confirm a diagnosis of mental disorder and find that (1) further inpatient treatment is likely to benefit the minor, and (2) placement in the facility represents the least

restrictive, most appropriate setting. The child has a right to the assistance of a legal advocate at the review.⁷⁵

This independent clinical review (sometimes called an “SB 595 hearing” because of the original bill number in the Legislature) represents a compromise between mental patients’ advocates concerned about the well-documented misuse of private mental health facilities to confine “out-of-control” but not mentally ill adolescents⁷⁶ and mental health professional and hospital associations anxious not to discourage parents from seeking needed mental health care. As a result, the independent clinical review is very different from the traditional adversarial model used for LPS certification or capacity hearings. The emphasis is on the *clinical* appropriateness of the hospitalization. The neutral decision-maker is a mental health professional rather than a judge or hearing officer trained in law. He or she must be a licensed psychiatrist with training and experience in treating adolescent patients and have no direct financial relationship with the treating physician or the facility. The clinical reviewers are assigned on a rotating basis from a list approved by the county mental health director. Perhaps most important, the reviewing mental health professional, in addition to hearing testimony from the child and argument from the child’s advocate, has the opportunity to interview the child.⁷⁷

If the independent clinical reviewer determines that the criteria for continued hospitalization have not been met, the child must be released from the facility that same day. If the reviewer confirms that continued hospitalization is appropriate, the child can also seek *judicial review* through a petition for writ of habeas corpus.⁷⁸ Typically a patients rights advocate represents the child at the clinical review hearing, a court-appointed lawyer at the habeas corpus hearing.⁷⁹

OTHER PROCEEDINGS

An advocate or attorney may represent a child in administrative or judicial proceedings to obtain benefits keyed to the child’s mental disability, such as special education or disability benefits. These are not formally considered “mental disability proceedings.” The federal Individuals With Disabilities Education Act (IDEA)⁸⁰ establishes for all eligible children a right to a free and appropriate public education. A child with disabilities is entitled to an Individualized Education Plan (IEP) designed to help him or her benefit from education. The child may be entitled to a broad spectrum of “related services,” including counseling, transportation, and occupational therapy (to enable him or her to benefit from public education, as well as “transitional services” (to help make a successful transition from school to work, college, and independent living).⁸¹ A

child with disabilities may be entitled to a range of other public benefits, such as social security disability benefits, Medicaid, and Early Periodic Screening Diagnosis and Treatment (EPSDT) services, to obtain placement and services that can enable him or her to live outside an institution.⁸² A lawyer/advocate may represent the child and parents in seeking these benefits for the child, first exhausting administrative remedies and then, if necessary, pursuing judicial relief.⁸³

A lawyer/advocate representing the child in another context, such as dependency or juvenile court, may also pursue special education benefits or other public benefits for the child client as part of developing an appropriate disposition. Inadequate screenings and a lack of coordination of services frequently result in the failure to provide appropriate services for abused and neglected children with disabilities. Various studies show that substantial percentages of children in out-of-home care are developmentally delayed or have serious psychological disorders.⁸⁴ Lawyers/advocates therefore may have to become “case managers” for their clients. A skilled advocate who understands the laws governing the various agencies that may have responsibility for serving the child can use the laws to the child’s advantage and weave together a beneficial program of services.⁸⁵

As one commentator aptly puts it, in the juvenile justice system, “[t]he assumption that children with emotional disabilities are either bad children who need to be punished or sick children who need medical treatment has impeded the development of effective special education and related services for this group of children.”⁸⁶ Yet by bringing to the court’s attention the services available to the child under special education and disability benefit law, lawyers may be able to prevent inappropriate placement in secure juvenile corrections facilities, detention centers, and mental hospitals.⁸⁷

Finally, a lawyer representing a mentally disabled child in a family law custody dispute⁸⁸ may need to explore and pursue special education or disability-related benefits to support the client’s ability to live in the desired custody arrangement. Whether the custody dispute is eventually resolved judicially or through mediation,⁸⁹ the child’s lawyer can help the decision-making process by introducing this essential information.

LEGAL AND ETHICAL ISSUES WHEN THE CLIENT MAY BE DOUBLY IMPAIRED BY DISABILITY AND MINORITY

As discussed earlier, California provides legal counsel and advocacy for children in a variety of mental disability proceedings. Nevertheless, as the American Bar Association

has noted, “Even when children are represented, the representation they receive is sometimes inadequate. Children’s cases are often ‘processed,’ not advocated, and too frequently children’s interests are poorly represented.”⁹⁰ Similarly, studies consistently show inadequate representation by lawyers in mental disability commitment proceedings. Lawyers often defer to the state psychiatrist testifying, doing minimal or no cross-examination; do not perform even rudimentary investigation into the facts leading to the commitment petition; or do not explore alternatives to hospitalization.⁹¹

One study of attorneys representing children in protection proceedings found that most had no beneficial effect on case outcome. However, those who were effective differed from the rest in that they spent more time on their cases and “*displayed more independence in their role as the child’s advocate.*”⁹² (Italics added.) Lawyers or advocates who lack a strong sense of their own role and ethical duties cannot take such independent action.

The extensive literature on representation of child clients⁹³ as well as on mentally disabled clients describes a common problem of “rolelessness.”⁹⁴ Rolelessness refers to the confusion experienced by many lawyers/advocates who are unsure about how to carry out their professional obligations to a client who is mentally disabled or who is a child. A client’s mental disabilities may be confusing and even frightening to a lawyer/advocate:

Lawyers are likely to share the general public’s unease with people with mental disabilities. A client who cannot readily perform the analytical and decision-making functions that are presumed to be part of the lawyer-client relationship can frustrate the lawyer. A client who has a hard time concentrating on the lawyer’s questions because she is hearing voices or is deeply depressed may be frightening.

A client’s behavior, demeanor and decisions may vary from day to day as a result of mental disability, or because of the effects of medication. Clients with mental disabilities can be unpredictable in court; their testimony on the stand or behavior at a hearing can be completely unrelated to what they said or did in an interview with the lawyer earlier the same day. All this may be especially unsettling to a lawyer, since one of the attractions of the legal profession is its aura of rationality and control.⁹⁵

Lawyers raise similar concerns about representing a child client:

[T]he rules [of ethics] instruct lawyers to consult with their clients, to keep their clients informed, and to preserve their clients’ confidentiality. But they do not explain how to perform this counseling function for children who have not sought or selected the lawyer, who do not understand the lawyer’s function and for whom the

legal process is unfamiliar, who ... distrust adults, and for whom access to the lawyer, by telephone or in person, is restricted. The rules do not explain how to respond to a child client's age, dependency, lack of verbal ability, or severe medical needs.⁹⁶

Of course, when the client is a child as well as mentally disabled, the difficulties are doubled:

The issue of control over the conduct of a case is often difficult, especially in juvenile [delinquency] cases when the attorney's willingness to acquiesce to his or her client's wishes is tempered by the fact that the client is a child who is immature, poorly educated, unsophisticated, and, all too frequently, emotionally disturbed or somehow physically, mentally or emotionally handicapped.⁹⁷

A second important factor contributing to rolelessness is the culture of the forum within which the lawyer/advocate practices. Courts that routinely hear mental health matters develop a special subculture within which lawyers are only accepted if they learn and follow the informal procedure and unwritten rules.⁹⁸ Similarly, juvenile and dependency courts develop a certain distinct culture, and lawyers practicing in this culture feel pressure to conform.⁹⁹ Within this culture, a lawyer/advocate may be encouraged to avoid the traditional adversarial role and to share the general conviction that the client is of course "sick" or "needs help."¹⁰⁰ Judges or hearing officers and other court personnel may encourage the lawyer/advocate to decide what is in the client's best interest rather than advocate for the client's expressed wishes or vigorously enforce the client's due process rights.

In order to resist such pressures, lawyers/advocates representing children in mental disability proceedings must have a strong and well-developed idea of their role. They must understand their professional duties to their clients under the traditional view of the lawyer's role as well as the extent to which that role can be modified to reflect the clients' special needs.

MODEL CODE AND RULES AND THE TRADITIONAL VIEW

The traditional view of the lawyer's role and obligations is found in the American Bar Association's Model Code of Professional Responsibility¹⁰¹ and the Model Rules of Professional Conduct.¹⁰² Canon 7 of the Model Code states: "A lawyer should represent a client zealously within the bounds of the law."¹⁰³ In general, the lawyer's responsibility is to pursue the client's interests—as the client defines them—as long as the client does not ask the lawyer to break the law or violate the canons of ethics. The lawyer can consult with the client about both the client's goals and the means by which they are pursued¹⁰⁴

and "limit the objectives of the representation if the client consents after consultation."¹⁰⁵ But both the Model Code and the Model Rules assume that the client has control over the fundamental decisions in the case. The Ethical Considerations (EC) accompanying the canons of the Model Code explain that a lawyer can make decisions only as to matters "not affecting the merits of the cause or substantially prejudicing the rights of a client."¹⁰⁶ Otherwise, the client has *exclusive* authority to make decisions, and the decisions are binding on the lawyer.

Traditionally, the attorney is to act as both the client's advocate and counselor. The lawyer/advocate must first provide the client with the information necessary for an informed decision. After providing this information, the lawyer/advocate's task is to assist the client in reaching a decision. This means helping the client identify goals and weigh the pros and cons of the proposed course of action, answering the client's questions, and expressing a professional opinion on the practical effect of the client's decision.¹⁰⁷ The lawyer's role is to facilitate the client's decision, not to make it for the client.¹⁰⁸

It is quite consistent with the concept of client autonomy for a lawyer to make a recommendation, as long as the client is free to accept or reject it. In counseling the client, the lawyer

may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.¹⁰⁹

Throughout the course of representation the lawyer may continue to recommend that the client rethink his or her goal. The lawyer may also withdraw from representation if the client insists upon a course of action that violates the lawyer's moral or personal standards.¹¹⁰ However, in representing the client to the outside world, the lawyer must speak for the client as if the lawyer had no doubts about the merits of the client's position.

THE TRADITIONAL VIEW AND THE CLIENT UNDER DISABILITY

Both the Model Rules and Model Code assume client competency—that in most cases the client will be able to understand the information and advice provided by the lawyer, to make decisions, and, finally, to communicate those decisions to the lawyer.¹¹¹ However, Model Rule 1.14 recognizes that there may be instances in which "a client's ability to make adequately considered decisions in connection with the representation is impaired, whether

because of minority, mental disability or for some other reason”¹¹² This “Client Under a Disability” rule identifies both minority and mental disability as possible forms of disability. “Minority” can simply refer to a child client’s *legal disability*: the common law or statutory requirement that a minor can take legal action—for example, sue or be sued—only through a parent or guardian ad litem. It can also suggest that, simply because of the client’s young age and degree of development, he or she is in fact incapable of making decisions regarding legal action. The first type of incapacity is *de jure*, the second *de facto*. Model Rule 1.14 makes no distinction between them.

If a client is unable “to make adequately considered decisions,” how does that affect the lawyer’s responsibilities and role? If a client has a legal guardian or other court-appointed representative such as a conservator, the lawyer ordinarily informs and advises that representative and takes directions from him or her. But this is likely to be the case only where the client is pursuing or defending a civil action filed against him or her and involving another private party—an inheritance claim or a tort suit, for example. By contrast, where the state seeks to restrict the client’s liberty, either in a civil or criminal proceeding, the conservator or legal guardian usually does not direct the court-appointed counsel. Thus, in proceedings to establish or renew a conservatorship, the proposed conservatee instructs the counsel,¹¹³ and in juvenile court proceedings the child directs his or her counsel.¹¹⁴

The Ethical Considerations to the Model Code (Canon 7, EC 7-12) indicate that if a client under disability has *no* legal representative,

his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decisions which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.¹¹⁵

This instruction gives the lawyer conflicting advice. On the one hand, the client’s mental disability alone does not relieve the lawyer of the responsibility to attempt to inform or advise the client and to obtain from the client

“all possible aid” in determining the client’s wishes. The Model Code thus does not authorize the lawyer to make decisions based upon the lawyer’s, rather than the client’s, definition of the client’s interests. Yet the Model Code also indicates that, at least when representing a client in court proceedings, the lawyer can make *some* of the kinds of decisions ordinarily reserved for the client. In so doing the lawyer must “safeguard and advance” the interests of the client.

Can an attorney who believes that the client is not competent to advise or direct the course of representation simply ask the court to appoint a guardian ad litem? To do so may violate the admonition to “act with care to safeguard and advance the interests” of the client.¹¹⁶ Telling the court that one’s client is incompetent and asking for a guardian ad litem to be appointed essentially concedes the merits of a conservatorship petition or of a hearing to determine the client’s ability to consent to or refuse treatment. The Commentary to Model Rule 1.14(b) acknowledges this danger:

[D]isclosure of the client’s disability can adversely affect the client’s interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer’s position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.¹¹⁷

Technically, a “diagnostician” can provide a “diagnosis” of the client’s mental condition, but the diagnosis may not be especially helpful to the lawyer. There is no automatic correlation between any given diagnosis and incompetency as a matter of law.¹¹⁸ A client with a mental disability may still possess “the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”¹¹⁹ Even a legally incompetent client may be “capable of understanding the matter in question or of contributing to the advancement of his interests.”¹²⁰ What the lawyer really needs to know is how to understand and communicate as effectively as possible with the client given the client’s disability. While the lawyer “may seek the appointment of a guardian or take other protective action with respect to a client,” Model Rule 1.14(b) cautions that this can be done “only when the lawyer reasonably believes that the client cannot act in the client’s own interest.”¹²¹ This rule would certainly apply to a situation where communication is totally lacking—for example, because the client just stares into space and does not respond to or acknowledge the lawyer’s presence.¹²² In such a case, it would be ethical for the lawyer to petition for appointment of a guardian ad litem or simply indicate to the court that he or she had been unable to communicate with the client.

But this example of a severely impaired client is distinguishable from one where the client wishes to resist the appointment of a conservator or refuse proposed treatment and communicates this clearly to the lawyer/advocate. Just because the client shows evidence of delusional thinking or behaves in ways suggesting mental disability does not mean the lawyer is justified in seeking appointment of a guardian ad litem. Rule 1.14(a) requires that “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the [mentally disabled] client.” The comment to the rule states that even “a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”¹²³ The fact that a client may be disabled “does not diminish the lawyer’s obligation to treat the client with attention and respect.”¹²⁴

Even if a client already has a guardian or other legal representative, the lawyer still has a duty to maintain communication with the client. Realizing that the guardian ad litem is not the client—only someone appointed to facilitate the lawyer’s representation of the client—is critical. If the lawyer becomes aware that the guardian “is acting adversely to the [mentally disabled client’s] interest,” he or she may be required to prevent or rectify the guardian’s misconduct.¹²⁵ This could mean asking a court to review the appropriateness of the guardian’s actions, to appoint a different guardian, or even to reconsider the need for a guardianship. Thus, appointing a guardian for a mentally disabled client does not resolve the lawyer’s ethical dilemma completely.

Can or should the attorney act like a guardian ad litem—decide what is in the client’s best interest and pursue that goal, rather than advocating the client’s expressed desires? Such an approach is fundamentally at odds with the principles underlying the Model Code and Model Rules and was explicitly rejected by both judges and legislatures before the Model Rules were drafted.¹²⁶ “But,” notes EC 7-12, “obviously a lawyer cannot perform any act or make any decisions which the law requires his client to perform or make”¹²⁷ If a client is in fact incompetent, he or she may need a guardian to be appointed. But the lawyer who simply takes on the role of guardian without being appointed by a court violates the client’s legal right to make decisions unless and until he or she declared incompetent by an appropriate authority.

In contrast, by advocating for the client’s expressed wishes, the “attorney avoids the psychiatric trap of trying to determine what the client ‘really’ wants,”¹²⁸—a task for which he or she is not professionally trained. By zealously presenting the client’s expressed desires and point of view the lawyer performs a unique professional role:

[T]he client is frequently in the position of being treated as a nonperson. Often poor and confused, the client has had his or her ability to think and function impugned. There are usually doctors, nurses, investigators, and conservators aligned against the individual, none of whom will express the client’s story or goals in court. If the attorney will not do so, the individual’s side remains unrepresented.¹²⁹

The established role of the lawyer should not suddenly be changed without warning to the client. A person with a mental disability, just like other clients, is entitled to expect that his or her lawyer will “act like a lawyer” and will not suddenly become a guardian ad litem—a would-be therapist or the unappointed judge of the merits of the client’s case. A lawyer who changes roles in this way violates an ethical duty of loyalty to the client.

It is ethically unacceptable for a lawyer, representing an *adult* mentally disabled client, to act like a guardian ad litem. Is it any different when the client is not only mentally disabled but a child? Two ABA model codes for representing child clients—and the recommendations of the Fordham Conference¹³⁰—address this complex issue.

STANDARDS FOR REPRESENTING CHILD CLIENTS

The ABA has promulgated standards over the years to ensure quality representation for child clients. These standards address issues arising in both delinquency and dependency proceedings.

IJA-ABA Juvenile Justice Standards

The Juvenile Justice Standards Related to Counsel for Private Parties, promulgated by the American Bar Association/Institute of Judicial Administration Joint Commission on Juvenile Justice (IJA-ABA),¹³¹ provide guidance to lawyers representing children charged with status offenses or delinquent acts in juvenile court.¹³² According to the IJA-ABA Standards, where a juvenile client is capable of “considered judgment,” the determination of the client’s interest is his or her responsibility.¹³³ The standards reject any assumption of identity of interest between the state and the accused child. They leave it within the power of the client, after consultation with the attorney, to decide whether, in his or her particular case, such identity exists¹³⁴ and thus whether it would be in the client’s best interest to, for example, waive the right to trial. The standards also provide that the child client capable of “considered judgment” can authorize disclosure of confidential lawyer-client communications.¹³⁵

The term “considered judgment” does not necessarily mean that the juvenile client can accurately weigh all the costs and benefits of available options. The IJA-ABA

Standards note that it is “ordinarily sufficient that clients understand the nature and purposes of the proceedings and its general consequences and be able to formulate their desires ... with some degree of clarity. Most adolescents can meet this standard, and more ought not to be required of them.”¹³⁶

What if a child client is not fully capable of “considered judgment”? Does this mean that the lawyer can assume a guardian ad litem role? The standards explicitly reject this proposition:

Where a client’s capacity may be affected by extreme youth, mental disability, or other cause ... such difficulties only underline the attorney’s duty to seek effective communication and consultation with the juvenile and do not justify adoption of a “guardian” ... role.¹³⁷

In such a situation, should the lawyer ask for a guardian ad litem to be appointed? The IJA–ABA Standards permit the lawyer to request appointment of a guardian, but recommend that the attorney consult the juvenile client as well as any appointed guardian concerning essential matters.¹³⁸ When the client and guardian substantially disagree about the client’s best interest, the attorney may so inform the court.¹³⁹ As discussed earlier, in a situation where the alleged inability of the child to make reasoned judgments in his own best interest is the essence of the charge against him, the attorney’s action in requesting a guardian may be tantamount to a concession on the merits.¹⁴⁰

The IJA–ABA Standards emphasize three key concepts: the child’s need for legal counsel at key stages of the juvenile justice process; the lawyer’s obligation to consult the child, as one would an adult client, on essential matters and to honor the client’s decision; and the lawyer’s duty to protect the rights of the client of limited or uncertain competency as vigorously as one would defend those of any other client.¹⁴¹ The standards assume that “most adolescents” will be capable of the “reasoned judgment” needed to competently instruct their counsel. Most of the child clients in juvenile court are indeed adolescents because age 12 is typically the point at which juvenile codes establish jurisdiction over status offenders and delinquents.¹⁴²

The IJA–ABA Standards may be less helpful for lawyers representing children under age 12 in dependency court. The ABA Standards for Child Abuse and Neglect Cases (hereinafter Child Abuse and Neglect Standards)¹⁴³ address the problem posed when an attorney’s clients range in age from one day old to late teens.

ABA Standards for Child Abuse and Neglect Cases

The Child Abuse and Neglect Standards, adopted in 1996, build upon the IJA–ABA Standards. Like the IJA–ABA

Standards, they affirm the traditional view of the lawyer-client relationship. The child’s attorney “owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due an adult client.”¹⁴⁴ The standards refer to Model Rule 1.14(a) and prescribe that, “[i]n all but the exceptional case, such as with a preverbal child, the child’s attorney will maintain this traditional relationship with the child client.”¹⁴⁵ Although in many, perhaps most, cases the attorney for the child will be appointed by the court, the standards clearly state that even privately retained counsel represent the child client, not the person paying for the legal services.¹⁴⁶

Consistent with the traditional view, the lawyer has a duty to advocate the client’s articulated position rather than the lawyer’s opinion about what would be in the best interest of the child. The standards provide that the child’s attorney should “represent the child’s expressed preferences and follow the child’s directions throughout the course of litigation.”¹⁴⁷ This is necessary “to ensure that the child’s independent voice is heard.”¹⁴⁸

If the child cannot express a preference, the attorney may not simply advocate his or her own view of the child’s best interest. Rather, the attorney “shall make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a guardian ad litem.”¹⁴⁹ If the child client “does not or will not express a preference about particular issues, the child’s attorney should determine and advocate the child’s legal interests.”¹⁵⁰ The standards distinguish the attorney’s role, identifying the child’s *legal* interests, from the guardian ad litem’s role, deciding what is in the child’s *best* interest:

The determination of the child’s legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child’s specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.¹⁵¹

The Child Abuse and Neglect Standards emphasize that the lawyer, in determining the client’s legal interests, should *not* do so based “merely on the lawyer’s personal values, philosophies, and experiences.”¹⁵² Nor should the lawyer decide based upon what he or she believes to be true about children in general. “Individual children have particular needs, and the lawyer must determine the child client’s individual needs.”¹⁵³

Under the standards, the attorney has the responsibility to determine whether the child client is “under a disability” within the meaning of Model Rule 1.14. Significantly, the standards reject a “global” approach under which a child

client is either fully competent and therefore entitled to zealous representation under the traditional model or is completely incompetent. The standards

do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children.¹⁵⁴

The lawyer must make every effort to identify and understand the needs and desires of the individual child client, even if the child cannot or will not articulate them directly. "Even nonverbal children can communicate their needs and interests through their behaviors and developmental needs."¹⁵⁵ It is not sufficient for the lawyer merely to present information to the court in an *amicus curiae* role: "The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child."¹⁵⁶

Among the lawyer's basic obligations is to *counsel* the child client concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process.¹⁵⁷ As part of this counseling function, as with any client, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying the recommendation.¹⁵⁸ The child's attorney may counsel against the pursuit of a particular position sought by the child.¹⁵⁹

In doing so, however, the standards caution the attorney to be especially aware of the danger of intimidating and manipulating the child client. A child client may be more susceptible than some adult clients to domination by the lawyer because of "the power dynamics inherent in adult/child relationships."¹⁶⁰ Therefore, the child's attorney "should ensure that the decision the child ultimately makes reflects his or her actual position."¹⁶¹

What if the child client, far from deferring to the attorney's advice, insists on a course of action that, in the lawyer's view, is not in the client's best interest? In such a case the standards do not permit the attorney, purely on that basis, to request appointment of a guardian ad litem or to withdraw from representation. If he or she deter-

mines that the child's expressed preference would be *seriously injurious* to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interest), the child's lawyer may request appointment of a separate guardian ad litem. However, the attorney must "continue to represent the child's expressed preference.... The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position."¹⁶²

The standards clearly do not endorse the lawyer's assumption of a guardian ad litem role. Indeed, they recognize that there is often an inherent conflict between the lawyer's duty to advocate the client's expressed position and the guardian's task of determining the best interest of the child. The standards acknowledge, but do not approve, the model used in some states in which a lawyer representing the child client is also appointed as guardian ad litem. In such a case, if the lawyer determines performing both roles causes a conflict, the lawyer should continue to perform as the child's attorney and withdraw as guardian.¹⁶³ The standards take the optimistic view that, "[a]s a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court."¹⁶⁴ Still, "the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility."¹⁶⁵

The exception permissible under the standards occurs where a substantial danger to the child client is revealed to the lawyer in a confidential disclosure. In such a situation the lawyer may request appointment of a guardian ad litem while continuing to represent the child. However, this action may not adequately protect the child. Therefore, "where there is a substantial danger of serious injury or death ... the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules."¹⁶⁶

The standards' exception is much narrower than, and distinguishable from, the recently adopted California rule, applicable only in dependency court proceedings, under which the child's attorney's "primary responsibility" is to "advocate for the protection, safety, and physical and emotional well-being of the child."¹⁶⁷ Although counsel

for a child 4 years or older must “advise the court of the minor’s wishes . . . [c]ounsel for the minor shall not advocate for the return of the child to the parents if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor.”¹⁶⁸ (Italics added.) The California rule requires the child’s attorney in virtually every child abuse or neglect case to make predictions about future danger to the child—an area in which lawyers are not professionally trained and can claim no special expertise. The California rule does not assume that the attorney has any more information about the child’s circumstances than what is available in the court record. In essence the rule requires the child’s attorney to perform the same function as the judge: to determine whether the child can be safely returned to the custody of a parent.

By contrast, the Abuse and Neglect Standards’ exception applies only in the rare circumstances where the attorney, by virtue of his or her confidential relationship with the child client, becomes aware of a danger to the client. There must be “substantial danger of serious injury or death” to permit the lawyer to take any action to protect the child. Even then, the exception does not explicitly authorize the lawyer to advocate against the child client’s expressed position—for example, by informing the court that the attorney believes the child would be endangered if returned to the parent’s custody. The language of the standards possibly would permit such an action by the lawyer, assuming that this was “the minimum step . . . necessary to ensure the child’s safety.” Moreover, the attorney still must follow the child client’s directions to the greatest extent possible.

Finally, the ABA Child Abuse and Neglect Standards emphasize the lawyer’s duty to look beyond the specific issue raised in the initial legal proceeding, to identify the child client’s needs and explore the resources available to meet them. “The lawyer must also identify appropriate family and professional resources for the child, including counseling, educational and health services . . . and other forms of material assistance for which the child may qualify under law.”¹⁶⁹ Significantly, the standards instruct the lawyer to do so, not from a guardian ad litem’s perspective of “what would be good for this child,” but to the extent such action is consistent with the child’s wishes.¹⁷⁰ The standards recognize that maximizing resources is especially important when representing a child with mental or physical disabilities: “*Consistent with the child’s wishes*, the child’s attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities.”¹⁷¹ (Italics added.) Assuming that such a course is consistent with the lawyer’s professional duty to the child client, he or she may request court authorization to pursue these services for the client.¹⁷²

Effective legal representation can be done only by lawyers/advocates who have a clear understanding of their professional obligation to their clients, as well as the training and expertise to carry it out.

