

1                   **AMERICAN BAR ASSOCIATION CENTER ON CHILDREN**  
2                   **AND THE LAW- BAR-YOUTH EMPOWERMENT PROJECT**  
3                   **WHITE PAPER**

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5                   **A LAWYER FOR *EVERY* CHILD: CLIENT-DIRECTED**  
6                   **REPRESENTATION IN DEPENDENCY CASES**

7                   LaShanda Taylor

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11                  The article begins with a due process analysis concluding that children are legally entitled to counsel and  
12                  continues by presenting examples of federal and state legislation, court decisions, and public policy arguments  
13                  that support this right. The article then goes a step further to advocate for a traditional, client-directed model of  
14                  representation, which empowers children and leads to better judicial decision making. Finally, the article discusses  
15                  the impact of high caseloads and lack of training on attorney performance. This article serves as an important  
16                  addition to the academic literature examining the need for and role of the child's attorney in dependency  
17                  proceedings.

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19                  **Keywords:** *Child's attorney; attorney for children; guardian ad litem; client-directed representation; abuse and*  
20                  *neglect; dependency; right to counsel*

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23                  *Editor's Note*

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25                  *This article was written by LaShanda Taylor, a staff attorney with the American Bar*  
26                  *Association Center on Children and the Law. LaShanda works primarily on the Bar-Youth*  
27                  *Empowerment Project, a project started by the American Bar Association's Center on*  
28                  *Children and the Law and the Commission on Youth at Risk, in partnership with Casey*  
29                  *Family Programs and the Eckerd Family Foundation.<sup>1</sup>*

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31                  *The Bar-Youth Empowerment Project aims to improve outcomes for youth currently in*  
32                  *foster care by promoting youth participation in court cases that affect them and ensuring*  
33                  *that all youth have legal representation in their dependency case. In furtherance of its*  
34                  *objectives, this article advocates for the appointment of client-directed attorneys for all*  
35                  *children in the abuse and neglect system.*

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2 *article serves as an important addition to the academic literature examining the need for*  
3 *and role of the child's attorney in dependency proceedings.*

4  
5 *While the overall positions presented in this article are consistent with policy resolutions*  
6 *approved formally by the ABA, including those addressing the important role that lawyers*  
7 *for youth play in assuring they receive the services to which they are entitled under law, the*  
8 *views expressed therein are those of the ABA Bar-Youth Empowerment Project and have not*  
9 *been approved by the House of Delegates or the Board of Governors of the American Bar*  
10 *Association. Nor should this article be construed as representing the policy of the ABA,*  
11 *Casey Family Programs, or the Eckerd Family Foundation.*

## 12 13 INTRODUCTION

14  
15 By the time a child's case enters the dependency court system, he is alleged to have  
16 experienced abuse, neglect, or abandonment by a parent or caregiver on whom he should  
17 have been most able to rely. He is removed from all that is familiar to him, including family,  
18 home, friends, and school. From the toys he had in his room to his favorite teacher at  
19 school, virtually everything to which he has become accustomed is stripped away suddenly  
20 and unexpectedly.

21 The dependency court system was designed to protect the child from future losses and  
22 abuse, ensure his safety and well-being, and reunite him with family or find him another  
23 permanent place to call home. Yet, when the child's case is heard he is often without a  
24 voice. He has no one advocating for his desires, wishes, or hopes. His views are not  
25 considered equal to the views of his parents, caregivers, or the state. In some jurisdictions,  
26 his opinion about his life, including where he wants to live, whether he can see his parents  
27 and/or siblings, or where he should go to school, are not considered at all.

28 Because the child often lacks a strong, effective voice in court, the information available  
29 to the judge (whose role is to consider all relevant information and make a decision about  
30 best interests) is limited and the child is denied a meaningful opportunity to participate in  
31 decisions that profoundly affect his life. He is one of society's most vulnerable members,  
32 yet he is rendered speechless and without input into proceedings that determine the course  
33 of his life. As one youth said:

34  
35 You are the one who makes the decisions, [but] I need to be heard so people may understand  
36 how I feel or what I need . . . Listen to me, since no one else will, and try to understand where  
37 I'm coming from.<sup>2</sup>

38  
39 Each year, approximately 300,000 children who have been the victim of child abuse or neglect  
40 enter the foster care system.<sup>3</sup> Until a safe and stable home can be located, the child is the  
41 subject of court proceedings held to determine what is in the child's best interests. At least  
42 every six months,<sup>4</sup> the parties to the matter have the opportunity to advocate their positions to  
43 a judicial officer. Generally, the state and the parents have attorneys to assist them in this  
44 endeavor; however, the child does not.<sup>5</sup>

45  
46 The dependency system should no longer dismiss the voices of those it is charged with  
47 protecting. Child clients want to be heard, need to be empowered, and should not be  
48 dismissed.<sup>6</sup>

## I. BACKGROUND

The debate over the appointment of counsel for children usually focuses on two issues: (1) whether children have a need for or right to attorney representation and (2) whether the attorney should serve as a guardian *ad litem* (GAL) (representing what the lawyer determines to be in the child's best interests) or a client-directed advocate (representing what the child client wants or the child's expressed interests).

While states have been moving toward legal representation as the preferred model, the role played by those lawyers remains a subject of divergence around the nation. Some states provide for a more traditional client-driven model of representation, while other states compel lawyers for children to advocate for the child's "best interests," even if at odds with what the youth may want.

This article argues that not only do children *need* legal representation but that they are *legally entitled* to it. The article further proposes that the child's attorney must be well trained, unencumbered by high caseloads, and acting within the traditional role as counselor, advisor, and advocate for the child's expressed wishes.

## II. CHILDREN HAVE A CONSTITUTIONAL RIGHT TO LEGAL COUNSEL IN DEPENDENCY PROCEEDINGS

It is well settled that children are afforded protection under the Due Process Clauses of both federal<sup>7</sup> and state constitutions.<sup>8</sup> These clauses guarantee every person due process of law before any deprivation of life, liberty, or property. To determine whether and to what extent process is due, the court applies a three-part balancing test that weighs the following factors: (1) the private interest that will be affected through the procedures used; (2) the state's interests, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (3) the risk of an erroneous decision if safeguards are not put into place.<sup>9</sup>

After performing the balancing test, one must conclude that the enormity of the child's interests involved in abuse and neglect proceedings and the high risk of erroneous deprivation require the appointment of legal representation for children in every case, at every hearing.<sup>10</sup>

### A. DEPENDENCY PROCEEDINGS THREATEN A CHILD'S FUNDAMENTAL LIBERTY INTERESTS

A right to counsel is supported by the child's liberty interests at stake in dependency proceedings. These include interests in their own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with biological parents.<sup>11</sup> Further, children in state custody may be ordered to reside in a wide array of placements, including those where their physical liberty may be restricted.<sup>12</sup>

Throughout a child's time in the dependency system, the court conducts several hearings aimed at determining what is in the child's best interests. These include (1) the initial detention hearing;<sup>13</sup> (2) the adjudicatory hearing;<sup>14</sup> (3) the dispositional hearing;<sup>15</sup> and (4) periodic permanency and review proceedings.<sup>16</sup> During dependency proceedings, the court makes decisions regarding issues such as placement, permanency, and visitation. These decisions have an impact on a child's fundamental interests in safety, health, and well-being

1 and on his ability to maintain relationships with his parents and siblings. Relationships with  
2 family members are very important to children and any interference with those relation-  
3 ships can be traumatic.<sup>17</sup> Once a child is placed in state custody, other liberty interests are  
4 at stake due to the “special relationship” created under such circumstances.<sup>18</sup>

## 6 **B. STATES’ INTERESTS FAVOR APPOINTING COUNSEL FOR CHILDREN**

7 States have several interests at stake in dependency proceedings, including their interest  
8 in maintaining family integrity and obtaining a just and fair resolution. Consistent with  
9 their duty to protect children from abuse,<sup>19</sup> states also have an interest in ensuring that  
10 children are not endangered. When children are determined to be at risk of harm, the state  
11 uses its *parens patriae* authority<sup>20</sup> to intervene in the family unit. Once the family dynamic  
12 has been disrupted, continued child protection requires a legal process supported by  
13 procedures that ensure a fair and inclusive process and maximize the court’s fact-finding  
14 ability. The state has no interest in intervening in the family when there is not proper  
15 justification supported by evidence.

16 The court is the ultimate arbiter of whether the child is placed in out-of-home care, what  
17 permanency plan is in the child’s best interests, and how often the child visits his parents  
18 and/or siblings. These are decisions that fundamentally alter the direction of the child’s  
19 future and his familial relationships. Because judges cannot conduct their own investiga-  
20 tions, they are entirely dependent on others to provide them with information about the  
21 child’s circumstances.<sup>21</sup> Attorneys not only advocate for their client’s position but also  
22 present additional facts to the court by filing motions, requesting hearings, and introducing  
23 evidence in accordance with applicable rules of procedure. Such advocacy enables each  
24 party to have its views, facts, and arguments presented, thereby enabling the court to reach  
25 a more informed and accurate decision. Therefore, it is in the state’s interest, as well as the  
26 child’s, to require the appointment of legal representation.

### 28 **i. The Child’s Fundamental Interests Far Outweigh Any Fiscal or Administrative Burden 29 That a Right to Appointed Counsel May Entail**

30 Despite the considerable benefit that attorneys for children provide to the court process  
31 and to the child, states may be dissuaded from providing them due to financial concerns. As  
32 will be discussed in section VII, studies have shown that the cost associated with appointing  
33 counsel for children is partially,<sup>22</sup> if not wholly, offset by the positive impact that children’s  
34 attorneys have on the cases and the youth. Even where the entire expenditure is not  
35 recuperated, however, the state’s fiscal interest against providing counsel is greatly out-  
36 weighed by the state’s other interests and the child’s interests in the matter (as discussed  
37 above).

## 40 **C. THE ABSENCE OF ATTORNEYS TO ADVOCATE FOR CHILDREN 41 IN DEPENDENCY PROCEEDINGS CREATES A HIGH RISK OF 42 ERRONEOUS DEPRIVATION**

43 The lack of legal advocacy on the child’s behalf may result in decisions that keep him  
44 in an unsafe environment. The absence of the child’s voice means that the court does not  
45 have all relevant information to make the best decision. Without attorneys to advocate for  
46 the child’s expressed interests and present information that would not otherwise be offered,  
47  
48

1 there is a high risk that children will be placed in foster care unnecessarily or will remain  
2 in the system longer than required to ensure their safety. In the alternative, it is also possible  
3 that when the child's views and wishes are ignored, he will be returned to an abusive  
4 environment. "Attorneys largely control the flow of information to the judge. Attorneys  
5 decide what witnesses, evidence, and arguments to present. . . . Without complete relevant  
6 information, judges' decisions may well be ill informed or even tragically mistaken."<sup>23</sup>

7 Any erroneous decision could have a traumatic, irreversible, and life-long effect on the  
8 child. "On the one hand, an erroneous decision that a child is not deprived or that parental  
9 rights should not be terminated can have a devastating effect on a child, leading to chronic  
10 abuse or even death. On the other hand, an erroneous decision that a child is deprived or that  
11 parental rights should be terminated can lead to the unnecessary destruction of the child's  
12 most important family relationships."<sup>24</sup> Due to the impact that an incorrect determination  
13 would have on the child, it is critical that judges are presented with all available  
14 information.

15 The presence of an attorney appointed to represent the child substantially decreases the  
16 likelihood of error and is therefore integral to the guarantee of due process. One court has  
17 found that "only the appointment of counsel can effectively mitigate the risk of significant  
18 errors in deprivation and TPR proceedings."<sup>25</sup>

#### 19 20 **D. DUE PROCESS REQUIRES THAT CHILDREN IN DEPENDENCY PROCEEDINGS** 21 **RECEIVE ATTORNEYS**

22 The failure to provide children with attorneys in abuse and neglect proceedings clearly  
23 violates the Due Process Clause of the Fourteenth Amendment. Without lawyers, children  
24 are deprived of their fundamental rights without due process of law. The enormity of the  
25 child's interests involved in dependency proceedings and the high risk of erroneous  
26 deprivation require the appointment of legal representation for children in every case, at  
27 every hearing.<sup>26</sup> This conclusion is not only consistent with the line of state court decisions  
28 upholding a child's constitutional right to counsel (outlined in section II), but also with the  
29 progression of children's rights in the United States.

