

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED that the American Bar Association urges federal, state, tribal, local, and territorial
2 governments to ensure that child victims of criminal conduct have prompt access to legal advice
3 and counsel and to specialized services and protections such as those provided by child advocacy
4 centers approved and accredited by the National Children's Alliance

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6 FURTHER RESOLVED that the American Bar Association urges federal, state, tribal, local, and
7 territorial governments including courts, and state and local bar associations:

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9 1. to support legislation or the modification of rules of court to provide that child victims of
10 criminal conduct have independent attorneys who can assist them in accessing applicable
11 victims' rights (such as those provided by 18 U.S.C. 3771 in the federal system) and age-
12 appropriate accommodations (such as those provided by 18 U.S.C. 3509 in the federal
13 system) established by law in the jurisdiction if the court makes a finding that the child's
14 interests are not otherwise adequately protected.
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16 2. to initiate pilot programs or demonstration projects in which rights and protections for the
17 child victim of criminal conduct are protected and enforced.

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19 FURTHER RESOLVED that the American Bar Association, state and local bar associations, law
20 schools, victim rights organizations, child rights organizations, and courts are urged to
21 collaborate to develop appointment procedures for courts to appoint attorneys for child victims
22 of criminal conduct and to adopt standards of practice and training requirements for those
23 attorneys appointed for child victims including those regarding the attorneys' roles and
24 responsibilities.

Report on Child Victims of Crime Resolution

I. The Problem

The number of children forced to interact with federal and state criminal courts in the past thirty years has increased. In 2005, almost 900,000 children¹ in the United States were the subjects of child abuse or neglect reports that were substantiated, indicated, or assessed to have occurred or at risk of occurrence.² In the same year, 1446 children in the United States were murdered.³ In 1991, almost 20% of violent offenders incarcerated in state prisons committed their crimes against children, and 78% of those convicted of sexual assault were convicted of crimes against children.⁴ Half of the violent crimes committed against children involved victims age 12 or under. The U.S. Department of Health and Human Services reported in 2004 that 78% of child fatalities due to abuse, neglect or both were caused by the child's parents.⁵

When children are abused or victimized by parents or strangers, the police and social services are called. In some of these cases, particularly those dealing with sexual abuse or severe physical abuse, the cases are prosecuted in criminal and delinquency courts. While a large number of perpetrators are parents or family members, children are also the victims of crimes committed by strangers and peers. Children may be the victims of gang-related violence and other street crime, robberies, kidnap, arson, and trafficking. Even in cases in which a parent or guardian is not the perpetrator, families generally lack the knowledge and resources to assist a child who is served with a subpoena and called upon to testify in a criminal or delinquency proceeding. Children may already be traumatized by their victimization, they may be threatened by the perpetrators, or they may be fearful of being falsely implicated in the crime. Even more than their adult counterparts, children may not have the capacity to understand or exercise the rights that they have been granted under the law.

Members of the 1982 President's Task Force on Victims of Crime were unanimous in their findings that the criminal justice system poorly served victims and needed reforms from all avenues of government and the private sector in order to provide victims with some modicum of the rights and protections constitutionally afforded defendants. The Final Report of the task force declared that "only the sustained efforts of federal, state, and local governments, combined with the resources of the private sector, can restore balance to the criminal justice system."⁶ One task force witness said of victims, "It is hard not to turn away from victims; their pain is

¹ Children, throughout the report, are defined as persons under 18 years of age.

² U.S. Dept. of Health and Human Serv., Admin. for Children and Families, Statistics and Research, *Child Maltreatment 2005*, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm05/index.htm>.

³ U.S. Dept. of Justice, Federal Bureau of Investigation. *Crime in the United States*, annual., available at <http://www.fbi.gov/ucr/05cius/>.

⁴ Lawrence A. Greenfield, U.S. Dept. of Justice Office of Justice Programs and Office of Juvenile Justice and Delinquency Prevention, *Child Victimized: Violent Offenders and their Victims* (March, 1996) (NCJ-153258).

⁵ Administration on Children, Youth & Families, U.S. Dept. of Health and Human Services, *Child Maltreatment 2004* at xvii (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

⁶ *Final Report*, 1982 President's Task Force on Victims of Crime, page ii, (1982).

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discomforting; their anger is embarrassing; their mutilations are upsetting.”⁷ When children are victims, their pain is more discomforting and their victimization more upsetting. Their reactions might be so incongruous to what the average person may expect that their stories are often difficult to believe. “Perhaps no crime is more misunderstood and less adequately treated by the criminal justice system than the sexual molestation of children...there is almost a need to find that the conduct is the result of mistake, misinterpretation, or psychological aberration.”⁸ David Lloyd, Attorney in the Child Protection Unit at Children’s Hospital of the National Medical Center in Washington, D.C., observed that “[c]hild victims of crime are specially handicapped. First, the criminal justice system distrusts them, and puts special barriers in their path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.”⁹

The 1982 President’s Task Force on Victims of Crime Report recommended 62 reforms, including many that have been codified in state and federal jurisdictions. These include sealing victims’ addresses from defendants, establishing victims of crime compensation funds, permitting victim impact statements during the sentencing phase of trial, and adding danger to the community as a consideration at bail hearings. It also recommended giving child victims the same understanding that youthful offenders receive in the juvenile justice system.¹⁰ With regard to sexual abuse offenses, Prosecutor Recommendation #8 of the Report called on prosecutors to “recognize the profound impact that crimes of sexual violence have on both child and adult victims and their families.”¹¹

Yet, despite the reforms that emerged after the 1982 Task Force Report, children remained unheard and re-victimized in criminal and delinquency courts. Even in jurisdictions in which protective measures and victims’ rights have been enacted, children are at a distinct disadvantage in exercising these rights.