FORDHAM CONFERENCE RECOMMENDATIONS

The recommendations developed by the participants in the Fordham Conference on Ethical Issues in the Legal Representation of Children¹⁷³ were designed to build upon the IJA–ABA Juvenile Justice Standards and the ABA Child Abuse Standards. The recommendations endorse many of the general principles set out in those standards but also critically address the ways in which the standards were insufficient and suggest improvements.¹⁷⁴ The recommendations focus on seven areas of concern, including (1) allocation of decision-making authority between child client and attorney; (2) assessment of the child’s capacity to make decisions in the representation; and (3) the lawyer’s role as decision-maker when the child cannot direct the representation.¹⁷⁵

The recommendations strongly endorse the principle that the lawyer for a child client should function in the traditional role rather than as a guardian ad litem: “The lawyer should assume the obligations of a lawyer, regardless of how the lawyer’s role is labeled. The lawyer should not serve as the child’s *guardian ad litem* or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.”¹⁷⁶ Consistent with this position, the lawyer for a child who has the capacity to direct the representation “must allow the child to set the goals of the representation as would an adult client.”¹⁷⁷ As with an adult client, the lawyer has an ethical duty “to advocate the position of a child unless there is independent evidence that the child is unable to express a reasoned choice.”¹⁷⁸ If the child client has indeed made a “reasoned choice, even if the attorney or other adults might disagree with the choice, the attorney nonetheless is bound by” it.¹⁷⁹

The recommendations identify three groups of child clients: the client who is not impaired (who has full capacity to direct the representation); the client who is verbal but impaired (who can communicate with the lawyer but who is not fully capable of “reasoned choice”), and the preverbal client (who is unable to communicate with the attorney). The lawyer has the duty to determine whether the child client has the capacity to express a reasoned position (and thus to direct the representation).¹⁸⁰ In assessing the client’s competency the lawyer “should seek guidance from appropriate professionals and others including family members”¹⁸¹ and should consider factors including the child’s developmental stage, ability to articulate reasons

and communicate with the lawyer, and ability to understand consequences.¹⁸² Noting that “[n]othing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their client,”¹⁸³ the recommendations state that “[an] attorney *with background and training in child development* should decide whether the child is sufficiently able to set the goals of the litigation and direct the representation.”¹⁸⁴ (Italics added.) Although seeking the assistance of a mental health professional or social worker may be helpful for the lawyer, in assessing the client’s competency “mental health professionals should not determine capacity because this term constitutes a *legal* construct and involves making a *legal* determination.”¹⁸⁵ (Italics added.)

The lawyer “must presume the child client’s capacity.”¹⁸⁶ “Because of the nearly irresistible instinct to conclude that the child client is competent only where the attorney agrees with his or her expressed preference,” the recommendations require “the lawyer to separate out the evaluation of the client’s ability to make a decision from the lawyer’s evaluation of the decision itself.”¹⁸⁷ “The lawyer should not decide that the client lacks capacity simply because he or she feels the client is exercising poor judgment.”¹⁸⁸ In evaluating the client’s capacity, the lawyer should be aware of his or her own biases and become educated about the role culture, race, ethnicity, and class may play in the choices a child client may make.¹⁸⁹ Competency does not depend upon the content of the child’s decision but on how he or she arrived at the decision.¹⁹⁰ The lawyer should “focus on the child’s ability to articulate a well-reasoned, independent choice, with a true understanding of the consequences involved.”¹⁹¹ The lawyer should also consider whether the child is consistent in expressing his or her wishes and whether the decision contradicts or reinforces the client’s other decisions or expressed wishes.¹⁹²

The lawyer must act upon and carry out a child client’s “well-reasoned . . . rational decision” even when it may threaten the child’s life or result in death. The recommendations do not “deny capacity to children who make life-threatening decisions.”¹⁹³ Although the recommendations permit a lawyer to exercise discretion and abrogate the traditional role “when an immediate danger threatens the child’s life,” this exception applies only with an *impaired* client.¹⁹⁴ An attorney who believes that a previously competent client has become impaired must meet “an extremely high threshold” of proof to justify a change in the traditional lawyer-client relationship.¹⁹⁵

Even if the lawyer determines that a child client *is* impaired, he or she cannot automatically abrogate the traditional role or assume the function of a guardian ad litem. Rather, the lawyer “must engage in additional fact finding to determine whether the child may develop the

capacity to direct the lawyer’s action.” It is the lawyer’s duty “to recognize, facilitate, and maximize the child’s capacities.”¹⁹⁶ If impairment results from a physical or mental disability, learning more about the disability “may help a lawyer to understand the reasoning of a child client, or may alert the lawyer to an additional need to facilitate the child client’s communication.”¹⁹⁷

The recommendations recognize that a child client “might be unimpaired as to some types of decisions and impaired as to other decisions within one case.” Thus the lawyer for a verbal but impaired child “must solicit input from the child insofar as the child can give meaningful input.”¹⁹⁸ The weight given to a child’s expressed opinion falls on a “sliding scale,” to be determined by the attorney, in consultation with experts as needed. If the child client is competent to make a particular decision, the lawyer must carry out the client’s expressed wishes on that decision. Only where the lawyer finds that the child is not competent regarding a particular decision can the lawyer exercise discretion and use the “sliding scale.”

Because the lawyer for a verbal but impaired child client may deviate from the traditional lawyer role, he or she must inform the client about this possibility. The recommendations suggest that the lawyer tell the verbal but impaired child client “she cannot promise to do everything that the child wants, but she can promise to listen to the child’s views and carry out the child’s wishes when she thinks the child is able to make that particular decision.”¹⁹⁹ Similarly, with regard to confidentiality, the attorney must inform a child client of any limitation on his or her promise to keep what the child client says confidential—for example, if the attorney has an ethical obligation to disclose client communications to protect the child from immediate, serious harm.²⁰⁰

As to the final category, the preverbal child client, the recommendations express “a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including ‘best interests’ determinations.”²⁰¹ To avoid this danger, lawyers for a preverbal client should still not assume the guardian ad litem role²⁰² but should try to “arrive in a principled way at a position or a range of positions which they may present to the fact finder or decision maker.”²⁰³ The lawyer representing a preverbal or impaired child client must identify not the “best interest” but the *legal* interests of the child.²⁰⁴ A *legal* interest is any interest that the legal proceeding has authority to address, including, for example, a right to “appropriate education” or placement in the “least restrictive alternative,” as well as interests in procedural due process rights.²⁰⁵

In identifying the client’s *legal* interests, the lawyer should “focus on the child in her context,”²⁰⁶ to achieve “a

thickly detailed view of the child client as a unique individual.²⁰⁷ The lawyer's responsibilities must include talking with the client, in a "dynamic and evolving" process throughout the course of the case.²⁰⁸ "Even where the lawyer has determined that the child cannot fully understand or express desires about the case, there will be very few verbal children who cannot express some views about their own lives."²⁰⁹ The lawyer must consider all legally available options, including good-faith options for seeking modification of the law.²¹⁰ If the lawyer cannot narrow down the options to one preferable course of action, he or she must identify the client's *primary* legal interest and present it to the court. However, the lawyer must also present evidence "on the remaining options to the court, and in opposition to all options that were actually available but that have been eliminated from the child's legal interest."²¹¹

Where needed, lawyers for the preverbal or impaired client can retain experts to aid them in deciding which legal interests to pursue. When lack of resources make such consultation impracticable, the lawyer may look to experts already involved with the client. However, he or she should be aware that these experts do not share the attorney's duty of advocacy and may have conflicting obligations.²¹² Similarly, recognizing the possible conflicts of interest, lawyers for preverbal clients should "advocate vigorously to protect the child's basic needs including medical and mental health services, housing, education, nourishment and strong agency case planning and implementation." At the same time, however, they should "challenge the basis for experts and agency conclusions in order to ensure accuracy" and strive to make sure that the child client's receipt of services is consistent with the position taken and goals pursued on behalf of the child.²¹³

The Fordham Conference recommendations also suggest the addition of state law mandating "that lawyers . . . be appointed to represent children in . . . mental health commitment cases."²¹⁴ The recommendations are an especially helpful source of ethical guidance for the lawyer representing a child in such proceedings. The lawyer can first use the recommendations concerning competency to identify whether an individual child client is fully capable, verbal but impaired, or preverbal. Having done so, the lawyer next must either carry out the expressed wishes of the competent client or refer to the guidelines regarding his or her representation of verbal but impaired or preverbal clients. Consistent with the recommendations, the lawyer should not assume that a mental disability automatically renders a child client incompetent. Moreover, the lawyer should evaluate competency based upon *how* the client reaches a decision, not depending upon whether the lawyer agrees with the decision. A competent client's

decision—for example, to give or withhold consent to treatment—must be honored, even if, in the lawyer's opinion, it may be inconsistent with the client's best interest. Even if a mentally disabled child client is verbal but impaired, the recommendations still require the lawyer not only to consult the client but also to maximize the client's ability to participate in the determination of his or her legal interests. The lawyer may not assume a guardian ad litem role, even for a preverbal client, but must strive to identify the client's legal interests and present all reasonable options to the court. The lawyer can and should make use of mental health professionals and other experts in assessing the child client's competency or determining the client's legal interests; however, he or she cannot delegate to others the *legal* and professional decisions only a lawyer can make.

THERAPEUTIC JURISPRUDENCE

Can or should the lawyer modify his or her representation of the child client because doing so is more "therapeutic"? Critics of traditional legal advocacy in mental health proceedings have charged that this harms the mentally disabled person's relationships with mental health professionals and family members:²¹⁵ it is counter-therapeutic, undermines trust in the mental health system, encourages refusal of treatment, and makes court proceedings unnecessarily stressful.

Nevertheless, research on the therapeutic impact of civil commitment proceedings and access to legal representation does not support the criticisms.²¹⁶ On the contrary, mentally disabled persons' perception that they have been coerced may affect their attitude toward and compliance with treatment.²¹⁷ Thus, providing full due process protections and effective legal counsel may well be therapeutic by "visibly demonstrat[ing] a coherence between the decision-making process and the mandates of the law so that justice 'is seen to be done.'"²¹⁸ A mentally disabled person who believes that he or she has been fairly treated is more apt to accept the ruling of the committing court and comply with the treatment plan.²¹⁹ "Enhancing respect for authorities, the willingness to voluntarily accept the decisions of authorities, and the willingness to follow social rules are core objectives to any therapeutic program."²²⁰ A similar argument has been made that providing due process in juvenile court will encourage young offenders to trust the system and cooperate in their rehabilitation.²²¹

Unfortunately, most discussions of the "therapeutic" impact of legal advocacy assume that the client is mentally disabled and that the most "therapeutic" outcome is for the client to accept that he or she is mentally disabled,

cooperate with the treatment plan, and submit to the authority of the mental health profession and the court. Providing full due process protections and legal representation is thus “therapeutic” because it will encourage such an outcome. But what if the client is not mentally disabled, or if the treatment plan is inappropriate, or the mental health and legal systems are “dysfunctional”?²²² In such a case, acceptance of the label of mental disability, compliance with treatment, or submission to authority might be counter-therapeutic, while vigorous assertion of the client’s legal rights would better promote his or her mental well-being. There may also be a conflict between what is “therapeutic” for the client and for other concerned parties, such as family members overwhelmed by the demands of caring for the child.

Several ethical standards suggest that lawyers consider therapeutic concerns when representing a client with a disability or a child client. For example, the Commentary to Model Rule 1.14 notes that an attorney who is considering whether to petition for appointment of a guardian ad litem must take into account that such an appointment “may be expensive or traumatic” for the client. Similarly, the ABA Child Abuse and Neglect Standards note, regarding whether the child client should testify, “While testifying is undoubtedly traumatic for many children, it is *therapeutic and empowering* for others.” (Italics added.) The commentary further suggests: “The lawyer should also prepare the child for the possibility that the judge may render a decision against the child’s wishes which will not be the child’s fault.”²²³ The Fordham recommendations for representing the preverbal child direct the lawyer to “shield the child from jurogenic harm (*e.g.*, multiple interviews, multiple hearings, and delays).”²²⁴

Lawyers in family law practice can and should advise even an “unimpaired” adult client to choose the legal course of action beneficial to his or her mental health. If a client’s emotional problems do impair his or her judgment, the lawyer should encourage the client to seek mental health counseling or treatment.²²⁵ In general, “the attorney should attempt to convince the client to work toward family harmony or the interests of the children. Conduct in the interests of the children or family will almost always be in the client’s long term best interests.”²²⁶

The lawyer can also try to reduce the “nontherapeutic” aspects of the legal proceeding by fostering good relations with family members, mental health professionals, and court personnel. The Model Code requires the lawyer to “treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”²²⁷ The Matrimonial Lawyers Standards caution that the lawyer “should not do anything to increase the emotional level of the dispute.”

The IJA–ABA Standards require the lawyer “to cooperate with social work and probation departments and to instruct the client to do so.”²²⁸ These standards recognize the practical benefit to lawyer and client of being on good terms with the people who have the power to make decisions affecting the client. However, there is an important condition: such cooperation is required unless it is inconsistent with promoting the client’s legal interests.²²⁹

This brings the inquiry full circle: Who can or should make the decision about what legal course of action is “therapeutic”?²³⁰ When a client’s legal interests and therapeutic interests conflict, who can decide which to pursue? Based upon the earlier analysis of ethical standards, it seems clear that only a fully competent child client could make such a decision. A verbal but impaired child may be able to give the lawyer information about his or her desires but cannot waive a legal right—which is in effect what is done when one chooses to forego pursuit of a legal interest for “therapeutic” reasons. A preverbal child cannot inform or instruct the lawyer at all. Can the lawyer for a verbal but impaired or preverbal child decide to waive a legal interest in the client’s “therapeutic best interest”? Such a waiver is, in my opinion, the kind of decision referred to under the Model Code that is not within the attorney’s discretion and that only the client can make. The same reasons a lawyer is not qualified to and should not make “best-interest” decisions for the child client are even more compelling when “therapeutic” is added to the phrase.

Ultimately, the most “therapeutic” thing the lawyer can do is to empower²³¹ the child client. That means treating the client with respect and building trust, trying to understand and communicate effectively with him or her, and resisting the temptation to coerce the client’s compliance. It means encouraging others involved with the child, including parents,²³² mental health professionals, and court personnel, to behave the same way. It means maximizing the client’s understanding of and participation in legal or treatment proceedings by informing, listening, counseling, assisting in decision making, and expressing the client’s unique individual perspective to the decision-maker. It means working to identify not just the legal issues involved in the immediate proceeding but also those that may be pursued in the future by or on behalf of the client.²³³ Finally, it means affirming to the client and to the outside world the inherent value of that child. “In a system of law, the idea of rights, and the recognition that an individual has a right to something, is all but synonymous with a recognition that the person is worthy of respect. . . . The assistance of a lawyer/advocate affirms both the importance of the right and of the person.”²³⁴

SPECIAL CONCERNS AND TRAINING FOR THE LAWYER/ADVOCATE

As has been noted earlier, professional ethics codes direct the lawyer to empower the child client by providing information and counseling and by helping him or her participate to the maximum extent possible in the course of legal representation. This section will discuss special concerns and additional obligations of legal counsel in mental disability proceedings. First, it will discuss the importance of identifying the client's and family members' attitudes about mental disability. Second, it will describe the temptation to act as a therapist rather than as an attorney and explain why this occurs and why the lawyer must resist it. It will suggest as a corrective that the lawyer look to the objective language of California mental health laws to help identify the legal interests of the child client. Finally, this section will suggest specialized training that will better qualify lawyers and advocates to provide high-quality legal representation in mental disability proceedings.

SPECIAL CONCERNS IN MENTAL DISABILITY PROCEEDINGS

The attorney in a mental disability proceeding must address issues that do not arise in other proceedings. First, the attorney must identify the family's perceptions of mental disability and then address these perceptions. Second, the attorney must ensure that he or she acts as the child's guardian ad litem rather than as a therapist.

Addressing the Client's and Family's Attitudes Toward Mental Disability

Whether the client is facing a decision to accept treatment on a voluntary basis or to seek public benefits, the lawyer/advocate cannot provide adequate counsel without first identifying how the client and his or her family perceive mental disability. Unfortunately, a diagnosis of mental illness or disability still carries a tremendous negative connotation in American society. As noted earlier, courts establishing due process rights for adults and minors facing civil commitment have recognized the stigma associated with mental disability, as well as the lifelong impact it can have on reputation, education, and employment opportunities. The child client as well as family members may view mental disability as a moral weakness or as a punishment for past misconduct. The idea of mental disability in general, or even a particular diagnosis, may carry moral, religious, or cultural significance. There may be disagreement within the family about the appropriate response to a child's mental disability. Indeed, the mental disability proceeding may be occurring precisely because

there is a conflict within the family or between parent and child about these matters.

A legal finding that a child is mentally disabled may be perceived—by the child client or the parents—as a positive step. It can reinforce and validate the client's or the family's understanding that the child has a serious problem and needs assistance. It may also be seen—by the child or the parents—as a way of identifying the “troublesome” or “bad” individual who needs to be isolated from the rest of the “good, healthy” family or community. An important part of counseling the child client, as well as interacting with the child's parents, is determining and addressing their hopes and fears about the significance of a legal finding of mental disability.

The lawyer should inform and counsel the child client about the impact a legal finding of mental disability may have both short-term and long-term. For example, if the client is facing serious penal code charges in juvenile court, a voluntary hospitalization for mental health treatment may be critical to a later disposition plan under which the child is placed in a special group home rather than in a juvenile corrections facility. In such a case, the identification as mentally disabled may benefit the child client—both by providing treatment and by enabling a less restrictive disposition. On the other hand, a record (albeit a juvenile court one) that explicitly connects mental disability with law violation—and thus labels the child as “mentally ill and dangerous”²³⁵—may have an adverse effect on later educational or employment options.

Because stigma may be increased by a legal finding of mental disability and of the need for secure confinement, the lawyer should try to obtain the least restrictive, least stigmatizing placement consistent with the client's wishes and needs. The lawyer should explore whether the child client can get the services he or she needs and wants without a legal finding of mental disability, or with such a finding but without an involuntary commitment. In doing so the lawyer should be guided by what the client thinks is best and most “therapeutic” for him or her. The lawyer should strive to make whatever happens in the legal proceeding less traumatic and thus perhaps more “therapeutic” by treating the child client with respect and encouraging others to do so.

Assuming that the child client does indeed have a mental disability, this may be a lifelong condition. As part of empowering the client, the lawyer should encourage him or her to learn about the mental disability, to understand the significance of the diagnosis, and to become familiar with treatment options and resources and the benefits and negatives of each. Generally speaking, whether or not the child client is capable of understanding this information, the lawyer should try to work with parents to make sure

they are able to assist the child in the future. Especially when the client is preverbal or impaired, parents and mental health professionals who will be involved with him or her on a long-term basis also need to know about available resources and the child's legal entitlement to them.

Resisting the Temptation to Play Therapist

Representing a mentally disabled client presents a particular temptation for the lawyer: to act not as the client's attorney but as a therapist. As discussed earlier, courts that regularly hear mental disability matters develop a unique environment, a blend of the two "cultures" of law and mental health.²³⁶ The court or hearing officer, caseworkers, court personnel, expert witnesses, and lawyers use not only the language and concepts of the law but also those of psychiatry and psychology. Even when the issue before the court involves a *legal* question, parties or the court commonly use "best-interest" and "therapeutic" language and concepts. Court personnel as well as mental health professionals may refer to the client as "the patient," reflecting an unspoken assumption that the client is mentally disabled and needs treatment.

In such an environment, avoiding role confusion and preserving a traditional lawyer-client relationship may be especially difficult for a lawyer. The lawyer may be confronted by family members saying, "Can't you see that [the client] is sick and needs to be in the hospital?" A treating mental health professional may ask the lawyer to avoid legal action that will reinforce the client's delusional thinking or resistance of treatment. The judge or hearing officer may ask the lawyer's opinion about which treatment option is in the client's best interests. The child client also may perceive the lawyer as another adult who is trying to provide "treatment" or to determine the child's "best interest." Depending upon the child's attitude, this misunderstanding may encourage him or her to confide in the lawyer as in a therapist or to distrust the lawyer as just another adult who is part of the mysterious system determining his or her fate.

Often lawyers are attracted to mental disability law because of a personal connection. A lawyer may have an educational or employment background in psychology, social work, or public health, for example. Sometimes a lawyer's family member has a mental disability. Personal familiarity with mental disability as well as related education or employment experience can be great assets to a lawyer but also can present great dangers. The lawyer may identify with the client's relatives and adopt their view of the situation. Or the lawyer may identify with the client and project upon him or her the lawyer's own memories and desires, rather than seeing the client as an individual. The lawyer may identify with the mental health profes-

sionals and try to ingratiate him- or herself with an expert witness or a treatment team. Finally, a lawyer who has chosen to represent children or people with mental disabilities may have an especially strong desire to see him- or herself and be seen as a "good person." Such a lawyer can find it especially difficult to withstand criticism or anger from the client's family members or pressure from court personnel or mental health professionals to "go along with" what everyone else believes is best for the child client.

As discussed below, a well-qualified lawyer should be familiar with the language and concepts of mental health law. He or she should understand the possible effects of mental disability on the client, the significance of diagnoses, and the risks and benefits associated with common treatment methods, including psychotropic medications. This base of knowledge enables the lawyer to accurately assess the merits of the client's case and communicate effectively with mental health professionals. It does not qualify the lawyer to be a therapist, however.

Even if the lawyer is a mental health professional with a degree in psychiatry, psychology, or social work, he or she must still resist the temptation to "combine" the two professional roles. The lawyer is acting as a lawyer, not as a therapist, in the relationship with the child client and should explain and maintain that role clearly and consistently. Switching back and forth between roles or picking and choosing which professional obligations to honor is unfair and confusing to the client.

Nevertheless, the lawyer can and should use the expertise of a mental health professional in carrying out his or her ethical duties to the child client. For example, the lawyer can use professional interviewing skills to more effectively communicate with the client and knowledge of treatment models to explain the risks and benefits of each to the client. He or she cannot, however, undertake to "treat" the child client in the guise of giving legal advice or recommend a treatment or placement option to the court (or to opposing counsel or the treating mental health professional) that is inconsistent with the client's wishes. Such a lawyer should be especially wary of misusing his or her mental health professional skills to manipulate the child client into agreeing with legal advice. Because the mentally disabled child client is so vulnerable to pressure from an adult, the lawyer should make every effort to ensure that the client's decision is uncoerced.

In summary, the lawyer must understand and communicate consistently that he or she is a lawyer, not a therapist. The lawyer has the unique obligation to identify and pursue the client's *legal* interests; he or she should not duplicate the role of others in making a "best-interest" decision. Resisting the pressure of the special court culture may

continue to be difficult, but performing the lawyer's role will be easier if he or she clearly explains it to the client, family members, and mental health professionals. Over time, if the lawyer is consistent in his or her role, the court personnel and mental health professionals who regularly participate in mental disability proceedings will learn to expect and accept it.

Although the lawyer should refuse to function as a therapist or a guardian ad litem, he or she can and should use mental health concepts and language when communicating with the court and mental health professionals.²³⁷ A lawyer can appropriately argue that an action is in the client's "best interest" or "therapeutic" where these terms are likely to be persuasive to the decision-maker.²³⁸ However, the lawyer can do so only where this approach advances the client's *legal* interest.

As a helpful corrective to the temptation to act as a therapist, the lawyer should assume that the client's *legal* interest, *at minimum*, includes preservation and enforcement of his or her rights under the relevant statutes and state and federal constitutions. For example, in California, the mission statement of the Lanterman-Petris-Short Act²³⁹ can provide a helpful checklist of such rights:

The mission of California's mental health system shall be to enable persons experiencing severe and disabling mental illnesses and children with serious emotional disturbances to access services and programs that assist them, in a manner tailored to each individual, to better control their illness, to achieve their personal goals, and to develop skills and supports leading to their living the most constructive and satisfying lives possible in the least restrictive available settings.

Consistent with this statement, the lawyer for a child client in mental disability proceedings should identify and pursue the course of action that will enable that client to (1) *access services and programs* that (2) *assist him or her in better controlling the illness* (or accommodate the disability), thereby allowing the client to live the most constructive and satisfying life possible. The programs and services should be (3) *individually tailored to the client's needs* and (4) *permit him or her to live in the least restrictive available setting*.

The emphasis in this language is on giving the client access to services and programs, rather than imposing involuntary treatment, and assisting the individual client with the goal of maximizing his or her opportunities for a meaningful life—a provision of special importance in representing a child client. True, the mission statement assumes that the child client does have a mental illness or disability and limits the right to the least restrictive *available* placement, but it still reflects the LPS Act's preference for voluntary over involuntary treatment, for community

placement over hospitalization, and for preservation of liberty to the maximum extent possible consistent with the needs for safety and treatment. Unless instructed to the contrary by his or her client, the lawyer should assume that the client's wishes and *legal interest* are best served by legal action consistent with the LPS Act's mission statement and philosophy.

TRAINING FOR LAWYERS IN MENTAL DISABILITY PROCEEDINGS

Of course, lawyers need to know the legal rights of their clients under state and federal constitutions and statutes. But a well-qualified lawyer should also be familiar with the language and concepts of mental health professionals. Without such training, the lawyer may easily be intimidated and bewildered by this unfamiliar "culture" and may not know when to consult mental health professionals or, alternatively, may inappropriately defer to them. Training should also help the lawyer perform the critical function of "translating" legal concepts to lay people, including his or her client, the client's family members, and mental health professionals.

The lawyer also needs to be familiar with the most common *diagnoses* and comfortable using the *Diagnostic and Statistical Manual of Mental Disorders*.²⁴⁰ He or she should know about the different *treatment* methods generally regarded as consistent with good professional practice and should be familiar with the *codes of ethics* and *licensing standards* used by mental health professionals. The lawyer should *visit* treatment and services programs available in his or her area and review information about model or innovative programs in other places.

The lawyer must be educated about the *medications* commonly prescribed to treat mental disability. He or she must be able to use the *Physician's Desk Reference* and to research possible negative side effects and contraindications of a given medication or combination of medications. The lawyer needs to understand how the medications may affect, positively or negatively, the client and his or her ability to communicate or make decisions.²⁴¹

Reaching a diagnosis, providing treatment, and prescribing medication are all decisions falling under the expertise of mental health professionals, not lawyers, but to serve the client effectively a lawyer must know enough about all these matters to recognize any possible problems. At that point the lawyer can and should call upon an appropriately qualified mental health professional for guidance. To do this, the lawyer must be aware of the different types of mental health professionals, including their training and expertise. He or she should know which tests are most commonly administered and by what type of

mental health professional and the tests' reliability and admissibility for forensic use.

Perhaps most important, the lawyer must be educated in the *effect of mental disability* on the client. To effectively represent any child client, the lawyer needs to be trained in *child development* and its possible effects on the child's ability to understand and participate in decision-making as well as the effects of different mental disabilities. This knowledge can assist the lawyer in determining the client's capacity and working to maximize the child client's participation in the lawyer-client relationship.

Especially when representing a child client, the lawyer must consider the ways in which a mental disability may affect the client *in the future*. Thus, the lawyer should be well informed about the ability of people with different mental disabilities to function in society. The lawyer should visit programs providing services to *adults* with mental disabilities and talk with them about their experiences in education, employment, and family life.

Finally, the lawyer should be trained in the special ethical problems that have been the subject of this article and in the professional standards that address them.

CONCLUSION

California provides procedural due process protections, including the right to counsel in administrative and judicial proceedings, for children with mental disabilities. For lawyers/advocates to provide effective legal representation, however, they must be familiar with the client's legal rights under state and federal statutes and constitutions. They must have a clear understanding of their professional role and their unique duty to identify and pursue the client's *legal interests* and avoid functioning as a guardian ad litem or therapist. They must be comfortable with the language and concepts of the mental health "culture" and be able to use them in communicating with mental health professionals and the court consistent with the client's *legal interest*. By skillful and zealous representation they must seek to empower the child client and to help fashion for him or her a future filled with possibilities.

NOTES

1. See, e.g., Model Code of Professional Responsibility EC 7-12, and Model Rules of Professional Conduct Rule 1.14.
2. See, e.g., ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Proceedings (1996); Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings, Standards 1.1, 2.4 (Am. Academy of Matrimonial Lawyers 1995); and IJA-ABA

Standards on Representing Private Parties (Institute of Judicial Admin.—American Bar Ass'n 1979).

