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Cover Page Footnote

Attorney and law teacher at the Children and Family Justice Center of Northwestern University School of Law Legal Clinic. I thank Center social worker Monica Mahan for her incredulity about the legal ethical limitations facing attorneys who represent children, and Bernardine Dohrn for reviewing an earlier draft of this Response.

RESPONSES TO THE CONFERENCE

DECONTEXTUALIZING THE CHILD CLIENT: THE EFFICACY OF THE ATTORNEY- CLIENT MODEL FOR VERY YOUNG CHILDREN

*Annette R. Appell**

MS. Smith gives birth to an HIV positive, drug-exposed baby girl and informs the hospital staff that she wants to place her daughter for adoption. The next day, Ms. Smith checks out of the hospital, leaving behind her newborn, who becomes known as Baby Girl Smith. The hospital calls child protection services to report the incident. For two weeks, Baby Girl Smith remains in the hospital while the child protection agency attempts to meet with Ms. Smith to obtain her written relinquishment of parental rights so the agency can place her baby in a preadoptive home. Unfortunately, although Ms. Smith consistently reaffirms her plan for her daughter, the agency fails to have Ms. Smith complete the necessary papers. No father steps forward or registers with the putative father's registry. The agency submits a petition of the case to juvenile court and searches for a foster-adoptive home for the baby. The juvenile court appoints an attorney to represent Baby Girl Smith as lawyer and guardian *ad litem* ("GAL") in the child protection proceedings.

Corey Thomas, a healthy, happy ten-month-old, is meeting his developmental milestones early. Ms. Thomas is his mother. She is an eighteen-year-old ward of the juvenile court herself. She refuses to cooperate with her caseworker and is, as are many eighteen-year-old girls, preoccupied with boys. She has failed to have Corey's immunizations updated. Ms. Thomas' aunt has cared for Corey on and off during his brief life and is seeking legal custody of him; she has raised Corey's two-year-old sister Marcess since birth. A foster parent is raising Ms. Thomas' other child. The domestic relations court appoints an attorney to serve as Corey's lawyer and GAL for the custody proceedings.

* Attorney and law teacher at the Children and Family Justice Center of Northwestern University School of Law Legal Clinic. I thank Center social worker Monica Mahan for her incredulity about the legal ethical limitations facing attorneys who represent children, and Bernardine Dohrn for reviewing an earlier draft of this Response.

INTRODUCTION

Courts and legislatures are increasingly recognizing children as people rather than as property. So too lawyers, child advocates, and legal scholars have been recommending that children be afforded legal representation that approximates, as nearly as possible, the attorney-client relationships enjoyed by competent adult clients.¹ The Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("Proposed ABA Standards") mandate the attorney-client model for attorneys appointed to represent children, and thus represent a welcome development in strengthening the protection of children's legal rights. The conferees at the Fordham University School of Law Conference on Ethical Issues in the Legal Representation of Children² (the "Conference") also recommended that attorneys for children with capacity must represent their clients as if they were adults.³ But, as the conferees also recognized, the attorney-client model is challenged when clients are not developmentally capable of defining the scope of representation or are capable of guiding some legal decisions but not others.⁴ In light of these challenges, the conferees developed thoughtful guidelines for attorneys representing children lacking capacity.⁵ These guidelines include Recommendations that the attorney listen to the child's own words and gather information from other sources to get to know the client as a unique individual. The guidelines provide

1. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham L. Rev. 1655, 1696-97 (1996); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. Fam. L. 607, 608 (1982-83); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Fam. L.Q. 287, 288-91 (1983); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 Fordham L. Rev. 1571, 1573-74 (1996); Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam. L.Q. 349, 350-53 (1993).

2. The Conference on Ethical Issues in the Legal Representation of Children was held at Fordham University School of Law, New York, New York, on December 1-3, 1995.

3. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) [hereinafter *Recommendations of the Conference*] (part I).

4. Rule 1.2(a) of the Model Rules of Professional Conduct states: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." Model Rules of Professional Conduct Rule 1.2(a) (1983) [hereinafter *Model Rules*]. Similarly, Ethical Consideration 7-7 of the Model Code of Professional Responsibility provides: "[T]he authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer." Model Code of Professional Responsibility EC 7-7 (1981) [hereinafter *Model Code*].

5. *Report of Working Group on Determining the Best Interest of the Child*, 64 Fordham Law. Rev. 1347, 1349-50 (1996) [hereinafter *Report—Determining Child's Best Interest*]. The conferees incorporated this into part IV of the Conference Recommendations. See *Recommendations of the Conference*, *supra* note 3, part IV.

an excellent model for the representation of precapacitated⁶ child clients. However, the guidelines do not provide sufficient direction for the representation of very young clients—newborns to toddlers—who may be nonverbal and lack both the developmental capacity to make reasoned decisions and a history of sufficient duration or depth to provide context and guidance to the attorney.⁷

Moreover, the conferees premised these guidelines on the appointment of an attorney to represent precapacitated children. Perhaps because the purpose of the Conference was to address ethical issues in the legal representation of children by attorneys, it did not systematically address the prefatory issue of whether children should be represented by attorneys in the first place. Nevertheless, the Conference endorsed mandatory appointment of counsel in a number of proceedings involving children.⁸ Yet, if the essence of the attorney-client relationship is the attorney's service at the client's direction,⁹ it makes little sense to appoint an attorney to represent a very young child such as an infant or toddler who unquestionably cannot direct that lawyer.

In fact, this lack of direction for lawyers representing precapacitated children can too easily lead to abuses. For example, an attorney appointed to represent the precapacitated child may also be appointed as GAL or might assume, de facto, the role of GAL and substitute the attorney's own judgment as to the appropriate outcome of the case.¹⁰

6. I use "precapacitated" instead of "incapacitated" or "without capacity" to refer specifically to very young children who do not have the developmental capacity to direct their attorney but who, unlike most other incapacitated clients, were never capacitated and hopefully will be in the future. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1400-01 (1996) (discussing the difference between lawyering for the once-capacitated and the precapacitated client); Wilber, *supra* note 1, at 361-62 (same).