II. The Solution

The Victims of Child Abuse Act of 1990 (VCAA), that portion of the Crime Control Act which provides specific rights and protections to child victims and witnesses, was enacted in response to “an alarming increase in reports of suspected child abuse made each year.”¹² “To address this nationwide emergency the 1990 VCAA ... amends the United States Criminal Code to ensure protection of children’s rights in court and throughout the criminal justice system.”¹³ The VCAA incorporates numerous federal rights for child victims and witnesses in criminal court that can be emulated in state statutes and rules. 18 USC 3509(h), for example, provides an effective mechanism for ensuring the protection of vulnerable children by providing for the

⁷ *Ibid.* at vii.

⁸ *Ibid.* at 81.

⁹ *Ibid.* at 51.

¹⁰ *Ibid.* See Recommendation for Federal Funding #5, recommending a study be commissioned at the federal level to evaluate the juvenile justice system from the perspective of the victim.

¹¹ *Ibid.* at 69.

¹² Alberto R. Gonzelez, *2005 Attorney General Guidelines for Victim and Witness Assistance* at 48, available at <http://www.usdoj.gov/olp/final.pdf>.

¹³ *Ibid.*

appointment of a guardian ad litem for a child victim or witness of a crime, as follows.

(h) Guardian Ad Litem.—

(1) In general.— The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian’s background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem. – A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney’s work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives). A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities. – A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian’s lawful duties described in paragraph (2).¹⁴

Under this federal law, the representative does not have to be an attorney. However, the rule instructs the court to “consider a prospective guardian’s background in, and familiarity with, the judicial process, social service programs, and child abuse issues.”¹⁵ Duties of the guardian ad litem appointed in federal court include attending all the “depositions, hearings, and trial proceedings in which a child participates and mak[ing] recommendations to the court concerning the welfare of the child...”¹⁶ The federal act gives the GAL the right to reports, evaluations, and records necessary to effectively advocate for the child.

In May of 2005, after the passage of the Crime Victims’ Rights Act (18 U.S.C. § 3771), the United States Attorney General updated the Attorney General Guidelines for Victim and Witness Assistance.¹⁷ Article VI of the Guidelines list those recommendations specifically focused on child victims and witnesses, but also emphasizes that victims’ rights applicable to any victims are equally important for child victims.¹⁸ The Guidelines specify that “[a]t all times, Justice Department personnel should be aware of the trauma child victims and child witnesses experience when they are forced to relive the crime during the investigation and prosecution of a

¹⁴ 18 U.S.C. §3509(h) (1990).

¹⁵ *Ibid.*

¹⁶ 18 U.S.C. 3509(h)(2).

¹⁷ *2005 Attorney General Guidelines for Victim and Witness Assistance.*

¹⁸ *Ibid.*, VI.B.2, at 49

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criminal case, and particularly while they are testifying in court. A primary goal of such officials, therefore, shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system. To that end, Department personnel are required to provide child victims with referrals for services and should provide child witnesses with such referrals.”¹⁹ This provision is consistent with the Crime Victims’ Rights Act, which permits victims to choose an attorney to pursue their rights in criminal court and to seek enforcement of those rights by expedited appellate review.²⁰ “In the case of a crime victim who is under 18 years of age...the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter...”²¹ 18 U.S.C. §3771(c)(2) requires federal prosecutors to “advise the crime victim that the crime victim can seek the advice of an attorney with respect to the [substantive] rights described in [the Act].”²² In the case of children, this right is even more significant, as children generally lack the ability to assert their own rights in any court process and even if they try, their voices are rarely heard.

The 2005 Attorney General guidelines expand upon 18 U.S.C. 3509(h), the VCAA subsection that permits the court to appoint a guardian ad litem to protect the rights and interests of the child victim or witness. “Although 18 U.S.C. 3509(h) by its terms applies only to cases in which a child is a victim of or witness to abuse or exploitation, prosecutors should consider whether moving for the appointment of a guardian *ad litem* would be appropriate in any case in which a child is a victim of or witness to a crime.”²³ State courts have similarly expanded upon the language of victims’ protection statutes, concluding that the court’s “inherent powers include its ability to protect witnesses.”²⁴

The Child Abuse Prevention and Treatment Act (CAPTA) requires that “in every case involving an abused or neglected child which results in judicial proceedings,” states receiving CAPTA funding should “insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem to represent and protect the rights and best interests of the child.”²⁵ However, few states receiving CAPTA funding appoint guardians ad litem in criminal proceedings.

California Welfare and Institutions Code section 326.5 reads:

The Judicial Council shall adopt a rule of court effective July 1, 2001, that complies with the requirement of the federal Child Abuse Prevention and Treatment Act (Public Law 93-247) for the appointment of a guardian ad litem, who may be an attorney or a court-appointed special advocate, for a child in cases in which a petition is filed based upon neglect or abuse of the child

¹⁹ *Ibid*, VI.A. Statement of Purpose, at 48.

²⁰ 18 U.S.C. §3771(c) and (d); *See also U.S. v. Turner*, 367 F. Supp. 2d 319, 328 (D.N.Y. 2005).

²¹ 18 U.S.C. § 3771(e)

²² 18 U.S.C. §3771(c)(2)

²³ *2005 Attorney General Guidelines for Victim and Witness Assistance* at 48.

²⁴ *State of Florida v. Tarrago*, 800 So.2d 300 at 302 (2001); *See also Arey v. State*, 400 Md. 491, 507-509 (2007); *Wise v. State*, 708 N.W.2d 66, 69-70 (2006); *State ex rel. Fitas v. Milwaukee County*, 65 Wis. 2d 130 (1974).