3. Cal. Welf. & Inst. Code § 317(c) (West Supp. 1999).

4. See generally *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (David B. Wexler & Bruce J. Winick eds., Carolina Academic Press 1996); David B. Wexler & Bruce J. Winick, *Essays in Therapeutic Jurisprudence* (Carolina Academic Press 1991). "Therapeutic jurisprudence" (TJ) studies the role of law as a therapeutic agent, considering whether substantive rules, legal procedures, and lawyers' roles can or should be altered to enhance their therapeutic potential. For examples of scholarship applying TJ concepts, see Stephen H. Behnke & Elyn R. Saks, *Therapeutic Jurisprudence: Informed Consent as a Clinical Indication for the Chronically Suicidal Patient with Borderline Personality Disorder, Symposium on Mental Disability Law*, 31 Loy. L.A. L. Rev. 945 (1998); Keri K. Gould, *A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney's Dilemma*, 18 Int'l J.L. & Psychiatry 93 (1995); Deborah A. Dorfman, *Effectively Implementing Title I of the Americans With Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105 (1993); Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. Rev. 409 (1992).

5. Welfare and Institutions Code section 5320 requires each county to appoint or contract for the services of patients' rights advocates to protect and enforce the rights of patients. Patients rights advocates investigate complaints, monitor mental health facilities for compliance with legal protections for patients, and provide training and education in mental health law. They also provide representation at a variety of administrative hearings.

6. *In re Roger S.*, 569 P.2d 1286 (Cal. 1977); *In re Michael E.*, 538 P.2d 231 (Cal. 1975).

7. See discussion of *In re Roger S.*, in text accompanying notes 56–74.

8. Cal. Welf. & Inst. Code §§ 5585–5585.59 (West 1998) (AB 4642; Stats. 1988 ch. 1202).

9. The Lanterman-Petris-Short Act, Stats. 1067, ch. 1667, § 36 (operative July 1, 1969) (codified at Cal. Welf. & Inst. Code § 5000 et seq.), which establishes the system of public mental health care in California. Its provisions apply to, inter alia, voluntary and involuntary treatment, conservatorships, and patients' rights. The Bronzan-McCorquodale Act (formerly the Short-Doyle Act), Stats. 1968, ch. 989 § 2 (operative July 1, 1969) (codified at Cal. Welf. & Inst. Code § 5750 et seq.), governs the

administration and funding of the state mental health system.

10. Cal. Welf. & Inst. Code § 5150 (West 1998). The 72-hour detention authorized by this provision is often referred to as a “5150 hold.”

11. Stephen H. Behnke et al., *The Essentials of California Mental Health Law 74* (W.W. Norton 1998).

12. Cal. Welf. & Inst. Code § 5585.25 (West 1998).

13. Cal. Welf. & Inst. Code § 5585.50 (West 1998).

14. Cal. Welf. & Inst. Code § 5885.52 (West 1998).

15. *Id.*

16. Cal. Welf. & Inst. Code § 5585.53 (West 1998).

17. Cal. Welf. & Inst. Code § 5250 (West 1998).

18. Cal. Welf. & Inst. Code § 5260 (West 1998).

19. Cal. Welf. & Inst. Code § 5270.15 (West 1998).

20. Cal. Welf. & Inst. Code § 5300 (West 1998).

21. Cal. Welf. & Inst. Code § 5275 (West 1998).

22. Cal. Welf. & Inst. Code §§ 5350–5371 (West 1998).

23. Cal. Welf. & Inst. Code § 5357 (West 1998).

24. Welfare and Institutions Code section 5350(d) provides that the proposed conservatee can choose between a court and a jury trial on the issue of grave disability. This right to jury trial also applies in subsequent proceedings to renew a conservatorship.

25. This is an instance in which California law provides greater procedural due process protections than the U.S. Constitution. *Compare* Addington v. Texas, 441 U.S. 418 (1979) (standard of proof in civil commitment proceedings must be greater than preponderance of evidence but need not be beyond a reasonable doubt to satisfy due process) and Conservatorship of Roulet, 23 Cal. 3d 219, 590 P.2d 1 (1979) (standard of proof in LPS conservatorship must be beyond a reasonable doubt).

26. Cal. Welf. & Inst. Code § 5362 (West 1998).

27. *See id.* § 5364 (West 1998).

28. *See id.* § 5358.3 (West 1998).

29. “Psychotropic” refers to medication prescribed for treatment of thought or mood disorders and includes antipsychotics, antidepressants, and antimanic agents. *See* Robert J. Waldinger, *Fundamentals of Psychiatry 397* (American Psychiatric Press 1986).

30. Cal. Welf. & Inst. Code § 5332–5336 (West 1998).

31. *Riese v. St. Mary’s Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199 (Cal. 1987), *appeal granted*, 751 P.2d 893 (Cal. 1988), *appeal dismissed*, 774 P.2d 698 (Cal. 1989).

32. Cal. Welf. & Inst. Code §§ 5150–5360 (West 1998).

33. Behnke et al., *supra* note 11, at 182–83.

34. Cal. Welf. & Inst. Code §§ 5150–5360 (West 1998).

35. *AAP v. Lungren*, 940 P.2d 797 (Cal. 1997).

36. *Id.* at 854 (Mosk, J., dissenting): “From *In re Roger S.*, we may derive the following principles. First, an unemancipated minor’s constitutional rights are not equal to, but are more limited than, those of an adult, both as against his or her parents and as against the state. Second, *an unemancipated minor has a right to procedures that will protect him or her from arbitrary and drastic curtailment of constitutional rights by his or her parents, or, presumably, the state, no manner [sic] how well motivated.* Third, a mature unemancipated minor, as opposed to one who is immature, has a increased right to exercise her constitutional rights, but even a mature unemancipated minor, as opposed to one who is immature, is not entitled to all the same procedural protections as an adult in the same situation.” (Italics added.)

37. The abortion decision (1) has critical implications for the child’s future; (2) is time sensitive (*see* *Bellotti v. Baird*, 443 U.S. 622, 642 (1979); *AAP v. Lungren*, 940 P.2d at 815, 66 Cal. Rptr. at 228); and (3) is inextricably linked with an individual’s personal values (*see* *Planned Parenthood v. Casey*, 505 U.S. 883, 850–51 (1991); *AAP v. Lungren*, 940 P.2d at 813, 66 Cal. Rptr. at 226).

38. *See* Jan C. Costello, *Making Kids Take Their Medicine: The Privacy and Due Process Rights of De Facto Competent Minors*, *Symposium on Mental Disability Law*, 31 Loy. L.A. L. Rev. 907, 924–26 (1998).

39. Cal. Welf. & Inst. Code § 5585.10(b) (West 1998).

40. Cal. Welf. & Inst. Code § 300 (West 1998). This is a broad summary of a very long and detailed code section.

41. Cal. Welf. & Inst. Code § 601 (West 1998).

42. Cal. Welf. & Inst. Code § 602 (West 1998).

43. Cal. Welf. & Inst. Code § 6551 (West 1998).

44. *Id.* The 72-hour detention is, of course, pursuant to Welfare and Institutions Code section 5150.

45. 538 P.2d 231 (Cal. 1975).

46. Cal. Welf. & Inst. Code § 6551 (West 1998).

47. Under Welfare and Institutions Code section 5260.

48. *See* discussion of voluntary application under Welfare and Institutions Code section 6552, at text accompanying notes 50–54 *infra*.

- NOTES
49. Cal. Welf. & Inst. Code § 5250, 5260, 5270.10, or 5300 (West 1998).
50. *See id.* § 6552.
51. *Id.*
52. *See* Cal. Welf. & Inst. Code § 317(c) (West Supp. 1999).
53. *See id.* § 634.
54. *Id.*
55. For a very early identification of this problem and use of the term “volunteering,” see James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Cal. L. Rev. 840 (1974). For a much expanded and more recent discussion, see James W. Ellis, *Voluntary Admission and Involuntary Hospitalization of Minors*, in *Law, Mental Health and Mental Disorder* 487–99 (Bruce D. Sales & Daniel W. Shuman eds., Brooks/Cole 1996).
56. *Roger S.*, 569 P.2d at 1286.
57. *Id.* at 1288.
58. *Id.* at 1296.
59. *Id.* at 1290.
60. 442 U.S. 584 (1979).
61. *Parham v. J.R.*, 442 U.S. at 600; *Roger S.*, 569 P.2d at 1288.
62. *Parham v. J.R.*, 442 U.S. at 607.
63. *Id.* at 611, 613.
64. *Id.* at 612.
65. *Id.* at 619.
66. *Id.* at 600.
67. *Id.* at 601.
68. *Id.* at 606.
69. *Roger S.*, 569 P.2d at 1295: “We emphasize here our assumption that the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children. That fact cannot, however, detract in any way from the child’s right to procedures that will protect him from arbitrary curtailment of his liberty interest in such a drastic manner no matter how well motivated.”
70. *Id.* at 1290.
71. *Id.* at 1295: “[Petitioner was] confined in a complex which has barred windows and locked doors in an open ward with 40 other minors some of whom are so severely disturbed that they are unable to dress themselves. He alleges that he has been approached sexually by other boys whose advances he has repelled, and he fears further such advances. While he has been hospitalized two other minors have attempted suicide.”
72. *Id.*: “The focus of our attention must be to delineate procedures that will ensure the child a fair opportunity to establish that (1) he is not mentally ill or disordered, or that, even if he is, confinement in a state mental hospital is unnecessary to protect him or others and might harm rather than improve his condition.”
- For a recent discussion of the interests at stake and the importance of a precommitment hearing for minors, see James W. Ellis, *Some Observations on the Juvenile Commitment Cases: Reconceptualizing What the Child Has at Stake*, 31 Loy. L.A. L. Rev. 929 (1998).
73. *Roger S.*, 569 P.2d at 1296.
74. The staff of the Office of Patients Rights Advocates advise and represent children in some *Roger S.* proceedings in Los Angeles County.
75. Cal. Welf. & Inst. Code § 6002.15 (West 1998).
76. *See, e.g.*, Mike A. Males, *Scapegoat Generation* 242–53 (Common Cause Press 1996) (critiquing unnecessary hospitalizations as “treatment of ‘Kid-With-Insurance’ Disorder”); Ira M. Schwartz, (In)justice for Juveniles: Rethinking the Best Interests of the Child 131, 131–48 (Lexington Books 1989) (characterizing unnecessary hospitalization as “being abused at better prices”); Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 Har. C.R.-C.L. L. Rev. 41, 61–72 (1981) (identifying inappropriate use of the mental health system to circumvent restrictions on juvenile court power to confine status offenders); Carol A.B. Warren & Patricia Guttridge, *Adolescent Psychiatric Hospitalization and Social Control*, in *Mental Health and Criminal Justice* 119, 199–22 (Linda A. Teplin ed., Sage Publications 1984) (discussing inappropriate hospitalization of adolescents as a means of social control); Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. Rev. 773, 831–34 (1988) (linking dramatic increase in hospitalization to inappropriate admissions of “troublesome youth”).
- On the especially controversial use of such placements by parents hoping to “cure” their lesbian or gay children, see Beth E. Molnar, *Juveniles and Psychiatric Institutionalization: Toward Better Due Process and Treatment Review in the United States*, 2 Health & Hum. Rts. 99, 102–05 (1995).

In an attempt to address this problem, California Welfare and Institutions Code section 6002.10(e)(1) provides: "A minor shall not be considered mentally disordered solely for exhibiting behaviors specified under Sections 601 [status offender] or 602 [juvenile delinquent]."

77. Welfare and Institutions Code section 6002.30 provides: "[T]he psychiatrist conducting the review shall privately interview the minor"

78. Welfare and Institutions Code section 6002.20 provides: "The role of the advocate shall be to provide information and assistance to the minor relating to the minor's right to obtain an independent clinical review to determine the appropriateness of placement within the facility. The advocate shall conduct his or her activities in a manner least disruptive to patient care in the facility."

79. Welfare and Institutions Code Section 6002.10 provides: "It is the intent of the Legislature that this act shall not preclude the right to review of inpatient treatment through the exercise of other legal remedies available to minors, including but not limited to, a writ of habeas corpus."

80. Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. (Supp. 1997).

81. Joseph Tulman, *The Best Defense Is a Good Offense: Using Special Education Advocacy in Delinquency Cases*, 15 ABA Child L. Prac. 97, 102 (1996).

82. The Early Periodic Screening Diagnosis and Treatment (EPSDT) entitlement was the result of a 1989 amendment to the Federal Medicaid Act, 42 U.S.C. § 1396d(a)(4)(B) (Supp. 1997). The EPSDT mandates that eligible children are entitled to receive, through their state's Medicaid system, any treatment listed in the Medicaid Act that is "medically necessary," even though it is not available to adults in the state.

83. See James Preis, *Advocacy for the Mental Health Needs of Children in California, Symposium on Mental Disability Law*, 31 Loy. L.A. L. Rev. 937 (1998) (describing effective litigation strategy using entitlements under federal EPSDT and Medicaid programs to develop a full range of mental health services for children). See also Melinda Bird, *The Integration of the ADA and the Problem of De-institutionalization, Symposium on Mental Disability Law*, 31 Loy. L.A. L. Rev. 847, 854–57 (1998) (discussing use of EPSDT and the integration mandate of the Americans With Disabilities Act to develop community-based programs and services for people with disabilities).

84. Lois A. Weinberg et al., *Advocacy's Role in Identifying Dysfunctions in Agencies Serving Abused and Neglected*

Children, 2 Child Maltreatment 212, 212–13, 223–24 (1997). NOTES

85. *Id.* at 223–24.

86. Therese Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 Tenn. L. Rev. 295, 364 (1993).

87. Joseph Tulman, *supra* note 81, at 102.

88. California Family Code section 3150 provides for appointment of counsel to represent a child in a custody or visitation proceeding if the court determines that it would be in the best interest of the child.

89. California Family Code section 3170(a) provides: "If . . . custody, visitation, or both are contested, the court shall set the contested issues for mediation."

90. ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, *America's Children at Risk: A National Agenda for Legal Action 7* (American Bar Ass'n 1993).

91. See William. S. Johnstone, Jr., & Susan T. House, *California Conservatorships and Guardianships*, § 15.10 (Cal. Cont. Ed. Bar 1995): "The tension between the client's demands and his or her best interest often results in the attorney's failure to present the client's demands in a meaningful or persuasive manner."

See generally Thomas Litwak, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 Cal. L. Rev. 816 (1974); Grant Morris, *Conservatorship for the "Gravely Disabled": California's Declaration of Non-independence*, 15 San Diego L. Rev. 201 (1978); Virginia Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. Rev. 1027 (1982); Michael Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 J.L. & Contemp. Prob. 161 (1982); Michael Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 J.L. & Hum. Behav. 37 (1992); Grant Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 San Diego L. Rev. 343 (1995).

92. Robert F. Kelly & Sarah H. Ramsey, *The Legal Representation of Children in Protection Proceedings: Some Empirical Findings and a Reflection on Public Policy*, 34(2) J. Fam. Rel. 277, 282 (1985).

93. An excellent resource that summarizes this literature is *A Judge's Guide to Improving Legal Representation of Children* (May 1998), by the ABA Center on Children and the Law. See generally *Special Issue: Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1281 (1996).

- NOTES
94. On the issue of rolelessness for counsel in mental disability proceedings, see Jan C. Costello, "Why Would I Need A Lawyer?" *Legal Counsel and Advocacy for People With Mental Disabilities*, in Law, Mental Health and Mental Disorder 15, 30-31 (Bruce D. Sales & Daniel W. Shuman eds., Brooks/Cole 1996).
95. *Id.* at 30.
96. Bruce A. Green & Bernadine Dohrn, *Children and the Ethical Practice of Law*, 64 *Fordham L. Rev.* 1281, 1289 (1996).
97. Robert N. Waxman, *California Juvenile Court Practice: Delinquent Minors* (Cal. Cont. Ed. Bar 1988) at 3.14.
98. See generally James A. Holstein, *Court-Ordered Insanity: Interpretive Practice and Involuntary Commitment* (Aldine DeGruyter 1993); Carol Warren, *The Court of Last Resort: Mental Illness and the Law* (University of Chicago Press 1982).
99. See generally John Hubner & Jill Wolfson, *Somebody Else's Children: The Courts, the Kids, and the Struggle to Save America's Troubled Families* (Crown 1996) (describing in detail representative cases in Santa Clara County dependency and juvenile court); Edward Hume, *No Matter How Loud I Shout: A Year in the Life of Juvenile Court* (Simon & Schuster 1997) (describing representative cases in Los Angeles County's juvenile justice system).
100. Warren, *supra* note 98, at 9.
101. Model Code of Prof. Responsibility (1981).
102. Model Rules of Prof. Conduct (1983).
103. See *id.* Rules 1.2(a), 1.3, 3.2. See also California Rules of Prof. Conduct Rule 3-110.
104. Model Rules of Prof. Conduct Rule 1.2(a).
105. See *id.* Rule 1.2(c).
106. Model Code of Prof. Responsibility EC 7-7.
107. See *id.* EC 7-5.
108. However, the Model Rules acknowledge that "[a] clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking." Model Rules of Prof. Conduct Rule 1.2 cmt.
109. Model Code of Prof. Responsibility EC 7-8.
110. Model Rules of Prof. Conduct Rule 1.16(b)(3). Compare Cal. Rules of Prof. Conduct Rule 3-700. But see Costello, *supra* note 94, at 24 (where client is poor or confined in a mental institution, alternative counsel may be unavailable and withdrawing from representation may mean abandoning the client).
111. See Model Rules of Prof. Conduct Rule 1.14 cmt.: "[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."
112. Model Rules of Prof. Conduct Rule 1.14, Client Under a Disability, provides:
- When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.
113. Johnstone & House, *supra* note 91, at § 15.10 ("proposed conservatee has the same right to zealous and competent representation as any other client"); § 15.31 (proposed conservatee's right to counsel); and § 15.110 (conservator petitions for renewal of conservatorship, but conservatee has right to court hearing or jury trial; conservatee can waive such hearing or trial and is not presumed incompetent by virtue of conservatorship).
114. See Waxman, *supra* note 97, at 3.14 (juvenile client, like adult criminal defendant, controls the waiver of the constitutional right to a speedy trial, the right to plead guilty or have a trial, the right to confront and cross-examine witnesses, the right to plead to a lesser offense, and the right to plead not guilty by reason of insanity). On the role of counsel in juvenile court, see further discussion of IJA-ABA Standards, *infra* at text accompanying notes 131-142.
115. Model Code of Prof. Responsibility EC 7-12.
116. *Id.*
117. Model Rules of Prof. Conduct Rule 1.14 cmt. 5.
118. The American Psychiatric Association, in its *Diagnostic and Statistical Manual of Mental Disorders*, at xxvii (4th ed. 1994) (*DSM-IV*), cautions that the courts should not regard psychiatric diagnoses as determining legal concepts such as individual responsibility, disability, or competency. Nevertheless, courts and other legal forums routinely use the *DSM* for this purpose.
119. Model Rules of Prof. Conduct Rule 1.14 cmt. 1 provides: "When the client is a minor or suffers from a mental disorder or disability, however, maintaining the

ordinary client–lawyer relationship may not be possible in all respect. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

120. Model Code of Prof. Responsibility EC 7-12.

121. Model Rules of Prof. Conduct Rule 1.14(b) cmt. 3 provides: “If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client’s best interests. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer’s part.”

122. A really principled lawyer would not simply rely upon the client’s lack of response during one interview, but rather would make further attempts to communicate with the client. A review of the client’s medical records might inform the attorney whether the client is unresponsive to everyone or communicates with family members, clinical staff, or other patients. If the client does communicate with some individuals, the lawyer may seek their assistance in meeting with the client and gaining the client’s trust.

123. Model Rules of Prof. Conduct Rule 1.14(b) cmt. 2 states: “The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as the de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.”

124. *Id.*

125. Model Rules of Prof. Conduct Rule 1.14(b) cmt. 4 (citing Rule 1.2(d)).

126. See Stan Herr, *Representation of Clients With Disabilities: Issues of Ethics and Control*, 17 N.Y.U. Rev. L. & Soc. Change 609 (1989); Michael Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 J.L. & Hum. Behav. 37 (1992).

127. Model Code of Prof. Responsibility EC 7-12.

128. Johnstone & House, *supra* note 91, at § 15.10.

129. *Id.* See also Steven J. Schwartz et al., *Protecting the Rights and Enhancing the Dignity of People With Mental Disabilities: Standards for Effective Legal Advocacy*, 14 Rutgers L. Rev. 541, 570–71 (1983): “Consideration for the clients mitigates in favor of representing their subjective wishes. The primary deficit in their lives—the one that renders their legal needs greater than those of others—is the lack of self and community valuation. If advocates do not listen to their clients, respect their views, and assist them to achieve some measure of self-determination, it is not clear who will.”

130. The recommendations of the Fordham Conference were published at 64 Fordham L. Rev. (1996).

131. Standards Related to Counsel for Private Parties (Institute of Judicial Admin.–American Bar Ass’n Commission on Juvenile Justice 1979) (hereinafter IJA–ABA Standards). See generally Jan C. Costello, *Ethical Issues in Representing Juvenile Clients: A Review of the IJA–ABA Standards on Representing Private Parties*, 10 N.M. L. Rev. 255 (1980).

132. For a discussion of the significance of “status offense” and “delinquent act,” see discussion *supra* at text accompanying notes 40–42.

133. IJA–ABA Standards Standard 3.1(b)(ii)(b).

134. See *id.* Standard 3.1(b)(i).

135. Standard 3.3(d) permits disclosure of confidences with the informed consent of the juvenile client or without consent where such disclosure will not disadvantage the juvenile, where it will further the juvenile’s interests, and where the juvenile is incapable of considered judgment.

136. IJA–ABA Standards Standard 3.1(b)(i).

137. See *id.* Introduction, at 3, 8, and Standard 4.2 note, at 99–101. The standards also rejected the adoption of a neutral amicus curiae role whereby the attorney simply presented the court with all relevant information concerning the child client.

138. See *id.* Standard 3.1(b)(ii)(c)(1).

139. See *id.* Standard 3.1(b) note, at 81–82.

140. Costello, *supra* note 131, at 274.

141. *Id.* at 267.

142. This is typically linked to a presumption that younger children are not capable of criminal intent.

143. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996).

144. See *id.* Standard A-1.

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145. *See id.* Standard A-1 commentary.
146. *See id.* Standard H-5. The court should permit the child to be represented by private counsel “if it determines that this lawyer is the child’s independent choice” and there is no conflict of interest. “The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.”
147. *See id.* Standard B-1.
148. *See id.* Standard A-1 commentary.
149. *See id.* Standard B-4.
150. *Id.* The commentary notes: “[T]he child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or the other party is out of the room. The lawyer is then bound by the child’s directive. The position taken by the lawyer should not contradict or undermine other issues about which the child had expressed a preference.”
151. *See id.* Standard B-5.
152. *See id.* Standard B-5 commentary.
153. *Id.*
154. *See id.* Standard B-3 commentary.
155. *See id.* Standard B-5 commentary.
156. *See id.* Standard B-1 commentary.
157. *See id.* Standard B-1(5).
158. *See id.* Standard B-4 commentary.
159. *See id.* Standard A-1 commentary.
160. *See id.* Standard B-4 commentary.
161. *See id.* Standard A-1 commentary.
162. *See id.* Standard B-4(3).
163. *See id.* Standard B-3.
164. *See id.* Standard B-3 commentary.
165. *See id.* Standard B-4 commentary.
166. *Id.*
167. Cal. Welf. & Inst. Code § 317(c) (West Supp. 1999).
168. *See id.* § 317(e). *Compare* Bus. & Prof. Code § 6068(e) (attorney shall maintain inviolate the confidences of the client) and *Zador Corp v. Kwan*, 37 Cal. Rptr. 2d 754 (Cal. 1995) (attorney must not assume a position that is inconsistent with the interests of the client).
169. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases Standard B-1(7) (1996).
170. *See id.* Standard B-1(7) requires the attorney to “[i]dentify appropriate family and professional resources for the child.” The commentary provides: “The lawyer can also identify family members, friends, neighbors, or teachers with whom *the child feels it is important* to maintain contact....” (Italics added.)
171. *See id.* Standard C-5. These services may include, but should not be limited to: (1) Special education and related services; (2) Supplemental security income (SSI) to help support needed services; (3) Therapeutic foster or group home care; and (4) Residential/in-patient and out-patient psychiatric treatment.
172. *See id.* Standard D-12 provides: “The child’s attorney may request the court for authority to pursue issues on behalf of the child in other matters, including SSI and other public benefits, school/education issues, especially for a child with disabilities, and mental health proceedings.”
173. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) (hereinafter “Recommendations”).
174. The Recommendations, *id.* at 1314 and 1352, advocate that further study should be given to the question of whether Model Rules of Professional Conduct Rule 1.14 adequately addresses the representation of children: “[C]onsideration might be given to amending Model Rule 1.14 to delete the term ‘minority’ and to adopting a separate Model Rule to address the representation of children, which would reflect the Recommendations.”
175. Green & Dohrn, *supra* note 96, at 1293.
176. Recommendations, *supra* note 173, at 1301. Further, “[l]aws that require lawyers serving on behalf of children to assume responsibilities inconsistent with those of a lawyer for the child as the client should be eliminated.” *Id.* at 1302.
177. *Id.*
178. Recommendations, *supra* note 173, at 1312. The Recommendations use the phrase “reasoned choice” to describe a competent child client’s decision. They prefer this to the IJA-ABA term “considered judgment.”
179. *Id.* at 1330 (Report of Working Group on Allocation of Decision-Making).
180. *Id.* at 1312.

181. *Id.*
182. “When capacity becomes an issue the lawyer should consider the following factors for assessing capacity:
- a. Child’s developmental stage
 - i. Cognitive ability
 - ii. Socialization
 - iii. Emotional development
 - b. Child’s expression of a relevant position
 - i. Ability to communicate with lawyer
 - ii. Ability to articulate reasons
 - c. Child’s individual decision-making process
 - i. Influence-Coercion-Exploitation
 - ii. Conformity
 - iii. Variability and consistency
 - d. Child’s ability to understand consequences
 - i. Risk of harm
 - ii. Finality of decision.”
- Recommendations, *supra* note 173, at 1313.
183. *Id.* at 1309.
184. *Id.* at 1329 (Report of Working Group on Allocation of Decision-Making). For detailed recommendations on training and education of child advocates, *see id.* at 1364–65.
185. *Id.* at 1341. This admonition may be of particular relevance to a lawyer representing a child in mental disability proceedings.
186. *Id.* at 1339 (Report of Working Group on Determining the Child’s Capacity to Make Decisions). Without such a presumption, “any guidelines risk becoming a test that child clients must pass before they can obtain the same form of representation that is available to adults.” *Id.*
187. Recommendations, *supra* note 173, at 1343.
188. *Id.* at 1344.
189. *Id.* at 1313.
190. *Id.* at 1344 (“how a child arrived at a decision ... goes to the heart of whether a child has capacity”).
191. *Id.* at 1345.
192. *Id.* at 1344.
193. *Id.* at 1345.
194. *Id.* at 1330.
195. *Id.*
196. Recommendations, *supra* note 173, at 1312 (Part V. Determining Whether a Verbal Child Is Capable of Directing the Representation).
197. *Id.* at 1342.
198. *Id.* at 1335.