### 30 31 32 **III. FEDERAL STATUTES SUPPORT CHILDREN'S RIGHT TO LEGAL** 33 **COUNSEL IN DEPENDENCY PROCEEDINGS**

34 Before 1974, issues related to legal representation for children were focused primarily  
35 on delinquency proceedings.<sup>27</sup> Widespread attention to child abuse issues, such as "battered  
36 child syndrome,"<sup>28</sup> led to a focus on child protection.<sup>29</sup> In 1974, Congress passed the Child  
37 Abuse Prevention and Treatment Act (CAPTA), the first comprehensive legislation on child  
38 abuse and prevention.<sup>30</sup> Among other criteria, CAPTA requires that states provide guardians  
39 *ad litem* (GAL) for all children in child abuse and neglect proceedings.<sup>31</sup>

40 Neither CAPTA nor the implementing regulations provided guidance regarding who  
41 should serve as GAL or the qualifications (including training) and responsibilities of a  
42 GAL.<sup>32</sup> Each state, therefore, devised a different system of representation based on its  
43 interpretation of the GAL provisions.<sup>33</sup> By 1980, forty-six states and territories had imple-  
44 mented state laws that at least partially complied with CAPTA.<sup>34</sup>

45 In 1996, CAPTA was reauthorized and amended to provide that a lawyer may be  
46 appointed as guardian *ad litem*.<sup>35</sup> The amendment stated that the GAL may "be an attorney  
47

1 or a CASA (or both)” whose role is “to obtain first-hand, a clear understanding of the  
2 situation and needs of the child; and to make recommendations to the court concerning the  
3 best interests of the child.”<sup>36</sup>

4 Further clarity as to the function and role of the GAL was provided in 2002 when, as part  
5 of “ADOPTION 2002: The President’s Initiative on Adoption and Foster Care,” the Depart-  
6 ment of Health and Human Services issued “Guidelines for Public Policy and State  
7 Legislation Governing Permanence for Children.”<sup>37</sup> The guidelines noted that “the states  
8 may appoint an [client-directed] attorney for the child . . . in fulfillment of the CAPTA  
9 requirement,” and that “states are free to appoint a guardian *ad litem*, perhaps a volunteer  
10 CASA, in addition to an [client-directed] attorney for the child. . . . This is the preferred  
11 approach.”<sup>38</sup> While not law, the guidelines were a technical assistance tool designed to help  
12 states review their own laws and develop statutes and policies that reflected the best  
13 practices in child welfare.<sup>39</sup>

14 During this time, many courts appointed individuals as GAL or attorney for the child  
15 without ensuring that he had undergone prior training that adequately addressed the specific  
16 types of responsibilities that he would undertake.<sup>40</sup> To address this problem, Congress once  
17 again amended CAPTA in 2003.<sup>41</sup> In a technical assistance bulletin, the Administration  
18 for Children and Families (ACF) stated that the amendment was “to ensure higher quality  
19 representation and to bar appointment of untrained or poorly trained court-appointed  
20 representatives for children.”<sup>42</sup>

21 CAPTA was the first of several federal statutes that identify the child as the central focus  
22 of the dependency proceeding.<sup>43</sup> Since it was first passed by Congress in 1974, the Act has  
23 been amended several times to provide increasing levels of clarity and guidance to states.  
24 CAPTA is due for reauthorization. Amendments aimed to further strengthen and add  
25 uniformity to state systems have been proposed by national advocacy organizations.  
26 Notably, the National Child Abuse Coalition has advocated for a provision that would  
27 require every child in a dependency proceeding to have both an attorney and a guardian  
28 *ad litem*.<sup>44</sup>

29 This proposal as well as each aforementioned amendment further Congress’ objective  
30 that all children involved in dependency proceedings receive quality, child-centered  
31 representation. Recognizing this goal, states have enacted legislation that support a child’s  
32 right to legal counsel. Furthermore, courts have issued decisions providing additional  
33 support.

#### 34 35 **IV. STATE STATUTES AND CASE LAW SUPPORT CHILDREN’S RIGHT TO** 36 **LEGAL COUNSEL IN DEPENDENCY PROCEEDINGS**

37  
38 In 1962, the New York legislature found that “counsel [for minors in Family Court  
39 proceedings] is often indispensable to a practical realization of due process of law and may  
40 be helpful in making reasoned determinations of fact and proper orders of disposition.”<sup>45</sup>  
41 Thus, New York became the first state to provide counsel for children in dependency  
42 proceedings. To date, nearly forty states (including the District of Columbia)<sup>46</sup> recognize  
43 the important functions that attorneys serve and have gone beyond the requirements of  
44 CAPTA by statutorily mandating *legal* representation. In the remainder of the states, courts  
45 have the discretion to appoint lay volunteers, Court Appointed Special Advocates (CASA),  
46 or lawyers.<sup>47</sup> In addition to state statutory provisions for legal representation, state case law  
47 has recognized a constitutional right.

1 **A. CHILDREN IN NEARLY FORTY STATES HAVE A STATUTORY RIGHT TO LEGAL**  
2 **REPRESENTATION IN DEPENDENCY CASES**<sup>48</sup>  
3

4 Legal counsel appointed to represent maltreated children most often do so as the child's  
5 GAL, advocating for the child's "best interests."<sup>49</sup> In most states, the person is called an  
6 "attorney-GAL" or an "attorney *ad litem*."<sup>50</sup> States requiring courts to appoint an attorney-  
7 GAL include Alabama, Arkansas, Colorado, the District of Columbia, Kansas, Kentucky,  
8 Michigan, Nebraska, South Dakota, Tennessee, Utah, and Virginia. The attorney-GAL  
9 advocates for the child's best interests and may or may not be required to inform the court  
10 when the child's wishes differ from his recommendation. When the court is made aware of  
11 the conflict, a separate GAL or attorney may be appointed.<sup>51</sup>

12 In some states children can receive both a lay GAL and an attorney.<sup>52</sup> When both are  
13 present in the case, the GAL represents the child's best interests while the attorney usually  
14 advocates for the child's expressed wishes. States whose statutes or court rules provide  
15 for the appointment of an attorney and a GAL include Arizona,<sup>53</sup> North Carolina,<sup>54</sup> South  
16 Carolina,<sup>55</sup> Texas,<sup>56</sup> and Vermont.<sup>57</sup>

17 Still other states expect the attorney to represent both the child's wishes and what the  
18 attorney deems to be his "best interests."<sup>58</sup> If a conflict arises, courts in Connecticut, Iowa,  
19 Mississippi, New York, and Pennsylvania appoint a separate GAL for the child while the  
20 attorney continues to advocate for the child's expressed wishes.

21  
22 **B. STATE CASE LAW HAS RECOGNIZED THE STATUTORY AND CONSTITUTIONAL**  
23 **RIGHT TO COUNSEL FOR CHILDREN IN DEPENDENCY CASES**  
24

25 Since 1976 (two years after CAPTA was enacted), several state courts have reinforced  
26 a child's right to legal counsel.<sup>59</sup> Where state statutes specifically guarantee counsel, some  
27 courts have found that the right is both statutory and constitutional. Where state statute does  
28 not guarantee counsel, some courts have found this to be a violation of the Due Process  
29 Clause of the Constitution.

30 In the earliest case, *Roe v. Conn*, a three-judge federal district court panel held that the  
31 challenged Alabama procedure "violates the due process clause of the Constitution because  
32 that procedure does not provide for the appointment of independent counsel to represent a  
33 child in a neglect proceeding. . . ."<sup>60</sup> Seventeen years later, a New York Appellate Court, in  
34 *Matter of Jamie TT*, held that it "would be callously ignoring the realities of [the child's]  
35 plight during the pendency of this abuse proceeding if we failed to accord her a liberty  
36 interest in the outcome of that proceeding, entitling her to the protection of procedural due  
37 process."<sup>61</sup> The court applied the *Mathews v. Eldridge* analysis and concluded that the  
38 process due to the child included effective legal representation of her interests.<sup>62</sup>

39 In June 2002, a class action lawsuit, *Kenny A. v. Perdue*, was filed on behalf of children  
40 in the Georgia foster care system.<sup>63</sup> The complaint alleged, *inter alia*, that children in Fulton  
41 and Dekalb counties received inadequate assistance of counsel from their court-appointed  
42 lawyers. In response to the state's motion for summary judgment, the federal court con-  
43 cluded "plaintiff foster children have both a statutory and a constitutional right to counsel  
44 in all [major child welfare] proceedings. . . ."<sup>64</sup>

45 Four years later, in *In re Christina M.*, parents asserted a claim that their children were  
46 denied their constitutional right to conflict-free representation in the proceeding to termi-  
47 nate parental rights.<sup>65</sup> "Inherent in the [parents'] claim are several layers of significant  
48 constitutional issues, beginning with the most fundamental one of whether children who  
49 are the subject of a termination proceeding have a federal and state constitutional right to

1 counsel in addition to the statutory right. . . .<sup>66</sup> While the Connecticut Supreme Court did  
2 not reach the ultimate issue of whether the right was indeed constitutional, it did not reject  
3 the claim. Moreover, the court signaled it would draw an analogy to the criminal context if  
4 it found a constitutional right existed in a termination proceeding. “In other words, we  
5 presume that, should such a constitutional right exist in the termination of parental rights  
6 context, the requirements for establishing a violation would, at a minimum, be comparable  
7 to those applied to establish the violation in the criminal context.”<sup>67</sup>

8 Thus, while children in nearly forty states have a statutory right to legal representation  
9 in dependency proceedings, state cases support and extend that right by emphasizing the  
10 important role attorneys play in the administration of justice and creating a constitutional  
11 entitlement.

## 12 13 **V. FUNDAMENTAL FAIRNESS REQUIRES LEGAL COUNSEL FOR** 14 **CHILDREN IN DEPENDENCY PROCEEDINGS** 15

16 Principles of fundamental fairness support a governmental obligation to ensure children  
17 are provided the means to effectively access the dependency court. A child’s right to access  
18 the courts and fully participate in his case can only be accomplished with legal represen-  
19 tation. Without such representation, children cannot effectively navigate the legal system,  
20 “they are denied access to fair and impartial dispute resolution, the adversarial process  
21 itself breaks down and the courts cannot perform their role of delivering a just result.”<sup>68</sup>  
22 Fundamental fairness also requires that children in dependency proceedings be given the  
23 same basic right to an attorney as given to children in the delinquency system.

### 24 25 **A. CHILDREN IN DEPENDENCY PROCEEDINGS SHOULD RECEIVE EQUIVALENT** 26 **DUE PROCESS RIGHTS AS CHILDREN IN DELINQUENCY MATTERS** 27

28 In 1967, the Supreme Court held that children accused of crimes in a delinquency  
29 proceeding must be afforded the right to counsel.<sup>69</sup> Before *Gault*, the prevailing notion was  
30 that juvenile court proceedings should be informal and based more on a social work model  
31 than a legal model.<sup>70</sup> Thus, children in juvenile court proceedings were not provided  
32 attorneys. “The *Gault* decision marked the start of a new way of thinking about legal  
33 representation for children and extended to children due process protections when liberty  
34 deprivations are at stake.”<sup>71</sup>

35 Per *Gault*, every jurisdiction provides the right to counsel for juveniles accused of a  
36 crime, at least at the adjudicatory hearing.<sup>72</sup> While the Supreme Court has not yet afforded  
37 children in the dependency system the same right to counsel, the rationale underlying the  
38 *Gault* is not limited to delinquency cases. Further, due to the similarities between the  
39 court’s function and role in delinquency and dependency cases, the rationale can equally  
40 apply to dependency proceedings.

#### 41 42 **i. The Basis for the Court’s Decision is Equally Applicable to Both Delinquency and** 43 **Dependency Proceedings** 44

45 In rendering its decision, the court relied upon the findings and recommendations of the  
46 President’s Commission on Law Enforcement and Administration of Justice. The commis-  
47 sion report stated “no single action holds more potential for achieving procedural justice



1 for the child in juvenile court than provision of counsel. The presence of an independent  
2 legal representative of the child . . . is the keystone of the whole structure of guarantees that  
3 a minimum system of procedural justice requires.”<sup>73</sup>

4 The portion of the Commission report relied upon by the Court (quoted above) refers to  
5 “the child in juvenile court” and does not specifically refer to delinquents.

6 [T]he juvenile justice system has two separate functions: the “delinquency” function- to  
7 deal with status offenders and to determine if a minor has broken the law, and, if so, how  
8 he/she should be punished or rehabilitated; and the “dependency,” or “child welfare”  
9 function- to protect children who have been abused physically and/or emotionally or  
10 neglected by their primary caregivers.<sup>74</sup>

11 As the juvenile court has both a delinquency and dependency function, an argument can  
12 be made that the findings and recommendations of the Commission are directed to the  
13 juvenile court generally and are therefore equally applicable to both delinquency and  
14 dependency proceedings.

15  
16 **ii. Children in Dependency Proceedings Experience Similar Injustice from the Lack of**  
17 **Procedural Safeguards**

18  
19 The Court determined that procedural safeguards, including the appointment of counsel  
20 for the child, were integral to accurate fact-finding and to preventing governmental  
21 oppression.

22 “The absence of procedural rules based upon constitutional principle has not always  
23 produced fair, efficient, and effective procedures. Departures from established principles of  
24 due process have frequently resulted not in enlightened procedure, but in arbitrariness.”<sup>75</sup>

25 Children in dependency proceedings are similarly disadvantaged by the lack of formal-  
26 ity and due process. “[D]ependency judges make the most important decisions in an ad hoc,  
27 chaotic environment without references to any discernible, meaningful standard.”<sup>76</sup> Thus,  
28 abused and neglected children should be afforded the same safeguards, including the right  
29 to counsel, to protect against arbitrary decisions. “Some kind of check for [the judge’s] vast  
30 power is required, and counsel for the child is the ideal solution.”<sup>77</sup>

31  
32 **B. CHILDREN IN DEPENDENCY PROCEEDINGS CANNOT NAVIGATE THE SYSTEM**  
33 **WITHOUT LEGAL REPRESENTATION**

34  
35 Dependency proceedings are complex and children cannot act as their own counsel.  
36 A child, whose median age at entrance into foster care is 7.5 years old,<sup>78</sup> cannot fully  
37 understand the legal process or the rights that he possesses. Without legal assistance,  
38 children cannot express their opinions within the context of the law, cross examine wit-  
39 nesses, conduct discovery, or carry out any of the functions performed by a lawyer. Simply  
40 put, children lack the skills and knowledge necessary to advocate for themselves effec-  
41 tively. “The most informal and well-intentioned of judicial proceedings are technical; few  
42 adults without legal training can influence or even understand them; certainly children  
43 cannot.”<sup>79</sup> As a result, children who are expected to navigate the legal system without the  
44 benefit of counsel are denied access to a fair process.

