

# **Clinical Education and the “Best Interest” Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy**

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## INTRODUCTION

This paper examines the practical, ethical, and pedagogical aspects of representing children in custody disputes through a “live client” in-house law school clinic.<sup>1</sup> The paper is grounded in the experience of the Child Advocacy Clinic at Indiana University School of Law-Bloomington, but should apply generally to clinic pedagogy as well as the broader context of child advocacy.

Parts I and II of the paper describe the Child Advocacy Clinic at Indiana University and outline the debate over clinical education, including benefits and potential pitfalls. Part III addresses the current debate over “best interest” versus traditional legal representation of children, exploring the ethical implications of the attorney-client and guardian ad litem (“GAL”) models of representing children, and unabashedly supports the GAL model. The challenges and opportunities for law students in GAL representation are raised in Part IV.

The Child Advocacy Clinic (“the Clinic”) at Indiana University is a newcomer to child advocacy, having been in existence only two years. This paper arises from the Clinic’s desire to integrate its experiences with the growing literature in children’s law, in order to formulate a comprehensive and clear model of child advocacy for law students. The Clinic, like this paper, is a work in progress.

## I. THE CHILD ADVOCACY CLINIC AT INDIANA UNIVERSITY

The Child Advocacy Clinic was founded in 1996 through a grant from Indiana University (“IU”),<sup>2</sup> with a mission to represent the interests of children. Although the Clinic accepts cases in paternity, guardianship, and termination of parental

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2. The author expresses appreciation to Dean Alfred C. Aman and the IU School of Law-Bloomington for its enthusiasm in creating the Clinic and to IU President Myles Brand for the forward-thinking Strategic Directions Grant Program that enabled the Clinic to hire social workers who provide an interdisciplinary educational experience that benefits the Clinic students and the children they serve.

rights,<sup>3</sup> the main focus of its work is in dissolution. Students serve as GALs, representing the best interest of children in visitation and custody cases.<sup>4</sup> The role of the GAL is explicitly that of an advocate for the best interest of the children. The GAL does not function as a traditional lawyer; she does not necessarily promote the agenda of the child served.

Our cases originate not with either party to the dispute (though a party may request the appointment of a GAL) but with the Circuit Court of Monroe County.<sup>5</sup> The court appoints the Clinic, rather than a specific student or supervisor, to serve as GAL.<sup>6</sup> The Clinic then designates a student to fulfill the Clinic's obligations as GAL. Another Clinic student, who is certified as a Legal Intern, files an appearance with the court to serve as counsel representing the GAL. The student serving as the GAL sets the parameters of the investigation and performs necessary interviews and observations.<sup>7</sup> At the close of the investigation,<sup>8</sup> the GAL submits a detailed report to the court outlining and

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3. Clinic students have served as counsel for volunteers from the Monroe County Court Appointed Special Advocacy ("CASA") Program in termination of parental rights and guardianship cases. In Monroe County the CASA Program does not accept custody cases. Indiana law defines CASA and GAL nearly identically, except that nonattorney CASAs and GALs must receive specialized training that is not required of attorney GALs. *See* IND. CODE ANN. §§ 31-9-2-28, -50 (West Supp. 1997).

4. Under Indiana law the court has the discretion to appoint a GAL or CASA for a child at any point in a custody or visitation proceeding. *See id.* § 31-15-6-1. The GAL may be an attorney or a trained volunteer. *See id.* § 31-9-2-50. The GAL is appointed to represent the best interest of the child and is specifically authorized to provide the child with services, including researching, examining, advocating, facilitating, and monitoring the child's situation. *See id.* The GAL is considered an officer of the court. *See id.* § 31-17-6-4. Indiana statutory law does not authorize appointment of traditional counsel for children in dissolution cases.

5. Since the fall of 1996, the Child Advocacy Clinic has received appointments in 55 cases (primarily original determinations of custody and petitions to modify custody or visitation), and has served 90 children in those cases.

6. The practice in Indiana is not uniform with regard to judicial appointment of child representatives in custody and visitation. In some counties the divorce courts appoint volunteers from local CASA programs, others appoint trained social workers or therapists to serve as GALs, and others appoint private counsel to serve as GALs.

7. *See* IND. CODE ANN. § 31-17-2-12 (authorizing judicial appointment of GALs to conduct investigations in dissolution cases and outlining the requirements of the investigation). The investigator may consult any person with information about the child and his potential custody arrangements, seek an order for professional diagnosis of the child, and consult with and obtain records from medical, psychiatric, or other experts serving the child. *See id.*

8. Because the children served by the Clinic most often are poor and frequently experience problems related to abuse or neglect, domestic violence, parental substance abuse, or other family dysfunction, the role of the GAL may of necessity be expanded beyond the normal bounds of an investigation. It may include seeking private or not-for-profit service providers for the child, negotiating for formal or informal welfare involvement on behalf of the child, obtaining evaluations and counseling for the parents, and locating relatives or affordable providers who can supervise parent visitations.

assessing the relevant facts and stating recommendations for custody and visitation.<sup>9</sup>

The student appointed as an attorney in the case does not advocate for the child, but for her fellow student GAL.<sup>10</sup> The student attorney undertakes the traditional legal work, including researching and assessing the legal issues, communicating with counsel for the parents, obtaining records, filing motions, counseling with the GAL client, and negotiating. If the case goes to hearing, the student attorney will subpoena witnesses, present evidence, cross-examine witnesses, make opening and closing arguments, and, if necessary, write a trial brief.<sup>11</sup> The GAL will testify in court to authenticate her written report offered into evidence and briefly explain her assessments and recommendations. The GAL must be available for cross-examination.<sup>12</sup> The GAL may monitor the case postjudgment for compliance with court orders,<sup>13</sup> and the GAL serves until the court enters an order for removal.<sup>14</sup>

The Clinic is interdisciplinary in its approach, recognizing that effective representation of children in legal matters involves a combination of social-science and legal skills. The Clinic's social-work staff, and the classroom component of the Clinic, reflect the strong influence and participation of the IU

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9. See IND. CODE ANN. § 31-17-2-12(a) (providing that the GAL may prepare a report concerning custodial arrangements for the child). The GAL's report must be filed with the court and served on the parties 10 days prior to the hearing. The GAL shall make available to counsel, and to any party not represented by counsel, the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator, and the names and addresses of all persons whom the investigator has consulted. The report can be admitted into evidence at trial and is not excludable on hearsay grounds, if the above-stated requirements are met. See *id.* § 31-17-2-12(b).