199. *Id.*
200. *Id.*
201. Recommendations, *supra* note 173, at 1309.
202. *Id.* at 1332–33. If the attorney acts as the GAL, there is a “problem of nonaccountability; ... [t]he child’s GAL is not accountable to anyone because the client cannot formulate or express a position.... [T]he GAL [might] make a premature and largely subjective decision about the child’s best interest.” Thus the recommendations “would prohibit an attorney from serving the dual function of GAL and attorney in the representation of a preverbal child.” *Id.*
203. Recommendations, *supra* note 173, at 1309.
204. *Id.* at 1310.
205. *Id.*
206. The phrase “the child in context” is associated with Professor Jean Koh Peters, who contributed a chapter from her book of the same name to the Fordham Symposium. *See* Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *Fordham L. Rev.* 1505 (1996).
207. Recommendations, *supra* note 173, at 1310 (Recommendation IV.B.3.b).
208. *Id.* at 1309.
209. *Id.* at 1310.
210. *Id.* at 1311.
211. *Id.*
212. Recommendations, *supra* note 173, at 1310.
213. *Id.* at 1332–33 (Part IV. Decision-Making for the Preverbal Child).
214. *Id.* at 1320.
215. *See, e.g.,* Robert Isaac & Samuel Brakel, *Subverting Good Intentions: A Brief History of Mental Health Law Reform*, 2 *Cornell J.L. & Pub. Pol’y* 89 (1992).
216. *See* John Ensminger & Thomas Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 *J. Psychiatry & L.* 5 (1978); Thomas Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 *SMU L. Rev.* 433 (1992).
217. David Wexler & Bruce Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 *U. Miami L. Rev.* 979 (1991). *See also* Charles W. Lidz, *Coercion in Psychiatric Care: What Have We Learned From Research?* 26 *J. Am. Acad. Psychiatry & L.* 631 (1998).

- NOTES 218. Warren, *supra* note 98, at 154.
219. Bruce J. Winick, *The Right to Refuse Mental Health Treatment* 327–28 (1997) (respecting a right to refuse treatment both promotes the patient's autonomy and enhances the likelihood of a positive treatment outcome).
220. Tyler, *supra* note 216, at 443.
221. The IJA–ABA Standards, *supra* note 131, Standard 7.5, cmt. at 144–45 (suggesting that involving the juvenile client in planning the disposition may motivate him or her to comply with the eventual court order): “This Standard emphasizes the importance of a professional demeanor in relationships with parents and court personnel as well as the juvenile client, suggesting that such behavior will increase client confidence in the justice process. Standard 9.5, referring to counseling after disposition, requires the attorney to ‘urge upon the client the need for accepting and cooperating with the dispositional order,’ even where the order is to be appealed. As part of that counseling role, it might be helpful for the attorney to remind the client of the attorney’s own obligation, under Standard 7.4, to comply with all rules, orders, and decisions of the court. A distrustful juvenile client, who believes that the attorney is simply one of many adults with authority to make decisions concerning his or her placement or care may develop increased confidence upon learning the extent to which counsel is bound by, and attempts skillfully to utilize, the procedures and powers of the court.” Costello, *supra* note 131, at 271 n.53.
222. *See* Weinberg, *supra* note 84.
223. ABA Standards of Practice for Lawyers Who Represent children in Abuse and Neglect Cases Standard D-6. Significantly, the standard provides: “Ultimately, the child’s attorney is bound by the client’s direction concerning testifying.”
224. Recommendations, *supra* note 173, at 1332–33.
225. Standard 2.10 of Standards for Attorneys and Guardians ad Litem, *supra* note 2, provides: “When the client’s decision-making ability is affected by emotional problems ... an attorney should recommend counseling or treatment.” The Comment further provides: “[An angry client may demand] a course of action that will escalate costs, prolong litigation, irritate the judge and raise the animosity level—but a course entirely within his or her legal rights. Even though the ultimate decision must be that of the client, before accepting a clearly detrimental decision, the attorney should attempt to dissuade the client and, if that fails, urge the client to counsel with others who might have a stabilizing influence: family, friends, therapists, doctor or clergyman....”
226. *Id.*; Standard 2.27 provides: “An attorney should refuse to assist in vindictive conduct toward a spouse or third person and should not do anything to increase the emotional level of the dispute. Comment: ... [T]he attorney should attempt to convince the client to work toward family harmony or the interests of the children. Conduct in the interests of the children or family will almost always be in the client’s long term best interests.”
227. Model Code of Prof. Responsibility EC 7-10: “The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”
228. IJA–ABA Standards, *supra* note 131, at Standard 1.4.
229. “To the extent that it is consistent with the attorney’s primary task of protecting the client’s rights, the attorney may and even should utilize those features of the juvenile justice system which reflect its arguably nonpenal, benevolent orientation. Thus conferences with court social workers and probation officers, exploration of diversion programs, referral for social, psychological, psychiatric or other services, may all be appropriately pursued where attorney and client agree they may benefit the client. [Stds. 1.4, 4.3., 5.2, 6.2].” Costello, *supra* note 131, at 268.
230. *See* Behnke & Saks, *supra* note 4, at 979: “When ... definitions of ‘therapeutic’ diverge, therapeutic jurisprudence must offer some way of determining who will be the arbiter of what lies in the patient’s best therapeutic interests.”
231. For an excellent article on client empowerment, *see* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *Fordham L. Rev.* 1655 (1996).
232. It is likely therapeutic to involve family members in the legal representation to the extent this is consistent with the expressed wishes of a competent client or a verbal but impaired client or with the clearly identified legal interests of a preverbal client. However, the lawyer should explain to the parents the lawyer’s role and the limits of confidential communication.
233. This is especially important with a child client who may become more competent and less impaired as he or she grows older, even if the client still has a mental disability.
234. Costello, *supra* note 94, at 35.

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235. The U.S. Supreme Court has consistently found that statutory criteria for civil commitment as “mentally ill and dangerous” have been satisfied by a previous proceeding that found a link between mental disability and violation of law. *Jones v. U.S.*, 463 U.S. 354 (1983) (upholding automatic commitment of persons found not guilty by reason of insanity even where charge involved nonviolent property crime); *Hendricks v. Kansas*, 521 U.S. 346 (1997) (upholding sexual predator commitment law where committed person had mental disability and had been found guilty of sexual crimes).

236. For a discussion of the differences between these two cultures, *see Costello, supra* note 94, at 17–19.

237. *See Peters, supra* note 206, at 1516–17 (lawyer should explain role to other professionals and show understanding of their best-interest orientation).

238. *Id.* at 1515 (lawyer should translate proposal into “best-interest” language if that is what court wants, even if actual legal issue is framed differently).

239. Cal. Welf. & Inst. Code § 5600.1 (West 1998).

240. *See supra* note 118, describing the *DSM-IV*.

241. *See Jan Costello, Representing the Medicated Client*, 7 *Mental Disability L. Rep.* 55 (1983); Kathi Grasso, *Children and Psychotropic Drugs: What’s an Attorney to Do?*, 16 *A.B.A. Child L. Prac.* 49 (1997).

Court-Appointed Attorneys for Children

Children are the silent majority of family law litigation. Attorneys for children give voice to their silence and ensure that the court has sufficient information for a custody order based upon the children's best interest. This article summarizes recent legislative changes, seeks to explain when and how attorneys are appointed for children, identifies the primary rights and responsibilities of counsel for minors, and briefly notes some of the difficult problems that arise in the representation of children.

At the outset, we need to recognize the men and women of the bar who have devoted countless hours and great effort in this often-difficult task. They have provided an invaluable public service to the children of divorce. This article is dedicated to them.

RECENT LEGISLATIVE CHANGES

The two basic models of minor's representation are the traditional child's advocate, representing only the wishes and preferences of the child, and the public advocate, representing only the best interest of his or her client regardless of preference. California has adopted a hybrid model combining aspects of both child and public advocate. California Family Code section 3151 now charges court-appointed minor's counsel to represent the child's best interest and, as appropriate, to communicate the child's preferences to the court.

Amendments to former Family Code section 3151 and new Family Code section 3151.5 went into effect on January 1, 1998. According to section 3151, unless inappropriate in a particular case, counsel shall interview the child, review the court file and all accessible relevant records, and investigate as necessary to obtain relevant facts. Also according to Family Code section 3151, at the court's request counsel shall prepare a written statement of issues and contentions. The statement must be filed and submitted 10 days prior to hearing and shall set forth a summary of the information received by counsel, a list of sources of the information, the results of counsel's investigation, and other matters as the court may direct.

The statement of issues and contentions is both an offer of proof and a report to the court. It contains not only the results of counsel's investigation but may also include analysis and recommendations. Any party may subpoena witnesses



Hon. Josanna Berkow

Superior Court of California, County of Contra Costa

Children are the silent majority of family law litigation. The attorneys for children give voice to their silence and ensure that the court has sufficient information for a custody order based upon the children's best interest. This article summarizes recent legislative changes, seeks to explain when and how attorneys are appointed for children, identifies the primary rights and responsibilities of counsel for minors, and briefly notes some of the difficult problems that arise in the representation of children. ■

mentioned in the statement of issues and contentions as having provided information to the child's attorney. However, according to section 3151.5, minor's counsel may not be called as a witness in the proceedings. The written statement shall not contain any confidential communication subject to the lawyer-client privilege within the meaning of Evidence Code section 954. Also according to section 3151, if requested by the court, counsel may state the child's custodial preferences per Family Code section 3042 orally rather than incorporate a stated preference in the written statement.

Children's attorneys may introduce and examine their own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to represent the client. Counsel has specifically enumerated rights, including reasonable access to the child, standing to seek affirmative relief, notice of any proceeding, the ability to take any action available to a party, access to all of the child's records, the right to notice and refusal of any physical or psychological examination or evaluation unless ordered by the court, the right to assert or waive any privilege on behalf of the child, and the opportunity to seek independent psychological or physical examination upon court's approval. (Section 3151.)

WHEN THE COURT MAY APPOINT A CHILD'S ATTORNEY

The Judicial Council of California has promulgated guidelines for appointment of counsel for minors in sections 20.5 and 20.6 of the California Standards of Judicial Administration. The guidelines predate the recent legislative changes to Family Code sections 3151 and 3151.5. To a certain extent they are redundant but do contain several provisions not embodied in the recent legislation.

Family Code section 3150 permits the court to appoint minor's counsel upon a determination that to do so would be in the minor's best interest. Section 20.5(a) of the Standards of Judicial Administration further specifies that a request for appointment should be considered by the court from any party, parties' counsel, court-appointed mediators and custody evaluators, the guardian ad litem, special advocates, and "any relative of the child." In considering appointment of minor's counsel, section 20.5(b) of the standards suggests that the court consider the following factors:

- (1) whether the dispute is exceptionally intense or protracted;
- (2) whether the child is subjected to stress on account of the dispute which might be alleviated by the intervention of counsel representing the child;
- (3) whether an attorney representing the child would be likely to provide the court with significant information not otherwise readily available or likely to be presented;
- (4) whether the dispute involves allegations that a parent, a step-parent, or other person with the parent's knowledge has physically or sexually abused the child;
- (5) whether it appears that neither parent is capable of providing a stable and secure environment;

- (6) whether the child is capable of verbally expressing his or her views;
- (7) whether attorneys are available for appointment who are sensitive to the needs of children and the issues raised in representing them;
- (8) whether the best interests of the child appear to require special representation.

Children's attorneys are most frequently appointed in high-conflict custody cases. These cases involve protracted and/or exceptionally acrimonious disputes often characterized by multiple modification motions. Generally, there are allegations or other reasons to be concerned about serious parenting deficiencies of either or both parents. Typically, these cases involve allegations of physical or emotional abuse or neglect, sexual molestation, substance abuse, domestic violence, parental alienation, and threats of kidnapping.

Most critically, children's attorneys direct the parents' focus back on their children and away from disputes with each other. The recent revisions to the law recognize the hybrid nature of the role of children's attorneys. They are information gatherers both at the initial stage of the proceedings and in post-trial monitoring roles.

Children's counsel can often provide critical information that would be otherwise unavailable, since these cases often involve pro per parents with little skill in drafting declarations, using subpoenas, or presenting critical evidence to the court.

Another type of case in which children's attorneys are particularly helpful involve children with special needs. Medical conditions, treatment issues, emotional problems, or learning disabilities are the usual problems we see in these cases. Particularly where the parents are self-represented, children's attorneys gather information about available resources and assist families in obtaining them. Minor's counsel can be invaluable in confirming that the child continues to get needed services.

Minor's counsel may also be helpful in proceedings where the child is a potential witness. There are particular benefits in appointing minor's counsel where there are serious allegations of domestic violence or an imbalance of power between the parents so that one may pressure the other into agreements that may be contrary to the children's best interest.

CONTENTS OF THE APPOINTMENT ORDER

In addition, the standards provide guidance on the content of the appointment order, an area left uncovered in the new legislation. Section 20.5(c) provides that the appointment order may specify:

- (1) the issues regarding which the child's representation is ordered;
- (2) any tasks related to the case that would benefit from the services of the attorney;
- (3) the duration of the appointment which may be extended upon a showing of good cause;
- (4) the source of funds and manner of reimbursement for costs and attorney fees.

A copy of the Contra Costa *Orders re Appointment of Counsel for Minor* follows this article. Copies of the appointment order are kept in each family law department.

PAYMENT OF MINOR'S COUNSEL

Family Code section 3153 requires the court to determine the parents' ability to pay minor's counsel fees. If parents are found unable to pay, the county must pay reasonable attorney fees as determined by the court.

OTHER LOGISTICAL ISSUES

Counties need to provide workable procedures for minor's counsel to file requests for waivers of various costs such as court filing fees, copying and discovery costs, transcript costs, and consultation with experts.

According to section 20.5(c)(3) of the standards, the court should also clearly state the term of the appointment of counsel for minors. Generally, once the pending litigation is resolved, counsel may be discharged subject to recall for further litigation as needed.

Family Code section 3152 establishes procedures for the release of relevant records from Child Protective Services agencies concerning the minor for whom counsel has been appointed. The request for release must be on noticed motion, and minor's counsel must maintain the confidentiality of these documents. The court must conduct an in camera review of these records for relevance before ordering their release.

SOME DIFFICULT PROBLEMS

Given the hybrid model of representation of children in California, some children's attorneys will have to determine how to proceed when their assessment of the child's best interest differs from the child's preference. Recent legislative changes have clarified to some degree the options available to these attorneys.

Where the Child's Custodial Preference and Best Interest Diverge

The new legislation has provided much-needed clarification for children's attorneys who find themselves in the difficult position of disagreeing with their client's stated custodial preference. Family Code section 3151 clearly states that court-appointed minor's counsel must represent the best interest of the minor and that counsel should present the minor's preference to the court as well as the reasons for the preference as counsel understands them, along with the reasons counsel believes the stated preference to be contrary to the minor's best interest. In rare cases, counsel may request the appointment of a guardian ad litem where the wishes of the child conflict with the best-interest assessment of minor's counsel. Such appointments are generally disfavored as they increase the complexity of the litigation and may unreasonably delay the proceedings.

The Psychotherapeutic Privilege

Evidence Code section 1013 states that the holder of the psychotherapeutic privilege is the guardian of the patient when he or she has a guardian. Arguably, both parents in a joint legal custody situation may be the minor's guardian within the meaning of section 1013 and may, therefore, be able to assert or waive the minor's privilege regarding confidential communications with a psychotherapist. Again, the new legislation has clarified this issue. Family Code section 3151(c)(7) states that child's attorney has the right to assert or waive any evidentiary privilege on behalf of his or her client. This clearly removes the child's best interest regarding the assertion or the waiver of the privilege from possible subversion by parents enmeshed in a custody battle.

CONCLUSION

Children's counsel are experienced family law attorneys with a working knowledge of juvenile court procedures and possess investigative and mediation skills. As a byproduct of advocacy for their clients, children's attorneys often find resources that benefit the entire family. They often serve as mediators working with all family members toward the best interest of their clients.

Children's counsel often bring about resolution in protracted and complex disputes. Closure is a considerable benefit to families in which all too frequently the war has raged on for years with the children in the center of the conflict. Counsel diverts the parties from focusing on each other's failings and back on the children's needs.

Recent legislative changes have clarified the rights and responsibilities of children's attorneys. Appointment of minor's counsel is one of the most effective tools in resolving difficult custody disputes.

ISSUES
FORUM



Photograph by Jonathan Alcorn

Child Custody Evaluations and the Need for Standards of Care and Peer Review

There is no more complex and stressful work in the field of forensic mental health than the evaluation of child custody disputes. All who assess these cases can attest to the difficulties involved.

Courts across the United States have increasingly turned to psychiatrists and other mental health professionals to assist in these evaluations, especially as the guiding principle in custody disputes moved from the “tender years” doctrine to the “best interest of the child” in the latter half of the 20th century. Because the “best-interest” analysis focuses upon the child rather than favoring the mother as the custodial parent (as was generally the case with the “tender years” doctrine), courts recognized that they needed assistance in identifying just what a child’s best interest would be.

It is now common practice in most jurisdictions for courts to request the assistance of mental health professionals who are knowledgeable in assessing children and their families and adept at communicating their findings to the court when the custody of a child is disputed. Psychiatrists—especially child and adolescent psychiatrists—are in particular demand because of their specialized expertise with families. In some locales, court-associated clinics provide on-site assessments; in other areas, practitioners in the community perform the evaluations. Unfortunately, standards for appointing experts vary, and all too often judicial determinations about who will do the evaluations are arbitrary and idiosyncratic. Given the importance of these evaluations—and their concomitant complexity and stress—there is a clear need for uniform standards for custody evaluators.

This article will address these issues as well as call attention to problems that may arise when experts with variable skills undertake child custody evaluations. It will also advocate for several mechanisms that can raise standards in this field and provide greater assistance to the courts, which would ultimately mean that families are better served.

HISTORICAL ANTECEDENTS OF CHILD CUSTODY DISPUTE RESOLUTION

Child custody disputes have continually served as mirrors to the soul of a society’s view of families. In ancient Rome, a father could do with his children as he wished because they were legally considered his property. This state-sanctioned right of fathers continued well into the 19th century in English common law, including its use in the United States legal system.¹ Gradually, though, government became more involved with the welfare of children as the concept of *parens patriae*, *i.e.*, the state acting in the role of parent, took hold.²

In the late 19th and early 20th centuries, the discoveries of psychoanalysis were increasingly accepted and children came to be seen as unique persons with specialized



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To assist the court in identifying the best interest of children, psychiatrists and other mental health professionals are frequently appointed to perform child custody evaluations. Some locales require specific conditions to be met by qualified child custody evaluators while others do not. Thus, standards vary and ultimately affect how well the evaluations serve the families.

This article explores how mental health professionals make evaluations as well as common pitfalls that must be avoided. The article encourages the use of published standards and peer review by colleagues to guide forensic experts. Providing judges with knowledge on standards of care allows them to choose experts carefully and to weigh their contributions appropriately in this important area of family law. ■

needs. The role of the mother was seen as paramount in the life of a child—especially a very young child. Courts began to favor mothers in custody disputes, and the “tender years” doctrine informed judicial opinion. This doctrine, although ill defined, provided that for about the first seven years of a child’s life, the mother was the better parent to raise the child. In some early cases, however, courts reversed custody in favor of the father once the child reached the age of 7.

In the second half of the 20th century, as no-fault divorces became common, courts came to focus on the needs of the child rather than parental culpability. Earlier state court decisions, such as *Finlay v. Finlay*, in which the concept of “the best interest of the child” was articulated, came under closer scrutiny.³ The tender years doctrine gave way to “best interest,” and the emphasis was redirected to what the child needed rather than whether a mother or a father made the better parent. More than ever before, courts consulted psychiatrists and other mental health professionals and others in the course of evaluating their cases.

In the 1970s, clinical researchers and legal scholars came to recognize the limits (and ambiguities) of the best-interest concept and looked for ways around the pain and suffering of parents and children caught up in custody disputes. Some even suggested that the deficiencies of the best-interest presumption could not be corrected and called for an entirely new approach, that of “the least detrimental alternative.”⁴ This concept attempts to focus on the realistic needs of the child and recognizes that there are no “best” solutions in a child custody dispute—only ones of varying degrees of harm to the child. The aim of the courts, as suggested by this concept, should be to find the plan that causes the least amount of further damage to the child. The “least detrimental alternative” has merit and can assist clinicians in their evaluations of families; however, no states have adopted this method as the standard by which custody determinations are made.

One approach taken by some states has been to award joint custody to parents in an attempt to avoid the “war” that a custody dispute can create. In Connecticut, for example, joint custody is the rebuttable presumption that guides courts hearing these cases. However, other states, such as California, adopted joint custody as the legal presumption but later repealed the legislation.⁵

Joint custody was thought to be a panacea at one time but was found to have shortcomings.⁶ It can work for some families and can be disastrous for others. Certain factors have been found to be predictive of successful and failed joint custody arrangements.⁷ For example, parents who can put aside their anger and frustration with each other and can tolerate their differing parenting styles, as

well as put the needs of their children first, have a much better chance of securing and maintaining a successful joint custody arrangement. Their children tend to have fewer emotional disturbances. On the other hand, parents who are unable to work through their anger and who may have their own emotional problems, including substance abuse, are not appropriate candidates for joint custody. For a court to award joint custody under such circumstances—particularly when one parent objects—ignores clinical research and makes a mockery of the best interest of the child.

The mental health professional conducting a child custody evaluation has the opportunity, after carefully assessing the personalities of the children and their parents, to make recommendations to the judge that are practical, realistic, and helpful for the particular family involved. The expert can advise the court whether joint custody could work, and if so, why. The evaluator provides assistance to the judge by uncovering and elucidating the factors militating for and against any particular custody plan.

STANDARDS FOR CHILD CUSTODY EVALUATIONS

In many locales, neither the courts nor mental health professionals are given any guidelines for performing child custody evaluations. Unfortunately, many judges assume that a child psychiatrist or psychologist, by virtue of his or her professional degree, already knows and understands how to undertake this task.

To correct the problem of varying levels of expertise and to bring some order to the process, other locales specify standards of practice for child custody evaluators. Rule 1257.3 of the California Rules of Court provides such uniform standards for court-ordered child custody evaluations. The rule pertains to both court-connected and private child custody evaluators appointed pursuant to the Family, Evidence, or Civil Procedure Codes.

The comprehensive guidelines in rule 1257.3 describe in detail the required scope of the child custody evaluation, including what kinds of data are to be collected and in what manner, how a written or oral presentation is to be fashioned, ethical considerations for the evaluator, and fee arrangements. The rule also calls for local courts to “provide for acceptance of and response to complaints about an evaluator’s performance.”⁸

Recent legislation requires the Judicial Council to “formulate a statewide rule of court by January 1, 2002, that establishes education, training, and license requirements for all child custody evaluators.” The bill would also require all child custody evaluators, whether they are psychiatrists, psychologists, social workers, marriage and

family therapists, or others to “declare under penalty of perjury that they are currently licensed and meet all other requirements of the rule.”⁹ This new law represents an important advance in raising and maintaining standards of care for these evaluations.

EVALUATION STRATEGY

The mental health professional assisting the court in assessing families in custody disputes conducts a comprehensive evaluation. Every custody evaluation should begin with a well-thought-out strategy so that the clinician can follow the procedure that makes sense for a particular family. Initially, the clinician plans an evaluation strategy based upon who comprises the family, the number and ages of the children, whether outside agencies have been involved, and whether other collateral interviews will be necessary. In order to understand and follow the proper protocol for performing a custody evaluation, clinicians can be guided by procedures explicated in the psychiatric literature.¹⁰

COLLATERAL INTERVIEWS

Collateral interviews might involve in-person interviews with child-care providers or relatives such as grandparents, or telephone interviews with therapists who have seen the parents or child, teachers and/or the school principal, a guidance counselor, or a tutor. Parents may ask the evaluator to speak with a particular relative, friend, or neighbor. The evaluating mental health professional must assess whether speaking to someone outside the immediate family will be helpful or whether the interview will only add another person to the list of those for or against one of the parents. The clinician should consider the length of the report and the value of each collateral contact. More is not necessarily better. The clinician must not forget that he or she is a mental health professional and that it is the judge who is the trier of fact.

HOME VISITS

In addition to interviews held in the clinician’s office, it may be appropriate for the evaluator to make a home visit to observe the child and parent in more natural surroundings. Of course, such a visit is not “natural,” because everyone knows it is part of the custody evaluation. However, when an issue may be whether or not a particular home is appropriate for a child, a home visit may provide the evaluator with additional information, such as the child’s playing and sleeping arrangements, where and how meals are served, and how “child-proof” the home has been made.

PSYCHOLOGICAL TESTING

Sometimes the evaluating clinician may consider administering psychological tests as part of the custody evaluation. The parents or other litigating caretakers are most commonly tested and occasionally the child. When the psychological health of one or both parents is a legitimate issue in a custody dispute or when the clinician feels the need for additional psychological information about the parents, testing can be helpful. When parents or other caretakers disagree about the psychological status of a child, testing of the child might clarify the issue.

However, as stated in section I.C.8 of the *Practice Parameters for Child Custody Evaluation*, published by the American Academy of Child and Adolescent Psychiatry,¹¹ the introduction of such tests within a custody evaluation can lead to increased battling over the meaning of raw data but may have little use in the assessment of parenting. Well-known tests, such as the Minnesota Multiphasic Personality Inventory, the Rorschach (“inkblot”) test, the Thematic Apperception Test, and the various intelligence tests were not designed for use in parenting evaluations. The results of such tests may be helpful in validating an evaluator’s clinical hypotheses or may serve to heighten conflict between litigants.

Several tests have been promoted as being specifically useful in custody evaluations. These include the Bricklin Perception of Relationships Test¹² and the Ackerman-Schoendorf Scales for Parent Evaluation of Custody.¹³ Use of these tests is controversial at present and not universally accepted. They should be used cautiously, if at all. Indeed, no test should ever take the place of a comprehensive clinical evaluation by a trained mental health professional.

In general, mental health professionals performing child custody evaluations should do so only if they have been court appointed or agreed to by all sides. It is an egregious error for a clinician to be selected by one party, to perform a one-sided evaluation, or to offer an opinion based on interviews with only one of the parties. These and other professional standards and ethics will be discussed later (*see* “The ‘Hired Gun’”). The evaluation strategy, psychological testing, and collateral interviews are all important. However, the “heart” of the evaluation lies in the actual clinical interviews.

THE CLINICAL INTERVIEWS

The evaluation consists of two major sections: the clinical interviews and the written report. What follows is a suggested paradigm of a very complete and comprehensive child custody evaluation. Such an evaluation is conducted when local jurisdictions can provide qualified staffing and sufficient time or when the litigants seek the services of a

private practitioner. The complete evaluation—especially if done privately—can be quite expensive.

Other kinds of evaluations related to custody might be appropriate, depending upon the circumstances, and would be less extensive—and less expensive. For example, parents might undergo a limited evaluation for assessing the presence of a psychiatric disorder that could affect parenting. Or a child might be evaluated for diagnostic purposes when parents have different opinions about his or her emotional status. Various models exist for partial evaluations, which can also assist the court.¹⁴

In the clinical interviews during a comprehensive child custody evaluation, the clinician meets with each parent several times, interviews the child separately, and holds at least one joint interview in which the child and each parent are observed together. As noted earlier, home visits are sometimes helpful when there is an issue about a particular home, but they are not mandatory in each case.

The parents are seen for sessions of 45 minutes to an hour or more, usually several times. Sometimes both parents may be seen together at the start of the evaluation or at some other point. The joint session may help the psychiatrist assess the level of conflict and whether or not it is realistic to assume that the parents will cooperate in the parenting of their child.

The clinician will interview the child early in the course of the evaluation. Siblings are seen together at first so they can provide emotional support to one another. Usually, a child as young as 3 years of age can be seen alone. Even children this young understand that there is conflict going on around them and that the doctor is trying to help the family sort things out. Three-year-olds are able to appreciate that their parents are fighting over them, and they can understand the role of the judge. The evaluator should strive to develop a warm and comfortable relationship with the child by using age-appropriate means of communication. For young children, the medium is play. It is helpful to have drawing materials, blocks, and a dollhouse for the young child to explore.