²⁵ 45 C.F.R. §1340.3(g), implementing Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq*).

or in which a prosecution is initiated under the Penal Code arising from neglect or abuse of the child.²⁶ (Emphasis added)

While the Judicial Council of California has adopted rules of court for the appointment of court-appointed special advocates and attorneys in child welfare (dependency) court, they have yet to adopt rules for appointing these guardians ad litem when the child abuse or neglect results in a prosecution under the Penal Code.

The Uniform Child Witness Testimony by Alternative Methods Act, drafted by the National Conference of Commissioners on Uniform State Laws in the summer of 2002, encourages states to allow for alternative means of testifying for child victims and witnesses under the age of 13. The Act contemplates a representative for the child, who would be permitted to motion the court for alternative means of testimony. ²⁷ The Act has been adopted in Idaho, Nevada, and Oklahoma.²⁸

A number of states have codified the right to a legal representative for a child victim into their statutes or state constitution. For example, Arizona Revised Statutes §13-4403(C) provides: “If the victim is a minor or vulnerable adult the victim’s parent, child or other immediate family member may exercise all of the victim’s rights on behalf of the victim. If the criminal offense is alleged against a member of the minor’s or vulnerable adult’s immediate family, the victim’s rights may not be exercised by that person but may be exercised by another member of the immediate family unless...the court finds that another person would better represent the interests of the minor...”²⁹ When the appointment of a representative for a child victim was challenged as not in full compliance with an Arizona statute allowing for the appointment of a representative for child victims in specified cases, the Court of Appeals of Arizona ruled that “[t]he ability of the court to appoint representatives for minor victims is not just a ‘power’ of the court, it is also a ‘right’ of victims.”³⁰

A Florida criminal proceedings statute mandates appointment of a guardian ad litem or other advocate “to represent a minor in any criminal proceeding if the minor is a victim of or witness to child abuse or neglect, or if the minor is a victim of a sexual offense or a witness to a sexual offense committed against another minor” and permits appointment of a guardian ad litem “in any other criminal proceeding in which a minor is involved as either a victim or a witness.”³¹ The Oklahoma Child Abuse Reporting and Prevention Act provides that “[i]n every criminal case filed pursuant to the Oklahoma Child Abuse Reporting and Prevention Act ... the judge of the district court may appoint an attorney-at-law to appear for and represent a child who is the

²⁶ California Welfare and Institutions Code § 326.5.

²⁷ The National Conference of Commissioners on Uniform State Laws, Uniform Child Witness Testimony by Alternative Methods Act, 2002, available at <http://www.law.upenn.edu/bll/ulc/ucwtbama/2002act.pdf>.

²⁸ See A Few Facts about the Uniform Child Witness Testimony by Alternative Methods Act, National Conference of Commissioners on Uniform State Laws, 2002, available at www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucwtbama.asp.

²⁹ ARS §13-4403(C).

³⁰ State ex rel. Romley v. Dairman, 208 Ariz. 484, 489, 95 P. 3d 548, 553. (2004).

³¹ Fla. Stat. 914.17.

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alleged victim of child abuse or neglect.”³² Similarly, North Carolina Superior Court Rule 7.1 provides, “[w]hen any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness.”³³

California Welfare and Institutions Code § 317 requires counsel for children involved in the child welfare system to “[i]nvestigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings.” The statute then mandates that the court “shall take whatever appropriate action is necessary to fully protect the interests of the child.”³⁴ Between California Welfare and Institutions Code §§317 and 326.5, either the criminal, delinquency or dependency court should appoint an attorney for the child victim of crime in criminal and delinquency courts. For consistency and the child’s comfort level, it stands to reason that the court would appoint the same counsel to represent the child in both forums.

III. Cases that Particularly Benefit from Appointment of a Child’s Representative

CASE EXAMPLE #1 -- MARCUS³⁵

Marcus was a witness to abuse of his younger sister who was brutally murdered. Although it was unclear whether Marcus, age 10, saw the horrific violent act that ultimately resulted in the young girl’s death, it was believed by the prosecutor and the defense that he had seen prior abuse of his sister and possibly experienced abuse himself. Both counsel believed that Marcus’ testimony could be critical to their case and wanted to interview Marcus at least once prior to trial. The prosecutor subpoenaed Marcus as a witness at the preliminary hearing and at trial. However, Marcus completely denied that his sister was murdered. He believed, through sheer wishing perhaps, that his sister had died simply because she was sick.³⁶ His therapist stated that being forced to face the fact of his sister’s murder, at the hands of one of his parenting figures, would be extremely detrimental to him. But his therapist’s opinion carried no weight because as an MSW, she lacked the qualifications required to quash the subpoena.

The child’s abuse and neglect attorney petitioned to be appointed to represent the child in the criminal case, to the extent necessary to protect his rights and interests as a victim and witness, and subsequently petitioned the juvenile court for an evaluation by a psychologist qualified to report to the criminal court. The psychologist determined that Marcus would suffer serious emotional distress if forced to testify at the preliminary hearing. With this evaluation in hand, the child’s attorney moved to quash the subpoena. However, the psychologist also established a

³² Okla. Stat. tit. § 7112. Appointment of representative for child, also provides that the court may appoint a court-appointed special advocate or guardian ad litem for the child welfare proceeding.

³³ N.C. Sup. Ct. R. 7.1. Appointment of guardian ad litem for minors, adopted July 26, 1990.

³⁴ California Welfare and Institutions Code §317(e).

³⁵ Names and identifying information about Marcus and each case example have been changed to protect their privacy. Some of these case records were sealed following trial.