10. See *id.* § 31-17-6-5 (providing that the GAL may be represented by an attorney, and if necessary to protect the child's interests, the court may appoint an attorney for this purpose).

11. See *id.* § 31-15-6-7 (providing that the GAL may subpoena witnesses and present evidence regarding the "supervision of the action" or any investigation and report the court requires of the GAL); *id.* § 31-17-6-6. Since Indiana does not require that the child's representative be a lawyer or be represented by counsel in the proceeding, there is concern that this statute invites nonlawyer GALs and volunteer CASAs to participate in the unauthorized practice of law.

12. See *id.* § 31-17-2-12(d).

13. See *id.* § 31-15-6-8 (authorizing the court to order the GAL to exercise continuing supervision over the child to assure that the visitation terms of an order are carried out as required by the court); *id.* § 31-17-6-7 (same). As a matter of policy, the Clinic is attempting to set limits on its involvement postjudgment. Careful consideration is given to the need and availability of students to monitor cases. Limits on the scope and time frame for monitoring are recommended in the GAL report to the court.

14. See *id.* § 31-15-6-4 (requiring the GAL to serve until the court enters an order for removal); *id.* § 31-17-6-3 (same).

School of Social Work.<sup>15</sup> Both law students and social-work students are enrolled in the Clinic.<sup>16</sup>

A Clinic social worker and a supervising attorney are assigned to each case. This team meets weekly with the GAL and student attorney to set goals, review the progress of the case, and prepare for interviews, negotiations, and court appearances. The supervision meetings are truly a collaborative effort, in which social-work and legal expertise are teamed to identify the needs and options for the child.<sup>17</sup> Legal and social-work staff "sit in" on at least one student interview per semester, and social-work staff may attend more interviews if the situation of the child or parent is particularly problematic.

The classroom component<sup>18</sup> of the Clinic involves a fifteen-hour, intensive-training period at the beginning of the semester, and weekly sessions thereafter on the following topics: (1) theories and practice in child advocacy; (2) ethics; (3) child development, family systems, and the effect of domestic violence, mental illness, divorce, and abuse and neglect on children; (4) substantive state law; and (5) motion and trial practice. The class topics are assigned to specific social-work and law staff, but all staff members attend each class and lend their legal or social-science perspective to discussions and role play.

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15. The Clinic staff is composed of a long-term-contract attorney director, a part-time attorney assistant director, two part-time master's-level social workers, and an office administrator who the Clinic shares with the IU Community Legal Clinic. The social-work staff are also separately employed as adjunct faculty with the IU School of Social Work.

16. The Clinic accepts between 10 and 15 students each semester. This includes one or two undergraduate or master's-level social-work students who receive credit through the IU School of Social Work. The Clinic social-work staff supervises and evaluates their work for compliance with social-work internship requirements.

17. In a supervision meeting it is not uncommon for the staff to encourage students to reconsider their approach to a particular child or situation to reflect the current body of scientific knowledge in child development, sexual abuse, family dynamics, and a variety of other social-science issues.

18. The Clinic is a graded, one-semester course, for three credits. With approval, students can take an additional semester. Teaching methodologies include discussion, role play, simulations, and lecture. Students present their cases to the class and may be given the opportunity to practice direct and cross-examination in class as preparation for court. At the close of the semester, students complete a four-page self-evaluation of their Clinic performance covering substantive law, case management, interviewing and investigation, correspondence and motions, report writing, and trial skills. An exit interview allows staff the opportunity to identify student progress and highlight opportunities for further development. See Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 136, 160-61 (1995) (discussing the difficulties of evaluating clinic students). The exit interview is also an opportunity to recognize the student's tremendous contribution to the children served and to encourage future pro bono efforts.

## II. ISSUES IN CLINICAL EDUCATION GENERALLY

Since the infusion of clinics into the law school curriculum in the 1960s,<sup>19</sup> there has been a continuing debate about the benefits of clinical education to students and their clients. Increasingly, both the American Bar Association ("ABA") and the American Association of Law Schools ("AALS") have emphasized the importance of clinical education. In the 1990s the report of the ABA Task Force on Law Schools, commonly referred to as the "MacCrate Report," recognized law school clinics as a "key component in the development and advancement of skills and values throughout the profession" and praised in-house clinics as an excellent means of training future lawyers.<sup>20</sup> Similarly, the AALS Committee on the Future of the In-House Clinic recognized the significance of in-house clinics and outlined specific goals for clinical education.<sup>21</sup>

Ideally, clinics represent the ultimate opportunity to teach by doing.<sup>22</sup> The tangible aspects of the process, such as meeting with clients, negotiating with opponents, and filing documents tap into a wider spectrum of learning styles than

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19. See William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 465-71 (1995) (charting the history of clinical education in the United States, and quoting the 1969 admonition of former Chief Justice Warren E. Burger that law graduates lack training in "dealing with facts or people—the stuff of which cases are really made"); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 590 (1987) (noting the broader focus in the 1970s on lawyer competency through increased training in skills and trial advocacy and citing the recommendations of the 1979 ABA Task Force on Lawyer Competency); see also SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY (1979).

20. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOL AND THE PROFESSION 238 (1992). See generally *id.* at 233-60.

21. See Quigley, *supra* note 19, at 471-72 (summarizing the goals and benefits identified in the *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992), as follows: (1) developing planning and analysis for unstructured situations; (2) developing skills in interviewing, counseling, and fact investigation; (3) teaching how to learn from experience; (4) teaching professional responsibility by firsthand exposure to actual mores of the profession; (5) exposing students to the demands and methods of acting in the role of attorney; (6) providing opportunities for collaborative learning; (7) imparting the obligation for service to clients and knowledge concerning the impact of the legal system on poor people; (8) providing opportunities to examine the impact of doctrine in real life, and providing a laboratory in which students and faculty study particular areas of law; and (9) critiquing the capacities and limitations of lawyers and the legal system).