In one poignant session, for example, a 6-year-old girl was drawn to the dollhouse and found some toy figures of children. She immediately placed the child figures inside the house, near a window, and then threw them out of the house, onto the pavement below. All the while she exclaimed to the psychiatrist, "All the children are being thrown out of the house! Look! They're all being kicked out!" The evaluator can explore such powerful themes with the child and convey the child's psychological state to the court.

In the session with the parent and the child, the evaluator usually allows the parent and younger child a session of unstructured play, during which the evaluator is more

of a passive observer. Older children and parents may engage in discussion as well as some play, and the evaluator may participate. Even though this joint session may seem artificial and forced and may also cause parents anxiety because they are being "watched," it can still provide much data to the clinician about how parent and child interact.

For example, in one joint session observed by the author, as a 9-year-old girl was drawing, her mother kept interrupting her, requesting that the child play with some paper figure the parent was constructing. The child repeatedly told her mother she wished to draw at that moment. Her mother, however, was insistent. The child, with an expression of sadness and resignation on her face, ultimately complied. Each time the child tried to return to her chosen activity, the parent forced her to attend to what the parent was creating. Such an interaction was notable, because it served as a microcosm for similar ways in which this particular parent repeatedly and insensitively imposed her will upon her daughter at other times.

ISSUES TO BE ASSESSED

As illustrated above, in speaking with and observing the parents and the child, the evaluator assesses a number of important issues that can have direct bearing upon his or her ultimate recommendations to the court. These issues can include the continuity and quality of the attachments between parent and child; a child's parental preference, if offered; whether or not a child and parent have become alienated from each other; any special needs the child may have and whether the parent displays appropriate sensitivity to them; educational planning; gender issues, when relevant; relationships with siblings; the physical and psychiatric health of the parents and the child; the parents' work schedules, finances, styles of parenting and discipline, and styles of conflict resolution; social support systems in place; pertinent cultural or ethnic issues; and religion.

There may also be issues unique to a particular family that will be assessed as part of the comprehensive child custody evaluation. Following are common issues that can complicate such cases: a parent with a psychiatric disorder, including substance abuse; a homosexual parent; a grandparent seeking custody and litigating against a parent; move-away (sometimes called "relocation") cases, allegations of sexual abuse; allegations of or proven domestic violence, and complex issues brought forth by advances in reproductive technology.¹⁵

In all of these categories, the particular issue is assessed in terms of the parent-child relationship. For example, a parent with a diagnosis of bipolar disorder is not automatically deemed unfit to have custody. The evaluator

assesses the nature of the illness in the particular parent, how that parent handles it and cares for him- or herself, and whether or not there has been or is likely to be any direct impact upon the child.

The same holds for a parent's medical or physical health. California case law, for example, treats a parent's medical condition as a factor—but not the determinant factor—when addressing the best interest of the child. A parent with a serious medical illness or physical handicap is assessed with regard to the issues of the overall parent-child relationship, attachment, and general ability to care for the child.¹⁶

Similarly, under California case law, the financial situation of a parent is not a permissible basis for making a custody decision. If a custodial parent does not have adequate financial resources to care for the child, custody cannot be changed based on that factor. Instead, the custodial parent might seek to increase child support.¹⁷

In California, New York, and a number of other states, a parent's sexual identity cannot in and of itself be the basis for a custodial decision. It may be considered as one of a number of factors that may affect the child-parent relationship or the home environment. In other states, however, homosexuality alone has been the basis for denying custody, overnight visitation (when the homosexual parent's partner is present), and even becoming a foster or an adoptive parent.

In a number of states, including California and New York, the presence of domestic violence in a family has direct bearing upon a custody determination. This is because it has been well recognized by social scientists and lawmakers alike that exposure of a child to domestic violence—even when the child is not directly abused himself—is detrimental to a child's well-being and emotional development.

In California, rule 1257.7 of the California Rules of Court addresses domestic violence training standards for court-appointed child custody investigators and evaluators. As of January 1, 1998, no one can be court appointed as a child custody evaluator unless he or she has completed domestic violence training. The rule specifically calls for the evaluator to complete the basic training in domestic violence described in California Family Code section 1816 (which should cover the effects of domestic violence on children, social and family dynamics of domestic violence, and techniques for identifying and assisting families affected by domestic violence), plus 16 hours of advanced training. The advanced training must be completed within one year and is to be followed by annual update training. The training is quite comprehensive and includes classroom instruction on all aspects of domestic violence and its impact on child-parent relationships and parenting, including the role of drug and alcohol use and

abuse in domestic violence and their effects on custody determinations.¹⁸

The issue of a parent wishing to move away following the divorce, taking the children with him or her, is becoming more common across the country. This additional complicating factor is a natural outgrowth of the confluence of two demographic phenomena: our mobile society and its high divorce rate. These cases can be agonizing—especially for the families contemplating relocation—but also for clinicians assessing family members and judges having to render decisions.

In *Tropea v. Tropea*, an important and far-reaching decision on two consolidated appeals, New York State's highest court, the Court of Appeals, addressed this issue. For the majority, Justice Titone wrote: "Relocation cases such as the two before us present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both parents."¹⁹

In *Tropea*, the court abandoned the previously used three-tiered approach to this problem: first, a court examined whether a move would deprive the noncustodial parent of regular and meaningful access to the child; if not, no further analysis was necessary. If answered in the affirmative, courts then presumed the move to be not in the best interest of the child, and the parent wishing to move would have to demonstrate "exceptional circumstance" as justification. With that hurdle passed, courts went on to consider the child's best interest.

In the *Tropea* decision the New York State Court of Appeals adopted a best-interest view of the entire matter: "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child."²⁰

Now, as a result of *Tropea*, in New York State—and most likely in a number of other states as well—the mental health professional again plays an important role in assessing family factors that go to the ultimate question. The clinician must look at a number of factors, including how a child would cope with the loss of more frequent and regular contact with the parent not recommended to have custody, the psychological impact of severing ties with a known community and establishing new ones elsewhere, which parent would better facilitate appropriate contact between the child and the parent not awarded

custody, how the moving parent would help in the child's psychological adjustment (if the child moves with that parent), and the motivation for the move-away plan. Yet even with the most careful analysis by the mental health professional, any conclusions will still be educated guesses about what the future will hold for the child and the family.

In approaching these issues, the mental health professional always returns to the fundamental issue of *parenting*—and in the context of the best interest of the child. The evaluator records and interprets the parents' characteristics in the context of the custody dispute. Child psychiatrists, especially, rely upon their particular skills in diagnosis, recognizing, and understanding the dynamics of family interaction and child development as they conduct these interviews. They assess a parent's concept of the best interest of the child and particularly how a parent does or does not wish to include the other parent in the life of the child. Finally, as he or she gets ready to prepare the report, the evaluator focuses on the level of attachment between each parent and the child and each parent's overall sensitivity to the needs of the child.

THE REPORT

The written report is the culmination of the evaluation. It represents the sum and substance of everything the evaluator has done. It becomes a document frequently introduced at trial; it is a reflection of the quality of the work; and, sometimes, it can even serve as the basis for a settlement. The report requires a great deal of thought, care, and sensitivity on the part of the evaluator, for it is a permanent record and can have tremendous impact upon the case.²¹

The report should be written clearly and without undefined psychiatric jargon. It should be long enough to be comprehensive but short enough to maintain the judge's interest. The report begins with the questions it will address, includes a list of the people interviewed in person and by telephone, the amount of time spent on each interview, and a list of all documents reviewed in conjunction with the evaluation (such as legal papers, diaries, notes, faxes, or e-mails provided by litigants). The report should also contain summaries of the interviews. Direct quotations are exceedingly helpful in conveying the tenor of the interviews. In a final section, perhaps titled "Conclusions and Recommendations," the evaluator provides his or her formulation of the case along with specific suggestions about custody, visitation, and any other recommendations.²²

The written report ought to be free of inflammatory language that may reflect the expert's bias or value judgments. Psychiatric diagnoses are not necessary because this is an evaluation of *parenting*, not a standard psychiatric

report. Finally, the report should be written with the expectation that at some point a parent might read it. The standards of practice regarding distribution of the report vary from state to state. Not all judges permit parents to have their own copies of the report. In California, however, Family Code section 3111 requires that the report "be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys."²³ In the written report, the evaluator has the opportunity to provide feedback to a parent that can be helpful as the family moves on after the litigation.

COMMON PITFALLS

While this overview of the custody evaluation may suggest that the process is relatively straightforward, all too often court-appointed experts make serious errors that can neutralize the evaluation's impact. Occasionally the errors are so severe that the judge may order an entirely new forensic evaluation, thus putting the family through the stressful, emotional (and expensive) process all over again. Errors can occur at any point: at the time the expert accepts a case, during the course of the evaluation, and in the writing of the report. Unfortunately, the expert operates without any ongoing oversight, so that the full impact of an error may not be appreciated until much later. If courts, attorneys, and clinicians develop an awareness of common pitfalls in this process, families could be better protected and courts better served.

THE "TWO HATS" SYNDROME

One of the most common and dangerous errors made by psychiatrists and other mental health experts performing custody evaluations is to act in both a forensic and a therapeutic capacity. The usual pattern is for a child to be in psychotherapy and for the family to subsequently become involved in a custody dispute. This problem can also arise when a child is being treated in an in-patient psychiatric unit, Child Protective Services is involved in placement planning (and disputing placement with a family member wishing to take care of the child), and the treating psychiatrist is asked for an opinion about where the child should live. A related problem occurs when the court asks the treating therapist to make recommendations regarding the circumstances under which visitation should occur: How often? Should there be supervision? If so, for how long should it continue?

The "two hats" syndrome is illustrated by the following scenario. A therapist was treating a 7-year-old girl whose mother made certain allegations of sexual abuse against the father, with whom she was involved in a divorce action. The mother repeatedly told the therapist about

strange and sexually explicit statements that the little girl allegedly made. The therapist was contacted by the mother's attorneys, who asked her to prepare an affidavit supporting restricted and supervised visitation for the father. The therapist prepared the affidavit and even agreed to testify in a court hearing. At the hearing she recommended that she be the "gatekeeper" of the father's visitation and be allowed to determine when and under what circumstances it would occur. At the same court hearing, however, she testified that she was not an expert on evaluating allegations of sexual abuse, had never performed such an evaluation in this case, and, in fact, had never discussed the allegations with the father—only with the mother and with her attorneys.

The judge, mindful of her need to protect the child and unsure of what really did transpire, agreed that the therapist should serve in that capacity. The result was that the father was now alienated from the therapist and his daughter's treatment. His alliance with the psychiatrist had been permanently damaged. The child was quite upset when she learned the doctor had gone to court to talk about her. And the confidentiality and her special relationship she had with her doctor had been violated.

The forensic and therapeutic roles serve very different purposes and are fundamentally incompatible.²⁴ Treating therapists serve to protect their patients' interests and to avoid causing them harm. An important aspect of therapy is that confidentiality is protected except in very specific and limited circumstances. This holds even for children, except in cases of emergencies where a child's health or safety may be in jeopardy. The forensic therapist, in contrast, works within a justice system seeking truth. The traditional doctor-patient relationship does not exist in this sphere. The patient is warned at the beginning of the forensic evaluation that confidentiality will not be protected. Therefore, combining the two roles damages the therapeutic alliance and reduces the credibility of the forensic evaluation.²⁵

In child placement conflicts, the therapist providing forensic "guidance" to the court damages her special relationship with the child and the parents. In addition, her objectivity and ability to gather evidence become seriously compromised. The result is a failed therapy and a substandard forensic investigation.

Practice parameters for child custody evaluation developed by the American Academy of Child and Adolescent Psychiatry specifically warn evaluators against falling into the "two hats" syndrome in a section entitled "The Role of the Evaluator."²⁶ Psychologists have also been cautioned against acting as therapist and as forensic evaluator in section II-7 of the *Guidelines for Child Custody Evaluations in Divorce Proceedings*.²⁷

THE "HIRED GUN"

Although experts agree that mental health professionals performing child custody evaluations ought to be court appointed, there are those who still offer opinions via one-sided evaluations. Some hardly do evaluations at all but instead rely upon information supplied by attorneys for one side.

For example, a mother in a custody case opposed the father's request for overnight visitation with their 3-year-old son and hired her own child psychiatrist. This doctor never saw the child or the father but still submitted an affidavit in opposition to the overnight visitation.

Sometimes, one side is not satisfied with a court-appointed expert's forensic report and decides to find a psychiatrist or other mental health professional who can take a position more favorable to him or her. Some psychiatrists then agree to interview one parent and the child, separately and together, and then issue a report lauding this parent-child relationship. Courts should give little credence to such one-sided and clearly partial evaluations. Although in many jurisdictions a judge cannot prevent such evaluations, they should be severely condemned. A child is put through another series of interviews in a process that takes advantage of the parent's anxiety about a prior unfavorable evaluation.

One-sided evaluations—particularly those that go to the ultimate question of custody without including all of the parties—do a disservice to all: the court, the profession, and especially the family. Forensic psychologists as well as child and adolescent psychiatrists performing child custody evaluations have in their practice guidelines and parameters cautions against one-sided evaluations.²⁸

BIASED EVALUATORS

Sometimes, a forensic report in a custody dispute clearly indicates that despite his or her professional training and experience the clinician has demonstrated bias in conducting the evaluation. Bias and personal value and moral judgments have no place in a forensic evaluation. They color the process and complicate matters for the court.²⁹

For example, in one report, the court-appointed expert made it known that she did not look favorably upon the father because he was in show business. The report included a number of references to the person coming home late at night (after performing in a play) and associating with various eccentric characters. These factors, the psychiatrist felt, were detrimental to the child's growth and development. Another court-appointed expert wrote in his report that a father's apartment was beautifully decorated with lovely artwork and that the bookshelves were well stacked with outstanding volumes. The mother's

apartment was described as being cluttered with too much furniture and with few artworks on display.

Sometimes the expert's point of view is more subtle, as when the psychiatrist describes one parent as "rigid" or "stubborn" and the other parent as "someone who perseveres" or has "the courage of her convictions." Some psychiatrists deem a parent unfit based solely on a psychiatric diagnosis or sexual identity instead of putting that diagnosis or sexual identity in its proper context as it relates to parenting. One psychiatrist offered his biased point of view during a forensic consultation with a father who wanted restricted visitation for his child because the child's mother was a lesbian. The child psychiatrist told the mother that if she wanted to "live on the fringes of society," that was her choice, but she had no business involving the child.

Bias is a long-recognized problem and has no place in these evaluations. It serves only to cast doubt upon the competence of the evaluator and detracts from the value of the entire process. Psychiatrists learn in their training to monitor their own emotional reactions to patients in order to free themselves to perform their work fairly and effectively. Forensic psychiatrists, who may hold tremendous power by virtue of their findings, must be especially mindful of their own biases. Section II-6 of the American Psychological Association's published child custody guidelines³⁰ calls for clinicians to strive to overcome their possible biases. Therefore, the court, when reading forensic reports, must be vigilant as to possible bias.

MISUSE OF DATA

A common error made by some forensic evaluators is to misuse or fail to use data that are gathered during the course of the process. For example, a frequent mistake is to confuse one's role as the expert with that of the trier of fact, deciding which party is telling the truth. In one report, the psychiatrist spent many pages reviewing an argument over finances, finally offering his own conclusions about whether or not the husband was in fact hiding assets as well as whether or not he did assault his wife.

Sometimes mental health professionals assume that because they are behavioral experts, they need not supply supporting information, only an opinion. For example, one evaluator concluded a particular parent was clearly the child's "psychological parent." Yet there were no supporting statements to defend this conclusion and not even a definition of "psychological parent." It was as if the expert were saying, "This is so because I am a doctor and say it is so."

A related, all-too-common error is that the expert draws certain conclusions at the end of the report, but the conclusions do not appear to follow from the data presented.

In one report, a psychologist repeatedly criticized a father, finding numerous faults in his parenting abilities and his overall character while describing the mother in glowing terms. At the end of the report, however, the expert recommended that the father have custody. There was no explanation for this seeming turnabout. The expert only succeeded in alienating both sides and the court. The result was that the judge threw out the entire report and ordered a new evaluation by another expert.

Psychologists are cautioned about the proper use of collected data in sections III-11 and III-12 of the *Guidelines for Child Custody Evaluations in Divorce Proceedings*.³¹ Child and adolescent psychiatrists receive similar guidance in their practice parameters in section II-N.³²

The person reading the report should be aware of a flow in the data leading to a comprehensive and understandable formulation at the end. The conclusions and recommendations should follow logically, as in a geometric proof. They should not take the reader by surprise. The court should easily follow the expert's reasoning and should clearly understand how the evaluator reached his or her conclusions.

MISUSING THE LITERATURE

Nowhere are opinions more passionate or more unsupported by hard science than in child custody evaluations. Articles published in peer-reviewed journals can be invoked to support almost any reasonable position the expert takes. Should a 2-year-old child be allowed overnight visitation? Can a breast-fed infant be away from her mother? Is joint custody a viable option? Should the children be allowed to remain in the marital home, with the parents moving in and out? Is a midweek overnight too disruptive to school-age children? Which parenting arrangement predicts the children's future well-being?

Sometimes experts will cite certain articles in the professional literature to bolster their particular point of view. There is disagreement, for example, regarding whether infants and toddlers should be permitted overnight visitation with a separated parent. A mental health professional may have a bias in favor or against, and it can appear more "scientific" to quote published research in support of one's stance. It is important to note that clinical research on this subject is fraught with problems, including choice of population studied, adequate numbers, and the ever-present dilemma of confounding variables. In other words, when investigators look at families going through custody disputes and gather follow-up data, there may be any number of intervening factors that complicate research conclusions. And, while a particular set of conclusions might apply to the population studied, it may not fit all families.

Because such studies may be unique to the population studied and may not have universal relevance, courts are obliged to recognize their limitations. While all concerned would like convincing “hard data,” the expectation that that is a practical possibility—at least for the time being—is unrealistic. Every family is different. The temperaments of all children—even those of the same age—are different. It follows that the “best interest” of those children may vary.

The scholarly literature may be helpful in explicating certain truths regarding child development, so that, for example, the court can understand the concepts of separation anxiety, attachment, or the impact of the loss of a parent upon a child of a specific age. However, the fact remains that the best mental health guidance for the court comes not from literature but from a careful and comprehensive clinical assessment of the particular family involved.

THE “SPOTLIGHT” SYNDROME

Another common error made by forensic experts might be called the “spotlight” syndrome. Here, the evaluating psychiatrist confuses “good enough” with “perfect” and attempts to identify which parent comes closest to some perceived ideal. Much is made of certain character flaws or quirks, and the expert makes it clear that the court should note these flaws. A parent is criticized for spanking a child after losing his temper. An expert raises objections because a mother goes to an astrologer. A father is held under the glare of the spotlight because he had been married twice before and is, therefore, setting a bad example for his children.

Much of what the expert may criticize during a custody evaluation can be found in all families. These quirks, failings, deviations, or eccentricities are part of the imperfections of all people and are woven into the fabric of every family. No mother or father is perfect. All have made mistakes; all have regrets. Most have idiosyncracies that would otherwise go unnoticed or unrecorded. The forensic evaluator needs to remember that “best interest” is not necessarily perfect or ideal. All mental health professionals evaluating custody disputes need to remember that they are investigating and assessing human beings.

USE OF CONTROVERSIAL TERMS

Occasionally the forensic expert will attempt to add legitimacy to his or her conclusions through the use of certain nonscientific and controversial terms. Examples include the “parental alienation syndrome” and the “sex abuse accommodation syndrome.” Such terms, much debated in clinical circles and the professional literature, are frequently used in a conclusory manner, implying the pres-

ence of certain factors that would otherwise be left to the trier of fact.

For example, “parental alienation syndrome,” coined by a child psychiatrist, has been used frequently in child custody reports as an explanation for the observed phenomenon of a child adamantly opposed to living with or visiting a parent. The term, although not accepted as a distinct and scientific syndrome by organized psychiatry, nevertheless is used to describe such estrangement between parent and child.³³ The use of the term often implies that the expert has direct knowledge of the cause of the so-called alienation when, in fact, he or she does not. Any conclusions about the causes of such estrangement between parent and child, when relevant to final disposition, should be made only by the trier of fact. The psychiatrist might be able to offer hypotheses, but that is all. Again, it must be remembered that every family is unique and that it may have its own particular reasons for the estrangement.

The “sexual abuse accommodation syndrome” has been offered as a description of psychological reactions in those sexually abused.³⁴ In particular, it has been invoked as a way of explaining delayed reporting of sexual abuse or subsequent recantation. The danger in using this term—especially in a custody dispute, where all too commonly allegations of sexual abuse may arise—is that it too may contain within it certain conclusory judgments based upon facts that the evaluator cannot directly know. There may be unique explanations for the behavior of a child in circumstances in which such allegations may arise. Moreover, the use of the term “syndrome” has varying acceptability in the scientific community. In custody reports the expert must be careful to choose his or her words carefully and to make responsible distinctions between scientific labels and terms of art.

GUARDING AGAINST PITFALLS

Mental health professionals performing child custody evaluations must be ever-vigilant to guard against these pitfalls so that they can assist the court in the best possible way. So it may surprise courts to know that mental health professionals may not have received any formal training in performing child custody evaluations. Even today, when forensic psychiatry has been officially recognized as a distinct subspecialty of psychiatry, with its own board-certifying examination and training requirements, most graduates of psychiatric training programs have had very little exposure to forensic psychiatry. Since most child and adult psychiatrists who are appointed by the court to perform custody evaluations will not have had formal training, where and how do they learn?

PUBLISHED STANDARDS

Various professional societies have published standards and guidelines for performing child custody evaluations. Both courts and clinicians ought to be familiar with these guidelines because they represent the official views of the various organizations. Along with what has been written in the scholarly literature, the guidelines serve as detailed road maps for clinicians. They are probably best known to matrimonial attorneys, who may consult them to mark whether or not a court-appointed expert is "guilty" of serious deviations.

Guidelines have been published by the American Psychiatric Association,³⁵ American Psychological Association,³⁶ American Association of Family and Conciliation Courts,³⁷ and American Academy of Child and Adolescent Psychiatry.³⁸ These guidelines offer similar recommendations but also take into account individual and stylistic differences among clinicians. Any clinician performing these evaluations ought to be familiar with the published standards and guidelines of his or her own professional discipline.

SPECIALIZED TRAINING

Forensic psychiatry fellowships are usually a year in length and are generally taken at the end of general and child psychiatry residencies. The amount of exposure to training in child custody evaluation varies with the forensic fellowship. In general, most forensic psychiatry fellowships focus on adult matters. There are several national forensic psychiatry professional associations, notably the American Academy of Psychiatry and the Law. The American Psychological Association has a special section devoted to forensic psychology. These professional associations, at their annual conferences and throughout the year, sponsor numerous workshops, courses, panels, and symposia on various aspects of child custody.

Clinicians who perform evaluations in family law ought to avail themselves of these courses and programs on a regular basis. In doing so they can learn about new developments in the field and recent important legal decisions. In addition, they can compare notes with their peers and hone their clinical skills. Courts should take note of the availability of this continuing education and should ask their experts whether they attend such courses.

IMPROVING STANDARDS FOR COURT APPOINTMENTS

If a major requirement for performing child custody evaluations is that the mental health professional is court appointed, it follows that judges should appoint the most qualified clinicians within their jurisdictions. But all too

often this is simply not the case. Instead, judges or their law secretaries may appoint "favorites" of the court without regard to their qualifications or the true quality of their work. For example, in one court, an adult psychiatrist frequently appointed by a judge turned in a child custody report of under four pages. The report indicated that each parent was seen only once, for a brief time, and the children were virtually ignored. Nevertheless, the court accepted the report.

Judges determined to set and maintain high standards for mental health professionals doing these important evaluations should familiarize themselves with the standards of the professions and carefully peruse each clinician's résumé. This kind of closer scrutiny is coming, slowly but surely, as courts catch on to the fact that more clinicians are holding themselves out as child custody "experts" because they are looking for ways to earn more money in a clinical endeavor safe from managed care. In New York State, for example, under the guidance and at the request of the Chief Justice of the Court of Appeals, judges, lawyers, and clinicians are collaborating to raise standards for the selection of experts across the state and to institute uniform standards in every county. In a short time, those psychiatrists, psychologists, and clinical social workers wishing to be appointed in custody and visitation cases may have to submit appropriate documentation to be "certified" as a potential court-appointed expert. Bringing uniformity and increased standards to this area can only be good for the families going through this complex, extended, and emotionally draining process.

PEER REVIEW

As the courts become more conscious of the need for high standards in this field, clinicians themselves can help one another gain in skill and knowledge. Mental health professionals new to this work can seek guidance from more-experienced mentors. This can be done on an individual basis or in a more organized fashion. Attending meetings that cross disciplines can be a helpful way of improving and maintaining one's clinical skills. Also, organizations such as the Interdisciplinary Forum on Mental Health and Family Law/New York State provide numerous opportunities for mental health professionals, lawyers, and judges to meet with and learn from one another.

Sometimes the adversarial system provides its own peer review, as when an outside expert testifies about the quality of the report and evaluation conducted by the court's expert. When a substandard report is submitted to the court, there may be a legitimate place for such a critique.³⁹ The peer-reviewing expert, hired by one side in this case, should confine his or her criticisms only to the court

expert's report and should not interview any of the parties. The critique should be limited to the manner in which the evaluation was conducted and the report written. The peer-reviewing expert of course cannot render any opinion at all on ultimate questions of custody and visitation. What he or she can do is testify whether the report actually reflects a competent evaluation and is in keeping with established standards.

Judges may rightfully have a high index of suspicion when a peer reviewer is brought in by one side—obviously the party who has suffered disappointment in the findings of the court-appointed expert. Nevertheless, the court-appointed evaluator may indeed have submitted a substandard report. This should be brought to the attention of the judge, who can then decide how much weight to give the original report. The peer reviewer, of course, should have impeccable credentials in order to be given credibility by the court.

STANDARDS OF CARE

Standards of care and peer review are accepted mechanisms for quality control when clinicians take care of patients. They also have their place in forensic evaluations. Nowhere is this more important than in child custody disputes, where the future of families is at stake. Courts need to appoint the most competent evaluators, and those experts must be aware of acceptable standards of care. By doing so, they can truly protect the best interest of children.

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When Police Question Children

Are Protections Adequate?

When 11-year-old Ryan Harris's body was found on a summer day in 1998, the demand for swift police action resonated throughout the country. Fourteen days later Chicago police announced that two boys, ages 7 and 8, had been charged following their confessions to the heinous crime. Chicago Police Sergeant Stanley Zaborac said, in a statement that would later seem prophetic, that the confessions contained information "that would only be known to the detectives or perpetrators."¹ Within a month new evidence revealed that the boys could not have committed the crime to which they had "confessed."

Although the boys were younger than the typical child defendant, this well-publicized case highlights the problematic use of police interrogation procedures with children. Incriminating statements were extracted from these innocent children through the use of routine police procedures designed to elicit confessions from adults. Unfortunately, the Chicago case is not an isolated incident. In 1996, 11-year-old Lachesha Murray was sentenced to 25 years' incarceration for injuring another child. This conviction, based in part on a "confession" elicited by experienced homicide detectives during a lengthy interrogation while Lachesha was separated from her parents, was reversed in 1999.²

Procedures that encourage innocent children to confess undermine the integrity of the juvenile justice system. While it has been recognized that children are not competent to make most legal decisions for themselves,³ there has been less acknowledgment of this limitation during the critical investigatory stages of a criminal case. Although the arrest rate for violent juvenile crime has decreased by 23 percent since 1994, public hysteria, fueled by media images of young "super-predators," has resulted in harsher penalties, longer sentences, and adult prison terms for juvenile offenders.⁴ Currently, every state allows juveniles to be tried as adults in certain circumstances. Since 1992, 40 states have significantly increased the list of offenses now considered serious enough to be tried as an adult and/or lowered the age for which juveniles may be tried in adult criminal court. For example, Texas statutes allow children as young as 10 to be subject to adult penalties.⁵ The changing emphasis of the juvenile court from rehabilitation to punishment increases the stakes for today's children.