45  
46 **C. CHILDREN IN DEPENDENCY PROCEEDINGS HAVE DISTINCT INTERESTS AND**  
47 **CANNOT BE REPRESENTED BY THEIR PARENTS OR THE STATE**

48  
49 Lawyers for children are “critically important because they promote a child’s interests,  
50 under circumstances where the child’s parents, and even the state, may have vastly different

1 ideas about what is best for that child.”<sup>80</sup> Traditionally, it was assumed that the child’s legal  
2 interests were aligned with either the state or the parent and, thus, the child’s voice would  
3 be heard.<sup>81</sup> This argument bears a striking similarity to one rejected by the Supreme Court  
4 in *Gault*.<sup>82</sup> There, the Court disagreed with a lower court’s ruling that the probation officer  
5 and the juvenile court could appropriately represent the child due to the role that each  
6 played in the process.<sup>83</sup> Likewise, the rights of children in dependency hearings cannot be  
7 protected by their parents or the state.

8 Parents involved in the dependency system may have difficulty seeing their child’s needs  
9 and interests as separate from their own. Because the parent will have her own motivations  
10 and interests stemming from her involvement with the courts, the parent’s interests are not  
11 identical to the child’s.<sup>84</sup> Similarly, the state “must consider the needs of the system, such  
12 as administrative requirements and costs, and the needs of the class of children as a  
13 whole.”<sup>85</sup> These additional factors likewise interfere with the state’s ability to represent the  
14 child’s interest without constraint.

15 Although the child’s interests are distinct from those of the parent and state, they are not  
16 always in conflict.<sup>86</sup> In fact, some scholars argue that a substantive conflict between the  
17 parent and child exists under the law only if parents are unfit.<sup>87</sup> Even when the child, parent,  
18 and state agree, however, the child needs legal counsel to address his unique interests, both  
19 legal and nonlegal. For example, where all parties agree that the child should be returned  
20 to his parents, the child might benefit from services that will aid in his transition. His  
21 attorney would be able to evaluate the child’s need for the service, advocate effectively for  
22 them and, if necessary, file a motion to compel the government to provide them. In that  
23 circumstance, the child needs to be represented by a person who has a duty of loyalty to him  
24 alone.

25  
26 **D. ATTORNEYS FOR CHILDREN IN DEPENDENCY PROCEEDINGS ARE NEEDED**  
27 **TO PERFORM SIMILAR FUNCTIONS AS THOSE IN DELINQUENCY PROCEEDINGS**  
28

29 In *Gault*, the Supreme Court found that the child “needs the assistance of counsel to  
30 cope with problems of law, to make skilled inquiry into the facts, to insist upon the  
31 regularity of the proceeding, and to ascertain whether he has a defense and prepare and  
32 submit it.”<sup>88</sup> Likewise, attorneys for children in dependency cases are needed to perform  
33 these essential duties for their clients.<sup>89</sup> As in the delinquency context, it is essential to the  
34 proper outcome of the dependency case that the attorney for the child introduces any  
35 relevant evidence supporting the child’s position or challenge, through cross-examination,  
36 any evidence that contradicts the client’s position.

37 The child’s attorney is uniquely situated to work with both the parent’s counsel and the  
38 government attorney, and can therefore aid in the creation of case plans and placement  
39 alternatives.<sup>90</sup> On behalf of the child, the attorney can independently investigate the child’s  
40 needs regarding services, placement, and visitation to ensure that the child’s needs are met  
41 and properly addressed by the court. The lawyer can also speak to the child about family  
42 resources and work with him to identify relative placement options.

43 Inside the courtroom, the lawyer assists the judge in reaching a well-informed deci-  
44 sion.<sup>91</sup> Children’s attorneys are in the best position to provide the court with information  
45 about the child while zealously advocating for their client’s position. Lawyers also chal-  
46 lenge the state to meet its legal burden when attempting to persuade the court to take  
47 measures such as removing the child from his home or terminating parental rights. Due to  
48 their legal training, attorneys also perform unique tasks that cannot be carried out by lay

1 persons. These include examining witnesses, informing the client of his legal rights and  
2 responsibilities, and representing the child in non-dependency related matters (e.g., special  
3 education hearings, immigration proceedings).

4 Lawyers also assist their clients by filing motions. In a study of the Legal Aid's Foster  
5 Children's Project (FCP) in Palm Beach County, Florida, conducted by the Chapin Hall  
6 Center for Children in 2008,<sup>92</sup> it was reported that the number of motions filed in cases in  
7 which the children had lawyers was 46.5 percent higher than in cases without a child's  
8 attorney.<sup>93</sup> These motions were filed to compel action on the part of another party<sup>94</sup> or for  
9 the purposes of discovery. As a result, the court conducted 49.6 percent more status checks  
10 when a child's lawyer was involved.<sup>95</sup>

11 While some may argue that this increase in court involvement may have a negative effect  
12 on children and create an unnecessarily adversarial process, children greatly benefit from  
13 increased oversight.<sup>96</sup> In fact, judges and attorneys in Palm Beach County viewed such legal  
14 activity as appropriate for "keep[ing] things on track."<sup>97</sup> Furthermore, the child's quicker  
15 transition to permanency (as will be discussed later) provides additional evidence that  
16 attorneys help create a more efficient system for children.

#### 17 **E. THE LEGAL PROFESSION SUPPORTS PROVIDING ATTORNEYS FOR CHILDREN 18 IN DEPENDENCY PROCEEDINGS**

19  
20 The American Bar Association (ABA) has passed several resolutions recognizing the  
21 importance of a child's ability and right to attend and fully participate in all hearings related  
22 to his case.<sup>98</sup> In 2005, the ABA resolved that all dependent youth should "have the right to  
23 quality legal representation, not simply an appointed lay guardian *ad litem* or lay volunteer  
24 advocate with no legal training, acting on their behalf. . . ."<sup>99</sup> The next year, the ABA passed  
25 a resolution urging federal, state, and territorial governments to provide legal counsel at  
26 public expense to low income persons "in those categories of adversarial proceedings  
27 where basic human needs are at stake," such as those involving child custody.<sup>100</sup> In 2007,  
28 the ABA once again resolved to provide "all youth with the ability and right to attend and  
29 fully participate in all hearings related to their cases."<sup>101</sup> Because dependency proceedings  
30 are adversarial and complex, no child can participate fully without a lawyer.  
31

#### 32 33 **VI. CHILDREN WHO HAVE ATTORNEYS ARE MORE LIKELY TO EXIT 34 FOSTER CARE TO A PERMANENT HOME**

35  
36 Attorneys for children in dependency cases decrease the likelihood that the child will  
37 exit the foster care system without achieving legal permanency.<sup>102</sup> In a recent study  
38 conducted in Palm Beach County, the 832 children represented by the Foster Children's  
39 Project (FCP) program attorneys experienced exit to permanent homes about 1.5 times  
40 more frequently than children who were not afforded counsel.<sup>103</sup> In addition, children  
41 moved from case plan approval to permanency at approximately twice the rate (2.01) of  
42 comparison children.<sup>104</sup>

43 Children who achieve permanency have better outcomes than those who languish in  
44 long-term foster care. Consequently, federal legislation has mandated that states give  
45 preference to permanency over long-term foster care.<sup>105</sup> One preferred permanency option-  
46 when a child can not be reunited with his parents- is adoption. Adoption "confers an  
47 irreplaceable sense of belonging: emotional security that enhances overall well-being and  
48 promotes gains in educational attainment and success in the labor market."<sup>106</sup>

1 A 2006 study found that adopted children are 15% more likely to be employed and have  
2 higher incomes (between \$88,000 and \$150,000 more over a lifetime) than their counter-  
3 parts who remain in foster care.<sup>107</sup> Adoptees are also 32% less likely to be incarcerated, 16%  
4 less likely to have substance abuse issues, and less likely to receive Temporary Aid to  
5 Needy Families (TANF) and food stamps.<sup>108</sup>

6 Unfortunately, not all children achieve permanency. Every year, nearly 20,000 youth  
7 “age out” of the foster care system without the stability that ensures their basic needs are  
8 met.<sup>109</sup> Not surprisingly, aging out is associated with strikingly dire outcomes in an array  
9 of well-being indicators, including homelessness,<sup>110</sup> criminal involvement,<sup>111</sup> mental and  
10 physical health,<sup>112</sup> education level,<sup>113</sup> and reliance on public assistance.<sup>114</sup>

11 Legal counsel has been shown to support permanency outcomes for children in depen-  
12 dency proceedings. By expediting and increasing likelihood of permanency, attorneys not  
13 only save the state money (as will be discussed in section VII) but can also reduce by over  
14 50% the frequently devastating exit known as “aging out”<sup>115</sup> of the foster care system.

## 16 **VII. THE COST OF PROVIDING ATTORNEYS TO CHILDREN IS** 17 **MITIGATED BY INCREASED TRANSITIONS TO PERMANENCY**

18  
19 For those states not already doing so, providing an attorney for each child in the abuse  
20 and neglect system would require states to make a significant financial investment.<sup>116</sup> The  
21 total cost of providing attorneys for children in abuse and neglect cases is dependent upon  
22 the total number of children served, the amount of time spent on each case, and the rate of  
23 compensation. In 2007, Connecticut Voices for Children (CVC), through the support of the  
24 Jim Casey Youth Opportunities Initiative, prepared a white paper advocating for reforms in  
25 the representation of children in that state.<sup>117</sup> In that paper, CVC examined the costs and  
26 benefits of providing legal representation to children and estimated the cost of a high-  
27 quality organizational model of representation to be about \$1,500 per child per year.<sup>118</sup> On  
28 the other end of the spectrum, the Palm Beach County pilot program (discussed in section  
29 V) was given a budget of \$4,857.14 per child.<sup>119</sup>

30 Irrespective of the expense, attorneys for children have been shown to provide a benefit  
31 not only to the child but to the government as well. In many instances, the cost of providing  
32 an attorney would be offset by the positive impact of effective court advocacy on behalf of  
33 the child, mainly increased permanency.

### 35 **A. INCREASED PERMANENCY RESULTS IN A NET SAVINGS TO FEDERAL AND** 36 **STATE GOVERNMENTS**

37  
38 After children are permanently placed, their cases are closed and monitoring by the child  
39 protection agency or the court is no longer required. Thus, increased permanency leads to  
40 a reduction in government costs associated with human services. One permanency option  
41 is adoption.<sup>120</sup> Each adoption from foster care saves the federal and state government  
42 approximately \$143,000 in child welfare costs.<sup>121</sup> Moreover, each adoption nets an addi-  
43 tional \$190,000 to \$235,000 in other savings such as reductions in special education  
44 spending and the costs of future involvement in the justice system.<sup>122</sup>

45 As previously discussed, the government also enjoys greater tax revenue when children  
46 are adopted since adoptees are likely to earn more and pay more in taxes than counterparts  
47 who “age out” of foster care without a permanent family.<sup>123</sup>

1 **B. PROVIDING ATTORNEYS TO CHILDREN IN DEPENDENCY PROCEEDINGS**  
2 **IS COST-EFFECTIVE**

3  
4 No study has specifically addressed the cost-effectiveness of providing attorneys to  
5 children in dependency cases.<sup>124</sup> However, analogies can be made to studies that examine  
6 and advocate for other services that might benefit foster youth. Studies, such as the one  
7 discussed below, can be used to illustrate the cost-benefit of effective advocacy on behalf  
8 of children in dependency proceedings.

9 In 2006, the Children's Advocacy Institute (CAI) publicized the results of a cost-benefit  
10 analysis which showed a significant cost savings attributed to expanding transitional ser-  
11 vices available to foster youth who "age out" of foster care.<sup>125</sup> Specifically, CAI considered  
12 the cost avoidance from fewer admissions to state prison and less dependence upon TANF.  
13 The study also factored in the higher income taxes paid to the state and federal treasuries  
14 because of improved lifetime employment earnings through increased education.

15 The financial benefits evaluated are nearly identical to those attained as a result of  
16 increased permanency (due to providing attorneys for children in dependency cases);<sup>126</sup>  
17 however, the cost is far less. The total cost of providing transition services was estimated at  
18 \$47,113 over 5 years, or \$9,422.60 per year per former foster youth, while the cost of  
19 providing attorneys has been estimated at between \$1,500<sup>127</sup> and \$4,857.14 per year per  
20 child.<sup>128</sup> Thus, whereas CAI's analysis revealed a benefit-to-cost ratio of approximately  
21 3:1,<sup>129</sup> a similar analysis of the cost-benefit of providing attorneys would show an even  
22 greater benefit-to-cost ratio.<sup>130</sup>

23  
24 **VIII. COUNSEL FOR CHILDREN SHOULD BE CLIENT-DIRECTED**  
25 **(REPRESENTING THE CHILD'S EXPRESSED INTERESTS)**

26  
27 In 2006, First Star conducted an extensive analysis of child representation laws in all 50  
28 states and the District of Columbia.<sup>131</sup> In the "National Report Card on Legal Representa-  
29 tion for Children," First Star reported that only 17 states require that the lawyer appointed  
30 to represent children in dependency and foster care proceedings be "client directed."<sup>132</sup>

31 While children benefit from attorneys whether they serve as GALs<sup>133</sup> or function within  
32 a more traditional attorney-client model, the role of the child's counsel can significantly  
33 impact the child's ability to participate fully in the proceedings. In order to be active  
34 participants in their cases, children in dependency court need advocates who value and  
35 advance their independent and individual interests. Further, the court needs to be aware of  
36 the child's position in order to make its decision. In 2006, Congress emphasized this point  
37 when it enacted the Child and Families Services Improvement Act,<sup>134</sup> which requires the  
38 court to consider the child's views on his permanency or transition plan during the hearing.