22. Few can contest the premise that we learn best by doing or the premise's application to clinical education. See *id.*; see also Elliot Milstein, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 350 (1987).

standard Socratic teaching provides.<sup>23</sup> Students who do not understand discovery in civil procedure class, may “get it” in the context of a real case in which they are soliciting needed information. It is not only the context, but the hands-on approach that contributes to learning. Clinical education also teaches skills often neglected in the traditional legal education such as interviewing, counseling, and negotiation. Additionally, clinical education offers the unique benefits of an extremely low student-to-faculty ratio.<sup>24</sup>

Perhaps the greatest strength of clinical education is the ability of the students to act as attorneys and hence face and resolve the on-the-spot intellectual questions and ethical dilemmas of attorneys.<sup>25</sup> Clinics allow students to reflect upon and try to resolve ethical issues in a context where such issues really matter. Clinics facilitate analysis not of an arid acontextualized problem or an issue posed by an appellate opinion with few facts, but rather provide richly informed, thickly nuanced settings and issues requiring immediate attention. Thus, clinics present ethical problems authentically. Clinics also ensure that their students’ first acquaintances with the pressures, hassles, conundrums, and ethical quagmires of practice are experienced in a supervised setting with clinical staff to guide them.

Two possible objections to clinical education can be raised. The first, that clinical education is unnecessary, journeyman-type training that can be learned in the real world, is simply uninformed. Students may certainly derive some sense of comfort and security from learning where the courthouse is located and

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23. See David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979).

[C]linical method is the culmination of the students’ previous legal instruction in the basic curriculum and is an integral part of the total learning process. Not only does it enable the student to synthesize the previous educational experience of the law school; it provides a laboratory in which students are placed in a controlled educational environment where their mistakes and successes are formed into a positive learning experience that is not harmful to either themselves or their clients. In this setting they can, through their relationships with teachers and other clinical students, examine their abilities and attitudes in the context of the developing patterns of professional behavior that will guide them in the future.

*Id.* at 73 (footnote omitted).

24. Individual interaction between student and faculty is a vital component of clinical education.

Clinical education offers an opportunity for a liberating education, an opportunity for teacher and student to join in a common quest for developing self-conscious reflection from experience. As a result, students transform into self-learners, teachers become reflective self-evaluating transformative agents of education, and clients get a chance to participate in fashioning their own futures. . . . A person who learns how to learn from their experience is building, shaping, changing, and modifying their advocacy with each experience.

Quigley, *supra* note 19, at 474.

25. “[E]ffective use of the clinical method is the only presently available means of consistently facilitating learning of ‘professional responsibility’ in a meaningful, internalized way sufficient to form an affirmative structure capable of guiding behavior in a manner consistent with the stated public norms of the legal profession.” Barnhizer, *supra* note 23, at 71-72.

how to file various documents. However, the notion that the purpose of clinics is to teach "practical" things in that prosaic sense is deeply flawed.

The other more important and telling criticism of clinical education targets the relationship with the client. To what extent are clients (who are mostly poor) the guinea pigs for our students' experiment of learning-through-doing? Ironically, clinics, which are perhaps the best venue for teaching ethics, pose a larger ethical problem of their own: Are the students competent to handle the cases?<sup>26</sup> This question of competence encompasses not only technical or specialized knowledge and skill. It also involves issues of emotional maturity and judgment.

Unfortunately, except for student representation, many clients might have no representation at all.<sup>27</sup> Given this reality, although student representation may lack the perfection of a long-time practicing attorney, it certainly is preferable to no representation at all. Additionally, and of greatest import, the supervising attorney will ensure the quality of the representation.

### III. THE CONTROVERSY: GAL OR ATTORNEY-CLIENT REPRESENTATION OF CHILDREN

Although the Clinic at IU has chosen, consistent with the law and practice in Indiana, to represent children in custody proceedings as GALs, part of the Clinic's educational mission is to clarify and distinguish the different models for representing children. There is profound and sometimes acrimonious disagreement over whether lawyers should represent children as GALs or traditional legal counsel. Several considerations affect this controversy: the status of children generally in our society; the status of children in related causes of action; the strengths and weaknesses of each model of representation; and ethical issues.

#### *A. The Status of Children in Society*

Society's obligation to children is composed of both protection and fostering autonomy. Indeed the term "children's rights" imputes both a claim to parental

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26. See *id.* at 72-73. Barnhizer refers to this risk in clinical education as the "tension of client representation," but demonstrates how the integration of three factors in the clinical instruction mitigates the risk and provides necessary protection to both the client and the student:

1. A substantial, but restricted, volume of actual client representation by the student.
2. The clear assumption by that individual student of 'primary' professional responsibility for the process and outcome of that representation.
3. An individualized teaching relationship between the student and clinical teacher, using the student's clinical experiences as its focus.

*Id.*

27. This is particularly significant in light of recent federal cutbacks in legal services for the indigent. Also, one of the identified goals, and certainly a part of the mission of clinics, is to serve unrepresented and indigent populations. See Quigley, *supra* note 19, at 471; see also Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 33 (1993).

care, as well as a claim to certain individual rights.<sup>28</sup> To raise children effectively we must (1) provide protection and control<sup>29</sup> and (2) encourage freedom and independence.<sup>30</sup> The models of representation of children, however, appear to polarize these two aspects of child welfare. The GAL model emphasizes the child as a developing, immature being entitled to the protective custody and control of his caregivers (and the state when necessary). From this perspective, the child's representative in legal proceedings should independently determine and forward the best interest of the child within the framework of the family system. The attorney-client model, on the other hand, emphasizes the child as an autonomous being, with a limited, but increasing entitlement to the rights and responsibilities of adulthood. From this autonomy perspective, the child should direct a representative who forwards the child's stated desires.