Psychological research on children's memory, suggestibility, and understanding of *Miranda* leads the authors to believe that children, especially those 12 and younger, are particularly susceptible to police interrogation procedures designed to elicit confessions from adults. Young children more easily succumb to suggestion, trickery, and coercion, resulting in false, self-incriminating statements. Such techniques may even alter children's recollections, depriving fact-finders of an unadulterated narrative of the events under investigation. Given the increasingly punitive sanctions applied to younger children throughout this country, we can no longer afford to ignore the impact of even well-intentioned interrogation procedures designed for adults but used with children suspected of committing serious crimes.

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The highly publicized Chicago case of Ryan Harris highlights the problematic use of police interrogation techniques with children, especially in high-stakes cases. Although the defendants in this case were younger than the typical child defendant, the case is not unusual in that children were interviewed by police who employed interrogation tactics designed to elicit confessions from adults.

In the case of *In re Gault* (1967) the U.S. Supreme Court warned that special care was required when police interrogate children. Likewise, psychological research on children's memory and suggestibility leads us to believe that children may be particularly susceptible to the tactics used in police interrogations. Procedures that encourage innocent children to confess or that mask accurate recall of critical facts undermine the integrity of the juvenile justice system. The extensive research on children's memory and suggestibility has recently been applied to the development of standards for interviewing alleged child victims in an attempt to elicit complete and accurate narrative reports. The authors explore the potential applicability of these interview techniques for developing a more appropriate methodology for police questioning of child suspects.

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This article examines current protections afforded young children confronted with police interrogation procedures. *Miranda*, the “totality-of-the-circumstances” test, and the “interested-adult” rules are examined and found wanting. Because of the vulnerability of children, the authors argue that children should be provided with greater protection and police with enhanced training. The article describes recent developments in interview techniques that have been designed to elicit complete and accurate narrative reports from child victims and discusses the applicability of these techniques to police interrogation of juvenile suspects.

MIRANDA'S IMPACT ON INTERROGATION AND CONFESSIONS

Prior to *Brown v. Mississippi* in 1936,⁶ courts rarely scrutinized police procedures for extracting confessions. Although courts expressed concern that “involuntary” confessions were unreliable as evidence of guilt, courts rarely looked beyond the confession to the methods used to elicit the incriminating statement.⁷ In *Brown v. Mississippi*, the first of the “due process” confession cases, the Court could no longer ignore the egregious police practice of beating suspects to extract confessions. The exclusion of these confessions as violations of the suspects’ due process rights put police on notice that the use of force or the threat of force would no longer be tolerated as part of police interrogation procedures.⁸ Nevertheless, suspects were still held incommunicado, subjected to endless hours of interrogation, and denied food or sleep. As cases challenging these procedures made their way through the judicial system, courts began to focus on the coercive police practices rather than the reliability of the statements as the basis for excluding confessions.⁹ As Justice Frankfurter stated in 1952, “Coerced confessions offend the community’s sense of fair play and decency.”¹⁰

In 1966, the Supreme Court, frustrated with attempts to assess the circumstances of the interrogation and the characteristics of the accused when determining whether a confession was voluntary, established procedural safeguards to protect the rights of suspects during custodial interrogations.¹¹ In *Miranda v. Arizona*, the Court prescribed a system of warnings to “assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.”¹² The Court held that a person in custody, about to be subjected to police interrogation, must be informed of his right to remain silent:

[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmos-

phere. . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. The circumstances surrounding the in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. . . . [I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.¹³

The *Miranda* warnings represented an attempt to exert control over law enforcement practices and to deter police from disregarding the rights of the individual.¹⁴ The Court stressed that “in-custody interrogation is *psychologically* rather than physically oriented” (italics added) and quoted from police training manuals that described interrogation tactics “designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty.”¹⁵

Miranda prescribed limitations on custodial interrogations as well as provided courts with guidelines for admitting statements obtained during them.¹⁶ Despite concern from law enforcement that *Miranda* warnings would undermine police effectiveness, empirical studies show no decrease in the rate of confessions in the post-*Miranda* era.¹⁷ Police routinely read the warnings to suspects, and the mere formulaic recitation satisfied many courts.

In the post-*Miranda* era, the art of interrogation has become increasingly more sophisticated. Inbau, in his widely used police interrogation training manual now in its third edition, details psychological tactics and techniques for eliciting incriminating statements.¹⁸ For example, the manual describes “minimization” techniques that make light of the situation in order to reduce the suspect’s fears and anxieties and prompt conversation with the interrogators.¹⁹ Alternative techniques that emphasize punishment are designed to raise the suspect’s anxiety level and reduce the likelihood that the suspect will remain silent.²⁰ If interrogators are still not successful at eliciting a statement, they are taught to recast the scenario, sympathizing with the suspect and condemning the victim, placing blame on someone other than the suspect or seeking an admission to a noncriminal act.²¹ If the suspect is a juvenile, Inbau urges the interrogator to spend time with the parents prior to the interview to gain their support and cooperation. The interrogator should explain to parents that “his only interest in talking to the youth is to ascertain the truth” and should emphasize that “no one

blames the parents or views them as negligent in the upbringing of their child, all children at one time or another have done things that disappoint their parents, and everyone (the interrogator as well as the parent) has done things as a youth that should not have been done."²² Once the parent has been co-opted, the "principles . . . discussed with respect to adult suspects are just as applicable to the young ones."²³

When *Miranda* warnings are given, a custodial interrogation proceeds only if the suspect waives his or her constitutional rights.²⁴ For a waiver to be valid, it must be demonstrated that the waiver was made "voluntarily," "knowingly," and "intelligently."²⁵ As the Supreme Court stated in *Moran v. Burbine*, the State must prove, that under the "totality of the circumstances surrounding the interrogation," a waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception" and that the waiver was made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."²⁶

However, defining a knowing, intelligent waiver when the suspect is a child has not been easy for the courts. Despite research evidence indicating that many children do not fully understand the implications of the *Miranda* warnings,²⁷ courts rarely question a child's comprehension of the nature of the rights he or she is abandoning when signing the waiver.

EVOLUTION OF A CHILD'S RIGHT AGAINST SELF-INCRIMINATION

Juvenile confessions have long been a problematic issue for the courts. After the creation of the juvenile courts, police and judges routinely admonished children to "admit" their wrongdoing as a critical step toward their rehabilitation. Under the guise of "treatment," these confessions often became the basis for extensive periods of confinement for relatively minor offenses. By 1967, when 15-year-old Gerald Gault faced the loss of liberty until age 21 for making a "lewd" phone call (a crime that would have resulted in a \$50 fine or two months' imprisonment for an adult facing the same charge), the Supreme Court recognized that the rhetoric of the juvenile court differed significantly from the reality.²⁸ The court noted: "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."²⁹

In 1967, the Supreme Court held that juveniles were entitled to elementary due process protections routinely afforded adults under the Fourteenth Amendment, including the right to counsel, advance notice of the charges, an opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination.³⁰

The Court recognized that the privilege against self-incrimination was critical for children subjected to police interrogation procedures:

One of its purposes was to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction. It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.³¹

In assessing the voluntariness of a confession, the court scrutinizes the "totality of the circumstances" surrounding the interrogation to ensure that the decision to confess "was the product of a free and deliberate choice rather than intimidation, coercion or deception."³² In 1948, in *Haley v. Ohio*, the Court reasoned that the age of the suspect was a critical factor that must be taken into account.³³ In *Haley*, police questioned a 15-year-old "lad" in relays starting at midnight, denied him access to counsel, and confronted him with confessions by co-defendants until he confessed early the next morning.³⁴ The Supreme Court reversed the conviction, holding that a confession obtained under these circumstances was involuntary, and cautioned trial judges to be particularly sensitive to the vulnerability of juveniles pitted against experienced police interrogators:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.³⁵

In 1962 in *Gallegos v. Colorado*,³⁶ the Court reiterated that the age of the accused constituted a special circumstance that affected the voluntariness of confessions and reemphasized the vulnerability of youth.

But a 14-year-old boy, no matter how sophisticated . . . is not equal to the police in knowledge and understanding . . . and is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.³⁷

In *Gault*, the Court admonished that “the greatest care must be taken to assure that the [minor’s] admission [is] voluntary.”³⁸ Although *Miranda* never mentions juveniles, the Court’s decision to extend the privilege against self-incrimination to juveniles in *Gault* prompted courts and legislators to develop juvenile waiver tests. Some states opted for the totality-of-the-circumstances analysis as articulated in *Haley* and *Gallegos*.³⁹ These states considered a variety of factors but gave special consideration to the child’s age, education, intelligence, and experience when evaluating the validity of the waiver of his or her constitutional rights. Other states sought a more objective standard, invalidating juvenile waivers if they were given without an attorney, a parent, or an interested adult present.⁴⁰

The underlying rationale of the interested-adult rule is that the immaturity of juveniles significantly affects both their ability to fully understand their rights and their susceptibility to the compelling atmosphere of police interrogation. Theoretically, an interested adult protects the child from police coercion, understands the protections afforded in the *Miranda* warnings, and understands the consequences of waiving those rights. Although the absence of an interested adult may invalidate a waiver, the presence of an interested adult does not necessarily guarantee the validity of the waiver. For instance, it has been anecdotally observed that parents often push their children to “talk” to authorities and to “tell the truth.” These parents are operating from a moral standpoint that it is best to tell the truth and often are unaware of the legal consequences when their children provide statements to police. As such, they function to aid the interrogation rather than acting as adults protecting their children’s rights.

Research by Grisso and Ring⁴¹ has supported the anecdotal observation that parents may not protect a juvenile during police encounters. Surveyed parents reported a belief that their role was to pressure their children to cooperate with police. These parents appeared to be motivated by a stance that emphasized respect for authority and acceptance of responsibility for wrongdoing. Furthermore, in the almost 400 juvenile interrogations examined, 70 to 80 percent of parents offered no advice to their children, and when parental advice was given, parents were far more likely to advise their children to waive their rights than to assert them.

This situation was highlighted in a Chicago murder case that has recently reentered the spotlight following the questions raised by the Ryan Harris case. In this case the mother of an 11-year-old boy agreed to let police question her son. The boy allegedly confessed to the crime and was convicted despite questionable interrogation techniques, contradictory statements, and a startling lack of physical

evidence. Regarding her decision to allow police to question her son, the mother was recently quoted by reporters as stating, “I’m trusting the police. I never dreamed this would happen. It was the biggest mistake I will ever make.”⁴²

Courts have faced several issues in defining an “interested adult.” Can a grandparent or an older sibling be an interested adult? What if the parent is the person who initiated the charge? What if the “interested adult’s” capacities have been seriously diminished by alcohol or drugs?⁴³ In 1979, the Supreme Court in *Fare v. Michael C.* held that a probation officer is not an “interested adult” and therefore the juvenile’s request to consult with the probation officer did not constitute an invocation of his Fifth Amendment rights.⁴⁴ Significantly, the Court also retreated from its previous solicitous position regarding juveniles in *Haley* and *Gallegos* and held that the adult standard for the totality-of-the-circumstances test was sufficient to assess the validity of a juvenile’s waiver of his or her legal rights.⁴⁵ The Court rejected the premise that psychological or developmental differences between adults and juveniles warranted special procedural protections.⁴⁶ Under this approach, no single factor such as age or immaturity is controlling; rather, the courts look to all the circumstances surrounding the elicitation of the confession. Currently, the majority of states adhere to some variation of the totality-of-the-circumstances test outlined in *Fare*.

Even when states have a per se exclusionary rule invalidating a child’s waiver in the absence of an interested adult, the waiver is required only in the context of a custodial interview. In the authors’ experience, police officers frequently insist that the child was not “in custody” when interrogated, thereby eliminating the necessity for *Miranda* warnings or a valid waiver. The Court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way*” (italics added).⁴⁷ Custody exists when “a reasonable person [would] have felt he or she was not at liberty to terminate the interview and leave.”⁴⁸ Typically, courts look to the circumstances surrounding the questioning to determine whether the suspect is in custody and will frequently try to assess “whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave.”⁴⁹ It is hard to imagine that a child, placed in a room with one or more adult authorities for an extended period of time and subjected to questioning, would understand that he or she is really free to leave or to end the interrogation.

Although the State should bear a heavy burden when establishing that a juvenile’s waiver of rights under *Miranda*

was made intelligently, knowingly, and voluntarily, there are many examples of suspect confessions that have been admitted under the *Fare* totality-of-the-circumstances analysis. For instance, the District Court of Appeal of Florida recently held that the trial court did not err when it determined that a 10-year-old with an intelligence score of 69 understood and waived his *Miranda* rights, even when there was no written acknowledgment of *Miranda* warnings and no adult was present.⁵⁰ The court held that the child was treated fairly because he had been given food during the six hours police held him. Another example is the previously noted Texas case of 11-year-old Lacreasha Murray, who was sentenced to 25 years' incarceration for injury to a child based on a coerced confession. Lacreasha was kept away from her family for four days and was interrogated by experienced homicide detectives. She was never given *Miranda* warnings, and, in violation of state law, no adult was present during the interrogation. However, Texas courts admitted the confession and upheld the conviction, finding that Lacreasha was not "in custody" when interviewed.⁵¹ The appellate court recently reversed Lacreasha's conviction.

PSYCHOLOGICAL RESEARCH AND THE "KNOWING, INTELLIGENT, VOLUNTARY" WAIVER

As previously noted, *Miranda* warnings were created as a procedural protection for adults and extended to children in *Gault*. Although these warnings typically precede custodial police questioning, practitioners have long surmised that the warnings do not necessarily function as a comparable procedural safeguard when applied to juveniles.⁵² Although research in this area is still in its infancy, the work completed to date appears to support the notion that juveniles may be at a disadvantage when asked to waive rights to silence and counsel voluntarily, knowingly, and intelligently.

Research findings consistently demonstrate that *Miranda* warnings are not well understood by children, especially those 14 and under or older adolescents with low intelligence scores.⁵³ These vulnerable groups were found to perform significantly more poorly than adults, including adults with low intelligence (when compared to juveniles with low intelligence). Juveniles, "compared with adults, demonstrated significantly poorer comprehension of the nature and significance of *Miranda* rights."⁵⁴ A similar study examining Canadian youth also found that few juveniles fully understood the *Miranda* warnings, and that those whose understanding was poor were more likely to waive their rights.⁵⁵

Additionally, multiple factors may interact to affect a youth's voluntary waiver of *Miranda* rights. For instance, Grisso found that the relationship between understanding of the *Miranda* warnings and prior experience with the justice system was not a simple one. While some youths learned a great deal from their legal experiences, others did not. It is likely that low cognitive ability may play a role in the failure of some youths to learn from their experiences.⁵⁶

Research findings on the *Miranda* waiver have noted that children may be far more likely to waive their *Miranda* rights than adults. Grisso and Pomicter found that about 90 percent of youth who were asked to make statements regarding suspected felonies waived their rights to silence and counsel.⁵⁷ This finding can be contrasted with research of adult suspects that found waiver rates closer to 60 percent.⁵⁸ Likewise, Ferguson and Douglas concluded that only "a small percentage of juveniles is capable of knowingly and intelligently waiving *Miranda* rights."⁵⁹ This study found that over 90 percent of the juveniles (approximately 14 years old) interrogated by police waived their rights and that the same number did not understand the rights they waived. In this study juveniles had the most difficulty with the element of the warning that addressed their right to have an attorney present during questioning.

As the Court held in *Haley* and *Gallegos*, juveniles may also be at a social disadvantage in the interrogation situation because of their increased vulnerability to the coercive pressures of adult authority figures.⁶⁰ From early childhood on, children are taught to answer questions directed to them by adults. Police officers often occupy an elevated position of power relative to children. This differential may be especially prominent for youth who have experienced or witnessed more negative and harassing interactions with police. For instance, King and Yuille⁶¹ found that when a "status differential" exists in the interview context, lower-status individuals are more likely to defer to the authority of higher-status individuals. To cite an example, a youth, asked about his prior interaction with police during questioning, stated, "They the police, you do what they say."⁶² Moreover, research indicates that when an adult interviewer presents himself or herself as authoritarian or unfriendly, children have more difficulty disagreeing with the adult.⁶³

Additionally, research supports the notion that adolescents' failure to consider long-term consequences may compromise youthful decision making.⁶⁴ A failure to consider consequences may be due to a lack of understanding of the consequences as well as a failure to consider them. For instance, a child may be more easily led into making damaging statements under the pretense that if he or she tells the police what they want to know the child can go

home. In this case, the opportunity to go home is far more compelling to a child than the long-term consequences, which the child may not appreciate because of a lack of experience.

Courts may confuse a child's age or physical stature with maturity, yet many youth involved with the legal system are disadvantaged cognitively and emotionally,⁶⁵ making them far less mature and astute than their same-age peers. Youths such as these may be just as lost and confused and susceptible to manipulation as young children when confronted by the complexities of the legal system and the coercive context of police questioning. Furthermore, a defendant's case may be disadvantaged by the negative bias that develops subsequent to the introduction of confession evidence, even if that evidence is later deemed inadmissible.⁶⁶

In summary, the research noted above points to potential disadvantages faced by juveniles in maintaining autonomy, exhibiting informed decision making, and protecting their own interests in encounters with police. These findings highlight the likelihood that many juveniles, especially preteens and those with cognitive and emotional disabilities, do not stand on the same footing as adults when waiving their constitutional rights. As such, caution is warranted when assuming that administration of *Miranda* warnings provides a valid safeguard against self-incrimination or false confession among these populations.

RESEARCH ON CHILDREN'S SUGGESTIBILITY

For years courts have questioned the veracity and credibility of statements made by child victims.⁶⁷ In the early 1980s, several highly publicized child abuse cases (such as the McMartin Preschool and Scott County cases) fueled the interest of researchers when it was observed that leading and suggestive questioning by adult interviewers may have led the alleged child victims to make false accusatory statements. Researchers began to explore issues of children's memory and suggestibility in relation to their abilities to accurately report events.

Almost two decades of intensive research in this area have produced a vast body of literature. Generally, findings indicate that when interviews are conducted appropriately, even very young children can resist mild suggestion. Alternatively, inappropriate interviewing can lead children to make statements that may misrepresent the facts and potentially incriminate innocent defendants.⁶⁸

A variety of interviewing techniques and circumstances have been found to be damaging to the accuracy of children's reports. For instance, studies have demonstrated the risk of eliciting inaccurate information when interviews

include repeated, coercive, leading questioning; a negative emotional tone; peer pressure; high-status or biased interviewers; or repeated interviews.⁶⁹ In addition, in extreme circumstances case evidence⁷⁰ and research⁷¹ indicate that adult questioning may significantly alter children's memories of events.

Although age-related findings consistently indicate that younger children are at greater risk for increased suggestibility, findings have also made it clear that knowing a child's age is not enough. Suggestibility is not a trait, and a child's ability to provide accurate reports is a very complex phenomenon that must be viewed in light of a host of situational and psychological factors.⁷² For instance, researchers have studied the context of the interview, biases held by interviewers, the emotional tone of the interview, the social status of the interviewer, the interviewer's presumed knowledge of the event, and the individual child's personality, capacity, memory, and present state of mind.⁷³

It is important to note that suggestive techniques used in these studies would typically be considered mild compared to the coercive tactics used in police interrogations. Owing to the ethical obligations of research, studying more extreme situations that closely mimic police interrogation, such as the effects of the use of threats, bribes, and intimidation on children's narratives, has not been possible.

GAPS IN INTERVIEWING PROCEDURES USED WITH CHILD SUSPECTS VERSUS ALLEGED CHILD VICTIMS

Following the highly publicized child abuse cases of the early 1980s, interviews of child victims were subject to scrutiny and individuals who interviewed alleged child victims were cautioned about the use of leading and suggestive interview techniques. More recently, the research findings highlighted above have been applied to the development of suggested practices for interviewing child victims.⁷⁴

Although there are clear parallels between the interviewing of alleged child victims and young suspects, the gap in interviewing practices between these two groups of legally involved children is significant. For instance, police questioning of young suspects offers none of the interviewing safeguards that are currently expected in the questioning of alleged child victims.⁷⁵ These very different practices are employed despite a similar potential for a child to make falsely incriminating statements. The primary difference is that in the case of a child suspect, the statements are potentially self-incriminating rather than potentially incriminating of another.

Techniques that would be considered brazenly suggestive, manipulative, and coercive in light of the findings

from research on child victims' reports in legal settings are rarely questioned in the context of a suspect's interrogation.⁷⁶ For instance, questioning of an alleged victim of sexual abuse would be highly suspect if it suggested new information (for example, "We have reason to believe that your teacher has been touching you in a bad way") or pressured the child to agree with the suggested information ("Why don't you be a good girl and help us out. We need you to tell us the ways he might have touched you"). It would be further determined to be highly coercive if the child were then rewarded (given praise or food or told he or she could go home) for providing certain information. Nevertheless, these practices are often used in police interrogations even when young children are questioned as suspects.⁷⁷

The research on child victims suggests that youth questioned under these conditions will have a difficult time maintaining autonomy and resisting the manipulation of adult interviewers. Rather than prefacing the interrogation with introductory comments that give the child suspect permission not to answer a question, police interrogators groom juvenile suspects to be easily manipulated. Juvenile suspects may be intimidated into acquiescence or may be led to believe that the interrogator is a friend and there to help. In either scenario, the police interviewer rarely takes a neutral stance. Police questioning may follow only the desired line of inquiry in order to confirm the preferred hypothesis (such as that the suspect committed the offense), rather than open-mindedly exploring all potential hypotheses. Likewise, the young suspect may be rewarded for certain responses. In a particularly compelling tactic, a child may be told that he or she will be allowed to go home after telling the police what they want to hear. Police may introduce new material (which may be true or false) to influence a child's statements rather than avoiding potentially suggestive information. For instance, in the *Harris* case, the 8-year-old suspect was provided with information from statements made by the 7-year-old suspect and consequently changed his story to more closely match that of his peer. Police may work in teams or co-opt parents in their endeavors, placing even more pressure on children in custody. Young detainees may be misled about their role in an investigation, being interviewed initially as if they are witnesses when they are actually being considered as suspects. In this situation children have virtually no protections.

SUGGESTED PRACTICES FOR INTERVIEWING CHILDREN

Overall, the research discussed above has led to the exercise of a great deal of care when potential child victims are

questioned. It has been applied to suggestions for conducting nonleading interviews⁷⁸ and for developing guidelines for child interviewing in legal contexts.⁷⁹ These interviews with child victims, typically conducted by legal or mental health professionals when sexual abuse has been disclosed, are now more often videotaped in their entirety and are subject to scrutiny by all parties involved in the proceedings. The wording of questions and the context of questioning of alleged victims is now considered critical, and suggestive or leading questions and conditions are subject to attack by the defense.

From a recent review of the literature, Reed⁸⁰ identified implications for interviewing children in a manner that minimizes suggestibility and thereby produces more accurate reports. It was suggested that the interview setting should be comfortable, private, informal, and free from distractions. The interviewer should approach the interview with an open mind and consider alternative hypotheses. He or she should be friendly with the child but should clearly avoid selectively reinforcing statements made by the child that support one hypothesis (for example, that the child was abused), while selectively ignoring statements that do not support a favored hypothesis. Expectations should be clarified at the outset of questioning. For instance, interviewers should emphasize the importance of being truthful; explain that they are uninformed and do not know what happened; encourage the child to admit confusion or lack of memory rather than guessing; advise the child that a repeated question does not mean the child's initial response was incorrect; give permission to the child to refuse to answer questions; and encourage the child to disagree with the interviewer and correct the interviewer when facts are misstated. Questioning strategies should take into account that misleading can occur in any direction depending on the nature of the interviewer's suggestions. Highly leading or coercive questions, as well as repetitive suggestions and multiple interviews, should clearly be avoided. Interviews should be developmentally appropriate and begin with open-ended questions. After the child's narrative is elicited, focused questions may be asked if needed but only if justified by previous information. All relevant questions and responses should be well documented. These strategies are thought to be necessary regardless of the child's age.

Thus, the preferred interview situation is one in which children are interviewed one time, in a neutral environment, free from pressure to produce a given response, asked developmentally appropriate questions as well as given permission to disagree with interviewers and to state that they do not know or do not remember when indeed they do not. This interview format prepares the child for the interview and aids in the resistance of suggestion.

When prepared and questioned in this manner, a child is more likely to provide an accurate, reliable report that will advance the fact-finder's investigation.

SUGGESTED MODIFICATIONS OF POLICE PROCEDURES

The above discussions point to the need for more appropriate procedural safeguards when police question juvenile suspects. First, *Miranda* warnings should be explained in detail with developmentally appropriate language, not just read or recited in rote fashion. Too often juveniles (and their parents) do not understand the warnings as they are currently written and do not know what rights they are waiving. A question-and-answer format, designed to elicit more than a yes-or-no response, may ensure there is a minimal level of comprehension before police officers proceed with the custodial interrogation.

Second, interrogation of juveniles, especially young, cognitively delayed, or emotionally disturbed suspects, should be conducted in a nonleading manner. Tactics routinely used with adults such as manipulation, rewards, and intimidation may unduly pressure children. Individuals conducting the questioning should be trained in appropriate techniques. The interview techniques outlined above can be helpful in instituting interview procedures that are appropriate for use with vulnerable juvenile suspects.

Third, interrogations should be videotaped in full. Following the Ryan Harris murder case in Chicago, it was proposed that confessions be videotaped;⁸¹ yet it should be understood that videotaped confessions are misleading unless they are accompanied by a taping of all questioning and encounters leading up to the confession.⁸² Care must be taken to avoid the use of biasing camera angles (*i.e.*, direct view of suspect and omission of interrogator).⁸³ Only when a full, videotaped record is obtained and viewed can the court be assured that the confession was not a product of a coercive interrogation.

Finally, the one safeguard that would most clearly protect children's due process rights during police questioning is the mandatory presence of counsel.

CONCLUSION

Once a child "confesses," the procedural safeguards of *Miranda*, the totality-of-the-circumstances, and the interested-adult analyses offer little protection. Interrogation procedures designed for adults but used with children increase the likelihood of false confessions and may even undermine the integrity of the fact-finding process. *Miranda* warnings and the subsequent interrogation procedures should be modified to compensate for the increased susceptibility and vulnerability of the child sus-

pect. Police, district attorney offices, and mental health professionals across the country have recognized that child victims differ from their adult counterparts and have modified interview procedures to compensate for the child's limitations in the questioning context. These techniques provide a model for modifying police interrogation procedures with child suspects.