39 A traditional client-directed model of representation empowers the child to have his  
40 wishes presented and considered by the court. Using a "best interests" model exclusively,  
41 however, does not give the child an opportunity to explain the case from his point of view.  
42 In fact, in many states, the attorney-GAL is not under any legal obligation to inform the  
43 court of the child's position.<sup>135</sup> "Denying the child a voice in the lawyer's advocacy  
44 'reinforces . . . the lessons, learned most thoroughly by abused and neglected children, that  
45 he should not expect to have any control over his fate.'"<sup>136</sup> In addition to creating a  
46 limitation on the child, lawyers serving as GAL routinely violate the Model Rules of  
47 Professional Conduct (MRPC).<sup>137</sup>

1 **A. JUDGES, NOT ATTORNEYS, SHOULD DETERMINE WHAT IS IN THE CHILD'S**  
2 **BEST INTERESTS**

3  
4 Attorneys who advocate for the child's "best interests" substitute their personal judg-  
5 ment, which can be colored by personal bias, when the child's stated goal is deemed  
6 contrary to that interest. "Best interests" represents an amorphous standard that is very  
7 difficult, if not impossible, to determine definitively. As such, attorneys often lack the  
8 knowledge or expertise to render this opinion.

9  
10 Left to their own devices, many lawyers are likely to arrive at decisions and advocate for  
11 positions on behalf of their child clients that are invariably based on what they believe to be  
12 best, based on the only value system they know, their own. Not only is there significant chance  
13 that these decisions and ensuing positions may be against the best interest of the individual  
14 child, who is likely of a different race, ethnicity, and/or class than the legal representative, but  
15 it also leads to a system where the position taken by a child's attorney may largely be based,  
16 not on what would be best for the individual child with unique needs and values, but rather on  
17 the arbitrary chance of who was appointed to represent the particular child.<sup>138</sup>

18  
19 The proper role of the attorney, therefore, is to provide the court with information that will  
20 enable the judge to make the "best interests" determination.

21  
22 **B. ATTORNEYS SERVING AS GUARDIANS *AD LITEM* MAY LEAD TO VIOLATIONS**  
23 **OF THE MODEL RULES OF PROFESSIONAL CONDUCT**

24  
25 Unless exempted, lawyers that represent children must honor the same ethical rules and  
26 duties that apply to attorneys generally. The MRPC requires attorneys to maintain confi-  
27 dential communications with the client (MR 1.6);<sup>139</sup> abide by the client's determinations as  
28 to the objectives of the litigation (MR 1.2);<sup>140</sup> maintain client loyalty (MR 1.2);<sup>141</sup> and  
29 refrain from intentionally or knowingly engaging in any activity which creates a conflict of  
30 interest (MR 1.7).<sup>142</sup>

31  
32 Lawyers are ethically bound not to disclose the substance of any conversation that they  
33 have with their client, whether the client is an adult or a child.<sup>143</sup> Therefore, a lawyer must  
34 keep confidential any information that the child reveals that may be relevant to the court's  
35 decision, unless disclosure is necessary to prevent substantial bodily harm.<sup>144</sup> When the  
36 attorney is performing his traditional role, this mandate does not present a problem. In fact,  
37 it may improve his representation of the client. "When a child is convinced that his secrets  
38 are safe with his lawyer, he is likely to share information more candidly, and this greater  
39 candor, in turn, will enhance the lawyer's ability to assess the merits of his case, provide  
40 good advice, and advocate effectively on his behalf."<sup>145</sup>

41  
42 On the other hand, when serving as a GAL, the attorney is often required to choose  
43 between violating the child's confidences and representing the child's best interests. "Con-  
44 sequently, a GAL generally must bend the restrictions of [Model Rule] 1.6 to permit  
45 disclosing to the court relevant and necessary information provided by the child. There is  
46 no satisfactory way to resolve this ethical dilemma."<sup>146</sup>

47  
48 Ethical standards may also be violated when an attorney, appointed as GAL, does not  
49 zealously and diligently advocate for their client's stated objective as required by MRPC  
1.2.<sup>147</sup> In some cases, lawyers not only fail to pursue their client's wishes but intentionally  
create a conflict by advancing a different position. As previously stated, some states have  
statutes designed to address this conflict when the court is made aware of its existence.

1           These remedies do not adequately address the issue because the GAL is presented with  
2 an ethical dilemma when disclosing the conflict to the court.<sup>148</sup> If the GAL continues in that  
3 capacity, he has received information from the child that he may use to support an opposing  
4 position. If the GAL becomes the child's attorney, he must zealously advocate for a  
5 position to which the court already knows he is personally opposed. No such conflict or  
6 ensuing dilemma would be created, however, if only client-directed lawyers are appointed  
7 in the first instance.

8  
9 **C. CLIENT-DIRECTED REPRESENTATION PROMOTES A SENSE OF FAIRNESS TO**  
10 **THE CHILD**

11           Dependency proceedings focus on the best interests of the child, however, in many  
12 courtrooms the child is not given the opportunity to express his opinion regarding what is  
13 in his best interests. Even though the child is usually appointed either a lay person or an  
14 attorney to serve as a GAL, the child's opinion may not be expressed to the court. As a  
15 result, the child is given the sense that both he and his views are unimportant. As one foster  
16 child said, "But judge, childhood is also letting your voice be heard . . . But how can I do  
17 that if you don't even want to hear what I, one *insignificant* twelve-year-old, have to say?"<sup>149</sup>

18           On the other hand, children who feel that they have been given the opportunity to  
19 meaningfully participate in the process will respect the decision and be more willing to  
20 abide by the court's order. Developmental research has established that children, even as  
21 young as first grade, are able to evaluate fairness of activities and have a more positive  
22 perception of activities they deem to be more fair.<sup>150</sup> "In contrast to children who conclude  
23 that a judge made a critical decision about their lives without respecting their views and  
24 preferences, children who can express their views through counsel may take solace in the  
25 rationality of the system that determined their fate- even if the decision is not the one they  
26 sought."<sup>151</sup>

27  
28  
29 **D. PROFESSIONAL STANDARDS AND POLICIES RECOMMEND ATTORNEYS USE A**  
30 **CLIENT-DIRECTED APPROACH WITH CHILD CLIENTS**

31           In addition to the MRPC, lawyers for children are also guided by professional standards  
32 and policy mandates that have been developed over the years and which govern their  
33 practice.<sup>152</sup> In 1995, a conference on representation of children resulted in the Recommen-  
34 dations of the Fordham Conference on Ethical Issues in the Legal Representation of  
35 Children.<sup>153</sup> A year later, the American Bar Association adopted its Standards of Practice  
36 for Lawyers Who Represent Children in Abuse and Neglect Proceedings.<sup>154</sup> The National  
37 Association of Counsel for Children (NACC) produced a revised version of the ABA  
38 standards in 1999 and adopted the NACC Recommendations for Representation of  
39 Children in Abuse and Neglect Cases in 2001.<sup>155</sup>

40           In 2003, the American Bar Association House of Delegates approved the Standards of  
41 Practice for Lawyers Representing Children in Custody Cases.<sup>156</sup> In 2006, the William S.  
42 Boyd School of Law at the University of Nevada, Las Vegas (UNLV) published, *Recommen-*  
43 *dat*ions of the UNLV Conference on Representing Children in Families: Child Advo-  
44 *cacy and Justice Ten Years After Fordham.*<sup>157</sup> To provide further guidance and uniformity,  
45 in 2008, the ABA Section of Litigation Children's Rights Litigation Committee, with the  
46 assistance of the Bar-Youth Empowerment Project of the ABA Center on Children and the  
47 Law and First Star, drafted the ABA Model Act Governing the Representation of Children  
48 in Abuse, Neglect, and Dependency Proceedings.<sup>158</sup>

49

1 While there are differences among the standards, recommendations, and proposed  
2 Model Act, each acknowledges the fundamental principle of client-directed representation  
3 for child clients. The ABA Standards of Practice, for example, explicitly recognizes the  
4 child as a separate individual with potentially discrete and independent views. "To ensure  
5 that the child's independent voice is heard, the child's attorney must advocate the child's  
6 articulated positions."<sup>159</sup> This approach to representation requires the attorney to be well-  
7 acquainted with the child and his developmental stage, the child's family and important  
8 people in the child's life, and the child's interests and needs.

## 9 10 **IX. CHILDREN HAVE A RIGHT TO WELL-TRAINED ATTORNEYS WHO** 11 **HAVE REASONABLE CASELOADS**

12  
13 A child's "constitutional and statutory rights to be represented by counsel [are] not  
14 satisfied merely by the [s]tate's supplying a lawyer's physical presence in the courtroom.  
15 [The child is entitled] to 'adequate' or 'effective' legal assistance. No less than an accused  
16 in a criminal case, [the child is] entitled to 'meaningful representation.'"<sup>160</sup> Such mean-  
17 ingful representation includes "assistance by an attorney who ha[s] taken the time to  
18 prepare presentation of the law and the facts, and employ[s] basic advocacy skills in  
19 support of her interests in the case."<sup>161</sup> A child's right to effective counsel was also  
20 highlighted in *Kenny A.*: "The right to counsel, of course, means *effective* counsel."<sup>162</sup> This  
21 level of representation requires adequate training and reasonable caseloads.<sup>163</sup>

### 22 23 **A. COMPREHENSIVE TRAINING IS ESSENTIAL TO PROVIDING EFFECTIVE** 24 **LEGAL ASSISTANCE**

25  
26 To fulfill their role consistent with the MRPC<sup>164</sup> and professional standards, attorneys  
27 representing children must have proper training. Not only does training benefit the child by  
28 helping to standardize the quality of representation and assure a minimum level of attorney  
29 proficiency, the court also benefits from trained attorneys. "Judges cannot serve families  
30 and children effectively without competent and well-prepared attorneys."<sup>165</sup>

31 It is essential that attorneys who represent children receive specific training for their  
32 role.<sup>166</sup> Many lawyers have not been provided training in interviewing and counseling  
33 clients and have little knowledge of child development. Attorneys handling child welfare  
34 cases must have standard legal training in trial skills and child welfare law as well as  
35 courses on child development, child psychology, and child interviewing. "Other critical  
36 issues for the child's lawyer are training in the many dimensions of introducing the  
37 lawyer's role, asking children questions to put them at ease, listening for useful and reliable  
38 information, explaining the confidential nature of the relationship, and counseling children  
39 through the difficult legal proceedings."<sup>167</sup>

40 Only 28 jurisdictions require attorneys to have training prior to appointment and/or  
41 continuing legal education (CLE) to enhance the attorney's knowledge of issues related to  
42 his representation.<sup>168</sup> Although the general training requirements are similar, there are vast  
43 differences among individual state programs. For example, Rhode Island, Massachusetts,  
44 Maine, Virginia, and the District of Columbia each have initial training and CLE require-  
45 ments. However, only Maine requires training in child psychology and development. Rhode  
46 Island, Virginia, and the District of Columbia require attorneys to participate in  
47 in-courtroom training; Massachusetts has an out-of-court mentor requirement. These  
48 variances complicate efforts to create more uniform standards of practice.<sup>169</sup>



1 National certification programs help states ensure high quality representation. In 2006,  
2 the NACC developed a certification program to become a Child Welfare Law Specialist.<sup>170</sup>  
3 The objective of the program is to help achieve safety, permanency, and well-being for  
4 children through improved legal representation. Through the program attorneys receive  
5 their credentials by demonstrating proficiency in child welfare law through a comprehen-  
6 sive child welfare law competency process. Currently, the program is available in eight  
7 jurisdictions<sup>171</sup> but it is anticipated that all 51 jurisdictions will be open to NACC certifi-  
8 cation by the end of 2009.<sup>172</sup>

9 Due to the rarity of such training programs, First Star found an overall lack of sufficient  
10 training necessary for children's attorneys to provide adequate representation to their  
11 clients.<sup>173</sup> The organization suggested that child welfare attorneys could benefit from  
12 multidisciplinary training programs and certification and has begun providing such training  
13 through its First Star Multidisciplinary Centers of Excellence (MCE).<sup>174</sup> In addition, First  
14 Star urged Congress to amend CAPTA to require that attorneys be trained in accordance  
15 with the ABA standards.<sup>175</sup>

16 The ABA standards call upon the courts to play a key role in providing training and  
17 continuing education opportunities.<sup>176</sup> Trial judges who are regularly involved in child-  
18 related matters should participate in training for the child's attorney. The standards pro-  
19 mulgated in 2003 (as well as the 1996 standards) outline what the training for lawyers  
20 representing children in custody cases should include. Effective advocacy requires the  
21 attorney to be knowledgeable about relevant state and federal laws, agency regulations,  
22 court decisions and court rules; the applicable legal standards; applicable representation  
23 guidelines and standards; the court process and key personnel in child-related litigation,  
24 including custody evaluations and mediation; child development, needs, and abilities at  
25 different ages; communicating with children; and preparing and presenting a child's  
26 viewpoint, including testimony and alternatives to direct testimony.<sup>177</sup>

27 Counsel for children also need to be trained on recognizing, evaluating, and understand-  
28 ing evidence of child abuse and neglect; family dynamics and dysfunction; domestic  
29 violence and substance abuse; information on multidisciplinary input required in child-  
30 related cases, including information on local experts who can provide consultation and  
31 testimony; available services for child welfare, family preservation, mental health, educa-  
32 tional, and special needs, including placement, evaluation/diagnostic, and treatment  
33 services; provisions and constraints related to agency payment for services; and basic  
34 information about state and federal laws and treaties on child custody jurisdiction, enforce-  
35 ment, and child abduction.<sup>178</sup>

36 In 2008, the president signed into law the Fostering Connections to Success and Increas-  
37 ing Adoptions Act (P.L. 110-351). The Act expands the availability of federal funds to train  
38 attorneys representing children in child protection proceedings. It is hopeful that this new  
39 legislation will motivate states to provide much needed training to lawyers engaged in this  
40 very specialized and demanding area of practice. In addition, extra resources may permit  
41 more children's attorneys to attend trainings offered by providers such as the NACC and  
42 First Star.