### *B. Status of Children in Various Legal Proceedings*

These differing views on children are reflected in the treatment of children in our criminal and civil legal systems, particularly in three subsets of the law: (1) delinquency; (2) child abuse and neglect; and (3) custody and visitation. In delinquency proceedings, it is clearly determined that the liberty interest at stake entitles children to traditional legal representation.<sup>31</sup> In child-abuse and neglect proceedings, children are generally provided representation due to federal legislation mandating representation as a precondition to state welfare funding.<sup>32</sup> There continues to be controversy about the type of representation in child-abuse and neglect cases, but there is a growing lobby for the attorney-client model in this litigation.<sup>33</sup> The debate over the appropriate model of representation for

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28. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1525 (1994) (arguing that children's-rights theories should extend beyond the right to care and nurturing to include the liberty interest and other potential rights of children, and that children should not be limited by the political and legal philosophy that competency is a prerequisite to having rights).

29. See Brian G. Fraser, *Independent Representation for Abused and Neglected Children: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 25 (1976). Young children require protection and older children need parental oversight to protect against passion and impulses that result from lack of experience and insight. The parental right to the care and control of the child gives rise to parental responsibilities which can also be termed the child's "negative rights": the right not to be abused, neglected, or endangered. *Id.* at 26.

30. See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIMONIAL L. 57, 76 n.73 (1995) (arguing that successful parenting requires a willingness to promote age-appropriate risk taking so child can move from the secure world of the family unit to the larger world of options).

31. See *In re Gault*, 387 U.S. 1 (1966).

32. See Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C.A. § 5106a(b)(2)(A)(ix) (West Supp. 1997) (requiring state courts to appoint either an attorney-GAL or a CASA-GAL to represent children in abuse and neglect proceedings in order for states to receive welfare funding).

33. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 253-479 (1997) (collecting state statutes and trial rules on appointment of counsel and GALs in child protective proceedings); Fraser, *supra* note 29, at 28-29 (noting that a child properly

children exists in custody and visitation law too, but with an added dimension: Should the child be represented at all?

The popular argument is that custody disputes are primarily private matters in which the parents safeguard the best interests of their children.<sup>34</sup> In this vein, children should not be drawn into the potentially painful controversy, and independent representation elevates the child's "wishes" beyond the statutory reality that "wishes" are just one factor in the best-interest equation.<sup>35</sup> The counterarguments for representation of children in custody proceedings include: (1) the court may not receive all of the information that would otherwise be presented; (2) divorcing parents sometimes place their own needs above the interests of their children; (3) children need a voice to express their desires; and (4) independent representation maximizes the probability that cases will be decided based on the child's best interest.<sup>36</sup>

Despite the controversy, most states grant judicial discretion to appoint some form of representation for children in custody proceedings.<sup>37</sup> Appointment is

before the court on petition for child abuse and neglect is a ward of the court, and the court must ensure that the child's safety and interests are fully protected).

34. See MARTHA FINEMAN, *THE POLITICS OF CUSTODY AND GENDER, CHILD ADVOCACY AND THE TRANSFORMATION OF DECISION MAKING IN THE U.S.A. 6-7* (Institute for Legal Studies Working Papers, Series 3, No. 7, 1988).

35. See Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIMONIAL L. 35, 41 (1995) (pointing out that custody proceedings are emotionally very difficult for children, and arguing that it may disserve their interests to place them in the center of the dispute).

36. See *id.*; *Report of the Working Group on the Allocation of Decision Making*, 64 FORDHAM L. REV. 1325, 1327 (1996) [hereinafter *Decision Making Report*]; Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 354-55 (1993) (arguing that a child's participation in the decisionmaking process is empowering and may reduce the child's alienation if the child perceives that someone is on his side and that the court has considered his views); Martha L. Minow & Kim J. Lansman, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1134 (1978) (arguing that in custody disputes neither parent can be presumed to be the exclusive representative of the child, nor be relied on to communicate the child's interest when distinct from their own).

37. The following 39 states and the District of Columbia appear to give the judge discretion in a dissolution case to appoint a lawyer or a GAL for the child: Alaska, see ALASKA STAT. § 25.24.310(a), (c) (Michie 1996); Arizona, see ARIZ. REV. STAT. ANN. § 25-321 (West 1991 & Supp. 1997); California, see CAL. FAM. CODE § 3150 (West 1994 & Supp. 1997); Colorado, see COLO. REV. STAT. ANN. § 14-10-116 (West 1997); Connecticut, see CONN. GEN. STAT. ANN. § 46b-54 (West 1995 & Supp. 1997); Delaware, see DEL. CODE ANN. tit. 13, § 721(c) (1993); District of Columbia, see D.C. CODE ANN. § 16-918(b) (1997); Florida, see FLA. STAT. ANN. § 61.401 (West 1997); Hawaii, see HAW. REV. STAT. § 571-46(8) (1993); Idaho, see IDAHO CODE § 32-704(4) (1996 & Supp. 1997); Illinois, see 750 ILL. COMP. STAT. 5/506 (West 1994); Indiana, see IND. CODE ANN. §§ 31-15-6-1, -17-6-1 (West Supp. 1997); Iowa, see IOWA CODE ANN. § 598.12(1) (West 1996); Kentucky, see KY. REV. STAT. ANN. § 403.090(1) (Michie 1984 & Supp. 1996); Louisiana, see LA. REV. STAT. ANN. § 9:345(A) (West Supp. 1997); Maine, see ME. REV. STAT. ANN. tit. 19, § 752-A(1) (West 1996); Maryland, see MD. CODE ANN., FAM. LAW § 1-202(1) (1991); Massachusetts, see MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989); Michigan, see MICH. COMP. LAWS ANN. § 722.27(1)(e) (West 1993 &

mandatory only in a few states, and generally only in specified situations.<sup>38</sup> This is consistent generally with academic commentary and legal standards of practice in custody.<sup>39</sup>

Once the appointment issue is hurdled, the question still remains: What form of representation is best? The significant differences between abuse and neglect proceedings and custody proceedings make it unwise to automatically group them together on the representation issue—in custody disputes the risk of harm to the