7. See Guggenheim, *supra* note 6, at 1399-1400 (describing the limitations peculiar to representing young children); Wilber, *supra* note 1, at 362-63 (same).

8. *Recommendations of the Conference*, *supra* note 3, part VIII.A.1 (recommending that attorneys be appointed in abuse and neglect, termination of parental rights, foster care, delinquency, status offense, and mental health commitment proceedings); see also Ross, *supra* note 1, at 1576 (arguing that all children *with capacity* should be represented by attorneys in legal proceedings).

9. This is my assumption for purposes of this Response. For alternatives, see Federle, *supra* note 1, at 1656 (arguing that the role of attorneys is to empower their clients), and Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 Fordham L. Rev. 1473, 1478 (1996) (rejecting the lawyer as agent and promoting lawyer as fact finder and value promoter). Although Federle's empowerment theory is not necessarily inconsistent with the attorney as agent and provides an attractive framework for the attorney-client relationship, Margulies' notion of lawyer as value promoter is troubling given the lack of societal agreement regarding what values to promote. See John E. Coons et al., *Deciding What's Best for Children*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 465, 480-82 (1993) (discussing value pluralism); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. Fam. L. 1, 12 (1977-78) (noting difficulty in making predictions about future outcomes).

10. *Recommendations of the Conference*, *supra* note 3, part IV.B.1; Mlyniec, *supra* note 9, at 11-13; Ramsey, *supra* note 1, at 305.

These essentially unreviewable decisions may be guided by the attorney's conception of the child's best interest, by the attorney's understanding of what is generally considered to be in children's best interest, or by the attorney's own beliefs about what is right.¹¹

Indeed, this lack of standards pervades decision making on behalf of children, not only because judges may rely on the child's attorney when making decisions,¹² but also because decision-making principles themselves are either inconsistent or applied inconsistently.¹³ Thus, decisions for precapacitated children may be based on institutional, political, or personal biases, and not on the children's actual needs.¹⁴ One would hope that attorneys for children would help focus decision making on the child and away from adult interests.¹⁵ For this reason, I endorse the call for the application of the attorney-client model to the legal representation of children; including the child's voice in the proceeding provides balance and an otherwise missing viewpoint to the proceedings.¹⁶ Nevertheless, the attorney for the precapacitated child is rudderless because the client is without a voice sufficient to direct representation.

This Response challenges attorney representation of these very young children.¹⁷ Because attorneys bring to these relationships limi-

11. Guggenheim, *supra* note 6, at 1415; Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423, 426 (1993); Ramsey, *supra* note 1, at 301-02; Mlyniec, *supra* note 9, at 9-10. *But see* Robert H. Mnookin, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* 515-16 (1985) (discussing how, despite inherent difficulties in representing children and class action members, those attorneys who specialized in such representation served the interests of their named clients in class action litigation.)

12. Hafen, *supra* note 11, at 451.

13. Theodore J. Stein & Tina L. Rzepnicki, *Decision Making In Child Welfare: Current Issues and Future Directions*, in *Child Welfare, Current Dilemmas—Future Directions* 259, 261-63 (Brenda McGowan & William Meezan eds., 1983).

14. *See, e.g., id.* at 273 ("Children have been removed from the care of their parents because the court does not approve of their lifestyle . . . [and not based on] evidence of harm to a child."); Robert F. Kelly & Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 Rutgers L. Rev. 1217, 1239-40 (1988) (noting that a child's race, parent's gender, and other factors unrelated to the severity of the problems which brought the cases into court had the most bearing on custodial decisions).

15. Kelly & Ramsey, *supra* note 14, at 1240. Kelly and Ramsey note: "[C]hildren with similar problems could receive widely disparate treatment depending on factors not intrinsically related to their needs. It is sensible to infer that children such as these might have benefited greatly from sustained and independent advocacy on their behalf." *Id.*

16. Ramsey, *supra* note 1, at 295-98.

17. Accordingly, this Response does not address proceedings which tend to involve older children, such as delinquency, abortion, special education, emancipation, and the right to marry. Nor does this Response tackle the thorny questions of representation of preadolescent, school-age children, although much in it may be applicable to this group. Choosing and evaluating normative models of representation for that age group presents the most complex and ethically challenging area for child

tations arising out of the absence of ethical guidelines for appropriate conduct, inadequate training, and ethical barriers to effective representation, lawyers are all but precluded from developing a multidimensional picture of their clients. The autonomization implicit in appointing counsel, coupled with specific ethical prohibitions which limit the ability of attorneys to gather information about clients who cannot provide that information themselves, serve to decontextualize the young client. That is, by first separating the child from those persons who know the child best, and then erecting barriers to constructing or reconstructing the child's world, the appointment of legal counsel isolates the child from the attorney, and both the child and the attorney from the child's past and future experiences.

In this Response, I argue first that the ethical rules governing the attorney-client relationship do not provide sufficient guidance for attorneys representing precapacitated children. Next, I argue that, because legal training does not impart the skills, knowledge, and disposition necessary to represent precapacitated clients ethically and effectively, attorneys are not a particularly good choice for representing this group. Third, I highlight two ethical prohibitions that interfere with the attorney's attempt to investigate and promote very young children's interests. Finally, I recommend that specially-trained social workers or other adults be appointed to represent this target group, and that these representatives should themselves be represented by attorneys. Nevertheless, I conclude with a caution against applying this model to capacitated children who have an active and often wise voice to share with the court.