³⁶ The horrific bruising of the child ruled out illness as a cause for this child’s death.

therapeutic plan for Marcus which would possibly enable him to safely testify at the trial. An agreement was thereafter reached between the prosecutor, defense counsel, and the child victim's attorney through which Marcus was excused from testifying at the preliminary hearing, but provided the therapeutic plan worked, the child's attorney would arrange to have one meeting in which the prosecutor and defense attorney could question the child – with the child's counsel and a support person for the child present – and then, if the child was emotionally strong enough, he would be made available to testify at trial. By the time of trial, Marcus was strong enough to testify, consistent with his best interest and the interests of justice.

CASE EXAMPLE #2 -- ALICIA

Alicia was taken across state lines and sexually abused by more than one defendant. As a child under six at the time, she was seriously emotionally traumatized by the assaults. Multiple defendants and crossing of state lines necessitated multiple trials in cross jurisdictions. Due to the complexity of the case, the federal prosecutor requested the appointment of a guardian ad litem pursuant to 18 USC 3509(h). The guardian ad litem coordinated services for the child, coordinated meetings with the prosecutors and other concerned individuals to minimize questions being posed to Alicia, and ensured that remote testimony was viewed and used by all jurisdictions. In addition, the guardian ad litem requested victim of crime assistance for Alicia and calculated financial expenses incurred by her family as a result of the attacks so that appropriate restitution could be recovered. The prosecutor, meanwhile, was able to focus on his trial.

CASE EXAMPLE #3 -- DAVID

In another federal case, a guardian ad litem was appointed to represent a victim of sexual abuse who was unable to testify. Fortunately, there was sufficient evidence of the crime that the defendant pled guilty. The guardian ad litem, however, conducted an independent investigation into the child's life before and after the abuse and undertook numerous conversations with the child. In this way, the guardian ad litem provided an accurate and compelling victim impact statement for the jury at time of sentencing.³⁷

CASE EXAMPLE #4 -- JAVIER

In a state case, Javier witnessed a crime of violence which he would rather have forgotten. He received a subpoena, met with the prosecutor, and presented himself at trial to testify. Halfway through his testimony, a gang member in the courtroom made a threatening gesture toward him, prompting Javier to ask for a break to use the bathroom. Out of the courtroom and terrified, Javier ran out of the courthouse and did not return. Because Javier was in the foster care system and had recently changed his placement, he never received a second subpoena. Javier's foster care attorney was not aware of the criminal case but was working with Javier to apply for legal residence. A few weeks after leaving the trial, Javier accompanied his attorney to the criminal courthouse to obtain a statement of good standing for immigration purposes. When Javier's name was given to the desk clerk, not only was he unable to receive his statement of good standing, but an officer was called to immediately incarcerate him until the

³⁷ See 18 USC 3509(f), 18 USC 3771(a)(4) and (e), defining who can speak for a child victim.

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next calling of the criminal trial. (Javier was, at this point, eighteen, and therefore eligible to be incarcerated as an adult). If not for the intervention of Javier's foster care attorney, who just happened to be present, Javier may have been incarcerated for three weeks until the next calling of the case, which would have forced him to miss his interview for permanent residence. However, his attorney provided Javier with advice regarding his safety concerns and his rights and obligations under the subpoena. With the advice of his attorney and discussion with the prosecutor, Javier was released, testified at the next calling of the criminal trial, and later received his United States permanent residence card.

CASE EXAMPLE #5 -- KRISTIE

Kristie witnessed her sibling being abused and reported it to authorities at school. The Department of Social Services officials investigated but closed the case. When the police were later involved after an incident that left Kristie's sibling permanently disabled, Kristie was subpoenaed to testify before the court, and her school records were also subpoenaed. An attorney appointed to represent Kristie in her child welfare case moved to quash the subpoena *duces tecum* because part of Kristie's school records were confidential under special education statutes and a portion included privileged communications with a counselor at the school, protected by evidentiary rules as therapist-patient communication. Kristie's attorney worked with the judge and counsel for the school district to conduct an *in camera* review of the school records so as to shield them to the extent possible from unnecessary external view. Without legal counsel, Kristie's rights to privilege and confidentiality would have been rendered meaningless.

The representative for the child has many duties, including assisting the child in his or her understanding of the proceedings and his or her rights and protections throughout the proceedings. Pursuant to 42 U.S.C. 10607(b), codifying federal services to victims, victims must be informed of their rights "at the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation."³⁸ Examples of the rights and interests of child victims and witnesses that can be provided through statute but may be lost if not independently pursued by the child's representative include:

To be represented and have the child's rights asserted during the investigation of child abuse. Assistance at this stage can mean the difference between the child obtaining therapeutic services or not and with attorney-client privilege between the child and attorney, can lead to revelations of physical threats received by the child as well as threats that he or she may be implicated in the crime. A representative can assist the child to make appropriate safety requests or seek civil stay away orders.

To be notified of all criminal proceedings and to be kept apprised of the status of the defendant

³⁸ 42 U.S.C. 10607(b); *See also e.g. State ex rel. Romley v. Dairman*, 95 P.3d 548 at 554, "to the extent that evidence of guilt may be required to rebut the presumption for purposes of appointing a representative, that evidentiary burden is satisfied when charges are filed." *See also* A.R.S. §13-4402(A), "the rights and duties that are established by this chapter [victim's rights] arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offense against a victim...[and] continue to be enforceable...until the final disposition of the charges..."

throughout the proceedings and following sentencing.³⁹ In the case of a child victim, such information should be communicated to the child in an age-appropriate manner, possibly in a therapeutic setting or by the child's designated support person.