#### 43 44 **B. CASELOADS MUST BE REASONABLE TO ENSURE** 45 **ADEQUATE REPRESENTATION** 46

47 While adequate training is necessary to provide a foundation for quality representation,  
48 such representation is also affected by the size of the attorney's caseload. Unreasonably

1 high caseloads make it impossible for lawyers to provide representation that is constitu-  
2 tionally adequate.<sup>179</sup> These caseloads prohibit attorneys from providing effective child  
3 advocacy both within and outside of the courtroom.

4 Lawyers must have the time and ability to meet with their clients on a consistent and  
5 regular basis, investigate the case, and identify their client's needs. Fewer cases provide  
6 attorneys the opportunity to become better acquainted with their clients, thereby encour-  
7 aging more holistic representation. As one attorney reported, "By keeping my caseload  
8 low . . . I am able to get to know my clients well, meet with them where they are living, and  
9 build the trust required to hear their desires, investigate cases fully, and better advocate for  
10 them. I also have time to more thoroughly research legal issues in my cases, so the level of  
11 practice in Family Court may be improved."<sup>180</sup>

12 Unfortunately, many attorneys representing children report having high caseloads.<sup>181</sup>  
13 Due to the prevalence of this problem, standards for maximum caseloads have been  
14 adopted. NACC recommends caseloads of no more than 100 children per attorney per year.  
15 This figure assumes 20 hours of work per child per year and that the lawyer has adequate  
16 support staff.<sup>182</sup> This standard is also acknowledged by the U.S. Department of Health and  
17 Human Services Administration for Children and Families Children's Bureau.<sup>183</sup>

18 Many states have attempted to follow the NACC national guideline, however, recom-  
19 mendations for caseload standards are not always followed and some jurisdictions have  
20 opted for higher standards. In 2006, Dekalb County, Georgia, through its consent decree in  
21 *Kenny A.*, established a caseload cap of 130.<sup>184</sup> A recently enacted New York court rule  
22 states that "the number of children represented at any given time by an attorney . . . shall  
23 not exceed 150."<sup>185</sup>

24 After conducting a comprehensive caseload study of court-appointed dependency coun-  
25 sel,<sup>186</sup> California adopted caseload standards of a maximum of 188 cases per attorney for  
26 attorneys who have appropriate support staff.<sup>187</sup> Currently, however, the statewide average  
27 is 273, with some counties experiencing attorney caseloads of between 500 and 600.<sup>188</sup>

28 In keeping with the belief that lower caseloads lead to better performance,<sup>189</sup> some states  
29 have adopted or been encouraged to adopt standards that set the caseload maximum much  
30 lower than that recommended by NACC. Wyoming, for instance, has defined a reasonable  
31 caseload as no more than 65 juvenile cases.<sup>190</sup> The Wyoming court determined that a lower  
32 caseload was necessary to ensure that attorneys had adequate time to provide the investi-  
33 gation and advocacy necessary to secure appropriate outcomes for dependent children and  
34 their families.<sup>191</sup> Connecticut Voices for Children, in a recent white paper, advocated for a  
35 cap of 80 clients per year for attorneys working full-time on these cases.<sup>192</sup> This cap  
36 assumes 2,000 hours of representation annually and twenty-five hours per client.

37 Where states have not established clear mandates regarding caseload size, courts should  
38 take steps to ensure that lawyers appointed to represent children are not prohibited from  
39 complying with appropriate standards of practice due to overwhelming caseloads. Lawyers  
40 also have an ethical responsibility to decline representation when accepting a case would  
41 interfere with their ability to provide constitutionally adequate representation.<sup>193</sup> In  
42 Nebraska, for example, the Supreme Court adopted guidelines that dissuade attorneys  
43 *ad litem* from maintaining caseloads "that by reason of their excessive size or demands  
44 . . . interfere with or lead to the breach of the professional obligations or standards required  
45 to be met by a guardian *ad litem* by statute or by court rule."<sup>194</sup>

46 In 2005, the ABA passed a resolution aimed at foster care reform.<sup>195</sup> In that resolution,  
47 the ABA urged Congress, states, and territories to enact and/or adopt laws and policies  
48 consistent with recommendations of the national bipartisan May 2004 Pew Commission on

1 Children in Foster Care for improving outcomes for abused and neglected children under  
2 dependency court jurisdiction. Those recommendations included the development and  
3 implementation of national protocols and standards for reasonable attorney caseloads,  
4 federal and state support for attorney training, and development, implementation of, and  
5 funding for, qualification and training standards for dependency counsel. In addition, Court  
6 Improvement Program (CIP) projects across the country have adopted several strategies to  
7 address high caseloads, and some child welfare attorneys have attempted to address the  
8 issue through ethics opinions and class action litigation.<sup>196</sup>

## 10 X. CONCLUSION

11 The United States Constitution, federal and state legislation, court decisions and public  
12 policy all provide support for a child's right to counsel. Despite an increased recognition of  
13 this right, many states still do not provide an abused and neglected child with a lawyer who  
14 will advocate for his expressed wishes, thereby stripping the child of the opportunity to  
15 have a voice in decisions that will profoundly affect his life. Furthermore, there remains an  
16 overall lack of quality, trained, and independent legal representation for children in the  
17 dependency system.

18 Lawyers are the keystone to ensuring fairness, accuracy, and appropriateness of court  
19 decisions. Studies have shown that, in addition to protecting a client's rights, a child's  
20 attorney can improve his client's life by ensuring that the child's well-being is an integral  
21 part of the court process and by taking steps that can expedite permanency. Attorneys also  
22 ensure fairness of the dependency process, contribute to conserving judicial resources, and  
23 support the state's fiscal interests.

24 Unfortunately, there are no national mandates defining the role attorneys should play in  
25 representing children, the type of training they should receive, or the limit on the size of  
26 their caseload. Thus, national organizations and advocacy groups have promulgated stan-  
27 dards and states have enacted statutes and court rules attempting to address these issues.

28 While 17 states have recognized the importance and necessity of providing client-  
29 directed attorneys that advocate for the child's expressed wishes, merely appointing an  
30 attorney does not, in and of itself, protect the child's constitutional right to due process. The  
31 child must have the assistance of a client-directed attorney that has been trained properly  
32 and whose caseload does not prohibit him from providing competent counsel. CAPTA's  
33 vision of full representation for all children will only be realized when these goals are  
34 achieved.

## 36 XI. ENDNOTES

37 1. The Bar-Youth Empowerment Project thanks the Project's national advisory board and Diane Boyd Rauber  
38 for their editorial assistance and Julian Darwall for his invaluable and extensive research assistance.

39 2. CHILDREN'S LAW CENTER AND HOME AT LAST, MY VOICE, MY LIFE, MY FUTURE 13 (2006) *avail-*  
40 *able at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster\\_care\\_reform/foster\\_care\\_](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_MyVoiceMyLifeMyFuture.pdf)  
41 [MyVoiceMyLifeMyFuture.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_MyVoiceMyLifeMyFuture.pdf).

42 3. U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILDREN AND FAMILIES, THE AFCARS REPORT:  
43 PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008 (2008), [http://www.acf.hhs.gov/programs/cb/](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm)  
44 [stats\\_research/afcars/tar/report14.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm).

45 4. ASFA requires permanency review hearings at least every six months and permanency hearings every 12  
46 months. 42 U.S.C. § 675(5)(B) and (C) (2008).

1 5. Parents involved in dependency courts do not have a constitutional right to representation; however, many  
2 states recognize the need for parents to have legal counsel. In an analysis of state statutes, the National Council  
3 of Juvenile and Family Court Judges (NCJFCJ) Project found that 39 state statutes provide that counsel be  
4 appointed to indigent parents. See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND  
5 NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (March 1998) available  
6 at <http://www.ncjfcj.org/content/blogcategory/366/435/>. In most jurisdictions, the child is provided a nonattorney  
7 GAL or an attorney-GAL who advocates for his best interests, not his expressed wishes. In most jurisdictions, the  
8 child is provided a nonattorney GAL or an attorney-GAL who advocates for his best interests, not his expressed  
9 wishes. *Id.*

10 6. CHILDREN'S LAW CENTER AND HOME AT LAST, MY VOICE, MY LIFE, MY FUTURE 13, *supra*  
11 note 2.

12 7. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (lack of adequate procedures used by school in suspending  
13 students violated due process); In re Gault, 387 U.S. 1 (1967) (holding that minors have due process right to  
14 counsel in delinquency proceedings).

15 8. See, e.g., K.E.S. v. Georgia, 134 Ga. App. 843 (1975) (recognizing minors' right to counsel established in  
16 *In re Gault*).

17 9. Mathews v. Eldridge, 424 U.S. 319 (1976).

18 10. See Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV.  
19 RTS. L. REV. 663 (Summer 2006); Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse*  
20 *and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485 (Fall 2003).

21 11. Kenny A. v. Perdue, 356 F.Supp.2d 1353, 1360 (N.D.Ga. 2005).

22 12. *Id.*

23 13. At this hearing, the judge must determine whether there are reasonable grounds to believe that the child  
24 is deprived and whether the child should be returned to his parents or retained in state custody until the  
25 adjudicatory hearing.

26 14. During the adjudicatory hearing, the court hears evidence and makes a determination on the merits of  
27 whether the child has been maltreated.

28 15. At the dispositional hearing, the court determines, among other things, whether the child will be removed  
29 from his home and with whom the child will be placed.

30 16. In accordance with the Adoption and Safe Families Act, the court conducts permanency review hearings  
31 at least every six months and permanency hearings every 12 months.

32 17. See, e.g., Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic*  
33 *Standards*, 27 STAN. L. REV. 985, 993-994 (1975) ("Removing a child from his family may cause serious  
34 psychological damage- damage more serious than the harm intervention is supposed to prevent").

35 18. Pitchal, *supra* note 10 (citing Kenny A., *supra* note 11).

36 19. The state is the supreme guardian of all children within its jurisdiction and state courts have the inherent  
37 power to intervene to protect the best interests of children whose welfare is jeopardized.

38 20. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (codified as amended in scattered sections  
39 of 42 U.S.C.); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND  
40 FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU. OFFICE ON CHILD  
41 ABUSE AND NEGLECT, INTRODUCTION 4 (February 2004). The complete text of the law (U.S. Code title 42,  
42 chapter 67) available at [www4.law.cornell.edu/uscode/42/ch67.html](http://www4.law.cornell.edu/uscode/42/ch67.html).

43 21. Kenny A., *supra* note 11, at 1361.

44 22. Zinn, A. E. & Slowriver, J. (2008) *Expediting Permanency: Legal Representation for Foster Children in*  
45 *Palm Beach County*. (Chicago: Chapin Hall Center for Children at the University of Chicago), available at  
46 [http://www.chapinhall.org/article\\_abstract.aspx?ar=1467](http://www.chapinhall.org/article_abstract.aspx?ar=1467). The study estimated the net cost of providing legal  
47 representation to children to be 32 dollars per day.

48 23. Mark Hardin, Director, Nat'l Child Welfare Res. Ctr. on Legal and Judicial Issues and Director, Child  
49 Welfare, Ctr. on Children and the Law, Am. Bar Ass'n, Testimony Before the Subcommittee on Income Security  
50 and Family Support of the House Committee on Ways and Means (Apr. 8, 2003).

51 24. Kenny A. *supra* note 11, at 1360.

52 25. *Id.* at 1361.

53 26. Pitchal, *supra* note 10.

54 27. Gault, *supra* note 7.

55 28. Battered child syndrome refers to injuries sustained by a child as a result of physical abuse, usually  
56 inflicted by an adult caregiver. Alternative terms include shaken baby, shaken baby syndrome, child abuse, and  
57 non-accidental trauma (NAT).

1 29. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND  
2 PRACTICAL DIMENSIONS 33 (3rd ed. 2007).

3 30. CHILD WELFARE INFORMATION GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY *available at* [http://](http://www.childwelfare.gov/pubs/pubs/factsheets/about.cfm)  
4 [www.childwelfare.gov/pubs/pubs/factsheets/about.cfm](http://www.childwelfare.gov/pubs/pubs/factsheets/about.cfm).

5 31. *Id.*

6 32. The original version of the law passed by the Senate contained no mention of the need for independent  
7 legal representation of the child. It was not until subsequent committee hearings that this issue was addressed in  
8 testimony given by Brian Fraser, then staff attorney for the National Center for Prevention of Child Abuse and  
9 Neglect. It was Fraser who played the primary role in the inclusion of the guardian ad litem requirement in the final  
10 law. Fraser had previously authored an article on the role of guardians ad litem, which broadly defined their duties  
11 to include both legal and nonlegal activities. Fraser's view of the guardian ad litem was as a "special guardian"  
12 legally obligated to do everything within his power to insure a judgment that is in the child's best interests,  
13 including acting as investigator, advocate, counsel, and guardian. REBECCA HEARTZ, NATIONAL CASA ASSO-  
14 CIATION, GUARDIANS AD LITEM IN CHILD ABUSE AND NEGLECT PROCEEDINGS: CLARIFYING THE ROLES TO  
15 IMPROVE EFFECTIVENESS 27 FAM. L.Q. 327 (1993), *available at* [http://www.casenet.org/library/guardian-ad-](http://www.casenet.org/library/guardian-ad-litem/gal-e-section2.htm)  
16 [litem/gal-e-section2.htm](http://www.casenet.org/library/guardian-ad-litem/gal-e-section2.htm).

17 33. *Id.*

18 34. *Id.* at 329.

19 35. CHILD WELFARE INFORMATION GATEWAY, *supra note 30* (In the early years of implementation, even  
20 without statutory mandate to do so, most judges appointed attorneys as GALs).