NOTES

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2. Bob Herbert, *A Child's Confession*, *N.Y. Times*, Sept. 15, 1998, at 15.
3. Recognizing children's limitations, states have passed laws restricting children's ability to enter into binding contracts, have delegated children's educational rights to their parents, and have mandated age requirements for driving, buying alcohol, and buying cigarettes.
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5. Patricia Torbet et al., *State Responses to Serious and Violent Juvenile Crime* (Office of Juvenile Justice and Delinquency Prevention 1996).
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8. *Id.*
9. *See Ashcroft v. Tennessee*, 22 U.S. 143 (1944) (conviction reversed after 36 hours of continuous interrogation); *see also Watts v. Indiana*, 338 U.S. 49 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (court reversed convictions resting on coerced confessions without disputing fact that confessions were probably true).
10. *Rochin v. California*, 342 U.S. 165, 173 (1952).
11. *Miranda v. Arizona*, 384 U.S. 436 (1966).
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13. *Id.* at 468-71.
14. *Id.* at 444-45.
15. *Id.* at 450.
16. *Id.* at 450.
17. Louis Sedman, *Brown and Miranda*, 80 *Cal. L. Rev.* 673, 743-47 (1992).
18. Fred Edward Inbau et al., *Criminal Interrogation and Confessions* (Lippincott et al. eds., 3d ed. 1986).

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20. *Id.* at 126.
21. *Id.* at 114–18.
22. *Id.* at 139.
23. *Id.* at 137.
24. *Miranda*, 384 U.S. at 444.
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28. *In re Gault*, 387 U.S. 1 (1967).
29. *Id.* at 17.
30. *Id.*
31. *Id.* at 46.
32. *Id.*
33. *Haley v. Ohio*, 332 U.S. 596, 598 (1948).
34. *Id.*
35. *Id.* at 599–600.
36. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).
37. *Id.*
38. *In re Gault*, 387 U.S. at 55.
39. Linda Szymanski, *Test of the Validity of a Juvenile's Waiver of His or Her Miranda Rights*, in NCJJ Snapshot 3(2) (National Center for Juvenile Justice 1998) (currently 16 states use a totality-of-the-circumstances rule); *see also Haley*, 332 U.S. at 596; *Gallegos*, 370 U.S. at 49.
40. *See id.* (currently 11 states use an interested-adult test).
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43. *See, e.g., Commonwealth v. Guyton*, 541 N.E.2d 1006 (Mass. 1989) (sibling who was 13 days shy of 18th birthday could not serve as interested adult); *Commonwealth v. MacNeil*, 502 N.E.2d 938 (Mass. 1987) (grandfather could serve as interested adult); *Commonwealth v. Berry*, 570 N.E.2d 1004 (Mass. 1991) (discussing when a parent might be disabled and unable to serve as interested adult).
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48. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).
49. *Commonwealth v. Bryant*, 459 N.E.2d 792, 798 (Mass. 1984).
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Unified Family Court

*A California Proposal Revisited*¹

The efficacy of the traditional court structure, which routinely assigns a family's divorce case to the family law judge while a juvenile judge presides over their teenager's delinquency case, continues to be questioned by legal scholars.² A parent who seeks a civil domestic violence restraining order does not appear in front of the juvenile court judge who hears his or her child's dependency case. Grandparents who file a guardianship petition will appear in a probate court, even though the family law judge has significant information about the parents' drug and violence issues garnered during their divorce proceeding. The traditional court's legacy for these families is conflicting orders,³ multiple appearances,⁴ uncoordinated treatment plans,⁵ unnecessary delays, repeated interviews with the children, lopsided resources, and incomplete information, all of which impede informed decision making.⁶

In response to these multiple proceedings and the multilayered problems of families in crisis, a national trend is to restructure traditional family, probate, juvenile, and, in some courts, even the criminal jurisdictions to create unified family courts.⁷ The central principle of a unified family court is that a single, highly trained and committed judge hears the family's multiple cases under a comprehensive jurisdiction.⁸ A significant corollary to the unified family court is that a multidisciplinary team⁹ of therapeutic and dispute resolution professionals¹⁰ makes recommendations to the judge and provides therapeutic support to the family throughout all proceedings. While unified family courts are hardly a new idea, the recent national momentum to create such courts has been in large part a result of the leadership of the American Bar Association¹¹ and the National Council of Juvenile and Family Court Judges.¹²

California courts have not been in the forefront of this effort to create unified family courts.¹³ The overwhelming majority of California courts still operate with separate and specialized family, juvenile, and probate departments. Each of these departments has minimal knowledge of the decisions of the other, even if the decisions involve the same family and its children. The larger the court, the more the problem is compounded.¹⁴ In large courts, each of these departments may not be just in separate courts, but in different facilities miles away from one another with no technological contact.¹⁵

Since 1997, the Judicial Council of California has been studying unified family courts through the Family and Juvenile Law Advisory Committee. Most recently the Judicial Council has instructed the advisory committee to study court coordination of proceedings involving families and children.¹⁶ A few courts in California have begun, on an ad hoc basis, the process of unifying their family, juvenile and probate courts, and in some cases, even the criminal court, to provide a holistic approach to families with multiple court cases. These courts have created unified family courts, without any additional financial resources, by reorganizing existing resources.¹⁷ In the process, each of these California courts addressed two significant issues: (1) determination of the court's jurisdiction and (2) development of a methodology for identifying the "family" unit for purposes of the unified family court.



Hon. Donna M. Petre
Yolo County Superior Court

To increase efficacy, traditional family, probate, and juvenile courts—and even the criminal jurisdictions in some courts—are being restructured as unified family courts. Although California has not followed the national trend at the state level, some counties have taken the initiative and reorganized their family courts. Yolo, Butte, and San Francisco counties have all created some type of a unified family court that allows them to track "families" with multiple cases in the judicial system. This article describes the unified family courts in each of these counties.

An issue that each of these counties confronted in creating a unified family court is how to define "family." The traditional family, generally defined along patrilineal lines, is not the norm in cases that fall within unified family courts. Unified family courts frequently encountered what the author defines as a "postnuclear family." Postnuclear family members are generally only identifiable through matrilineal lineage. This change requires courts that are tracking families with multiple cases to reorganize not just the court calendar, but also the court's data processing system, to ensure that the cases for all members of the

family are captured. Despite these challenges, Yolo, Butte, and San Francisco have developed noteworthy unified family courts without any additional funding. ■

JURISDICTION

Usually only a court rule consolidating and assigning all the cases to one judge is needed to create a unified family court.¹⁸ The cases coming before a unified family court can be from different departments, but they must be at one jurisdictional level. The assignment of the judges therefore should come from the highest trial level, superior court judges.¹⁹ The caseload of a model unified court includes abuse and neglect, adoption, spousal support, child custody and visitation, child support, dissolution of marriage (including annulments and separation), domestic violence, spousal abuse, elder abuse,²⁰ consent to marriage of minors, management of minor's funds, juvenile delinquency, paternity, palimony, status offenders, and termination of parental rights.

Other matters that should be considered for inclusion in unified family court are adult criminal prosecutions, appeal of agency decisions affecting children, competency, commitment to mental health facilities, and motor vehicle offenses of minors. Concurrent adult criminal jurisdiction over crimes involving family members is the furthest extent to which family courts have expanded.²¹

YOLO'S UNIFIED FAMILY COURT

Yolo County²² consolidated its municipal and superior courts in 1993, making it one of the first courts in the state to do so. The restructuring continued in 1997 with the creation of a domestic violence court.²³ The unified family court followed with the transfer of all probate guardianship to the family department. Because all the cases and judges were on the same jurisdictional level and the judges of the family and probate departments agreed to the innovation, the restructuring was a straightforward, uncomplicated process.

Compelling arguments supported the change. First, an overwhelming number of guardianships of minors involved a family member, such as a grandmother seeking custody of grandchildren because of a parent's drug addiction. Second, the Yolo County probate department has no therapeutic component, but the family department has mediators who could assist the parties in reaching an agreement. Once the cases were moved to the unified family court, the parents often conceded that their drug usage was interfering with their child-rearing responsibilities, agreed to attend drug treatment, consented to the guardianship, and continued to see their children under the guardian's supervision.²⁴

At the end of 1997, the jurisdiction of Yolo's unified family court consisted of all divorces; separations and nullities; minor marriages; adoptions; spousal support cases; child custody and visitation and child support in non-district attorney cases;²⁵ guardianships; and civil domestic violence restraining orders.

The location of the juvenile court was a major impediment to the unified family court's completion. A commissioner heard the juvenile cases at the juvenile hall, several miles from the main courthouse, where all the juvenile files were kept. In 1999, two events allowed the court to add the juvenile component to the unified family court: the court moved all the juvenile files to the main courthouse, and Superior Court Judge Thomas E. Warriner requested the juvenile assignment. Two judges formerly assigned to the family and juvenile departments became co-presiding judges of the newly created unified family court.²⁶ By working together on joint projects the judges have sought to blur the lines between traditional juvenile and family departments.²⁷ To ensure continuity, all eight trial court judges of the Yolo County court agreed that an assignment to the unified family court required a minimum three-year commitment.

BUTTE’S H.O.P.E COURT²⁸

Under the leadership of Judge Steven J. Howell of the Superior Court of Butte County, that court has created the H.O.P.E. (“Helping Organize Parents Effectively”) Court.²⁹ This therapeutic court identifies families with multiple court filings and bundles their cases together so one judge will hear them. The H.O.P.E. Court does not automatically accept every family with multiple cases into the court system; instead, it selects them through an evaluation process. Agencies nominate families to the H.O.P.E. Court coordinator, who then searches for active cases involving any member of the nominated families. The coordinator distributes the case summary to the case management team at the H.O.P.E. Court’s weekly precalendar meeting. The committee reviews and evaluates cases and families and decides whether to accept the family into the court. Once a family is accepted, Judge Howell assumes responsibility for all cases that family has in the court system. The jurisdiction of the H.O.P.E. calendar is the most comprehensive in the state, including not just family, probate, and juvenile, but also criminal, traffic, and district attorney family support.

SAN FRANCISCO’S UNIFIED FAMILY COURT

Judge Donna Hitchens created San Francisco’s Unified Family Court in 1997 and presently serves as its supervising judge.³⁰ Judge Hitchens has successfully unified the family and juvenile departments and is presently working to incorporate the probate department.

Judge Hitchens has implemented dramatic changes under her reorganization that affect all the judges and staff in those departments. Judges in San Francisco’s unified family court are primarily assigned to the family, delinquency, and dependency departments. However, upon the filing of a new case involving any of the family members who are already appearing in front of a judge, that judge is automatically assigned the case regardless of jurisdiction. The biggest challenge Judge Hitchens faced in creating the unified family court was defining the family unit to be served by the unified family court.³¹

WHAT IS A FAMILY?

The cornerstone of a unified family court is the concept of “one judge–one family,” sometimes referred to as “one family–one team.”³² The rationale behind “one judge–one family” is that a decision-maker with a broad perspective on interrelated family problems can be indispensable in crafting solutions appropriate to each family.³³

This simple and often repeated mantra of “one judge–one family,” which begins most discussions on uni-

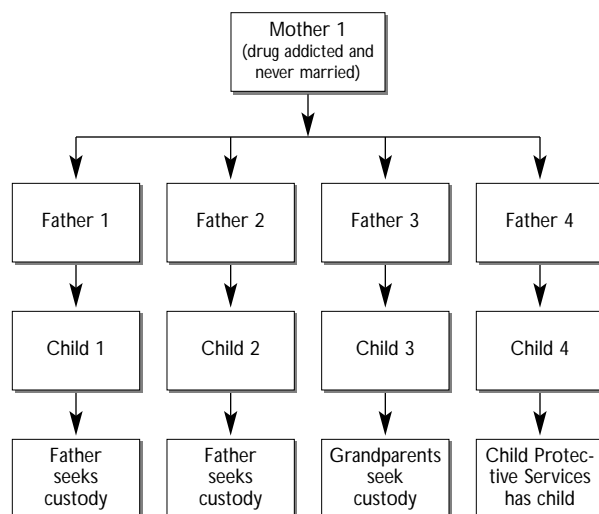
fied family courts, frequently assumes a readily ascertainable definition of a family member. The fact is, however, that the traditional family, defined by popular culture as a married couple with two children, is in actuality not the norm:³⁴ single parents, cohabitants, grandparent guardians, and foster parents are a more sizable proportion of American families.³⁵ This transformation of the family creates a significant problem for courts attempting to institute a unified family court.³⁶

A few traditionally structured families come within the jurisdiction of the unified family court, and they are readily identifiable. For example, a family may have two sons who are on the delinquency calendar and two other children who come into the dependency court when a parent files for divorce and seeks a civil domestic violence restraining order. By the touch of a button the court can pull up all the cases for this family because no matter how dysfunctional the family may be, it has a patrilineal lineage. Families with high dysfunction and patrilineal lineage are, however, the exception in a unified family court. Most families who appear in a unified family court can be described as “postnuclear families.”³⁷

The postnuclear family metaphor conjures the image of a nuclear bomb exploding the concept of the traditional family forever. The term applies to any family in which the parties never married and/or the children have no common father. This family can be identified only by following a matrilineal line.³⁸ An example of a postnuclear family that typically appears in the court is a methamphetamine-addicted mother and four children with four different fathers, none of whom has ever been married to the mother.

As shown in Figure 1, a postnuclear family may be in the family law department when two biological fathers

Figure 1. Example of postnuclear family court case



seek custody orders, the probate department when a grandparent seeks guardianship of the third child, and a juvenile dependency court for the fourth child. The best interest of each of these children and judicial efficiency are served by a system that has one judge presiding over the custody, juvenile, and probate cases for a family consisting of a mother, four children, four unrelated fathers, and grandparents. While it may come as a surprise to the four unrelated fathers, they are members of a family for purposes of a unified family court. Without the unified family court, the grandparent guardianship would be heard by a probate judge. A juvenile judge would preside over the juvenile dependency case, and the family judge would hear the custody cases of the two fathers, all in isolation from the proceedings of the others.

The Butte model resolves this problem through its nomination process. The court's case manager retrieves all of a family's cases for review at the weekly precalendar hearing. If, for some reason, a significant family member's case is overlooked, it can be retrieved after the hearing. This time-consuming process works because Butte does not select every multiple-court family into the H.O.P.E. Court. In contrast, the San Francisco and Yolo courts, which intend to identify all crossover cases and include them in a unified family court, must rely on computers to identify family members. To do this, the courts had to establish a clear set of instructions for data entry personnel that precisely defined the family unit.

The new system required more data collection at the time of filing. Before the creation of the unified family court, the Yolo court did not collect enough data about the family at the time of filing. The data input clerk only placed the youngest child's name in the computer when a dissolution was filed. Neither the mother's nor any of the children's names were placed in the computer when a father filed a complaint to establish paternity. None of the children's names were placed in the computer when a domestic violence restraining order was sought. In juvenile cases, the name of the dependent or delinquent child was placed in the computer but neither of the parents' names was entered. Guardianship petitions included the name of the petitioner and child but not the names of the parents.³⁹

Now that all this data is recorded, the court can identify the cases of the postnuclear family just as readily as it does a traditional family.⁴⁰ Paternity cases filed by the biological fathers will be recovered because the mother's name is now entered. Juvenile cases will appear as well because the dependency and delinquency cases include the parents' names. Guardianship cases are identifiable by the parents' names.

Even though the Yolo court has implemented these data input changes, which are a marked improvement, problems in defining "the family" remain to be resolved. For example, in postnuclear families, a father's latest girlfriend or a mother's newest boyfriend may be a crucial family member in a unified family court. However, to include each of the four biological fathers' current girlfriends and the latest boyfriend of the mother would result in a data entry nightmare. But their exclusion creates a huge information gap for the decision-maker. A judge can place a child of a methamphetamine-addicted mother with the father, unaware that the father's newest girlfriend has a history of abuse of her own biological children from a prior relationship. These children will likely have a different name than hers. Worse yet would be a situation where the current girlfriend has no cases in the court system, but her child by a previous relationship, who has a different name, is about to be released from the California Youth Authority after serving time for child molestation and on release will move in with his mom. She is living, of course, with the biological father who now has custody of the child. The biological mother may not even know these facts, and the biological father, who may have other concerns, such as child support payments and/or a desire not to upset his current girlfriend, may not volunteer the information. Adding to these considerations are the limitations on courts seeking criminal records, especially juvenile records, of people who may be temporarily living with one of the parents (or in the same residence as the children). Some boyfriends and girlfriends are without doubt the *de facto* parent of a child, and they must be included as members of the unified court's family. However, the data entry clerk will not be able to make these subjective determinations and place their names in the computer.

California's scholars have for years questioned the effectiveness of our court's structure in addressing complex family cases.⁴¹ The California courts described in this article, out of a concern for the well-being of the families and children appearing before them, have embarked on ambitious overhauls of their family, juvenile, and probate departments without any additional expenditures of moneys. Their accomplishments to date are noteworthy. Their efforts, and the national momentum, should renew discussions in the California Legislature⁴² on the need for unified family courts.

NOTES

1. In 1968, Professor Herma Hill Kay recommended that family courts exercise unified jurisdiction over all legal

questions affecting the family. Herma Hill Kay, *Family Court: The California Proposal*, 56 Cal. L. Rev. 1205, 1239 (1968).

2. In advocating the establishment of a unified court to hear family law matters, Dean Roscoe Pound of the Harvard Law School noted: "It has been pointed out more than once of late that a juvenile court ... a court of divorce jurisdiction ... a court of common-law jurisdiction ... and a criminal court or domestic relations court ... all of these courts might be dealing piecemeal at the same time with the difficulties of the same family. It is time to put an end to the waste of time, energy, money, and the interest of the litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequently at cross purposes to adjust the relations and order the conduct of a family which has ceased to function." Roscoe Pound, *The Place of the Family in the Judicial System*, 5 Nat'l Probation & Parole Ass'n J. 161, 164 (1959); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 Fam. L.Q. 8 (1998).

3. Avoiding conflicting orders is especially important in domestic violence cases. In reviewing cases in the Yolo courts, the author found a case in which the family department ordered that the father's visitation with his son be supervised owing to a felony domestic violence conviction with a suspended state prison sentence. The mother also represented in court that the father had beaten one of their sons so badly that he became nearly deaf in one ear. Unaware of the domestic violence conviction, the juvenile court commissioner released a second son, who had been a ward of the court for juvenile delinquency, to the custody of this father.

4. Another experience of the author underscoring the need for change was a conversation with a father who had multiple cases in the court system in different departments. When the father was asked if he worked, he stated, "No, I just come to court." And that he did. Court records indicated that his son's delinquency case was set on one day and his other children's dependency case on the following day. His wife's and his probation cases were heard on other days.

5. No effort is made to coordinate therapeutic courts. Record reviews show that one judge orders a parent into anger control classes, another judge orders parenting classes, another judge sends the parent to drug court, and still another remands the parent to jail. Many of these families are indigent by any standard, yet no effort is made to consider the fiscal impact of court orders. As an example, if the parenting program is ordered as part of family reuni-

fication, the fee is waived, but if probation or the family court orders a parenting class, the cost falls on the family.

6. See Ross, *supra* note 2, at 3.

7. The first model of a unified family court was created in Cincinnati, Ohio, in 1914. Almost 50 years later statewide systems were established in Rhode Island (1961), Hawaii (1964), South Carolina (1968), the District of Columbia (1970), Delaware (1970), Louisiana (1979), and New Jersey (1984). Other courts followed in the 1990s, including Florida, Vermont, Virginia, and Kentucky. Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 Juv. & Fam. Ct. J. 7-23 (1993); Hunter Hurst, Jr., & Linda A. Szymanski, *Family Courts in the United States*, 1996: Statute, Court Rule, and Practice Analysis (National Ctr. for Juvenile Justice 1996); Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and Mandate to Establish Unified Family Courts*, 32 Fam. L.Q. 31, 35-37 (1998).

8. Andrew Schepard, *Law and Children: Introduction to Unified Family Courts*, N.Y. L.J., Apr. 16, 1997, at 3 (col.1).

9. The California Legislature has adopted a series of laws that allow for the formation of multidisciplinary teams. Cal. Welf. & Inst. Code § 18951 (West 1991); Cal. Welf. & Inst. Code § 18986.46 (West Supp. 1999); Cal. Welf. & Inst. Code § 830.1 (West 1998).

10. A key feature of unified family courts is maximization of nonadversarial dispute resolution professionals, who help families resolve problems through counseling and mediation. This is one area where California has been in the forefront as the first state in the nation to make mediation in all custody cases mandatory. Cal. Fam. Code § 3170 (West Supp. 1999). The majority of states have discretionary mediation programs allowing for mediation upon the recommendation of the court or the request of one of the parties. Dane A. Gaschen, *Mandatory Custody Mediation: The Debate Over Its Usefulness Continues*, 10 Ohio St. J. On Disp. Resol. 469, 472 (1995) (finding that approximately 60 percent of the states have some form of custody mediation). One concern is the potential danger of mediation in domestic violence cases. California has resolved this issue by legislation requiring that the parties not meet together for mediation in domestic violence cases in the absence of a stipulation. Cal. Fam. Code § 3181 (West 1994).

11. The American Bar Association first addressed unified family court systems at its 1980 midyear meeting. The ABA Steering Committee on the Unmet Legal Needs of Children drafted and was the primary sponsor of this pol-

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icy, which was adopted by the ABA House of Delegates at the 1994 annual meeting. For the report that accompanied the policy resolution see Reports with Recommendations to the House of Delegates: 1994 Annual Meeting § 10c (1994).

12. Growing interest in unified family courts prompted the National Council of Juvenile and Family Court Judges to convene a National Family Court Symposium in 1989. Sanford N. Katz & Jeffrey A. Kuhn, Recommendations for a Model Family Court: A Report from the National Family Court Symposium 13-17 (Nat'l Council of Juvenile and Family Court Judges, May 1991).

13. Judge Leonard Edwards of the Superior Court of California, County of Santa Clara, has consistently advocated more coordination of information when several courts are involved with the same family. Leonard P. Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps*, 48 Juv. & Fam. Ct. J. 12 (1997).

14. The 1990 Senate Task Force on Family Relations Court admitted that the existing superior court structure in California, by its nature, allows inconsistent orders, multiplicity of hearings and interviews, and uncoordinated services. The report recommended, inter alia, that the Judicial Council develop and adopt a protocol to identify families with multiple cases in the court, whether the cases are occurring concurrently or consecutively. Senate Task Force on Family Relations Court Final Report (1990).

15. Separate family court facilities provide increased public access, efficient use of resources, and maximized opportunity for the use of a comprehensive automated base of information. Katz & Kuhn, *supra* note 12, at 69. Sacramento is presently building a new facility to house the family, probate, and juvenile courts under one roof, thereby facilitating the future creation of a unified family court.

16. At the 1997 Planning Workshop, the Judicial Council requested that the Family and Juvenile Law Advisory Committee study and propose changes in current practices and methods for maximizing case coordination in all matters involving children and families in the court system. In response to the council's request, the committee began its study by (1) surveying the courts both nationally and within the state to determine current practices, (2) holding a public forum at the California Judicial Administration Conference (CJAC) in February 1998 to gather information, (3) conducting a comprehensive review of the literature, and (4) participating in a conference on family courts sponsored by the American Bar Association.

17. The Robert Wood Johnson Foundation of Princeton, New Jersey, has provided the ABA moneys to support several jurisdictions in the nation chosen by the ABA to receive technical assistance in developing unified family courts.

18. Page, *supra* note 7, at 7.

19. The organization and administration of unified family courts becomes important in considering the allotment of resources as well as staff and budgetary requirements. An administration that recognizes this importance will advocate for sufficient funding and allotment of personnel to meet its needs, while an organization or administration that downplays or considers the court in any way inferior to the other courts will fail to properly allocate its resources. Page, *supra* note 7, at 13.

Yolo's experience confirms this conclusion. The juvenile commissioner was inundated with cases. From 1996 to 1998 the juvenile dependency calendar increased 130 percent, yet the commissioner had the least available resources. The court routinely ran hours past five o'clock as the number of cases continued to increase. The court was housed miles away from the main courthouse, where all the administration and judicial, clerical, research, and security resources were located.

20. Erica F. Wood & Lori A. Stiegel, Not Just for Kids: Including Elders in the Family Court Concept 589-96 (American Bar Ass'n, Comm'n on Legal Problems of the Elderly, Oct. 1996). The National Family Court Symposium recommended that family court jurisdiction should include adult and juvenile guardianships and conservatorships. Katz & Kuhn, *supra* note 12, at Recommendation 17.

21. Kay, *supra* note 1, at A-3, A-5.

22. Yolo County straddles the corridor between San Francisco and Sacramento, lying less than 70 miles northeast of San Francisco and immediately adjacent to the city of Sacramento, California's state capital. Yolo County's 152,000 residents live in the incorporated cities of Davis, West Sacramento, Woodland, and Winters. Davis, the largest city, is the site of the University of California. Ethnically the county is 22 percent Latino, 8.1 percent Asian, 2 percent African-American, and 1 percent Native American. The non-Latino Caucasian population is 67 percent and includes the nation's second-largest Russian community. Demographics obtained from Yolanda Williams, Court Executive Officer, Superior Court of California, Yolo County (June 1999). Yolo's largest source of employment is agriculture. One in five Yolo County families receives public assistance. Two interstate highways cross

Yolo County, making it a prime thoroughfare for drug trafficking and a major methamphetamine production location.

23. Yolo County has a comprehensive domestic violence court that includes a criminal department that handles all felony and misdemeanor cases, a civil department, and a juvenile department. These three departments are unified as one domestic violence court with the assistance of a case manager and domestic violence attorney. The Yolo court specifically did not place the civil and criminal departments together because of the public defender's objection. The public defender did not want the family law judge to acquire information about a party in a family law case that would possibly adversely affect his or her criminal case. The case manager does apprise the family law judge of all criminal court cases involving the families without objection from the public defender.

Proponents for inclusion of criminal jurisdiction in family courts argue that such a system promotes coordinated delivery of services to the family and discourages multiple interviewing of victims. Opponents stress possible due process violations and community pressure for a more punitive stance toward offenders renders such jurisdiction inappropriate for the family court. *Supra* note 2. See commentators' concerns regarding inclusion of criminal domestic violence cases in the unified family court. Billie Lee Dunford-Jackson et al., *How Will They Serve Victims of Domestic Violence?*, 32 Fam. L.Q. 131 (1998).

24. An argument against unified family courts is increased cost. Costs must be balanced against increased savings of time. For example, significant cost savings result when guardianships are heard in the family department or where a mediator is available to help the family resolve problems.

25. Commentators have recommended that the unified family court include related courts of special jurisdiction, such as those established by federal legislation to reduce the backlog of child support cases. Social Security Act, Pub. L. No. 103-66, and section 13712 of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 649 (as codified in 42 U.S.C. § 670). Delaware and Rhode Island, for example, have incorporated child support enforcement courts (known as "IV-D courts") into their unified family court. California is impeded in this coordination by a mandate that a commissioner handle IV-D cases.

26. California has established an expansive role for juvenile presiding judges. The division has co-presiding judges, which affords the judges more opportunities for community outreach and program development. Cal. Standards Jud. Admin. § 24.

27. The co-presiding judges of the division have been able to successfully implement several programs since the beginning of 1999. The first is the Family Court Children's Fund, which seeks to provide a small monetary grant (no more than \$250 per child) to meet the reasonable needs of a child. A second project is the Juvenile Violence Court, which began operation in June of 1999. The judges have also increased the budget to include for the first time funds for mediation in juvenile dependency cases. This change alone will increase the opportunity for nonadversarial dispute resolution that should result in substantial cost savings for the court.

28. See Steven J. Howell, *One Judge—One Family: Butte County's Unified Family Court*, p. 171.

29. Butte Protocols for H.O.P.E Calendar.

30. Conversation with Hon. Donna Hitchens, Supervising Judge of San Francisco's Unified Family Court (May 28, 1999).

31. *Id.*

32. The National Family Court Symposium conferees agreed that a "one judge—one family" approach to case management was the cornerstone of unified family courts. The concept continues to be a frequent subject of debate in discussions concerning unified family courts. Mr. Kuhn recently published his conclusion that teams of family court staff may be a better alternative to the "one judge, one family" idea. Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 Fam. L.Q. 76-77 (1998).