To be present or have a representative present at all proceedings and to be consulted before a case is dismissed or a plea agreement entered.⁴⁰ Under federal law, victims have a right to attend proceedings "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."⁴¹

To forego or to present evidence at a competency hearing. 18 USC 3509(c) clarifies that children are presumed competent and provides a mechanism to establish competence upon a written motion and offer of proof of incompetency by a party.⁴² The child's guardian ad litem may be best suited to assert concerns during this hearing on behalf of the minor.

To confidentiality of the victim's name and identifying information, to obtain protective orders when needed, maintain privilege of all records, including school records, IEP records, therapeutic relationships, and medical records when warranted⁴³ and request that the courtroom be closed to all nonessential persons.⁴⁴

To refuse to be interviewed by defense counsel. It is unlikely that a child or even a child's parent unschooled in legal rights would refuse an interview. The child's representative can sort through the calls from the prosecutor and other attorneys in order to protect the child from unnecessary or unnecessarily burdensome processes.

To have an advocate or representative present during any related interview and to have interviews coordinated, particularly in the case of multi-jurisdiction cases, so as to minimize harm to the child.⁴⁵

To a separate and private waiting area. The first right of the crime victim enumerated in the

³⁹ 18 U.S.C. §3771(a)(2) calls for reasonable, accurate, and timely notice of any public court proceedings, or any parole proceeding, involving the crime or of any release or escape of the accused.

⁴⁰ 18 USC 3771(a)(5) grants victims "the reasonable right to confer with the attorney for the Government in the case."

⁴¹ See 18 USC 3771(a)(3). See also MD Rule 5-615(b)(5) "A court shall not exclude pursuant to this Rule a victim of a crime of violence or the representative of such a deceased or disabled victim to the extent required by statute."

⁴² 18 USC 3509(c); See also Utah Code Ann. §76-5-410 and MD Cts and Jud Proc Code §9-103.

⁴³ See e.g. *Fisher v. State*, 128 Md. App. 79 (1999), in which the court appointed a "Nagle v. Hooks" attorney to represent a child victim in a criminal court proceeding with respect to the child's psychotherapist-patient privilege, authorized under MD Courts and Judicial Proceedings Article 9-109(b). *Nagle v. Hooks*, 296 Md. 123 (1983) authorized the Courts, most commonly in domestic relations proceedings, to appoint an attorney for the child for the purpose of protecting any privileges.

⁴⁴ 18 USC 3509(d) and (e). 18 U.S.C. 3771(a)(8) also includes the right to be "treated with fairness and with respect for the victim's dignity and privacy."

⁴⁵ 18 USC 3509 provides for a stay of any civil action arising out of the same circumstances. It is not uncommon in child abuse cases that there are multiple jurisdictions at play, attorneys in each calling for interviews and responses from a child witness.

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Crime Victims' Rights Act is the right to be reasonably protected from the accused.⁴⁶ In the case of children, without counsel, the child may be forced to sit with family members who may be testifying for the defendant, and the pressure on the child may become unbearable.

To make a statement at sentencing or pre- and post-trial release proceedings. 18 USC 3509(f) permits a child's victim impact statement to be completed by the child abuse team, the guardian ad litem, and/or the child. Specifically, the Act requires the guardian ad litem to "make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization."⁴⁷

To obtain appropriate and accurate restitution. A guardian ad litem can assist the prosecution by rendering a full and accurate account of the restitution due the child victim.⁴⁸

To participate fully in any financial victims of crime program.

To have a support person or adult attendant available whenever the child is questioned or at any official meeting. 18 USC 3509(i) provides for an "adult attendant," also defined as "an adult ... who accompanies a child throughout the judicial process for the purpose of providing emotional support."⁴⁹ The adult attendant acts as a resource for the child separate and apart from the guardian ad litem or attorney.

To petition the court for permission to testify by remote means.⁵⁰ Among its provisions, 18 USC 3509 calls for federal courts to provide alternatives to live in-court testimony by a child, including testimony by two-way closed circuit television and the opportunity to take a videotaped deposition of the child. The federal law is detailed in its protocol and includes critical safeguards for the defense. Nevertheless, in a study of child sexual abuse cases in an urban center involving 250 cases and 400 child witnesses in the 1990s, most of these children still testified in open court.⁵¹

⁴⁶ 18 U.S.C. 3771(a)(1).

⁴⁷ See 18 USC 3771(a)(4). 18 USC 3509(f) further delineates the GAL's duties by mandating the use of "forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability."

⁴⁸ 18 U.S.C. § 3771(a)(6) provides for full and timely restitution under the law. In the case of children, there is often nobody other than the child's representative to compute the child's need for restitution as well as medical and other services. If an attorney, the GAL can also assist the child to pursue a civil remedy available for child victims of certain federal violations under 18 USC 2255.

⁴⁹ See 18 USC 3509(i) re adult attendant; See also MD Rule 5-615(c) "The court may permit a child witness's parents or another person having a supportive relationship with the child to remain in court during the child's testimony." See also MD Crim. Proc. Art. §11-303(d)(v), allowing for the support person to be present during remote testimony.

⁵⁰ See 18 USC 3509(b); New Hampshire RSA 517:13-a; V.R.E. Rule 807; W.Va. Code §62-6B; MD Crim Proc Code §9-102; Alaska Stat § 12.45.046; Iowa Code §915.38; 725 ILCS 5/106B-5; Fla Stat § 92.54; A.R.S. §13-4253; KRS §421.350; MD Courts and Judicial Proceedings Article § 11-303, allowing for the child's attorney to be present during the remote testimony.

⁵¹ Thomas D. Lyon and Karen J. Saywitz, *From Post-Mortem to Preventive Medicine: Next Steps for Research on Child Witnesses*, The Society for the Psychological Study of Social Issues, 2006, at page 27, NACC Children's Law Manual-2007 Edition, citing 1999 study by Goodman, Quas, Bulkely & Shapiro.