21 36. 42 U.S.C. §5106a *available at* [http://www4.law.cornell.edu/uscode/pdf/uscode42/lii\\_usc\\_TI\\_42\\_](http://www4.law.cornell.edu/uscode/pdf/uscode42/lii_usc_TI_42_CH_67_SC_I_SE_5106a.pdf)  
22 [CH\\_67\\_SC\\_I\\_SE\\_5106a.pdf](http://www4.law.cornell.edu/uscode/pdf/uscode42/lii_usc_TI_42_CH_67_SC_I_SE_5106a.pdf).

23 37. DONALD N. DUQUETTE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMA-  
24 NENCE FOR CHILDREN, (Department of Health and Human Services, Administration for Children and Families,  
25 Administration on Children, Youth and Families, Children's Bureau) (2002).

26 38. DONALD N. DUQUETTE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING  
27 PERMANENCE FOR CHILDREN (Department of Health and Human Services, Administration for Children and  
28 Families, Administration on Children, Youth and Families, Children's Bureau) (1999) (Option 15A states, "We  
29 recommend that the child's attorney representation be client directed, that is, the child's attorney shall in all  
30 circumstances fulfill the same duties of zealous advocacy, loyalty, confidentiality, and competent representation as  
31 are due an adult child. The child's attorney should represent the child's expressed preferences and follow the  
32 child's direction throughout the course of litigation").

33 39. *Id.*

34 40. M. Carmela Welte, *GAL Training Mandated in CAPTA- HHS Issue Guidelines, National CASA Volunteer*  
35 *Curriculum Cited as Model for Volunteer Training*, July 2004, *available at* [http://www.casenet.org/reference/gal-](http://www.casenet.org/reference/gal-training-mandate.htm)  
36 [training-mandate.htm](http://www.casenet.org/reference/gal-training-mandate.htm).

37 41. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, sec. 114, §(b)(1)(B)(vii)(I), 117 Stat.  
38 2003 (The CAPTA amendment required states receiving funds to certify that each court-appointed children's  
39 lawyer or GAL was a person "who has received training appropriate to the role").

40 42. *See Welte, supra note 40* (The bulletin cites the standards of practice developed by the American Bar  
41 Association and the National Association of Counsel for Children as appropriate training for lawyers representing  
42 children in abuse and neglect cases).

43 43. In 2006, Congress enacted the Child and Families Services Improvement Act, 42 U.S.C. § 675(5)(C). This  
44 Act contains a requirement that foster care proceedings include, in an age-appropriate manner, consultation with the  
45 child that is the subject of the proceedings. The U.S. Department of Health & Human Services Administration for  
46 Children and Families Children's Bureau does not interpret the term "consult" to require a court representative to  
47 pose a literal question to a child or require the physical presence of the child at a permanency hearing. However, the  
48 child's views on the child's permanency or transition plan must be obtained by the court for consideration during  
49 the hearing. Children's Bureau, 8.3C.2c Title IV-E, *Foster Care Maintenance Payments Program, State Plan/*  
50 *Procedural Requirements, Case review system, permanency hearings*, ADMIN. FOR CHILDREN & FAMILIES, U.S.  
51 DEP'T OF HEALTH & HUMAN SERV., Aug. 07, 2007, [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/qaHistory.jsp?citID=58&id=1720)  
52 [laws/cwpm/qaHistory.jsp?citID=58&id=1720](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/qaHistory.jsp?citID=58&id=1720).

53 44. Conversation with Thomas L. Birch, JD, Legislative Counsel, National Child Abuse Coalition (Jan. 5,  
54 2009).

55 45. N.Y. FAM. CT. ACT §241 (McKinney 2008).

56 46. *See generally* Representing Children Worldwide, 250 *Jurisdictions in 2005, How Children's Voices are*  
57 *Heard in Child Protective Proceedings*, <http://www.law.yale.edu/RCW/>; *See also* First Star, *A Child's Right to*

1 *Counsel: First Star's National Report Card On Legal Representation for Children*, 2007, [http://www.firststar.org/](http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf)  
2 documents/FIRSTSTARReportCard07.pdf (Analysis is based on a plain reading of the state statutes. The First  
3 Star Report and Representing Children Worldwide were also consulted. The South Carolina statute requires an  
4 attorney in dependency cases but not in termination of parental rights proceedings).

5 47. In Delaware, for example, an attorney is appointed in more complex and serious cases. "When determining  
6 whether to appoint an attorney through the Office of the Child Advocate or a Court-Appointed Special Advocate  
7 through the Family Court, the Family Court judge, in his or her discretion, should assign the most complex and  
8 serious cases to the Office of the Child Advocate." DEL. CODE ANN. tit. 13, §701(c) (2006).

9 48. See generally Nat'l Ass'n of Counsel for Children, *NACC Recommendations for Representation of*  
10 *Children in Abuse and Neglect Cases* (2001), available at [http://www.naccchildlaw.org/resource/resmgr/](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf)  
11 [resource\\_center/nacc\\_standards\\_and\\_recommend.pdf](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf). As will be discussed, the states have different representa-  
12 tion models. Listed cite provides a good discussion of the pros and cons of each model.

13 49. The Fordham Conference on Ethical Issues in the Legal Representation of Children recommended that  
14 laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as the child's guardian ad  
15 litem be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding. The  
16 conference further recommended that conflicting laws requiring children's lawyers to assume responsibility  
17 inconsistent with those of a client-directed lawyer be eliminated.

18 50. While this approach is most common, as discussed in section VIII, attorneys who advocate for their  
19 client's "best interests" are at risk of violating ethical rules. Further, most lawyers have not received sufficient  
20 training to make subjective determinations about what is best for their child client.

21 51. When a GAL is appointed, he represents the child's best interests and the "former" attorney-GAL  
22 represents the child's expressed wishes. If an attorney is appointed, that attorney represents the child's expressed  
23 interests while the attorney-GAL continues to advocate for the child's best interests.

24 52. As previously discussed, this approach is preferred under the "Guidelines for Public Policy and State  
25 Legislation Governing Permanence for Children" and the scheme for which the National Child Abuse Coalition  
26 is advocating. *Supra* note 38.

27 53. YALE LAW SCHOOL, REPRESENTING CHILDREN WORLDWIDE (2005), [http://www.law.yale.edu/RCW/rcw/](http://www.law.yale.edu/RCW/rcw/jurisdictions/am_n/usa/arizona/frontpage.htm)  
28 [jurisdictions/am\\_n/usa/arizona/frontpage.htm](http://www.law.yale.edu/RCW/rcw/jurisdictions/am_n/usa/arizona/frontpage.htm). Courts are permitted to appoint both an attorney and a GAL, but it  
29 is much more common for the attorney to act both as an attorney and a GAL. However, if there is a conflict  
30 between the child's wishes and best interests, the attorney must represent the child's wishes and request the  
31 appointment of a separate GAL.

32 54. North Carolina General Statutes § 7B-600. Appointment of guardian [http://law.justia.com/northcarolina/](http://law.justia.com/northcarolina/codes/chapter_7b/gs_7b-600.html)  
33 [codes/chapter\\_7b/gs\\_7b-600.html](http://law.justia.com/northcarolina/codes/chapter_7b/gs_7b-600.html). In North Carolina, when a petition alleging abuse or neglect is filed, the judge  
34 shall appoint a GAL to represent the juvenile. In every case where a non-attorney is appointed as a GAL, an  
35 attorney for the child shall be appointed in the case to assure protection of the child's legal rights throughout the  
36 proceeding.

37 55. See S.C. CHILDREN'S CODE tit. 63, § 63-3-810 (2008). In abuse and neglect proceedings, the court is  
38 statutorily required to appoint both a GAL and an attorney for the child.

39 56. See TEXAS FAMILY CODE §107.012 (2007). Representation by an Attorney *ad Litem* (AAL) and a GAL is  
40 mandatory in cases in which the government is seeking conservatorship of the child in response to child abuse or  
41 neglect allegations or is seeking termination of parental rights.

42 57. YALE LAW SCHOOL, REPRESENTING CHILDREN WORLDWIDE (2005), [http://www.law.yale.edu/RCW/rcw/](http://www.law.yale.edu/RCW/rcw/jurisdictions/am_n/usa/vermont/frontpage.htm)  
43 [jurisdictions/am\\_n/usa/vermont/frontpage.htm](http://www.law.yale.edu/RCW/rcw/jurisdictions/am_n/usa/vermont/frontpage.htm); VT. CT. RULES, RULES FOR FAMILY PROCEEDINGS, §§ 2, 3, 6, 6.1,  
44 7 (2009), <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>. The Rules for Family  
45 Proceedings require that a child who is the subject of a juvenile court proceeding be represented both by counsel  
46 and by a GAL.

47 58. The mere expression of a child's wishes by a lawyer who then undermines the child's stated position  
48 by arguing for or presenting evidence supporting the opposite result fails to provide the child with a  
49 meaningful voice. This approach creates an ethical dilemma for the attorney, who must refrain from intentionally  
50 or knowingly engaging in any activity which creates a conflict of interest. MODEL RULES OF PROF'L CONDUCT R.  
51 1.7 (2009).

52 59. See Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, PACE L. FAC.  
53 PUBL'N (2005).

54 60. *Roe v. Conn*, 417 F. Supp. 769, 780 (1967) (The Plaintiffs maintained that the Alabama child custody  
55 procedure violated the Due Process Clause of the Constitution because it did not provide for the appointment of  
56 independent counsel to represent a child in a neglect proceeding).

57 61. *Matter of Jamie TT*, 599 N.Y.S.2d 892, 894 (App. Div.1993).

1 62. *Id.*

2 63. Kenny A., *supra* note 11.

3 64. *Id.* at 1357. While the case was decided under the Georgia state constitution, it was premised on a Due  
4 Process Clause with language nearly identical to the federal constitution.

5 65. In re Christina M., 908 A.2d 1073, 1083 (Conn. 2006).

6 66. *Id.* at 1083

7 67. *Id.* Ultimately, the court concluded that the record did not support the parents' claim that a conflict existed  
8 between the child's expressed wishes and her attorney's position during trial.

9 68. A.B.A. *Resolution* 112A at 10, approved by House of Delegates on August 7, 2006.

10 69. Gault, *supra* note 7.

11 70. MICHAEL D. GRIMES, *PATCHING UP THE CRACKS: A CASE STUDY OF JUVENILE COURT REFORM* 12  
(Lanham MD: Lexington Books 2005).

13 71. Miriam Aroni Krinsky, *Overwhelmed System Must Not Silence Voices of Foster Youth*, Daily Journal,  
14 March 15, 2005.

15 72. Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation*  
16 *for Children Accused of Crime*, 62 MD. L. REV. 288, 316 (2003).

17 73. THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMM'N ON LAW  
18 ENFORCEMENT AND ADMIN. OF JUSTICE 86 (U.S. Gov't Printing Office, February 1967).

19 74. GRIMES, *supra* note 70.

20 75. Gault, *supra* note 7, at 18–19

21 76. Pitchal, *supra* note 10. In her article, *Why Won't Mom Cooperate?: A Critique of Informality in Child*  
22 *Welfare Proceedings*, Amy Sniden argues that "[f]ormality incorporates a number of mechanisms designed to  
23 promote just outcomes in terms of both consistency with each other and consistency with collective norms." 11  
24 YALE J.L. & FEMINISM 339 (1999).

25 77. Pitchal, *supra* note 10.

26 78. THE AFCARS REPORT, *supra* note 3. While the median age for children entering care is 7.5 years old,  
27 attorneys may be appointed to represent children who, due to their minority, are unable to direct the representation  
28 and make their wishes known. In such circumstances, the attorney should determine whether the child is "under  
29 a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Respon-  
30 sibility with respect to each issue in which the child is called upon to direct the representation. If the child is  
31 "under a disability," the attorney should refer to Model Rule 1.14. *See also* Emily Buss, *You're My What? The*  
32 *Problem of Children's Misperceptions of Their Lawyer's Roles*, 64 FORDHAM L. REV. 1699, 1715 (1996)  
33 (discussing children's developing capacity to comprehend the lawyer's role and the ethical issues implicated by  
34 children's role confusion).

35 79. Gault, *supra* note 7 at 38, n. 65 (*quoting* National Crime Commission Report).

36 80. SUSAN A. SNYDER, *PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN'S RIGHT TO*  
37 *COUNSEL IN DEPENDENCY PROCEEDINGS IN PENNSYLVANIA* 8 *Juvenile Law Center* (December 2000), *available*  
38 *at* <http://www.jlc.org/publications/9/promises-kept-promises-broken/>.

39 81. Children were originally viewed as chattel and had few participatory rights. Over time, children have been  
40 recognized as parties to the proceeding in some state and significant participants in others. The passage of CAPTA  
41 signaled an acknowledgment that children in dependency cases have interests that are separate and distinct from  
42 their parents and the state.

43 82. Gault, *supra* note 7, at 34.

44 83. *Id.* In Arizona, probation officers were also arresting officers who initiate proceedings and testify against  
45 the child. The judge could not represent the child because his role was to determine whether the child was  
46 delinquent.

47 84. This conclusion assumes that the parent is actively participating in the proceeding. In the case of  
48 abandonment, for example, the parent generally has no communication with the court or the child.

49 85. Robyn-Marie Lyons, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV.  
50 681, 686 (March 1987). A similar argument can be made regarding the relationship between the state and other  
51 persons in state custody, such as prisoners or psychiatric patients.

52 86. *But see*, Kenny A., *supra* note 11, at 1359 ("there is an inherent conflict of interests between the child and  
53 his or her parent, guardian, or custodian, which requires appointment of separate counsel for the child").