Supp. 1997); Minnesota, *see* MINN. STAT. ANN. § 518.165(1)-(2) (West 1990 & Supp. 1997); Missouri, *see* MO. ANN. STAT. § 452.423(1) (West 1997); Montana, *see* MONT. CODE ANN. § 40-4-205(1) (1997); Nebraska, *see* NEB. REV. STAT. § 42-358(1) (1993); New Hampshire, *see* N.H. REV. STAT. ANN. § 458:17-a (1995 & Supp. 1996); New Jersey, *see* N.J. STAT. ANN. § 9:2-4(c) (West 1993); New Mexico, *see* N.M. STAT. ANN. § 40-4-8(A) (Michie 1995); New York, *see* N.Y. FAM. CT. ACT § 241 (Gould 1993); North Dakota, *see* N.D. CENT. CODE § 14-09-06.4 (1991); Ohio, *see* OHIO R. CIV. P. 75(B)(2); Oregon, *see* OR. REV. STAT. § 107.425(3) (1990); Pennsylvania, *see* PA. R. CIV. P. 1915.11(a); Rhode Island, *see* R.I. GEN. LAWS § 15-5-16.2(c) (1996); South Dakota, *see* S.D. CODIFIED LAWS § 25-4-45.4 (Michie 1992); Texas, *see* TEX. FAM. CODE ANN. § 107.001(b) (West 1996); Utah, *see* UTAH CODE ANN. § 30-3-11.2 (1995); Vermont, *see* VT. STAT. ANN. tit. 15, §§ 594, 669 (1989); Virginia, *see* VA. CODE ANN. § 16.1-266(D) (Michie 1996); Washington, *see* WASH. REV. CODE ANN. §§ 26.09.110, .09.220 (West 1997); Wisconsin, *see* WIS. STAT. ANN. § 767.045(1)(b) (West 1993); Wyoming, *see* WYO. STAT. ANN. § 14-3-211(b) (Michie 1997).

38. Wisconsin is the only state which mandates that a GAL be appointed for a child in all contested custody proceedings. *See* WIS. STAT. ANN. § 767.045(1)(a)(2) (West 1993). The following eight states mandate the appointment of an attorney or a GAL for the child only in specific situations: Florida, *see* FLA. STAT. ANN. § 61.401 (West 1997) (child abuse or neglect alleged); Louisiana, *see* LA. REV. STAT. ANN. § 9:345(B) (West Supp. 1997) (child abuse or neglect alleged); Minnesota, *see* MINN. STAT. ANN. § 518.165(2) (West 1990) (court has reason to believe child is victim of child abuse or neglect); Missouri, *see* MO. ANN. STAT. § 452.423(1) (West 1997) (child abuse or neglect alleged); Oregon, *see* OR. REV. STAT. § 107.425(3) (1990) (child requests appointment); Vermont, *see* VT. STAT. ANN. tit. 15, § 594(b) (1989) (before child is called as a witness); West Virginia, *see* W. VA. CODE § 48-2-11(b) (1996) (paternity raised as issue); Wyoming, *see* WYO. STAT. ANN. § 14-3-211(a) (Michie 1997) (child abuse or neglect alleged). Four states *mandate* that the judge use her discretion in appointing an attorney or GAL: Alaska, *see* ALASKA STAT. § 25.24.310(a), (c) (Michie 1996); Idaho, *see* IDAHO CODE § 32-704(4) (1996); North Dakota, *see* N.D. R. CT. 4.1; Wisconsin, *see* WIS. STAT. ANN. § 767.045(1)(a)(1) (West 1993).

39. *See* UNIF. MARRIAGE AND DIVORCE ACT § 310, 9A U.L.A. 443 (1987) (allowing the court to appoint attorney to represent interests of a minor in support, custody, and visitation litigation); Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1294 (1996) (discussing how counsel should be appointed for children in “individual cases where appropriate”); *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIMONIAL L. 1, 2 (1995) [hereinafter *Representing Children*] (arguing that under Standard 1.1, courts should not routinely assign counsel or GALs for children in custody or visitation proceedings). *But see* Patricia S. Curley & Gregg Herman, *Representing the Best Interest of Children: The Wisconsin Experience*, 13 J. AM. ACAD. MATRIMONIAL L. 123 (1995) (suggesting that GALs should be appointed for all children in contested-custody cases); *Report of the Working Group on Interviewing and Counseling*, 64 FORDHAM L. REV. 1351, 1353-54 (1996) [hereinafter *Interviewing and Counseling Report*] (recommending mandatory appointment of counsel for children in custody proceedings); Wilber, *supra* note 36, at 350 (encouraging child representation in divorce).

child is presumably not great, the bond between the child and the parent has not been broken by allegations or proof of parental abuse or neglect, the child may not be a party to the proceeding, and the judiciary does not assume the wide range of treatment and placement authority over the child and the family (something which is available in juvenile court). Basically, custody and visitation disputes are private matters, with the state's only involvement being the court's resolution of the dispute. Although the distinctions are substantial, the similarities between the proceedings encourage some analogies: both center on the need to determine appropriate and permanent custody for the child, both generally involve trauma and some breakdown of the family, and both favor traditional concepts of continuity and stability in determining custody.

The comparison between child abuse and neglect proceedings and custody proceedings does not clearly establish a preference for either the GAL or attorney-client model of representation. Thus the debate about the nature of representation rests on the differing views of children discussed at the beginning of Part III.A, reformulated in the specific context of custody and visitation. The first view (GAL representation) suggests that the best interest of the child should be determined in the context of the family by the parents or independent representative appointed for the child, protecting the child from harmful involvement in the legal controversy and/or his immature decisionmaking. Under this view the child will be heard, but her stated interests, though influential, may not be determinative. The second view (attorney-client representation) holds that the child has the capacity and the right to make decisions in her own behalf and should operate as a traditional client able to direct the goals of the representation.

In practice the controversy between the GAL and attorney-client models of representing children may converge at both ends of the age spectrum, since there is some agreement that the child's role in determining his own best interest and participating in the legal process is de minimis in infancy, but overwhelmingly significant in late adolescence. However, this agreement is not complete, and the debate certainly rages over the children in between. Thus the roles and responsibilities of each model of representation, and the attendant benefits and problems, must be clarified.