To encourage age-appropriate questioning and communication.⁵² 18 USC 3509 provides the right of the child witness to use testimonial aids, such as anatomical dolls in testifying.⁵³

To a speedy trial. 18 USC 3509(j) permits the guardian ad litem, the prosecutor, or the court to motion to designate a proceeding involving a child witness as a case of special importance and so expedite the proceeding while giving it precedence over other cases.⁵⁴

To consult with the prosecutor. The Crime Victims Rights Act calls for the reasonable right to confer with the attorney for the government.⁵⁵ This right is meaningless for a child without an adult representative.

An argument can be made that the prosecutor can and should ensure the provision of the above rights. In fact, many prosecutorial offices work closely with Children's Advocacy Centers, provide children's waiting rooms, and have prosecutors and/or Victims Witness Advocates who specialize in and are knowledgeable about working with child victims.⁵⁶ These efforts are to be encouraged as model programs for the many offices that do not offer special protections for children. Still, many of the prosecutors who are most concerned about the safety and protection of child victims are those who also advocate for independent attorneys to be appointed for them. The reason for this is differentiation in role. Prosecutors ensure that justice is done for the community; they do not and cannot always represent the individual needs of the child victim or witness, particularly when those needs conflict with the safety needs of the community. Under the Model Rules of Professional Conduct, attorneys must ensure that unrepresented parties do not misunderstand their role and must correct mistaken beliefs that the attorney represents them.⁵⁷ Similarly, the Model Rules prohibit lawyers from communicating with "third persons" in a way that the lawyer "knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege."⁵⁸ The most effective means of doing both in the case of child victims and witnesses may be to afford them an independent attorney who can ensure their rights and privileges are protected. Prosecutors who have worked with children's representatives attest to the value of having a attorney for the child appointed, both to free the prosecutor up to work on the case without fear of further traumatizing the child and to help the child prepare to testify, when necessary. One federal prosecutor who has asked for a child's attorney to be appointed pursuant to 18 USC 3509(h) explained that while the prosecutor represents the victim's general interest in prosecution, she cannot possibly represent the unique needs of each victim.⁵⁹ "The child's representative develops a relationship and rapport with the

⁵² See e.g. Cal. Evid. Code § 765.

⁵³ 18 USC 3509(l).

⁵⁴ 18 USC 3509 (j); 18 USC 3771(l)(5); See also KRS §421.510 and N.D. Cent. Code §12.1-35-05.

⁵⁵ 18 USC 3771(a)(5).

⁵⁶ For example, the San Francisco Office of the District Attorney has instituted a Child Assault Unit, utilizing vertical prosecution and specifically geared toward working with child victims of abuse.

⁵⁷ See Model Rules of Professional Conduct, Rule 4.3. Dealing with Unrepresented Person.

⁵⁸ See Model Rules of Professional Conduct, Rule 4.4(b). Respect for Rights of Third Persons

⁵⁹ Comments of Tina Miller, Assistant U.S. Attorney for the Western District of Pennsylvania, telephone interview, September 29, 2008. Ms. Miller recommends appointing a child's representative particularly in cases involving young children and children who are also faced with custody or dependency proceedings.

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child that neither a prosecutor nor the prosecutor's victim witness assistant, who works with the prosecutor and has limited contact with the child, could."60

At least one study found that false reports of child sexual abuse increased as did pressure on children in child abuse investigations.⁶¹ Thomas Lyon and Karen Saywitz report that "trusting the interviewer is a pivotal issue for children's disclosure."⁶² Having an attorney appointed to represent the child victim or witness can ensure that a person known to the child is present. In cases in which the defendant is a parent, guardian, household member, or known to the family, relatives may taint the questioning of the child, given their own desires for the allegations to be false.

Although the federal law does not require the guardian ad litem to be an attorney, only an attorney, acting either as counsel or guardian *ad litem*, can effectively petition the court for relief. Also, an attorney is better positioned to assist the child to access victims of crime funds, to assess and verify restitution needs, to coordinate representation with related custody or dependency cases, and to work effectively with the Child Advocacy Centers. In addition, only an attorney can offer lawyer-client privilege to the child victim, ensuring that the child is more likely to share the fears that may inhibit testimony and involvement with the proceedings.

IV. Overcoming Obstacles

There has been some concern that precedent such as *Maryland v. Craig*, calling for protections for child victims and witnesses during court proceedings, would not withstand changes in the law and enforcement of the confrontational clause under *Crawford v. Washington*.⁶³ However, in *U.S. v. Pack* the court held in a military case that the remote testimony permitted in *Craig* is still permissible post-*Crawford*.⁶⁴ Similarly, a Kansas case held that *Crawford* does not impact the constitutionality of KSA 22-3434, a Kansas statute permitting child victims to testify by closed circuit television.⁶⁵ In *State v. Henriod*, the Utah appellate court held that *Crawford* did not abrogate *Craig*⁶⁶ and the Wisconsin Court of Appeals upheld remote testimony by a child when "the child would likely be further traumatized by having to face his abuser at trial."⁶⁷ While the lower courts have upheld protections for child victims and witnesses post-*Crawford*, the more stringent requirements increase the likelihood that more children will be forced to testify. Attorneys for these children can make the case for them to testify by alternative means, ensure they have adult attendants available to them, and pursue additional protections as they will need.

V. Making It Work: Funding Opportunities for States

⁶⁰ *Ibid.*

⁶¹ Thomas D. Lyon and Karen J. Saywitz, *From Post-Mortem to Preventive Medicine: Next Steps for Research on Child Witnesses*, The Society for the Psychological Study of Social Issues, 2006 in the NACC Children's Law Manual-2007 Edition.