54 87. Joseph Goldstein, et al., *Beyond the Best Interests of the Child* 111–12 (1973); *see also* Guggenheim,  
55 *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29  
56 LOY. U. CHI. L.J. 299 (1998) at 344. Goldstein, Freud, and Solnit argued that assigning a lawyer to represent a  
57 child over a parent's objection before a judicial declaration of parental unfitness violates the parent's right to

1 control the upbringing of her child. See Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6  
2 Nev. L.J. 805 (Spring 2006); "In cases when unfitness is alleged but unproven, children and their parents have  
3 overlapping, but divergent interests." Pitchal, *supra* note 10, at 685.

4 88. Gault, *supra* note 7, at 36.

5 89. *Id.* For example, without attorneys to "insist on the regularity" of permanency proceedings, permanency  
6 for the child would be delayed.

7 90. Zinn & Slowriver, *supra* note 22. In the Palm Beach County study, it was noted that a number of informed  
8 participants that the FCP lawyer made efforts to influence the nature of the case plans and, in particular, the  
9 conditions required for reunification.

10 91. *Veazey v. Veazey*, 560 P.2d 382, 390 (Alaska 1977). The basic premise of the adversary system is that the  
11 best decision will be reached if each interested person had his case presented by counsel of unquestionably  
12 undivided loyalty.

13 92. Zinn & Slowriver, *supra* note 22. The Children's Services Council of Palm Beach County contracted with  
14 the Legal Aid Society of Palm Beach County in July 2001 to provide legal representation to children three years  
15 of age and younger entering shelter care in Palm Beach County. In April 2006, the Children's Services Council  
16 and Legal Aid contracted with Chapin Hall Center for Children at the University of Chicago to conduct a  
17 third-party evaluation of the program. The primary purpose of the study was to examine the impact that the  
18 program has had on the nature and timing of children's permanency outcomes. As the study is the first of its kind,  
19 it is somewhat limited in scope. Despite its limitations, it provides invaluable insight into the impact that attorneys  
20 for children have in dependency cases.

21 93. Zinn & Slowriver, *supra* note 22.

22 94. Such motions may include motions to compel the state to provide services or visitation with siblings.  
23 Motions may also be used to review issues related to the child's placement.

24 95. Zinn & Slowriver, *supra* note 22.

25 96. See also, Gault, *supra* note 7, at 38, n. 65 (*quoting* the National Crime Commission Report, "Fears have  
26 been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it  
27 is partly desirable. Informality is often abused.")

28 97. Zinn & Slowriver, *supra* note 22.

29 98. In addition to the ABA, several other organizations and conferences have stressed the importance of  
30 providing attorneys to children. See discussion in section VIII.

31 99. *A.B.A. Resolutions on Foster Care and Adoption: Foster Care Reform* (August 2005), available at  
32 <http://www.abanet.org/child/foster-adopt.shtml>. The August 2005 Foster Care Reform resolution also urges states  
33 to attract and retain effective, trained, and qualified lawyers in the dependency practice area by (i) development  
34 and implementation of reasonable compensation for dependency counsel, that is not tied to the volume of cases  
35 or clients a lawyer represents; (ii) establishment of loan forgiveness programs for attorneys who enter or currently  
36 practice in this area; (iii) development and implementation of national protocols and standards for reasonable  
37 attorney caseloads; (iv) federal and state support for attorney training; and (v) development, implementation of,  
38 and funding for, qualification and training standards for dependency counsel.

39 100. Howard H. Dana, Jr., *A.B.A. Resolution 112a*, A.B.A. (2006).

40 101. ABA Resolution 104a, adopted August 2007. Youth Transitioning from Foster Care (Youth at Risk). Full  
41 text available at: <http://www.abanet.org/crimjust/just/policy.html#104a>. *Youth Transitioning From Foster Care*  
42 (*Youth at Risk*), A.B.A. resolution 104a (2007).

43 102. "Permanency" means that child has a safe, stable, custodial environment in which to grow up and a  
44 life-long relationship with a nurturing caregiver.

45 103. Zinn & Slowriver, *supra* note 22.

46 104. *Id.* Notably, the increase in exits to adoption and long-term relative custody did not decrease the  
47 likelihood of family reunification. While children in the sample were three times more likely to exit to adoption,  
48 they were also 25% more likely to be reunified with their parents.

49 105. Two major pieces of federal foster care legislation, the Adoption Assistance and Child Welfare Act and  
50 the Adoption and Safe Families Act were enacted to ensure that children who cannot return to their family or  
51 extended family do not remain in long-term foster care.

52 106. Mary Eshelbach Hansen, *Despite a Tragedy, Adoption Aid Remains Crucial*, Washington Post, Oct. 19,  
53 2007, at B8.

54 107. Mary Eshelbach Hansen, *The Value of Adoption*, ADOPTION Q., Mar. 2008, 65.

55 108. *Id.*

56 109. Mark E. Courtney, et al., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER  
57 YOUTH (Chapin Hall 2007).



1 110. In New York City, the Department of Homeless Services estimated that 23% of children who age out of  
2 foster care enter homeless shelters. *The Needs of Youth Aging out of Foster Care, Public hearing before Assembly*  
3 *Standing committee on Children and Families and Assembly Subcommittee on Foster Care* (NY 2007). In another  
4 sample, 80% of homeless youth did not earn enough to be self-supporting four years after aging out, with 50%  
5 unemployed, and 25% experiencing homelessness. RONNA COOK, *A NATIONAL EVALUATION OF TITLE IV-E FOSTER*  
6 *CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH* (1991).

7 111. The Courtney and Piliavin study (2001) found 25% males who aged out without a permanent placement  
8 had been incarcerated at least once in a six month period within 12–18 months after leaving custody. The Midwest  
9 Study (2005) study found a 24% arrest rate among males within a year of aging out. Seminal research on a sample  
10 of California children who had not reached permanency found that 35% of the discharged youths had been  
11 arrested or convicted. Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD AND  
12 ADOLESCENT SOC. WORK J. 419 (1990).

13 112. The Illinois Child Well-Being Study, a longitudinal analysis of 400 children, found clinical and borderline  
14 levels of behavior and mental health diagnoses associated with lack of exit to permanency and found the rate of  
15 posttraumatic stress disorder (PTSD) at 25%. The Midwest study sample of children that did not exit to  
16 permanency found that the majority were without health insurance and that 15% had developed a mental health  
17 or substance disorder after the first year of aging out. COURTNEY, *supra*, note 109. Over two-fifths of former foster  
18 children who had aged out scored highly on a depression scale. CAROL BRADFORD & DIANA J. ENGLISH, OFF. OF  
19 CHILD. ADMIN. RES., *FOSTER YOUTH TRANSITION TO INDEPENDENT STUDY* 26 (2004).

20 113. In a 2001 study of individuals who had aged out of care within the prior two to four years, only about 50%  
21 of the sample had completed high school or received a GED. KIMBERLY NOLLAN & CHRIS DOWNS, *Preparing*  
22 *Youth for Long-term Success*—PROCEEDINGS FROM THE CASEY FAMILY PROGRAM NATIONAL INDEPENDENT  
23 FORUM 454 (2001). In a 1998 study, only 9% of the study sample of who had aged out had entered college. *Child*  
24 *Welfare*, 80, 685–717. Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of*  
25 *Youth Leaving Care*, 80 CHILD WELFARE 685 (2001). A 2005 study found that children exiting to permanency  
26 were twice as likely to have a high school diploma or GED as their age group peers who had not reached  
27 permanency. COURTNEY, *supra* note 109.

28 114. Of the 2001 sample, under half of the approximately 600 individuals studied maintained stable employ-  
29 ment after aging out. NOLLAN, *supra* note 113.

30 115. “Aging out” is the case outcome for youth who exit foster care because they have reached the age of  
31 majority.

32 116. *See*, REPORT OF THE 100% REPRESENTATION WORK GROUP, FLORIDA BAR FOUNDATION CHILDREN’S  
33 LEGAL SERVICES GRANTEES (2008). The estimated budget of \$5,377,448 contemplates a model program staffed  
34 by attorneys, paralegals, social workers and administrative assistants and includes human resources, accounting  
35 and IT support. Further, the model program would serve children who had achieved permanency, former foster  
36 youth and child who meet the criteria for dependency but for whom no petition is pending.

37 117. William Bowen, Joshua Hudner & Blair Warner, *Giving Families a Chance: Necessary Reforms for the*  
38 *Adequate Representation of Connecticut’s Children and Families in Child Abuse and Neglect Cases*, CT VOICES  
39 FOR CHILDREN 24 (2007), <http://ctkidslink.org/publications/welf07reformsforrep.pdf>.

40 118. *Id.* That estimate assumes that each attorney will spend between 1500 and 2000 hours annually  
41 representing between 60 and 80 children and be compensated at a rate of \$60/hour.

42 119. H.B. 3048, 59th Leg., Reg. Sess. (Wa. 2007). The total budget for the project was \$1.7 million. Ten FCP  
43 attorneys had a caseload of approximately thirty-five children. The budget for a proposed two-county pilot  
44 program in Washington state that would provide legal representation to all children age twelve and over was  
45 approximately \$440,000 a year. However, the budget did not include the exact number of children who would be  
46 served. Bill Number: 3048 HB Multiple Agency Fiscal Note Summary.

47 120. This paper does not contend that, as a policy goal, adoption is superior to reunification.

48 121. Hansen, *supra* note 107. An adoption costs the state and federal government approximately \$115,000 but  
49 saves about \$258,000; thus, a net savings of \$143,000. *See also*, Richard Barth Et Al., *A Comparison of the*  
50 *Governmental Costs of Long-Term Foster Care and Adoption*, 80 SOC. SERVICES REV. 127 (2006) (found that a  
51 child who is adopted will cost the government approximately \$21,000 less over the first 7.7 years than one who  
52 remains in foster care. If certain conditions are met, the total project governmental savings could range from  
53 \$3,271,100,000 to \$6,341,250,000 through age 18).

54 122. *Id.*

55 123. *Id.*

56 124. Although the Palm Beach study estimated the net cost of providing legal representation to be \$32 per day,  
57 its primary purpose was to examine the impact that attorneys had on the nature and timing of children’s

1 permanency outcomes. Further, it only considered the reduction of costs of substitute care and case management  
2 that accrue from expedited permanency.

3 125. TOM PACKARD, COST BENEFIT ANALYSIS OF THE TRANSITION GUARDIAN PLAN (2006).

4 126. See discussion in section VI.

5 127. BOWEN, *supra* note 117.

6 128. *Id.* The program's total budget was \$1.7 million. Ten attorneys represented 35 children each.

7 129. *Id.* 2.98 to 1 (or 1.85 to 1 present value) for one cohort and 3.1 to 1 (or 1.9 to 1 present value) for 40  
8 cohorts.

9 130. This conclusion should in no way be interpreted to suggest that older adolescents in the dependency  
10 system should not be provided expanded transitional services, whether or not they have an attorney, as the two are  
11 not mutually exclusive.

12 131. WHYTNI KERNODLE FREDERICK & DEBORAH L. SAMS, RIGHT TO COUNSEL: FIRST STAR'S NATIONAL  
13 REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN (2007).

14 132. *Id.* The seventeen states with a mandated client-directed model of representation are: Arizona, Connecti-  
15 cut, Georgia, Louisiana, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon,  
16 South Carolina, Tennessee, Texas, Vermont, and West Virginia.

17 133. Clark Peters, Katie S. Claussen Bell, Andrew Zinn, Robert M. Goerge & Mark E. Courtney, Continuing  
18 Foster Care Beyond Age 18: How Courts Can Help (2008), available at [http://www.chapinhall.org/](http://www.chapinhall.org/article_abstract.aspx?ar=1472)  
19 [article\\_abstract.aspx?ar=1472](http://www.chapinhall.org/article_abstract.aspx?ar=1472).

20 134. 42 U.S.C. § 675(5)(C).

21 135. Even when the attorney-GAL is required to inform the court of the child's position, they do not have the  
22 same zealous advocacy obligations as traditional attorneys. Therefore, the child's position is minimized.

23 136. Giving the Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency  
24 and Termination of Parental Rights Proceedings, available at [http://www.legal-aid.org/media/68451/](http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf)  
25 [role%20of%20jrp%20lawyer%2010-08.pdf](http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf), citing Emily Buss, *Confronting Developmental Barriers to the*  
26 *Empowerment of Child Clients*, 84 CORNELL L. REV. 895, at 960 (1999).

27 137. See ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody  
28 Cases (2003). See also Jennifer L. Renne, *Legal Ethics in Child Welfare Cases, Special Issues for Guardians ad*  
29 *Litem*, ABA Center on Children and the Law, National Resource Center on Legal and Judicial Issues, and the  
30 Center for Professional Responsibility (2004) [http://www.abanet.org/abastore/index.cfm?section=main&fm=](http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5490442)  
31 [Product.AddToCart&pid=5490442](http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5490442)]; Buss, *supra* note 78.

32 138. Giving the Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency  
33 and Termination of Parental Rights Proceedings, available at [http://www.legal-aid.org/media/68451/](http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf)  
34 [role%20of%20jrp%20lawyer%2010-08.pdf](http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf), citing Randi Mandelbaum, *Revisiting the Question of Whether Young*  
35 *Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 36 (2000).

36 139. MODEL RULES OF PROF'L CONDUCT R 1.6 cmt. (1983). See, e.g., *People v. Gabriesheski*, No.  
37 07CA1016 (Colo. App. Sept. 4, 2008).

38 140. MODEL RULES OF PROF'L CONDUCT R 1.2 cmt. (1983).

39 141. *Id.*

40 142. MODEL RULES OF PROF'L CONDUCT R 1.7 cmt. (1983).

41 143. MODEL RULES, *supra* note 139.