I. ETHICAL RULES DO NOT PROVIDE GUIDANCE FOR ATTORNEYS REPRESENTING INCAPACITATED CHILDREN

The ethical rules governing lawyers are based on the notion that they are expert servants, that the essence of the attorney-client relationship is that attorneys act on behalf of their clients' stated objectives.¹⁸ Without the client, we lawyers are, so to speak, nothing. Lawyers' own goals, interests, and objectives are (or should be) irrelevant to the court or to the transaction. Thus, lawyers may not normally substitute their own opinions regarding the goals of

advocates and attorneys, and calls for a fuller treatment than is permitted here. See generally Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *Fordham L. Rev.* 1699, 1699-1762 (1996) (providing an extremely thoughtful analysis of ethical issues in the legal representation of young child clients); 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) (same).

18. Emily Buss recognizes that those attorneys practicing under the GAL model (in which the attorney substitutes his or her own decisions for the client's) "abandon the most fundamental aspect of the client-lawyer relationship" on which ethical principles are based. Buss, *supra* note 17, at 1731.

representation for their clients.¹⁹ Instead, the ethical rules mandate that lawyers follow their clients' manifested legal objectives. We lawyers are hired or appointed to help clients navigate the legal system—a system our profession constructed over time and with which we (by virtue of our training) are most familiar.

When representing clients without decision-making capacity, the Model Rules instruct lawyers to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."²⁰ When the client cannot act in his or her own interest, the Model Rules provide that lawyers "may seek the appointment of a guardian or take other protective action with respect to a client."²¹ Although the comments to the Model Rules state that "the lawyer often must act as de facto guardian" for the disabled client,²² the Model Rules do not mandate the substitution of the attorney as the decision maker on behalf of the client, but instead suggest that the guardian assume such a role.²³ The Model Code more clearly permits the attorney to make decisions on behalf of the incapacitated client without a guardian.²⁴ Unlike the Model Rules, the Model Code does not suggest the attorney seek appointment of a guardian for the incapacitated client. The Model Code states that when the lawyer is compelled because of the client's disability and absence of a guardian to make decisions for the client, "the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client."²⁵ By contrast, the Model Rules do not provide even that limited direction to the attorney representing incapacitated clients.

Despite this lack of guidance for the attorney representing a pre-capacitated client, many jurisdictions mandate the appointment of an attorney for children of any age in child protection proceedings,²⁶ and

19. See discussion *infra* notes 40-47 and accompanying text.

20. Model Rules, *supra* note 4, Rule 1.14(a).

21. *Id.* Rule 1.14(b).

22. *Id.* Rule 1.14 cmt.

23. *Id.* Rule 1.14.

24. Ethical Consideration 7-12 of the Model Code provides:

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 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.

Model Code, *supra* note 4, EC 7-12.

25. *Id.*

26. See, e.g., Ill. Ann. Stat. ch. 705, para. 405/2-17 (Smith-Hurd 1995); see also Rebecca P. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 327-28 (1993) (stating that 46 states and territories have partially implemented statutes that require a GAL to serve as an advocate); Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. Fam. L. 405, 408 n.9 (1982-83)

permit the appointment of one in private custody disputes.²⁷ In fact, if the drafters of the Proposed ABA Standards have their way, the ABA will adopt a policy favoring the appointment of an attorney for every child in all child protection proceedings and all other proceedings involving allegations of parental misconduct or nonfeasance.²⁸ Yet if one of the fundamental tenets of legal ethics is obedience to clients' decisions, then removal of that foundation (as in the case with pre-capacitated child clients) leaves the ethics rules logically and practically on shaky ground.²⁹ Although the Proposed ABA Standards improve greatly upon the vagaries and vacancies of the Model Rules and Model Code as they relate to pre-capacitated clients, the Standards nonetheless fail to answer the fundamental question of what attorneys should do when their clients are infants.

By contrast, the Fordham conferees addressed the role of attorneys representing pre-capacitated clients to a greater extent than the Proposed ABA Standards.³⁰ The conferees approached this question from two directions. Professor Guggenheim and, implicitly, the drafters of the Proposed ABA Standards (some of whom were among the

(listing 22 states mandating appointment of attorneys in child protection proceedings and another 15 which permit such appointment).

27. Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 Fam. L.Q. 53, 55-56 (1992) (noting that 21 jurisdictions authorize and two jurisdictions mandate appointment of attorneys for counsel for children in contested divorce custody disputes); see also David Peterson, Comment, *Judicial Discretion is Insufficient: Minors' Due Process Right to Participate with Counsel when Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 Golden Gate U. L. Rev. 513, 516 (1995) (reporting that although only one state mandates appointment of attorney or GAL for children in all disputed custody cases, a majority of other states only permit such appointment).

28. The Preface to the Proposed ABA Standards provides:

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Family L.Q. 375 (1995) [hereinafter Proposed ABA Standards].

29. See Buss, *supra* note 17, at 1734 (maintaining that, in shifting decision making from the client to the lawyer, "children are divested of all the ethical protections owed to clients . . . for they lack the status that entitles them to (indeed, justifies) those protections").

30. See Guggenheim, *supra* note 6, at 1399-1400; Margulies *supra* note 9, at 1474; Peters, *supra* note 17, at 1564-69; Report—*Determining Child's Best Interest*, *supra* note 5, at 1348; Report of the Working Group on *Determining the Child's Capacity to Make Decisions*, 64 Fordham L. Rev. 1339, 1340-45 (1996); Report of the Working Group on *Interviewing and Counseling*, 64 Fordham L. Rev. 1351, 1352-56 (1996); Report of the Working Group on the *Judicial Role*, 64 Fordham L. Rev. 1389, 1389-91 (1996).

conferees) focused on defining the scope of representation, i.e., the purpose for which the attorney is hired or appointed. Attention to the scope of representation is critical when representing precapacitated clients because, as discussed above, the client normally defines the objectives of representation. Other conferees chose not to address this fundamental question and instead focused on how and when to make decisions on behalf of these children.³¹ This second approach constitutes another important analysis given the challenge that children's attorneys face when representing clients incapable of making decisions.