33. Ross, *supra* note 2, at 17.

34. U.S. Dep't of Commerce, Statistical Abstract of the United States, tbl. 81, Families, by Number of Children Under 18 Years Old: 1980 to 1997 (1998).

35. Little Hoover Comm'n Report, *Enforcing Child Support: Parental Duty, Public Priority* (May 1997), stating that 4 in 10 children are not living with both biological parents.

36. Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 Ind. L.J. 775, 776 (1997).

37. *Id.*

38. The author recently presented the technological problems of identifying a family in a postnuclear family context at the 1999 Government Technology Conference held in Sacramento.

Commentators have noted that data management may be easier and more efficient if it is organized by the mother's

NOTES name but note that it is paramount that battered women not be identified as the dysfunctional parent because of case processing. Therefore, one commentator recommends that unified family court data systems be organized so cases are sorted by perpetrators' names. Dunford-Jackson et al., *supra* note 23, at 141-43.

39. Conversation with Arlene Lambert-Lisinski, Yolo County Clerk (May 1999).

40. There is a great deal of discussion in the literature on the advantages of a unified family court for families with multiple cases in the court system, and comparatively little on what constitutes a family in a unified court. One of the most thorough discussions comes from Kuhn, *supra* note 32, at 77-79. The author comments that the definition of "family" must by necessity be dynamic. He acknowledges that the prospect of accepting the dynamic family for case management purposes seems daunting, but that there is less of a need for a precise, stable definition than may initially appear. The unified family court can legitimately develop the definition of each family to suit the case management objective. The author recommends several principles: (1) the factual and legal issues of families should be similar; (2) the cases should be at similar stages of development and should be conveniently calendared if the parties are closely related or are substantially the same; (3) case familiarity will assist, but not bias, the family court judge; (4) considerable potential for conflicting orders exists unless all matters are assigned to one judge.

The above system works well for the Butte model, which relies heavily on individual case management. This solution may work satisfactorily in a court with ample case coordinators, but in those courts that are unifying with no additional resources, the court must rely on the computer to place all the cases identified before one judge. For such courts, Mr. Kuhn's proposal lacks the specificity needed by the data entry personnel, who know nothing whatsoever about the family. The criteria he uses are based on the "one judge, one family" case management practice conducted in the Family Court of Monmouth County, New Jersey, from 1990 through 1992. The system he proposes also presumes that the court has a case coordinator supporting the unified family court. Mr. Kuhn's plan also assumes that a team is available to aggressively manage each family court case by providing intake, screening, assessment, calendar coordination, and case monitoring services to the parties and the family court judge. Kuhn, *supra* note 32, at 78-79.

41. Kay, *supra* note 1.

42. In 1990 the Senate Task Force on Family Relations Court considered the issue of unified family courts. The

report stated: "The Senate Task Force on Family Relations Court finds that the problem of families involved in multiple courts and receiving conflicting orders, as identified by the Attorney General's Advisory Committee on Child Victim Witnesses, does not occur in a sufficient number of cases to warrant a total restructuring of the Superior Court. Although there were cases in each county which showed the potential of overlapping actions in more than one court, there is insufficient data to determine the number of cases which involve one family that are being filed concurrently or consecutively in the criminal, domestic relations, dependency and delinquency courts. Current systems fail to direct such cases to the appropriate judicial forum at the beginning of the action and no efforts are made to avoid or coordinate duplicate orders and services to families and children. However, without the statistical data base, the Task Force cannot recommend the creation of a Family Relations Division. Additionally with the overburdening of the courts and the inadequate resources, the present system functions as well as it does only because of the degree of judicial specialization within each of the courts serving families. This specialization permits each court to more efficiently handle the volume of cases within the family courts." Senate Task Force on Family Relations Court Final Report 1 (1990).

PERSPECTIVES



Photograph by Jonathan Alcorn

One Judge–One Family

Butte County's Unified Family Court

In January 1998 the judges of the Superior Court of Butte County began work to create a unified family court. At formal and informal meetings we had noted the incredible crossover among the cases involving the same persons or the same family in the various divisions of our court. The Supervising Family Division Judge, Ann H. Rutherford, took an active role in “bundling” files that involved the same individual or family. Judge Rutherford, for several years prior to our formally creating our unified family court, required, on an ad hoc basis, the attendance in court of probation officers, prosecutors, defense lawyers, and all parties and counsel who were involved in the various cases. Whether they were criminal, probate, traffic, or some other type of case, all cases for this family or individual were rubber-banded together and heard by Judge Rutherford, an extremely experienced judicial officer.

To avoid treating these cases on an ad hoc basis, the court began holding planning meetings. All members of the Butte County Board of Supervisors were invited, as were the heads of county departments that were likely to have substantial involvement in the unified court. These included the Butte County Probation Department, the Department of Behavioral Health (formerly Mental Health), the Children's Services Division of the Welfare Department (CSD, formerly Child Protective Services, or CPS), and the Butte County Office of Education (BCOE).

Meetings were well attended, and no one could argue with the concept that one judge, thoroughly familiar with a family, should hear all the cases involving that particular family. This approach, known as a “unified” court, has also been termed a “one judge–one family” structure. Because all participants agreed in principle with the unified court concept, the agencies could not refuse to provide assistance in organizing the calendars.

We noted some of the problems identified with not having a unified court at the planning meetings. They included:

- A lack of coordination and communication in the delivery of social services intended to assist the families in resolving their legal issues and the underlying interpersonal and personal issues that contributed to their involvement in



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The Superior Court of California, County of Butte instituted a unified family court in June 1998. In a unified family court such as Butte's, one judge handles all cases involving a family, regardless of case type. Butte's unified calendar, named H.O.P.E. (Helping Organize Parents Effectively), is outcome-based and relies on multidisciplinary team members as service providers. The court attempts to fashion orders that are consistent and provide for coordination in the delivery of services to assist the family in resolving their legal and personal issues. Another outcome is the reduction of currently pending cases involving the family.

The author would like to express his thanks to Ms. Jane Pfeifer, a former H.O.P.E. court coordinator, for her assistance in preparation of this article. ■

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the legal system in the first place. Services were often fragmented. Different case-workers from different agencies were frequently unaware that they were assigned to the same family.

- Different judges in different divisions made inconsistent orders. For example, the family law court may have made orders encouraging the father to visit his children. If he was prosecuted for domestic violence against the mother in criminal court, there may also have been orders requiring him to stay away from the mother and children. Obviously, with one judge hearing all cases, the orders were much more likely to be consistent and appropriate.
- Some families have an incredibly large number of individual cases before the court. One man and woman, who were parents of a child under the jurisdiction of the juvenile dependency court, had over 30 separate cases involving minor drug offenses in the preceding five years. An obvious goal of the unified family court is to reduce the family's contacts with the court system in terms of future court filings.

Because of the success of our therapeutic drug court, we decided that this integrated family court should emphasize a therapeutic approach as opposed to a punitive one. The judicial officer should emphasize persuasion rather than punishment and use the parent's desire to be with his or her children (a positive outcome of the visitation, custody, or other issue in dispute) as the primary motivation for compliance. We also agreed that the judicial officer would focus on short-term goals rather than long-term challenges for the families. The primary approach of the court would be outcome-based, and the judicial officer could impose appropriate sanctions, including jail time, if he or she felt them to be necessary.

After months of planning, our first calendar for the unified family court was called in June 1998. We named the calendar H.O.P.E., for "Helping Organize Parents Effectively."

To not overload the agencies that agreed to participate in this experiment, the court decided to limit the size of the calendar to 15 families at any one time. The families are selected through a nomination process that involves a review of their situation and cases by the court and a designee from each of the four agencies that provide social services believed to be critical to the success of almost every family involved in the H.O.P.E. Court (Behavioral Health, Probation, BCOE, and CSD).

The general procedure and criteria for accepting a nomination include the following:

- The family must be involved in multiple Butte County court filings. We are not looking at the "difficult" divorce case; rather, we are searching for families who are causing an impact on the court system through multiple court filings. Any case type involving the family may be placed on the H.O.P.E. calendar. These could include traffic cases, family support reimbursement cases filed by the district attorney, and even criminal cases. However, all criminal matters must have been adjudicated because there will be no criminal trials in the H.O.P.E. Court. Violation of probation hearings, sentencings, and dispositions may be adjudicated in H.O.P.E. Court.

- H.O.P.E. Court does not displace any existing therapeutic courts—for example, our drug court. Although this may seem inconsistent with the “one judge–one family” premise, these specialized courts offer expertise and realize therapeutic gains that outweigh the general goal of one judge–one family. The H.O.P.E. Court judge monitors the family members’ progress in the other therapeutic courts.
- An attorney with the county counsel’s office prepared a broad release-of-information form. The release form addresses the confidentiality issues that often bar the exchange of information between and among the various providers of services. All adult members of the family seeking acceptance into H.O.P.E. Court must sign the release. The execution of the release indicates the family’s willingness to participate in H.O.P.E. Court.
- Upon receipt of the nomination, the H.O.P.E. Court coordinator, a court employee dedicated only part-time to the H.O.P.E. project, conducts a search for any active cases involving any members of the family, gathering all pertinent case files and preparing a list of cases and their current status, including active warrants. The coordinator then distributes the case summary to our case management team, which consists of designated lead workers from Probation, CSD, Behavioral Health, and BCOE.
- The case management team, together with the judge, reviews and evaluates cases and families to decide which families will be accepted for H.O.P.E. Court. The case management team evaluates the families based upon appropriateness or suitability for the family to be placed on the H.O.P.E. calendar and the availability of space and resources.
- Attorneys who are representing members of the families in any of the open cases that are being discussed in the evaluation process are invited to attend the nomination meetings and participate in the discussion.
- As the person with the authority to make final decisions regarding the family, the H.O.P.E. Court judge makes the ultimate decision about acceptance into the unified calendar, but only after a full and frank discussion with the other team members. In the end, a nominated family may be denied access to H.O.P.E. Court, the decision may be postponed, or the nomination accepted.

When a family is accepted into the H.O.P.E. Court, one of the four team members is appointed to act as the lead worker for that family. The lead worker is responsible for contacting all agencies involved with the family’s cases and for preparing a court service plan. This service plan is comprehensive and specific regarding the services being offered the family and the responsibilities the parents and children are expected to fulfill in order to comply with the plan. The service plan sets specific goals that the family must meet, normally within an eight-week period. The plan calls for a structured system of supervision and accountability; it outlines the participants’ and service agencies’ obligations and clearly states the method of monitoring (such as drug testing and producing proof of attendance at Alcoholics Anonymous meetings). Prior to the initial court hearing, all attorneys, all parties, and all members of the case

management team should receive a copy of the proposed service plan. In addition, the lead worker prepares reports before each review, outlining the family's progress and making appropriate recommendations.

Before all court appearances, be it the initial hearing or any subsequent reviews, a precalendar case management meeting takes place with the four team members, a public defender, all attorneys involved in the cases, any service providers who wish to attend, and the court. The family members do not attend these meetings. At the case management meeting members of the management team, the judicial officer, and others who have an interest in the case review and discuss the service plan. The team is made aware of the specifics of the family's current situation and any proposed action. The case management team discusses the family's progress in meeting the service plan's goals and makes recommendations for changes or modifications to the service plan.

After the precalendar case management meeting, the cases are called in open court with a court reporter present. The judicial officer engages in conversation with the lead workers and the parents (sometimes the children as well), and discusses the goals to be achieved prior to a review. The parties are encouraged to ask questions and to fully participate in the process so they understand what is required of them. Borrowing a suggestion from Judge Carl F. Bryan (Nevada County Superior Court), the family is placed in the jury box so that all participants in the process can hear and see each other.

In most cases, the judicial officer orders an eight-week review hearing. However, reviews may be set more or less frequently as is deemed necessary. During the reviews, the judicial officer normally inquires about challenges the family members are meeting on a daily basis and ways the court and members of the case management team might help them meet those challenges more effectively. The judicial officer also asks each member of the case management team to make comments to, or ask questions of, the parents. This not only involves the team members in the hearing process, but the dialogue also begins to build alliances between the parents and team members, and gives the parents the sense that there is a community of caring service providers who are there to help them in the reorganization and recovery of their family.

A family remains under the supervision of the H.O.P.E. Court until one of two situations arises. The first is if, after one or more review hearings, the case management team and the judicial officer determine that one or both parents have not participated in good faith in achieving the goals stated in their service plan. This generally occurs after the parents have been given sufficient opportunities and warnings to improve their participation and compliance but have failed to do so, have continued not to meet the goals and objectives of the H.O.P.E. Court service plan, and/or have continued to violate conditions of probation or other judicial orders. In this situation, the judicial officer will order the family's multiple cases returned to their respective courts—criminal court, juvenile court, family court, and so forth. Conversely, the family may leave H.O.P.E. Court because they

have achieved their individual and collective goals and regularly reporting to the court serves no further purpose.

Much has been written about the obstacles that are faced in establishing a unified family court. Butte County certainly has encountered many of them, ranging from confidentiality to simply being able to identify the files that belong to a particular family throughout the court system. Some practical problems, and possible solutions, follow.

Given the existing court organization, how do we identify all files belonging to a particular family?

One problem is the way in which cases are indexed: a juvenile case is indexed by the name of the child, a dissolution of marriage or paternity suit is indexed by the names of the parents; and, often, the parents—and the child—may have different last names as well.

The Butte County court system does have a computerized case management system that indexes names regardless of case type. This means that if John Doe has a criminal case and a traffic case and is the defendant in a civil case, our case management system will list all cases involving John Doe. Therefore, it simply requires routine and not overly difficult detective work. Our coordinator performs a record search on each name in the family tree that has been provided to her by the family or participating agencies.

How do we coordinate between the court's separate units?

The Civil Division processes family law, paternity, and the usual civil cases. We also have a Probate Division that processes conservatorships and guardianships. A Criminal Division processes domestic violence, drug court, and other misdemeanor and felony cases. Traffic cases are processed separately, as are juvenile cases.

When a family's cases are scheduled to be called on a H.O.P.E. calendar day, the coordinator must go to four or five separate locations to retrieve the files. This obviously requires coordination among the divisions and that the coordinator pull the cases well in advance of the calendar day.

During the planning process we developed a minute order sheet that addresses most of the issues the different case types present on the H.O.P.E. calendar. For example, for the criminal cases, the form provides checkboxes to indicate that the hearing is for a probation review or a violation of probation, that the defendant was advised of and knowingly and voluntarily waived his or her rights, and so on.

How does one define a "family"?

This is both a practical and philosophical question. All of us have encountered cases where a stepparent or even a nonrelative can have a more nurturing rela-

tionship with a child than the biological parents. Additionally, we encounter situations where one woman has several children, each fathered by a different man, some of whom may be involved with the children and others not. From our experience, it is usually clear who forms the core of the family unit. These are the persons whose consent and authorization we seek and the persons to whom services are provided.

How does one bridge the confidentiality gap among the various service providers?

It became apparent to us that nearly every H.O.P.E. Court family was involved in a confidential proceeding, usually a juvenile matter. Our county counsel drafted a very broad confidentiality waiver, and we require all adults who wish to participate in the H.O.P.E. calendar to execute it. To date, counsel for the children have never objected to proceeding in the unified family court.

Our experience has been that family members want to participate in the H.O.P.E. Court. Many of the court's characteristics explain their willingness to participate. For example, a convicted felon facing a violation of probation might (wishfully) view the H.O.P.E. Court as an alternative to state prison. A parent subject to Welfare and Institutions Code section 300 dependency jurisdiction might look to the H.O.P.E. Court as a means to demonstrate a willingness to reunify with the children, thereby avoiding termination of reunification services and, ultimately, a termination of parental rights. We have not encountered a single person who refused to waive confidentiality or a person who has withdrawn consent.

What happens when the judicial officer must conduct a contested hearing?

Many times the families wishing to participate in the H.O.P.E. Court are involved in proceedings under the jurisdiction of the dependency court. The timelines for reunification are very strict. If a parent shows commitment to the process toward the end of the reunification period and is then accepted into the H.O.P.E. Court, that parent must accomplish much in a short period of time. For some parents, the reunification period ends without their having substantially addressed the problems causing the court to assume jurisdiction in the first place. The recommendation is to terminate reunification efforts and set the matter for a permanency planning hearing. If the parent objects, should the H.O.P.E. Court judge hear the contested proceeding?

The answer appears to be no, based on discussions among colleagues in unified family courts. In monitoring the families and reviewing their cases in the H.O.P.E. Court, one learns a great deal about each family's strengths and weaknesses that might not otherwise be revealed in a proceeding governed by the rules of evidence. Accordingly, contested matters, where findings must be made based on conflicting evidence, are probably best heard by another judicial officer.

During the first year of H.O.P.E. Court operation,

- Seventeen families entered the H.O.P.E. Court;
- Seven families exited: I would characterize four of the exits as favorable and three as unfavorable;
- Seven families were denied entry to H.O.P.E. Court;
- Four nominations were postponed, and all were either later accepted or denied;
- The average number of open cases for each family in H.O.P.E. Court was 7; the lowest number was 3, and the highest was 11.
- The 17 families that entered the program had 117 total cases. As the families progressed (or regressed) in H.O.P.E. Court, individual cases would be resolved or disposed of (for example, a traffic case might be adjudicated), or, as in the case of one family, a new case might be added as a result of a family member's arrest on a drug charge.

Parenthetically, we have not “cherry-picked” families for the purpose of trumpeting our successes. Against my better judgment, two families were admitted in which the parents were involved in the criminal justice system and drug culture for many years. I rated their chances for improvement as hopeless (sorry). As it turned out, these were two of our most stunning successes.

One last point. I have characterized exits from H.O.P.E. Court as “favorable” or “unfavorable.” Making these determinations has presented us with our most difficult challenge: How do we judge or assess the outcomes in these cases? Clearly, if the program does not succeed in meeting clearly defined program goals, then the program should be discontinued. How do you develop the “objective” criteria by which to judge the outcomes of the cases?

In a therapeutic or outcome-based court such as drug court, the defendant is the only person appearing before the court. The goal is clear: to assist a drug abuser in abstaining from continued use of drugs. This is accomplished in a number of ways—building self-esteem, obtaining employment, attending counseling, and so forth.

In our unified family court there are usually a number of individuals who are parties to the proceedings. Each has different needs and limitations. For example, one of our cases involved a husband and wife who did not live together. Each was homeless. They had three children between them, none of whom were attending school. This case was identified as one of the worst in our county in terms of truancy. As is often the case, these homeless parents were not employed and had few job skills. The mother was a drug abuser as well. The eldest child was developmentally disabled, but no effort had been made to process an application for services through the Regional Center organized to assist such children. The children had not received needed medical attention.

The case came to H.O.P.E. Court when the parents were convicted (by plea) of contributing to the delinquency of a minor in criminal court (Cal. Penal Code § 272). They were placed on formal probation.

The initial goal identified for this family was to require the children to attend school. Compliance was minimal. The parents were exhorted to comply with the case plan, and incidentally, their probation conditions, at the first review.

Soon the mother was arrested for possession of drugs. I sentenced her to six months in the county jail and decided that if she would agree to participate in an in-patient drug rehabilitation program, I would release her to that program. She chose to sit out the time in jail.

For some reason, the absence of the mother from the family dynamics energized and empowered the father. Attendance at school became perfect. He arranged for necessary medical treatment for the children. He participated with the children in after-school homework clubs and other programs. The children were fed and appropriately clothed. They thrived in the school environment.

The eldest daughter was processed through the Regional Center and started receiving additional services. The father obtained a job, and after bartering with a landlord, obtained the first permanent dwelling the family had ever been in. He painted it, obtained secondhand furniture, and moved his children in on Christmas Eve. The children were dumbstruck.

The mother appeared at one of the reviews while still in custody. One of the "pending" files involving this family was a dissolution of marriage proceeding that had been initiated by the mother, in propria persona, years earlier. With the consent of the parties I avoided several procedural requirements of our court to obtain a trial date and proceeded to enter a dissolution of their marriage. Additionally, with the consent of the parties, custody orders were made.

Upon the mother's release from jail she was promptly arrested for another drug violation. She will probably serve time in our state prison. The father, on the other hand, recently received an award for "Father of the Year" from a local service club.

How do you assess the outcome reached for this "family" in our H.O.P.E. Court? Was it favorable or unfavorable? When you look at the individuals involved, the three children and the father ended up better off for participating in the H.O.P.E. Court program; no change was accomplished in the mother's situation. Each case is unique. If we help a majority of the family members, is that a success?

Our H.O.P.E. Court team presently leans toward evaluating the relative success of our efforts based on a format used by counselors when they bill insurance companies for their work. An assessment of the person obtaining counseling is made at the beginning of the relationship and after each session. The counselor's intervention hopefully produces a positive change in the individual that the insurance company can understand and support.

The before-and-after assessments for H.O.P.E. Court will be done on each individual in the family. Alcohol use, drug use, parenting skills, employment, school attendance, legal entanglements, mental health/well-being, and behavioral and medical issues are the general items that will be assessed for each individual in the H.O.P.E. Court. We are hoping that this instrument will enable us to somewhat objectively determine whether our efforts are successful or not.

As the judge hearing the Butte County H.O.P.E. Court calendar, I can truthfully say that it has been one of the most challenging assignments of my nearly 12-year career. One must be “ambidextrous”—able to call out a variety of cases, each with different procedures and burdens of proof. One must try to make sense of the priorities of each family—for instance, deferring sentencing on an admitted violation of probation in a criminal case until the parent is able to demonstrate progress in learning parenting skills or taking advantage of counseling for domestic violence. While this assignment is challenging, it has also been very rewarding. One comes to learn much about the dynamics of a particular family and witness real growth and progress.

Essay

Hardships of a Minor Hero in the “System”

*Hero: a person admired for his
achievements and qualities.*

Amariche Hawkins

I have been referred to as a hero by some just because I have made it through the system and have a plan for the future. I don't feel very heroic, but just getting through the system intact seems like a feat of heroic proportions—especially with the odds stacked against me, odds put in place when I was born.

It has not always been a foregone conclusion that I would make it through successfully. As described below, there are many hardships put upon kids just because they are foster children. But before I speak of those difficulties, I'd like to celebrate myself.

Prioritizing things is not easy for any adolescent. For a foster kid with no positive adult role models, it was more difficult for me. I would put partying before school work, music and dance over God, and football practice before church. Luckily I came across several people who helped guide me down another path. My pastor and a former foster father instilled the importance of education, even though they themselves did not graduate high school. Bombarded with their hardships in life, I became determined not to create the same obstacles for myself. I realized I was an important person and that God gave me dominion over tangible things. I learned the importance of morality, integrity, and my responsibilities to myself as a man.

With this new enthusiasm and despite the limits placed on me as a foster child, I began finding ways to help myself and others. Visiting convalescent homes and sick children in the hospital cheered the residents up and let me feel good for making them feel good, if only for brief moments at a time. On a more ongoing and an equally rewarding basis, I volunteered as a peer mediator, working to diffuse other teens' conflicts.

In celebration of this new way of going on, I looked for a way to express myself creatively. After several attempts with different art mediums, I chose writing and, as demonstrated in this essay, I like it.

Many times in our lives we believe a problem is fixed when it isn't broken. The "system" provides the bare necessities in life, but don't you think we (foster kids) deserve more? Our parents are the ones who failed to meet the basic requirements of parenthood, yet we catch all the suffering and madness that consumes our childhood. Finally, isn't it hard enough for teens or "minors" to gain respect and get the chance to do as others do? For example, driving a car, traveling, visiting others, and going off to college. Sure, we shouldn't complain because at least we have somewhere to live, however minimal. I think we deserve more—in fact, I demand it!

I truly believe that the "system" is nothing but a business. Foster parents receive money, minors are fed and clothed; the transaction is made. When minors don't agree, they can be replaced and uprooted to another location. I know firsthand. Many, if not all the foster parents I had, depended on the money they received for my care as income to their household. Can you imagine living in a family knowing the only reason you are there is for the check each month? So many times I felt lonely sitting on my bed crying, asking the Lord, "Why me?" Meanwhile, the parents are on the phone to DCFS asking that I be removed, and then I am the one labeled the "problem child" or "emotionally disturbed." This because I asked for more spending money or for a ride to a friend's.

How can a person be "stable" when so many people flash in and out of your life? Social workers change, lawyers change, and, seemingly the least important to everyone but me, "parents" change all the time. The children have to deal with the fact that they will never have a normal childhood because of where they came from and why—nobody else has to, and nobody thinks they themselves are responsible for the situation.

If the system is so good, why do so many of us end up in jail, homeless, or just plain mixed up? And why, when one of us does make it, is everyone shocked? This shouldn't be. If we expect our "normal" children to succeed, the standard should be the same for kids in the system. And we should be treated similarly. For example, my present foster mother fusses and yells at her grandson to make better grades and get a job—"Do something with your life," she says. Yet I bring home straight Ds and she tells me, "At least you are graduating." Now I don't prefer to be screamed at, but I do like to be loved. And if that love comes from yelling, even I don't mind a dose.

It is unfortunate that our parents couldn't provide what we needed in life. If a child were given the choice to stay with his mother and be hungry and homeless or be with foster parents, I can guarantee he would choose his mother. The reason is that even though there may be neglect and abuse, the child senses real love. Being a foster parent means being a substitute parent, not instead of. Not being with our parents causes depression (at least it did in my case). Everyone in the system throws money at psychologists, therapists, and other doctors when all we need is genuine love. The county social worker comes once a month and drops off a lot of bull, then leaves after an hour. In that time she has decided your immediate and long-term fate. Do I get to live in the same house, have the same friends, go to the same school, get to relax until the next visit, or is everything going to be to be thrown in the tempest otherwise known as "replacement"? On top of what our parents did to us, and now this, is it any wonder so many of us kids are messed up?

Now the restrictions of children in the system. For foster parents trying to truly treat us as their own, it is one obstacle after another. A foster child cannot visit a friend across the street because agency rules say permission must be gotten first. Foster children are left behind while the rest of the family goes on vacation because special permission is needed. A 17-year-old MAN is not allowed cologne, toothpaste, or deodorant because the county says it's dangerous. It is humiliating to have these common necessities and choices disregarded. And the worst restriction and horror: a man turns 18 and must leave the house because he has been terminated. It has nothing to do with "Is he ready?" but with the fact that monthly payments have stopped. It is inconsistent with maturity to be treated like a prisoner for so long and then be turned loose.

Doesn't sound like a wonderful substitute for a family, does it? Why is it that I must go through lawyers, judges, and a social worker just to get a pair of socks when I need it? Why is it that there are restrictions on what is paid for a child each month? Surely, with so many of thousands of kids in the system, all our needs can't be the same.

For all these reasons I have written about, I am ashamed of being a foster child. Even though we all know it's not my fault, I am treated the same as probation kids. Restricted, prohibited, and underprivileged.

I am going to Grambling State University, where I'll major in criminal justice. There I'll be part of the ROTC program and will play football. I plan to be the first in my family to graduate college and then go pro in the NFL.

Playing football was always a dream. In high school I realized I was good enough to consider it as a career and make it in the NFL. However, I also know that like one out of every 5,000 college players do turn pro, so I am pursuing a degree in criminal justice in order that I can become a law enforcement professional and continue to help others. In this way I also help myself.

Is all this heroic? Today, while I am reeling in the effects of being a system kid, it doesn't seem so. Just writing this essay it doesn't seem so. However, I felt this was the only time to voice my opinion and have it heard on what we all call the "system."

It's a system that systematically fosters criminals, crazies, and all kinds of weird things. Things in conflict with the welfare of youth. Until someone makes a change, we will all be guilty of raising deprived young people who never had a fair chance with their parents and never got one in the system.