### *C. Defining and Clarifying GAL and Attorney-Client Representation*

It is significant to note that the models of representation outlined below do not appear in pure form, but in many permutations. For example, the GAL model varies depending upon whether the GAL is an attorney or not. If the GAL is an attorney, the representation will vary depending upon whether the attorney considers himself in an attorney-client relationship with the child, the extent to which the attorney considers the ethical rules in conflict with best-interest representation and the effect of those conflicts, whether the appointing statute and/or practice requires the attorney to serve both as counsel and GAL for the

child,<sup>40</sup> and whether the attorney serves as a neutral fact finder or actively advocates a position for the child.<sup>41</sup> When an attorney is appointed as counsel rather than as GAL for a child, there may be significant variations in the representation depending on whether counsel is specifically directed by statute or practice to represent the best interest of the child.<sup>42</sup> Despite the lack of agreement and conformity regarding GAL and attorney-client models of representing children, these models are outlined below based upon some general perceptions.

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40. The Clinic at IU has taken the position, though the controversy has not been raised in Indiana, that combining the roles of traditional attorney and GAL causes irreconcilable conflicts in that the obligation to represent a child's best interest is not always compatible with either the lawyer's ethical mandate to zealously represent the stated desires of the client, or the lawyer's duty to maintain client confidences. Several commentaries recognize this ethical dilemma. See, e.g., Federle, *supra* note 28, at 1556 (discussing the tendency to confuse distinctive roles of attorney and GAL, and discussing how allowing an attorney to present her own assessment of the appropriate outcome for a child client is a clear violation of professional norms); Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Rules to Improve Effectiveness*, 27 FAM. L.Q. 327, 334-36 (1993) (explaining that the conflicts of interest which arise when counsel is appointed both as attorney and as GAL include best-interest versus: wishes of the child, privileged communications, and provision of testimony); Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIMONIAL L. 45, 46-47 (1993) (noting the ethical responsibilities as counsel and GAL may differ "dramatically"); Kathryn E. Stryker & Gregory G. Gordon, *Representing Children*, NEV. LAW., Oct. 1995, at 12, 12-13 (recognizing that some courts treat terms "attorney" and "GAL" interchangeably, but "the underlying rights and responsibilities are completely different").

41. See Minow & Lansman, *supra* note 36, at 1140 n.64 (discussing how the changing and differing concepts of the roles and responsibilities of the GAL include: (1) the historical role of representing a child named as a defendant, (2) the neutral-investigator role as initially conceived in federal legislation mandating appointment of child representation in abuse and neglect proceedings, and (3) the advocate role of actively pursuing the best interest of the child); see also Fraser, *supra* note 29, at 27-28 (giving a historical perspective on the GAL concept); *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1369 (1996) (discussing the separation of GALs into two different types: "best interest guardian ad litem," who functions as an independent advocate for the child, and "judicially designated investigator," who serves as a neutral fact finder and owes his loyalty to the appointing judge).

42. The following 15 states and the District of Columbia appear to require that a lawyers appointed as counsel for a child serve the "interests" or "best interests" of the child: Arizona, see ARIZ. REV. STAT. ANN. § 25-321 (West 1991) ("interests"); California, see CAL. FAM. CODE § 3150(a) (West 1994) ("interests"); Colorado, see COLO. REV. STAT. ANN. § 14-10-116 (West 1997) ("interests"); Connecticut, see CONN. GEN. STAT. ANN. § 46b-54(c) (West 1995) ("best interests"); District of Columbia, see D.C. CODE ANN. § 16-918 (1997) ("best interests"); Idaho, see IDAHO CODE § 37-704(4) ("interests"); Illinois, see 750 ILL. COMP. STAT. ANN. 5/506 (West 1993) ("interests"); Iowa, see IOWA CODE ANN. § 598.12(1) (West 1996) ("interests"); Nebraska, see NEB. REV. STAT. § 42-358(1) (1993) ("interests"); New Jersey, see N.J. STAT. ANN. § 9:2-4(c) (West 1993) ("interests"); Rhode Island, see R.I. GEN. LAWS § 15-5-16.2(c) ("interests"); South Dakota, see S.D. CODIFIED LAWS § 25-4-45.4 (Michie 1992) ("best interests"); Vermont, see VT. STAT. ANN. tit. 15, § 594(a) ("interests"); Virginia, see VA. CODE ANN. § 16.1-266(D) (Michie Supp. 1997) ("interests"); Washington, see WASH. REV. CODE ANN. § 26.09.110 (West 1997) ("interests"); Wyoming, see WYO. STAT. ANN. § 14-3-211(a) (Michie 1997) ("best interests").

### 1. Defining GAL Representation

This discussion focuses on attorneys serving as GALs for children in custody and visitation litigation,<sup>43</sup> rather than representing children in the traditional attorney-client relationship.<sup>44</sup> In this context, a GAL serves as an officer of the court appointed to represent the best interest of the child. The GAL conducts a thorough investigation into the custody and visitation issues and may submit a written report to the court and the parties in advance of the hearing.<sup>45</sup> The GAL facilitates settlement among the parties. The GAL may be statutorily authorized to subpoena and cross-examine witnesses, or may simply undertake these tasks as a licensed attorney. The GAL may testify in the hearing<sup>46</sup> and advocate for the best interest of the child.<sup>47</sup> The GAL should clearly present the child's wishes, even if inconsistent with the GAL's recommendation.<sup>48</sup>