As discussed next, ascertaining or developing rules for defining the scope of representation is crucial. However, defining the scope purely with regard to positive legal standards may disregard the client's individuality. The client's individual circumstance offers a reference which provides the attorney with invaluable guidance when the child's legal interests are unclear or when protecting those interests may harm the child. Nevertheless, as discussed in part II, a focus on decision-making standards is not, by itself, a satisfactory alternative. Although accounting for the child's individuality, such a focus does not sufficiently address the practical and ethical limitations of attorneys representing precapacitated children.

Professor Guggenheim suggests that attorneys for precapacitated children should represent the children's legal interests as defined under the law.³² Similarly, the Proposed ABA Standards suggest that "the lawyer's primary duty must still be focused on the protection of the legal rights of the child client."³³ The mandate to protect the child's legal interests or rights is an advance, particularly in light of the concerns child advocates have raised about the lack of standards for representing children and the all-too-common, unprincipled decision making "on behalf of" children.³⁴ Defining the scope of representation as the protection of the child's legal interests, however, provides only limited guidance. First, courts have not always applied constitutional doctrines consistently with regard to children's rights.³⁵ Thus,

31. The Conference Recommendations do, nevertheless, limit the scope of decisions that can be made for the precapacitated client based on the child's legal, as opposed to other, interests. *Recommendations of the Conference, supra* note 3, part IV.B.3.

32. See Guggenheim, *supra* note 6, at 1411.

33. Proposed ABA Standards, *supra* note 28, Preface (emphasis added). Although these standards contemplate that the child will define the scope of representation, *id.* § IA-1 cmt., the very young child cannot do so. Accordingly, I interpret this prefatory language as defining the scope of representation for these precapacitated children.

34. See *supra* notes 10-16 and accompanying text.

35. See, e.g., Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92*, 27 Fam. L.Q. 307, 321 (1993) (noting the inconsistency in the Supreme Court's treatment of children's constitutional claims.)

the attorney representing a child may be uncertain about what the client's rights are, even when state law is clear. Second, even clearly-defined legal rights and interests may conflict. For example, a child has the right to remain a part of his or her family of origin,³⁶ yet a child also has an interest in being protected from abusive or neglectful parents.³⁷ These interests may conflict, particularly when the facts of a case indicate a level of abuse or neglect which is not severe or, as is often the case, when it is unclear whether abuse or neglect has occurred.³⁸ Thus, instructing the lawyer to represent the child's legal interests does not sufficiently direct the goals of litigation.

Nor does the legal interests model provide guidance as to what interests to pursue when the child's substantive legal rights may violate the child's less defined constitutional rights. Consequently, this model could limit constitutional challenges to, or defenses in, proceedings in which the applicable substantive state or federal law may be unconstitutional.³⁹ If the child possessed the requisite capacity of a client as contemplated under the Model Rules and Model Code, then he or she could simply instruct the lawyer which right or claim to pursue, just as an adult can instruct the attorney when or whether to exercise one legal theory over another.⁴⁰ An infant, however, cannot provide such instruction.

36. *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 847 (1977).

37. See, e.g., Child Abuse and Prevention Treatment Act, Pub. L. No. 100-294, 102 Stat. 102 (establishing comprehensive federal support and direction for state child abuse prevention programs). *But see DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202-03 (1989) (finding that a child does not have a constitutional right to be protected by the state from abuse by their parents, even when the state holds itself out as such a protector).

38. For example, such a situation occurs when a child has suffered a physical injury, such as a head injury, which could have been accidental or intentional.

39. For example, some children's rights litigation has been brought by children challenging state laws or procedures on constitutional grounds not yet extended to minors. See, e.g., *In re Winship*, 397 U.S. 358, 368 (1970) (striking down preponderance burden in juvenile delinquency adjudication proceedings and replacing it with reasonable doubt burden); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that a regulation that banned school children's symbolic acts of protest without a showing of substantial interference with school discipline or rights of others violated students' First and Fourteenth Amendment rights.) In these cases, however, the children arguably had capacity to direct their attorneys. The novel constitutional theories presented by attorneys for precapacitated clients in the infamous "Baby Jessica" and "Baby Richard" cases failed and advocacy of those theories led to protracted litigation resulting in inordinately long delays of custodial dispositions for those young clients. *Doe v. Kirchner*, 115 S. Ct. 499 (1994) (denying claim that a child has a due process right to a best interests hearing), *denying cert. to* 624 N.E.2d 181 (Ill.); *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993) (same), *denying cert. to* 502 N.W.2d 649 (Mich.). It is not clear whether the attorneys representing "Richard" and "Jessica" served their clients well by advocating a process to which the children had no legal right. Nevertheless, instances may exist in which precapacitated clients would clearly benefit from pressing novel legal theories.

40. Similarly, the legal interests model provides little guidance regarding settlement. For example, Guggenheim suggests that a child has the right to have his or her

Representing Corey's or Baby Girl's legal interests may direct the lawyer, but may not necessarily lead to good outcomes. Both infants have a right to be raised by their parents. Yet Baby Girl's mother has said she wants the baby placed for adoption, although her mother has not relinquished her parental rights. In addition, Baby Girl's father has not come forward. By failing to register as her father, he may have foregone the parental right to oppose an adoption,⁴¹ although he may have a right to be involved in the child protection proceedings. Yet even under this scenario, Baby Girl has no legal right to be adopted. At best, there is a policy favoring permanent placement for dependant children.⁴²

Given the absence of her parents, Baby Girl will benefit from being placed as soon as possible with the family who will commit to raising her through adulthood. Baby Girl, however, may also benefit from knowing her biological father and his family,⁴³ perhaps someone in his family would be willing to care for her. Therefore, it would also be beneficial for her attorney to search or insist on a search for her relatives. Such a search, however, would also take time, resulting in a longer stay in foster care and its attendant risks of multiple placements.⁴⁴ In any event, if her attorney were to confine himself to representation of her legal interests, the clearest of which is to be reunited with her parents, then he would not necessarily be helping her because her parents do not appear to want her. Under the legal interests model, her less defined interests in a permanent placement and in knowing her birth family are difficult to prioritize and may be trumped by her clear right to birth family integrity.