42 144. MRPC 1.6 provides limited circumstances when a lawyer may reveal information relating to the  
43 representation of a client, such as, when the client gives informed consent or the disclosure is impliedly authorized  
44 in order to carry out the representation. Lawyers may also reveal information relating to the representation of a  
45 client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial  
46 bodily harm. MRPC 1.14 permits an attorney taking protective action for a client with diminished capacity to  
47 reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

48 145. *Supra*, note 137.

49 146. Renne, *supra*, note 137 ("[E]ven if a GAL succeeds in avoiding direct and indirect disclosure of the  
50 client's secrets, she will certainly undermine the broader confidentiality interest . . . that is, the client's interest in  
51 ensuring that his otherwise secret statements are only used to further his desired ends. This broader confidentiality  
52 obligation, so central to representation by a lawyer with undivided loyalties, cannot be squared with the GAL  
53 approach.")

54 147. Because the GAL's duty of loyalty as the lawyer for the child is contrary to the GAL's statutory duty to  
55 the court, some states, such as Wyoming, have amended their versions of the rule to exclude GALs from  
56 complying with MRPC 1.2.

57 148. Such provisions also assume that the GAL will disclose the conflict to the court.

1 149. CHILDREN'S LAW CENTER AND HOME AT LAST, MY VOICE, MY LIFE, MY FUTURE 13, *supra*  
2 note 2.

3 150. Victoria Weisz, Twila Wingrove, and April Faith-Slaker, *Children and Procedural Justice*, 44 COURT  
4 REVIEW 36 (2007).

5 151. Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64  
6 FORDHAM L. REV. 1571, 1619 (1996).

7 152. In addition to the national standards, some state standards require client-directed advocacy. *See, e.g.*,  
8 NYSBA Committee on Children and the Law, Standards for Attorneys Representing Children in New York Child  
9 Protective, Foster Care, and Termination of Parental Rights Proceedings; Giving the Children a Meaningful Voice:  
10 The Role of the Child's Lawyer in Child Protective, Permanency, and Termination of Parental Rights Proceedings,  
11 New York Legal Aid Society, Juvenile Rights Practice; John E. Carter, Jr., *Function of the Attorney for the*  
12 *Child*, NYSBA Journal, available at [http://www.nysba.org/AM/Template.cfm?Section=Bar\\_i\\_Journal\\_i\\_](http://www.nysba.org/AM/Template.cfm?Section=Bar_i_Journal_i_&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14981)  
13 [&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14981](http://www.nysba.org/AM/Template.cfm?Section=Bar_i_Journal_i_&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14981); Elliot Wiener, *The Chief Judge Clarifies the*  
14 *Role of Attorneys for Children*, 40 NYSBA FAM. L. REV. 2, 4 (2008).

15 153. *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996);  
16 Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV.  
17 1301 (1996).

18 154. *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and*  
19 *Neglect Cases*, Approved by the ABA House of Delegates, February 5, 1996. Available at, [http://www.abanet.org/](http://www.abanet.org/child/repstandwhole.pdf)  
20 [child/repstandwhole.pdf](http://www.abanet.org/child/repstandwhole.pdf).

21 155. National Association of Counsel for Children, *NACC Recommendations for Representation of Children*  
22 *in Abuse and Neglect Cases* (2001), available at [http://www.naccchildlaw.org/resource/resmgr/resource\\_center/](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf)  
23 [nacc\\_standards\\_and\\_recommend.pdf](http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf). *See also* National Association of Counsel for Children, *ABA Standards of*  
24 *Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1999),  
25 available at <http://www.naccchildlaw.org/?page=Practicestandards>.

26 156. American Bar Association Section of Family Law Standards of Practice for Lawyers Representing  
27 Children in Custody Cases Approved by the American Bar Association House of Delegates August 2003, available  
28 at [http://www.afcnet.org/pdfs/aba\\_standards.pdf](http://www.afcnet.org/pdfs/aba_standards.pdf).

29 157. Special Issue on Legal Representation of Children, *Recommendations of the UNLV Conference on*  
30 *Representing Children in Families*, 6 NEV. L. J. 592 (2006).

31 158. ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Pro-  
32 ceedings, ABA Section of Litigation Children's Rights Litigation Committee with assistance of the Bar-Youth  
33 Empowerment Program of the ABA Center on Children and the Law and First Star, available at [www.abanet.org/](http://www.abanet.org/child/empowerment/Model_Act_FINAL_VERSION_6_10.doc)  
34 [child/empowerment/Model\\_Act\\_FINAL\\_VERSION\\_6\\_10.doc](http://www.abanet.org/child/empowerment/Model_Act_FINAL_VERSION_6_10.doc).

35 159. American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and  
36 Neglect Cases (1996). Definitions [A-1] The Child's Attorney, comment. Standards published by ABA, available  
37 at: <http://www.abanet.org/child/repstandwhole.pdf>.

38 160. *See, Strickland v. Washington*, 466 US 668 (1984) (setting forth a two-part test for establishing a claim  
39 of ineffective assistance of counsel).

40 161. In the Matter of Jamie TT, *supra* note 61, at 137.

41 162. Kenny A., *supra* note 11, at 1361 (emphasis in the original). The court held that "effective assistance of  
42 counsel by a child advocate attorney requires that he or she carry out certain minimum legal tasks as part of the  
43 representation. These tasks include meeting with the child prior to court hearings and when apprised of emer-  
44 gencies or significant events impacting the child; conducting investigations and discovery, including interviewing  
45 individuals involved with the child, such as caseworkers and foster parents, and reviewing all judicial, medical,  
46 social services, educational, and other records pertaining to the child; evaluating the child's need for particular  
47 services; monitoring the implementation of all court orders; participating in all hearings; and filing all relevant  
48 motions and appeals." *Id.* at 1362.

49 163. *See also*, National Association of Counsel for Children, Child Welfare Law Office Guidebook: Best  
50 Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency  
51 Cases, available at, <http://www.naccchildlaw.org/resource/resmgr/clop/cloguidebookfinal4-06.pdf>.

52 164. The MRPC also requires competent representation.

53 165. Statement of Mark Hardin, Director, Child Welfare, American Bar Association, Center on Children and  
54 the Law. Testimony Before the House Committee on Ways and Means Subcommittee on Human Resources,  
55 Hearing on Child Protections Issues. March 23, 2000, available at [http://waysandmeans.house.gov/legacy/](http://waysandmeans.house.gov/legacy/humres/106cong/3-23-00/3-23hard.htm)  
56 [humres/106cong/3-23-00/3-23hard.htm](http://waysandmeans.house.gov/legacy/humres/106cong/3-23-00/3-23hard.htm).

1 166. As discussed in section III, CAPTA was amended in 2003 to require states receiving federal funds to  
2 certify that each court-appointed children's lawyer or GAL was a person "who has received training appropriate  
3 to the role." *Supra* note 30; 42 U.S.C. §5106a (b)(2)(A)(xiii) (West 2009).

4 167. KOH, *supra* note 29.

5 168. First Star, *supra* note 46.

6 169. Standards also vary within individual states. In California, Rule of Court 1438, requires that each county  
7 develop adopt rules of court regarding the appointment of competent counsel in dependency proceedings.  
8 CAL.WELF. & INST. CODE § 317.6 (a) (1996).

9 170. Information and standards, <http://www.naccchildlaw.org/?page=Certification>. See also Marvin Ventrell  
10 & Amanda George Donnelly, *NACC certifies nation's first child welfare law specialists*, CHILDREN'S VOICE  
11 MAGAZINE, Apr. 1, 2007.

12 171. California, Connecticut, District of Columbia, Iowa, Michigan, New Mexico, North Carolina, and  
13 Tennessee.

14 172. NACC Child Welfare Law Certification State Status Chart, available at [http://c.yourmembership.com/  
15 sites/www.naccchildlaw.org/resource/resmgr/certification/state\\_status\\_chart.pdf](http://c.yourmembership.com/sites/www.naccchildlaw.org/resource/resmgr/certification/state_status_chart.pdf).

16 173. *Id. supra* note 168.

17 174. Information on First's Stars multidisciplinary centers of excellence, available at [http://www.firststar.org/  
18 education/default.asp](http://www.firststar.org/education/default.asp).

19 175. Information on First Star's Congressional Roundtable on Children, available at [http://www.firststar.org/  
20 research/roundtable.asp](http://www.firststar.org/research/roundtable.asp).

21 176. American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and  
22 Neglect Cases, Approved by the ABA House of Delegates, February 5, 1996, [http://www.abanet.org/child/  
23 repstandwhole.pdf](http://www.abanet.org/child/repstandwhole.pdf) (Continuing education opportunities are critical to maintain a high level of performance).

24 177. *Id.*

25 178. American Bar Association Section of Family Law Standards of Practice for Lawyers Representing  
26 Children in Custody Cases (2003).

27 179. Howard Davidson & Erik. S. Pitchal, *Caseloads must be controlled so all child clients can receive  
28 competent lawyering*, in *THE SPECIALIZED PRACTICE OF JUVENILE LAW: MODEL PRACTICE IN MODEL OFFICES*,  
29 (National Association of Counsel for Children, 2006.)

30 180. *Id.* at 8.

31 181. *Id.* at 7. A survey found that 17.6% of all respondents had caseloads of 200 and over and 24.9% had  
32 caseloads between 100 and 199. In April 2008, it was reported that assistant public defenders in Oklahoma County  
33 had caseloads between 1,000 and 1,250 children. Nolan Clay and Randy Ellis, *National panel faults Oklahoma  
34 County system*, THE OKLAHOMAN, April 27, 2008.

35 182. Kenny A., *supra* note 11, at 1362. In *Kenny A.*, NACC Executive Director Marvin Ventrell testified that  
36 the recommended caseload limit is meant to apply regardless of how many support staff an attorney might have  
37 and assumes that that child advocate attorneys are not required to perform non-legal, administrative tasks.

38 183. *Supra* note 38. Other recommendations regarding caseloads have not provided a specific number of cases  
39 or individuals that attorneys can represent effectively. For example, the UNLV Conference recommended that  
40 "attorneys for children receive . . . reasonable caseloads." (H.2.b.iv) and the Fordham Conference proposed  
41 caseloads "appropriate for competent and effective representation of each client." *Special Issue on Legal Repre-  
42 sentation of Children: Appendix: Recommendations of the Fordham Conference on Ethical Issues in the Legal  
43 Representation of Children* 6 NEV. L.J. 1408, 1422 (2006).

44 184. Kenny A., *supra* note 11 (Consent Decree between plaintiffs and defendant Fulton County).

45 185. Rules of the Chief Administrative Judge, Part 127, § 127.5(a). The workload standards may be adjusted  
46 based on factors such as the availability and use of support staff. § 127.5(b), Available at [http://  
47 www.courts.state.ny.us/rules/chiefadmin/127.shtml](http://www.courts.state.ny.us/rules/chiefadmin/127.shtml).

48 186. The study recommended that a maximum caseload of 141 clients per full-time dependency attorney as  
49 the base-level standard of performance; a maximum of 77 clients was identified as necessary for an optimal, or  
50 best practice, standard of performance.

51 187. Dependency Counsel Caseload Study and Service Delivery Model Analysis, (June 2004); prepared for  
52 the Administrative Office of the Courts by The American Humane Association Denver, Colorado; the Spangenberg  
53 Group, West Newton, Massachusetts. The findings of this study served as the foundation for *Dependency  
54 Representation, Administration, Funding and Training ("DRAFT") Program*, Administrative office of the Courts,  
55 Center for Families, Children and the Courts, October 2007 report to the Judicial Council. See also *Dependency  
56 Counsel Caseload Standards: A Report to the California Legislature*, (April 2008) Judicial Council of California,  
57 <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm>.

1 188. JUD. COUNCIL OF CAL., ADMIN. OFF. OF THE CTS.: CHILDREN IN FOSTER CARE: FINAL RECOMMENDA-  
2 TIONS OF THE CALIFORNIA BLUE RIBBON COMMISSION ON CHILDREN IN FOSTER CARE (2008). The Blue Ribbon  
3 Commission is recommending that the Judicial Council seek the funding needed to implement the standard. The  
4 estimated cost of implementation is \$57.14 million. It is virtually impossible to meaningfully represent clients  
5 when caseloads are at this level.

6 189. *See also* Davidson & Pitchal, *supra* note 179.

7 190. WY R UNIF DIST CTS Rule 106 (e)(2) (according to Stacy Obrec, Director of the Office of the State  
8 Public Defender GAL Program, the average caseload is 10–15 children because the attorneys work part-time. The  
9 highest caseload is just under 40 children. Newly proposed rules will establish a caseload cap of 80 cases for  
10 full-time attorneys and 40 cases for part-time attorneys. Each judge determines whether “case” means an  
11 individual child or a family).

12 191. *Id.*

13 192. BOWEN, *supra* note 117.

14 193. MPRC 1.7(b) prohibits attorneys from representing clients “if the representation of that client may be  
15 materially limited by the lawyer’s responsibilities to another client.” *See also* Davidson and Pitchal, *supra* note  
16 179.

17 194. Guidelines for Guardians Ad Litem For Juveniles in Juvenile Court Proceedings. Nebraska Supreme  
18 Court, [http://www.supremecourt.ne.gov/rules/guidelines/GAL\\_Guidelines.pdf](http://www.supremecourt.ne.gov/rules/guidelines/GAL_Guidelines.pdf).

19 195. ABA Resolutions on Foster Care and Adoption: Foster Care Reform, August 2005, [http://](http://www.abanet.org/child/foster-adopt.shtml)  
20 [www.abanet.org/child/foster-adopt.shtml](http://www.abanet.org/child/foster-adopt.shtml).

21 196. *Strategies for Addressing High Attorney Caseloads in Child Welfare Cases*, 8 CHILD COURT WORKS,  
22 (August 2005).

23  
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