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43. The following 25 states and the District of Columbia specifically authorize the court by statute to appoint a GAL or a CASA to represent the child in custody litigation: Alaska, *see* ALASKA STAT. § 25.24.310(c) (Michie 1996); District of Columbia, *see* D.C. CODE ANN. § 16-2372(a)-(b) (1997); Florida, *see* FLA. STAT. ANN. § 61.401 (West 1997); Hawaii, *see* HAW. REV. STAT. § 571-46(8) (1993); Illinois, *see* 750 ILL. COMP. STAT. ANN. 5/506; Indiana, *see* IND. CODE ANN. §§ 31-15-6-1, 31-17-6-1 (Michie 1997); Kentucky, *see* KY. REV. STAT. ANN. § 403.090(1) (Michie 1984) ("friend of the court"); Maine, *see* ME. REV. STAT. ANN. tit. 19, § 752-A(1) (West 1996); Massachusetts, *see* MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1986); Michigan, *see* MICH. COMP. LAWS ANN. § 722.27(1)(e) (West 1993); Minnesota, *see* MINN. STAT. ANN. § 518.165(1)-(2) (West 1990); Missouri, *see* MO. ANN. STAT. § 452.423(1) (West 1997); Montana, *see* MONT. CODE ANN. § 40-4-205(1) (1997); New Hampshire, *see* N.H. REV. STAT. ANN. § 458:17(II)(b) (1992); New Jersey, *see* N.J. STAT. ANN. § 9:2-4(c); New Mexico, *see* N.M. STAT. ANN. § 40-4-8(A) (Michie 1994); New York, *see* N.Y. FAM. CT. ACT § 241 (McKinney 1983); North Dakota, *see* N.D. R. CT. 4.1; Ohio, *see* OHIO R. CIV. P. 75(B)(2); Rhode Island, *see* R.I. GEN. LAWS § 15-5-16.2(c); Texas, *see* TEX. FAM. CODE ANN. § 107.011(b) (West 1996); Vermont, *see* VT. STAT. ANN. tit. 15, § 669; Virginia, *see* VA. CODE ANN. § 16.1-266(A), (D); Washington, *see* WASH. REV. CODE ANN. § 26.09.220(1); West Virginia, *see* W. VA. CODE § 48-2-11(b); Wisconsin, *see* WIS. STAT. ANN. § 767.045(1) (West 1993).

44. *See* Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757 (1990) (discussing the roles and responsibilities of an attorney serving as a GAL).

45. For a discussion of the report of the GAL and its admissibility, *see* Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 61-62 (1992).

46. *See infra* note 89 and accompanying text (discussing ethics of an attorney testifying in client's litigation).

47. *See* Haralambie & Glaser, *supra* note 30 (discussing whether the child's advocate—whether GAL or attorney—should be barred from advocating a position for a child who lacks capacity to direct litigation or is otherwise impaired). *But see* Guggenheim, *supra* note 35 (arguing that a GAL should not advocate a position for an impaired child); *Representing Children*, *supra* note 39 (sizing up the arguments for and against allowing GALs to advocate the position of, or issues for, any child).

48. *See* Elrod, *supra* note 45, at 60 (discussing the disagreement over whether an attorney serving as a GAL must advise the court of the stated desires of a child when they vary from the GAL's recommendation); *see also* Stryker & Gordon, *supra* note 40 (writing that although a GAL is not bound by the child's wishes, the GAL should inform the court of the child's wishes even if they conflict with the GAL's position). The Clinic at IU takes the position that the GAL

In representing the best interest of the child, the GAL is not required to adhere to the stated desires of the child. However, two significant factors with regard to a verbal child are (1) ascertaining whether the child wants to forward a position in the custody dispute, and (2) bringing that position, or other articulated needs and desires of the child, clearly and accurately before the court. The GAL will question the stated desires of the child to determine if they are the result of parental pressure, impulse, or some other motive inconsistent with the child's best interest.<sup>49</sup> The GAL assesses the child's capacity for decisionmaking to determine the weight to be accorded the child's stated desires.<sup>50</sup> The child's communications to the GAL are not privileged, but the GAL may disclose those communications only as necessary to investigate or promote the best interest of the child, and only as required by statute or due process of law to ensure the fairness of the custody proceeding.

Ideally, the GAL-child relationship in a custody proceeding is based on honesty and respect. The GAL must repeatedly define her role to the child<sup>51</sup> (in age-appropriate terms<sup>52</sup>), clarifying that she is not serving as the child's attorney and that their conversations are not confidential.<sup>53</sup> The GAL must spend enough time with the child to ascertain her needs and desires, yet maintain the detachment necessary to question the source and validity of the child's statements through independent investigation. Even though the GAL is not bound by the child's wishes and may of necessity share her confidences, the GAL must always accord the child respect and honor the child's autonomy as appropriate to the child's age and maturity. The depth of the relationship and the extensiveness of the communications between the child and the GAL are defined by the child's capacity and need to participate in the legal process. Older, mature

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should inform the court of the child's position as a matter of respect to the child and as an officer of the court, unless disclosure is contrary to the child's best interest.

49. See Brooks, *supra* note 44, at 759-80 (observing that statements of children regarding their wishes may require interpretation, and that a GAL or child specialist may need to clarify the child's verbal and nonverbal, direct and symbolic, and spoken and gestured communications); see also Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1886-87 (1996) (noting that research reveals commonly held belief by practicing trial judges that expressed preferences of children should not be taken at face value, since children may improperly assess long-term interests, rely on unrealistic expectations, and manipulate—or be manipulated by—parents).

50. See Mlyniec, *supra* note 49, at 1908 (arguing that a child's representative must present credible evidence of the child's capacity for decisionmaking to effectively advocate for the position that the child's wishes are consistent with best-interest).

51. See Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1747-49 (1996) (emphasizing the importance of clearly informing the child on the roles, responsibilities, and limitations of GAL representation).

52. See ANNE GRAFFAM WALKER, *ABA CTR. ON THE LAW, HANDBOOK ON QUESTIONING CHILDREN* (1994) (emphasizing how important it is for child advocates to understand the importance of a child's developmental stage and cognitive abilities when wording questions and responses for children).

53. See *Interviewing and Counseling Report*, *supra* note 39, at 1360-61 (arguing that the GAL must inform the child she will advocate for what she determines best for the child and that the GAL is not obligated to keep "secrets").

children will be given greater encouragement to share information and facilitate the investigation by identifying persons or other information sources pertinent to the custody issue. Based upon the child's maturity and interest, the GAL may keep the child informed regarding the investigation, negotiations, and litigation.<sup>54</sup> Generally, all verbal children should be advised of the substance of a GAL recommendation and encouraged to state needed changes or corrections in the recommendation. The GAL may give the child the opportunity to testify in the courtroom or in chambers, and in other situations the GAL may attempt to protect the child from being compelled to testify by parents' counsel.