Corey's legal interests may also conflict with each other. On the one hand, he has an interest in being raised by his mother. Yet he also has a legal interest in remaining with a relative to whom he has

best interests in a custody matter decided by a judge, not the child's lawyer. Guggenheim, *supra* note 6, at 1426. This construct suggests that the child's attorney could not agree to settle a case, i.e., permit the parents or child welfare agencies to reach an accord as to the child's best interest. Moreover, even if the attorney could settle on behalf of the child, because the legal interests model prohibits the attorney from taking a position regarding the child's best interest, *id.*, it would also forbid the attorney from assessing whether proposed settlement terms are even appropriate.

41. Ill. Ann. Stat. ch. 750, para. 50/8 (Smith-Hurd 1995) (providing that putative fathers who fail to register or hold themselves out as the child's father have no right to contest the adoption of the child.)

42. See 42 U.S.C. §§ 627, 675(5) (requiring states to establish administrative or judicial review to insure that foster children will find permanent placements either through their returning home or adoption).

43. See Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. Rev. 997, 1015-18 (1995) (discussing the importance of birth families to adoptees).

44. See Andre P. Derdeyn, M.D., *A Case for Permanent Foster Placement of Dependent, Neglected, and Abused Children*, 47 Am. J. Orthopsychiatry 604, 607 (1977) ("[F]oster care for many children . . . may involve a number of different placements.").

formed significant attachments.⁴⁵ He too has an arguable legal interest in his relationship with his sister.⁴⁶ In addition, his predominant developmental interests lay in a stable, long-term home, which his great aunt appears to be the best candidate to provide. Because Corey's interests seem to conflict, the legal interests model of representation may not provide his lawyer with sufficient guidance. Guggenheim might suggest that the attorney present evidence as to each interest, enabling the court to make the ultimate decision.⁴⁷ Although this is a solid, workable role for the child's representative, this role could also be performed by a social worker or a specially trained volunteer, also known as a Court Appointed Special Advocate ("CASA").

In sum, the focus on the scope of representation advances the discussion of child advocacy for precapacitated children and will hopefully spawn further discussion, development, and debate. Such a focus may be troubling, however, to those child advocates who seek to empower children. Although the legal interests model may help retire the all-too-prevalent practice of adult-focused, standardless decision making on behalf of children,⁴⁸ it may diminish children's presence in their own legal proceedings.⁴⁹ The next part addresses an alternative to the legal interest model for representing precapacitated children. Although this alternative model focuses on giving the child a voice, little about the attorney-client relationship or the expertise of attorneys suggest that attorneys should represent very young children.

II. CONVENTIONAL LEGAL TRAINING AND EDUCATION DOES NOT EQUIP ATTORNEYS TO MAKE DECISIONS ON BEHALF OF CHILDREN

The conferees recommended that "[d]ecision making on behalf of a [precapacitated] child must be made in a contextual, self-aware, delib-

45. See, e.g., *Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969) (stating that although parent's right to custody is usually superior against a third person, in certain circumstances, a third party may be awarded custody when in the child's interests).

46. See, e.g., *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (presuming sibling contact to be in the best interests of foster care children); *In re Perkins/Pollnow*, 779 S.W.2d 531, 534 (Ark. 1989) (upholding finding that it was in the best interests of the child to be adopted by parents who had previously adopted the child's siblings, rather than to be adopted by the child's actual custodian); *In re Anthony*, 448 N.Y.S.2d 377, 381 (Fam. Ct. 1982) (holding that sibling contact was in the best interests of the adoptee).

47. See Guggenheim, *supra* note 6, at 1426.

48. The findings of Robert Kelly and Sarah Ramsey demonstrate the absence of such standards. For example, they note that the severity of problems that sweep children's cases into child protection proceedings do not necessarily determine whether the foster care agency assumed custody of those children. Instead, the child's race, parent's gender, effectiveness of parents' attorney, and the identity of the petitioner predicted custodial outcomes. Kelly & Ramsey, *supra* note 14, at 1239-40.

49. As Catherine Ross reminds us: "After all, it is the child's world view we are being asked to acknowledge." Ross, *supra* note 1, at [8].

erate[,] and principled manner."⁵⁰ After first determining the jurisdictional parameters⁵¹ of proceedings for which the attorney is appointed, the attorney must "focus on the child in her context" by conducting a "full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client's unique personality, her family system, history[,] and daily life."⁵² To this end, attorneys should be trained in interviewing and counseling children, medical and psychiatric treatment of children's illnesses, and the various competing interdisciplinary theories pertinent to children's interests in legal proceedings.⁵³ The attorney should also take repeated "snapshot[s]" of the child at each step of the legal proceedings, thereby capturing the child's development, behavior, and reactions in his or her current surroundings.⁵⁴

These prescriptions are apt, but nothing in the training of attorneys prepares them to do these things.⁵⁵ Law schools rarely (if at all) offer courses on child development;⁵⁶ and questions about family systems typically do not appear on bar exams. Indeed, such useful subjects for resolving disputes regarding children as negotiation and alternative dispute resolution have joined the law school lexicon only relatively recently. Attorneys review documents, investigate locations of incidents, and interview witnesses. Attorneys listen to what their clients say. Understanding a child's personality, psychological theories of attachment, loss, and genealogical bewilderment, while being sensitive to racial, class, and cultural differences⁵⁷ is not necessarily part of an attorney's training or expertise.