⁶² *Ibid* at 33.

⁶³ *Maryland v. Craig*, 497 U.S. 836 (1990); *Crawford v. Washington*, 541 U.S. 36 (2004).

⁶⁴ *U.S. v. Pack*, 65 M.J. 381 (2007).

⁶⁵ *State v. Balanchette*, 134 P.3d 19, 22 (Kan Ct App 2006).

⁶⁶ *State v. Henriod*, 131 P.3d 232, 237 (Utah, 2006).

⁶⁷ *State v. Vogelsberg*, 724 N.W.2d 649, 650 (Wis. Ct. App. 2006)

The ABA recommends that attorneys serving as counsel for child victims and witnesses be trained and appointment standards be upheld. In 2006, 18 U.S.C. 3509(h) was amended to include the right for the court to “provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.”⁶⁸

There are a number of federal funding sources available to states to assist in the prevention and prosecution of criminal child abuse which, in many cases, is not limited to abuse by a parent or guardian and may include other forms of child victimization. The Crime Victims’ Rights Act authorized funding for legal counsel for victims to assist them in the process and to ensure that the rights enumerated under the federal act are enforced. This funding has been appropriated each year since passage and extends federally as well as to “states and tribal governments that have victims’ rights laws substantially equivalent to those provided by [the Crime Victims’ Rights Act].”⁶⁹

The Federal Children’s Justice Act has provided grants to states to improve the investigation, prosecution, and judicial handling of cases of child abuse and neglect, particularly child sexual abuse and exploitation.⁷⁰ Funds may be used, *inter alia*, to support the enactment of laws to improve systems response, including admission of testimony by alternative means, shortening the trial process, and permitting victims to make sentencing statements. States should explore an array of funding sources to adequately protect child victims and witnesses. In practice, attorneys acting as guardians ad litem in federal courts have been funded through the Criminal Justice Act, although the Act does not specifically authorize it.⁷¹ In some states, attorneys trained for and appointed to represent children in dependency, or child welfare proceedings, are appointed to represent child victims and witnesses in criminal and delinquency proceedings.⁷²

The Child Abuse Prevention and Treatment Act (CAPTA) includes funding to be used for “various methods and procedures for the investigation, assessment, and prosecution of child physical and sexual abuse cases” including “ways to mitigate psychological trauma to the child victim.”⁷³ 42 U.S.C. §5106(c)(a)(1) provides grants to states to improve “the handling of child abuse and neglect cases, particularly cases of child sexual abuse and exploitation, in a manner which limits additional trauma to the child victim.”⁷⁴ CAPTA also calls on states receiving assistance to adopt recommendations to the State Task Force regarding “experimental, model and demonstration programs for testing innovative approaches and techniques which may improve the prompt and successful resolution of civil and criminal court proceedings...including the enhancement of performance of court-appointed attorneys and guardians ad litem for

⁶⁸ See H.R. Rep. 4472, the Adam Walsh Child Protection and Safety Act of 2006.

⁶⁹ 2005 U.S.C.A.N.2274 Section 103 appropriated \$11 million annually for FY 2006-2009 for organizations that provide legal counsel and support services for victims.

⁷⁰ 42 USC §5101 (2004); 100 Stat. 903 (1986).

⁷¹ 18 USC 3006A.

⁷² See e.g. CA Welfare & Institutions Code § 326.5 calling for the appointment of attorneys or GALs for children in child welfare and criminal proceedings involving child abuse, in compliance with CAPTA.

⁷³ 42 USC 5101(b)(4)(A) and (B).

⁷⁴ 42 USC 5106(c)(a)(1).

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children...”⁷⁵ States may establish pilot programs in which they appoint victims’ representatives to child victims of crime.

In addition, once the training and appointment standards are established, attorneys may fulfill their state or ethical pro bono requirements by serving as guardian ad litem or counsel for child victims in criminal and delinquency cases.⁷⁶

VI. Duties, Training and Appointment Standards

The Model Rules of Professional Conduct require lawyers to provide competent representation to their clients and specify that competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁷⁷ Model Rules of Professional Conduct, Rule 1.14, discussing the duties of lawyers working with clients with diminished capacity, would apply to child victims’ representatives. The Model Rules require that lawyers “maintain a normal client-lawyer relationship with the child.”⁷⁸

Attorneys who currently represent children in abuse and neglect proceedings or custody cases may be appropriately situated to represent these same children in criminal and delinquency cases. However, many children’s attorneys lack any familiarity with criminal or delinquency court or with the rights afforded crime victims and witnesses in these forums. Therefore, traditional children’s attorneys should work with victims’ attorneys, prosecutors, and criminal court practitioners in developing guidelines and training standards. Jurisdictions can draw from the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which distinguishes the duties of a lawyer appointed as a guardian ad litem from those appointed as counsel and provides direction to either as to duties and obligations at all stages of proceedings – from initial filing through post-appeal. Similar guidelines were established in August of 2003 by the American Bar Association Section of Family Law, setting forth Standards of Practice for Lawyers Representing Children in Custody Cases. In addition, the National Association of Counsel for Children (NACC) put forth the NACC Recommendations for Representation of Children in Abuse and Neglect Cases, calling for systemic safeguards, including only appointing counsel with enough time and resources to competently represent children. Similarly rigorous standards of training and practice must be developed for attorneys who represent child victims and witnesses. With uniform rules, duties, and guidelines, attorneys for child victims will not only protect the rights and interests of the child, but will also enhance the criminal court’s ability to hold efficient, full, and fair proceedings.