Indeed, representation of Baby Girl Smith will involve little fact-finding because her life has been so short. Certainly her attorney should investigate potential long-term or adoptive placements, exert

50. *Recommendations of the Conference*, *supra* note 3, part IV.B.2.

51. That is, what interests the legal proceeding has authority to address. *See id.* part IV.B.3.

52. *Id.* part IV.B.3.b.

53. *Id.* part IV.C.1; *see also Report—Interviewing and Counseling*, *supra* note 30, at 1351-52; Peters, *supra* note 17, at 1542-54; Margulies, *supra* note 9, at 1494-95.

54. *See Recommendations of the Conference*, *supra* note 3, at 1301 (part IV.B.3.c).

55. Indeed, the conferees acknowledged as much. *Id.* part IV.B.2 ("Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients."); *see also*, Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. Mich. J.L. Ref. 341, 351 (1987) (noting attorneys know little about child maltreatment or the physical, psychological, emotional, and cognitive needs and development of children).

56. The conferees also recommended additions to law school curricula including: (1) training in interviewing, counseling, and special ethical and practice issues relating to representation of children; and (2) the creation of law school clinical child advocacy programs. *See Recommendations of the Conference*, *supra* note 3, part II.B.4.

57. *See id.* part IV.B.2 ("References to the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyer's, and the lawyer's lay understanding of child development and children's needs should be considered highly suspect bases for decision making on behalf of her client.").

pressure to locate her family members (although finding them may delay the adoptive placement and could result in a custodial change for her at a tender developmental stage), and review her medical records to determine if she has any special medical needs or identified developmental limitations. After that, representation will depend on child development theory: (1) how quickly ought a permanent placement be found for the child; (2) what adverse effects may the child suffer if she is moved at various ages; and (3) which risk is greater, loss of birth relationships or possible multiple placements. Attorneys do not receive the training necessary to make these Solomonic judgments.

On the contrary, law schools and law firms, for the most part, train attorneys to analyze law and fact and to win cases on behalf of their clients. Yet disputes involving young children are not so simple. Not only is it unclear what winning means for these clients, but often one legal outcome, though beneficial to the child, will also entail losses for that child. Corey, for example, should not be pitted against his mother or his great aunt. He will derive some benefit from each custodial choice and surely will suffer (presently or in the future) if deprived of either one or of contact with his sister. In short, litigation involving children like Corey does not fit nicely into the standard lawsuit paradigm that is at the core of conventional attorney training.

Studies of attorneys for children suggest that, typically, attorneys who have no special training regarding child representation make no difference in outcomes for children and sometimes practice at substandard levels.⁵⁸ Unfortunately, the vast majority of attorneys appointed to represent children (unlike many of the conferees) are not specially-trained child advocates, but instead are general practitioners.⁵⁹ Moreover, attorneys constitute an expensive choice to fill a job for which they may be ill-suited in the first place. In fact, the poor quality of some legal representation of children has been linked to low compensation (relative to lawyers' scale), high caseloads, and judicial concerns about the impact of hourly payment of these attorneys on courts' coffers.⁶⁰ By contrast, special training, devotion of sufficient

58. Duquette & Ramsey, *supra* note 55, at 388-89 (finding that well-trained lay volunteers, attorneys, and law students performed similarly to each other and much better compared to the nontrained court appointed attorneys); Kelly & Ramsey, *supra* note 14, at 1238 (finding that appointment of attorneys for children had no impact on case outcomes).

59. Duquette & Ramsey, *supra* note 55, at 391. Indeed, although the numbers have surely increased in the past decade, by the mid-1980s, an extremely small percentage of attorneys specialized in child representation. Mnookin, *supra* note 11, at 48-50.

60. Kelly & Ramsey, *supra* note 14, at 1223-25; Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child is My Client, But Who Am I?," 64 *Fordham L. Rev.* 1917, 1925 (1996); see also Duquette & Ramsey, *supra* note 55, at 348 (noting the low fees paid to private attorneys representing children); Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinat-*

time, continuity in representation, and direct contact with the client comprise essential ingredients for effective child advocacy.⁶¹

Nevertheless, most jurisdictions choose attorneys for children in child protection proceedings merely because the attorneys have expressed an interest in representing children; many of these attorneys bring to this task no special training in child advocacy and consequently may, despite good efforts and intentions, provide less than optimal representation to children.⁶² This state of affairs has led at least two experts in the field of child representation to admonish: "[T]he lack of training and the low fees paid to private attorneys representing children sorely limit the ambitious child advocate's role suggested by many commentators."⁶³ This is not to say that we should surrender the idea of providing quality legal representation to children. Instead, the admonition cautions against the routine appointment of attorneys to represent precapacitated clients who have little to gain from the conventional attorney-client relationship, but (because of their vulnerability) have much to lose from the appointment of an untrained representative.

III. LEGAL ETHICS RULES OBSTRUCT THE REPRESENTATION OF VERY YOUNG CHILDREN

In addition to the unsuitability of attorneys for this type of representation in light of their training, the adversarial nature of their roles, lack of ethical guidance, and the high cost of lawyers, the appointment of an attorney may interfere with effective representation of the young child *because of* the ethical rules which bind attorneys and the very nature of such representation. Normally a court appoints an attorney to protect a client's sphere of interests. The flip-side of this protection, particularly in the context of an adjudicatory proceeding, is that the client's interests are, at least potentially, in opposition to those of the other parties.⁶⁴ In adoption, child protection, and other custody proceedings, the presumption underlying appointment of an attorney for the child is that the child's interests are or may be adverse to the parents, legal custodian or guardian, other custodial claimant, and, in child protection proceedings, the state. Thus, the child is segregated from all other parties in a proceeding, which is, ostensibly,

ing Council, 27 Fam. L.Q. 417, 418-20 (1993) (noting the low pay of children's attorneys as well as the low esteem in which they are held by the profession).

61. See Duquette & Ramsey, *supra* note 55, at 388-89; Hartz, *supra* note 26, at 339-40; Kelly & Ramsey, *supra* note 14, at 1238.

62. Duquette & Ramsey, *supra* note 55, at 391.

63. *Id.* at 348.

64. The comment to Model Rule 2.2 acknowledges this dynamic by noting that when parties to a common transaction each have their own attorneys, additional complications and even litigation may ensue. Model Rules, *supra* note 4, Rule 2.2 cmt.

about the child⁶⁵ and which involves parties who have some interest in the child.

On the one hand, the purpose of appointing counsel for children is to protect their own interests, which may or may not coincide with the interests of the other parties. On the other hand, very young children—particularly the subjects of this Response—are not autonomous. Thus, for the reasons described above, they and their attorneys may be at sea regarding the scope and goals of legal representation. Unlike capacitated clients who can articulate—or at least actively assist counsel to discover—when the client's interests overlap with others, very young clients cannot similarly guide their attorneys. Yet the act of appointing an attorney for such young children sets up an adversarial relationship, with attendant ethical obligations that actually interfere with the attorney's ability to discover the client's interests, particularly to the extent that these interests are shared with or related to those of other parties to the litigation. For example, these other parties—and their relations—may possess important information and insights regarding the child. Nevertheless, this information now is less accessible to the attorney not only because of the reticence people have about speaking with attorneys, but because the attorney is constrained by ethical rules from gathering and presenting such information.

The most interpositional ethical rule in this context is the rule prohibiting communication with a person represented by counsel. Model Rule 4.2 states that “a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”⁶⁶ The Model Code contains essentially the same proscription.⁶⁷ An appropriate and necessary ethical rule, this prohibition against speaking to represented parties nevertheless hampers the attorney representing the precapacitated child because the key parties who can provide context to the child's life, for example, the parents or other relatives or guardians who are contesting or seeking custody, are likely to be rep-

65. The issues of whether custodial proceedings really concern children and at what point children's interests diverge from their parents—although related to the presumption of the need for appointment of separate counsel—extend beyond the scope of this Response. For a discussion of the limited degree to which child welfare and custodial disputes sometimes involve children's interest, see Martin Guggenheim, *The Best Interests of the Child: Much Ado About Nothing?*, in Child, Parent & State 27, 29 (S. Randall Humm et al. eds., 1994); Robert H. Mnookin, *supra* note 11. For a discussion about when and why children's and parent's interests conflict, see Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy?*, 2 Duke J. Gender L. & Pol'y 63 (1995).

66. Model Rules, *supra* note 4, Rule 4.2.

67. Model Code, *supra* note 4, DR 7-104(A)(1).

resented and therefore are off limits to the infant's attorney.⁶⁸ Although opposing counsel may permit the client to speak with the child's attorney without presence of counsel, the opposing attorney may be hesitant if the client's interests are or could be at odds with the child's. Often the child's attorney will not know how those interests coincide or diverge until that attorney can investigate the child's situation.

Take the case of Corey Thomas. He is ten months old, healthy, happy, and developmentally appropriate. His representative cannot ask him who has been caring for him these past ten months; where he has been living; whether his mother feeds and plays with him, or whether others perform this caregiving; how many babysitters he has had; and whether he has been well-cared for because of or despite his mother. His attorney speaks to Corey's relatives (who are not represented) to attempt to understand what Corey's life has been like and where, if anywhere, he considers home. His relatives are either reticent about sharing information with this stranger who says she is their ten-month-old nephew's attorney, or simply do not know enough about Corey's early life because they have not seen him every day. They give the attorney different stories, depending on their experiences with Corey and their loyalties to Ms. Thomas, Corey's father, or to Ms. Thomas' aunt who is seeking custody. Corey's attorney really needs to speak with and get to know Ms. Thomas if the attorney is going to be able to understand who Corey is and what type of care Ms. Thomas has provided, and can provide, for him. For similar reasons, the attorney will also need to speak to Ms. Thomas' aunt. The attorney must be honest with the lawyers for the custody-seekers. She should inform those attorneys of what information she is seeking and what her concerns are. One or both of the attorneys may not give consent to speak to their clients who could have much to lose by sharing troubling information with the child's attorney. Thus, Corey will remain, at least in part, a mystery to his lawyer.

Even if the attorney could obtain the information necessary to know her client sufficiently to represent his interests, she would still be hampered by the ethical rules prohibiting lawyers from acting as witnesses. Model Rule 3.7 states that "[a] lawyer shall not act as advo-

68. Although in child protection proceedings, the state agency too may have important information about the child (which the caseworker acquires through interviews and other information gathering), the ethics rules probably would not prohibit communications with the caseworker because the caseworker is not the client of the attorney representing the state or the agency. See Model Rules, *supra* note 4, Rule 4.2 cmt. (indicating that the rule prohibits communication only with managers and other persons whose actions or omissions could be imputed to the organization for purposes of admissions and legal liability); see also Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. Law. 1053, 1060-71 (1987) (discussing ethical rules in the context of communications with employees of a represented organization).

cate at a trial in which the lawyer is likely to be a necessary witness."⁶⁹ The Model Code contains essentially the same prohibition.⁷⁰ This proscription would bar the attorney who obtains direct evidence of her own (for example, she witnessed something directly or has information which can be used for impeachment) from presenting that evidence to the court or would require the attorney to be disqualified.⁷¹ Similarly, the attorney would not be able to argue a position on behalf of the client because of ethical rules that prohibit attorneys from making assertions which are based on personal knowledge or are unsupported by admissible evidence.⁷²

The attorney for a precapacitated child is thus in a double bind. The rules first hamper her investigation of the client's interests. Then the rules limit her use of the information she obtains through her investigation. Although when applied in children's cases, these rules undermine the court's ability to see and hear the child, they are based on sound policy and should not be sacrificed. Instead, they question the propriety of appointing lawyers to represent children.