VII. Conclusion

Criminal cases involving children as victims and witnesses have increased in numbers over the past thirty years. In various forums, the federal government and the states have responded by

⁷⁵ 42 USC 5106(c)(e)(1)(B).

⁷⁶ See Model Rule of Professional Conduct 6.1. Pro Bono Publico Service.

⁷⁷ Model Rule of Professional Conduct 1.1. Competence.

⁷⁸ See Model Rule of Professional Conduct 1.14(a).

providing rights and protections for child victims in the criminal and delinquency systems. Yet, the reforms have not proved to be as effective as they might. Conflicting pressures of the criminal justice system prevent their enforcement on a regular basis, and there has been no uniform measure to ensure that child victims are heard and appropriately afforded these rights and protections, particularly when there is no parent or guardian to act in the child's best interest. The appointment of counsel for child victims and witnesses in criminal and delinquency cases will provide for the enforcement of protections already in place, take the onus of these obligations off the court and the prosecutor, provide a safer system for child victims, utilize court resources more efficiently, and create a more just court process and better outcome for all involved.

Respectfully submitted,
Anthony Joseph
Chair, Criminal Justice Section
February, 2009

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GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Anthony Joseph, Chair Section of Criminal Justice

1. Summary of Recommendation(s).
Criminal cases involving children as victims and witnesses have increased in numbers over the past thirty years. In various forums, the federal government and the states have responded by providing rights and protections for child victims in the criminal and delinquency systems. Yet, the reforms have not proved to be as effective as they might. Conflicting pressures of the criminal justice system prevent their enforcement on a regular basis, and there has been no uniform measure to ensure that child victims are heard and appropriately afforded these rights and protections, particularly when there is no parent or guardian to act in the child's best interest. The appointment of counsel for child victims and witnesses in criminal and delinquency cases will provide for the enforcement of protections already in place, take the onus of these obligations off the court and the prosecutor, provide a safer system for child victims, utilize court resources more efficiently, and create a more just court process and better outcome for all involved.
2. Approval by Submitting Entity The Criminal Justice Section approved the resolution on November 19, 2008.
3. Has this or a similar recommendation been submitted to the House or Board previously?
No.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

ABA Criminal Justice Standards on:

- Fair Trial, Free Press (approved February 1991)
- Pleas of Guilty (approved August 1997)
- Prosecution Function (approved February 1992)
- Sentencing (approved February 1993)
- Special Functions of the Trial Judge (approved February 1999)
- Speedy Trial and Timely Resolution of Criminal Cases

Resolution to continue support of victim rights and the adoption of statutory measures to protect those rights while ensuring the rights of defendants are not diminished and the discretion of the prosecutor is not curtailed (approved August 1997)

“Guidelines for Fair Treatment of Crime Victims and Witnesses,” American Bar Association (1983) www.abanet.org

“Suggested Guidelines for Reducing Adverse Effects of Case Continuances and Delays on Crime Victims and Witnesses” (approved February 1986)

“Reducing Victim/Witness Intimidation: A Package” (approved August 1980)

ABA Attorney Ethical Rule 4.4 - enforce the rule to protect privilege and confidentiality.
Fisher v. State 128 Md.App.79 (1999)(The Court appointed a guardian because mother was charged with child abuse and murder of sibling)

ABA Judicial Canon 3 B (6) (a) enforce the canon by ensuring child victims with legal interests as crime victims including the ability to be heard.

Generally - the rule of law would be applicable to child victims who have rights as crime victims where their rights are not otherwise protected.

This resolution will strengthen existing ABA policy regarding child victims.

5. What urgency exists which requires action at this meeting of the House?

While there have been many rights added for crime victims, child victims are perhaps the most vulnerable of all victims. When a family member is accused of criminal acts against a child often this victim is unable to understand, process, receive notice, and exercise their victims' rights. There is a strong need to make sure mechanisms are in place where the legal interests of child victims can be adequately conveyed and executed as provided by law.

6. Status of Legislation.

None pending

7. Cost to the Association. (Both direct and indirect costs.) No Costs

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

The ABA Commission on Youth at Risk has agreed to cosponsor the recommendation. Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2009 House of Delegates agenda, it is being circulated to the following:

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Sections, Divisions and Forums:

All Sections and Divisions

10. Contact Person. (Prior to the meeting.)

Christopher Gowen

The American Bar Association

740 15th St NW

Washington DC 20005

(202) 662-1511

Fax (202) 662-1501

gowenc@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Stephen Saltzburg

George Washington University

2000 H St NW

Washington, DC 20052-0001

(202) 994-7089

Fax: (202) 994-7143

Email: ssaltz@law.gwu.edu

Executive Summary

1. **Summary of the recommendation**

The Criminal Justice Section recommends that the ABA adopt new policy. *Addressing the needs of child victims through rules of court and legislation.*

2. **Summary of the issue which the recommendation addresses**

Criminal cases involving children as victims and witnesses have increased in numbers over the past thirty years. In various forums, the federal government and the states have responded by providing rights and protections for child victims in the criminal and delinquency systems. Yet, the reforms have not proved to be as effective as they might. Conflicting pressures of the criminal justice system prevent their enforcement on a regular basis, and there has been no uniform measure to ensure that child victims are heard and appropriately afforded these rights and protections, particularly when there is no parent or guardian to act in the child's best interest.

3. **How the proposed policy position will address the issue**

The appointment of counsel for child victims and witnesses in criminal and delinquency cases will provide for the enforcement of protections already in place, take the onus of these obligations off the court and the prosecutor, provide a safer system for child victims, utilize court resources more efficiently, and create a more just court process and better outcome for all involved

4. **A summary of any minority views or opposition which have been identified**

None have been identified yet.