IV. A PROPOSAL FOR A MULTIDISCIPLINARY MODEL FOR REPRESENTATION OF PRECAPACITATED CHILDREN

Rather than appointing attorneys to represent very young children, the appointment of specialized social workers or trained lay advocates

69. Model Rules, *supra* note 4, Rule 3.7(a).

70. Model Code, *supra* note 4, DR 5-102(A).

71. Model Rule 3.7(a)(3) provides that disqualification is not necessary if it would "work substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." Model Rules, *supra* note 4, Rule 3.7(a)(3). Similarly, DR 5-101(B)(4) permits testimony from the attorney when "refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." Model Code, *supra* note 4, DR 5-101(B)(4). Perhaps when representing young children, attorneys should be permitted to testify in situations where disqualification or not testifying would "work a substantial hardship on the client," such an outcome would constitute an exception to the ethical rules which govern attorney conduct. *Id.*

72. Model Rule 3.4(e) states that an attorney in trial may not allude to any matter that . . . will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Model Rules, *supra* note 4, Rule 3.4(e). The Model Code contains essentially the same prohibitions in DR 7-106 (C)(1), (3) & (4). Model Code, *supra* note 4, DR 7-106 (C)(1), (3) & (4).

These rules also protect the litigants' due process rights. As Professor Guggenheim writes:

A . . . due process concern arises when lawyers are authorized to engage in a fact-finding mission and then seek to influence a court to reach an outcome that they have concluded is correct. The process by which they reached that conclusion cannot be subjected to meaningful inquiry.

See Guggenheim, *supra* note 6, at 1415.

as GALs⁷³ to represent the interests of precapacitated children may mitigate or avoid some of the problems discussed above.⁷⁴ The GAL model would not place the child automatically at odds with the other parties. Instead, the model would guarantee the child an independent representative who can be counted on to give the child a voice in the proceedings. These GALs would not be bound by the attorney's ethical rules,⁷⁵ so the nonattorney GAL could interview and observe represented parties. Like any other party, including the child with capacity, the GAL could testify if necessary.

Nevertheless, trained GALs should have access to the advice, consultation, and advocacy of attorneys. After all, child protection and custody proceedings occur in a legal arena where all other parties are represented by legal counsel; judges themselves are attorneys. Just as nothing in legal training prepares lawyers to make assessments about children, social workers and other nonattorneys are not necessarily trained in the law or oral presentation skills. Nonlawyers may be unable to recognize legal issues, legal interests, and the need for taking legal action; they are also unlikely to be skilled in motion practice, presentation of evidence, and the development of legal argument. Those activities are uniquely attorney functions.

A nonlawyer representing a child should, then, have access to an attorney to assist in the presentation or defense of the precapacitated child's legal interests in court. For example, a child may want or need a change in parent-child visitation parameters. Without the ability to bring such matters to the court's attention, which in some jurisdictions may occur only through motion practice, all of the GAL's factfinding and assessments made regarding the child will not be very useful. Thus, it would not do for the child to be the only party without legal representation. Moreover, given increasing fiscal constraints, a model in which specifically trained GALs represent young children and attorneys represent the GALs may be more cost-effective because the

73. GAL is a loaded and ill-defined term. See, e.g., Ramsey, *supra* note 1, at 289 (“[T]he definition [of GAL] has broadened to include a variety of kinds of representation, and therefore does not clearly indicate what is expected.”); Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *Fordham L. Rev.* 1785, 1786 (1996) (noting that courts failed to define accurately the roles, responsibilities, and loyalties of GALs, and that the purported purposes and scope of the representation may conflict within a single appointment). I use the term here to refer to the kind of representation outlined in the Recommendations of the Conference and Professor Peters’ article. See *Recommendations of the Conference*, *supra* note 3, part IV; Peters, *supra* note 17, at 1525-29.

74. This is hardly a novel idea. Others have suggested a lay GAL model. See, e.g., Duquette & Ramsey, *supra* note 55, at 388-89 (discussing a study, that found that trained lay volunteers were effective child advocates); Hartz, *supra* note 26, at 336-41 (advocating volunteer GAL or CASA programs to represent children).

75. Being free from these rules presents some drawbacks. The beauty of the attorney-client model is its twin mandates of loyalty and zealous advocacy—two duties which children of any age should be owed, particularly given children's inherent and historical difficulty in being seen and heard by the court.

bulk of the work—investigation and client contact—will be performed by the nonlawyers and less work will be performed by (the more expensive) attorneys, who will conduct purely legal work on behalf of the GALs.

CONCLUSION

The GAL role has been ill-defined and abused over the years. Many child advocates now view the position with disdain, perhaps rightly so. Notwithstanding its many weaknesses, the GAL model may nevertheless be the most meaningful and effective one for those infants and young children who have little to gain through the traditional attorney-client model. Yet once children have the capacity to make relevant legal decisions, they should be appointed an attorney, rather than a GAL. Moreover, child custody and child protection proceedings may last for years, so some mechanism should be developed to insure that children who come into the court system needing a GAL are appointed an attorney when they reach the developmental stage where they can make and articulate even the most rudimentary logical decisions.⁷⁶

76. See Ross, *supra* note 1, at 1578 (cautioning against discounting children's views because their capacities are not as developed as adults).