## 2. Defining Attorney-Client Representation

The attorney-client model for representing children, as opposed to the GAL model outlined above, needs little explanation to the extent that it adheres to the traditional ethical rules and procedures for lawyering. Proponents for the attorney-client model,<sup>55</sup> as opposed to the GAL model, urge that children are best served when they are allowed to determine the goals of the representation, when they are fully informed on the matters of the representation, and when they develop a trusting relationship with their attorney through preservation of confidences. However, these proponents acknowledge that many children lack the cognitive ability and judgment to direct the litigation in their own interest, and in that sense are "impaired" within the meaning of Rule 1.14 of the *Model Rules of Professional Conduct*.<sup>56</sup> As for "impaired" children, the attorney may

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54. See Stryker & Gordon, *supra* note 40, at 14 (arguing that the child's representative should keep the child informed of proceedings, explaining stages and upcoming events, and that the child should be invited to contact the representative).

55. The following 26 states and the District of Columbia specifically authorize the court by statute to appoint an attorney or counsel to represent the child in custody litigation: Alaska, see ALASKA STAT. § 25.24.310(a) (Michie 1996); Arizona, see ARIZ. REV. STAT. ANN. § 25-321 (West 1991); California, see CAL. FAM. CODE § 3150(a) (West 1994); Colorado, see COLO. REV. STAT. ANN. § 14-10-116 (West 1997); Connecticut, see CONN. GEN. STAT. ANN. § 46b-54(a) (West 1995); Delaware, see DEL. CODE ANN. tit. 13, § 721(c) (1993); District of Columbia, see D.C. CODE ANN. § 16-918(b) (1997); Florida, see FLA. STAT. ANN. § 61.401 (West 1997); Idaho, see IDAHO CODE § 32-704(4) (1996); Illinois, see 750 ILL. COMP. STAT. ANN. 5/506 (West 1993); Iowa, see IOWA CODE ANN. § 598.12(1) (West 1996); Louisiana, see LA. REV. STAT. ANN. § 9:345(A)-(B) (West 1997); Maine, see ME. REV. STAT. ANN. tit. 22, § 4005(1)(A) (West 1996); Maryland, see MD. CODE ANN., FAM. LAW § 1-202 (1997); Michigan, see MICH. COMP. LAWS ANN. § 722.27(1)(e) (West 1993); Nebraska, see NEB. REV. STAT. § 42-358(1) (1993); New Jersey, see N.J. STAT. ANN. § 9:2-4(c) (West 1993); New York, see N.Y. FAM. CT. ACT § 249(a) (McKinney 1983); Ohio, see OHIO R. CIV. P. 75(B)(2); Oregon, see OR. REV. STAT. § 107.425(3) (1990); Pennsylvania, see PA. R. CIV. P. 1915.11; Rhode Island, see R.I. GEN. LAWS § 15-5-16.2(c) (1996); South Dakota, see S.D. CODIFIED LAWS § 25-4-45.4 (Michie 1992); Utah, see UTAH CODE ANN. § 30-3-11.2 (1995); Vermont, see VT. STAT. ANN. tit. 15, § 594 (1989); Virginia, see VA. CODE ANN. § 16.1-266(D) (Michie 1996); Washington, see WASH. REV. CODE ANN. § 26.09.110 (West 1997).

56. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1313 (1996) [hereinafter *Recommendations*] (outlining the factors to be considered in determining whether a child is impaired or lacks capacity with regard to decisionmaking or otherwise directing litigation). Factors to be

direct the litigation with appropriate input from the child, and the attorney should determine the options that best serve the child's legal interests, considering the child in the context of his environment.<sup>57</sup>

Some commentators on the attorney-client model separate children into three categories (preverbal-impaired, verbal-impaired, and unimpaired) to determine the child's involvement in the litigation, the level and type of client communication, and the roles of the attorney as an investigator and advocate.<sup>58</sup> For preverbal-impaired children it is suggested that the attorney function as a fact gatherer, presenting the substance of his investigation to the court and either advocating what he determines to be in the child's best interest or making no recommendation at all.<sup>59</sup> Verbal-impaired children should participate in the decisionmaking process to the extent counsel determines them capable, but counsel should seek independent GAL representation if the child and counsel clearly disagree on best interest. Unimpaired children should be represented as adults, with counsel advocating their expressed positions, even when inconsistent with counsel's determination of best interest. Counsel should maintain their confidences.

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considered include: the child's developmental stage, the child's expression of a relevant position, the child's individual decisionmaking process, and the child's ability to understand consequences. *See id.*; Wilber, *supra* note 36, at 358 (arguing that determining a child's capacity for decisionmaking is primarily a matter of common sense and experience, in which the attorney employs a "largely intuitive process" to define the parameters of the attorney-client relationship).

57. Current academic writing acknowledges that lawyers serving young children will have to ultimately direct the litigation, although they should reserve appropriate decisionmaking authority to the child based upon the child's capacity. In this process, the attorney is charged with selecting and presenting one or more options to the court consistent with the child's legal interest, considering the child in the context of his environment. *See* Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955 (1996); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473 (1996); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996); *Report of the Working Group on Determining the Best Interest of the Child*, 64 *FORDHAM L. REV.* 1347, 1349-50 (1996). The process whereby the attorney defines the child's legal interest by narrowing the inquiry from the universe of possible needs and interests to those options that are commensurate with the child's particular situation, and that are within the range of legal authority, is outlined in the *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, which rely heavily on the work of Jean Koh Peters.

The process must then focus on the child in her context. It is the lawyer's responsibility to carry out a full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client's unique personality, her family system, history, and daily life. This process should include the client's own words, stories, and desires at every possible point. . . . [T]he lawyer should organize those facts using devices such as genograms, chronologies, and daily schedules to ensure that the lawyer is working from a thickly detailed view of the child client as a unique individual.

*Recommendations*, *supra* note 56, at 1310.

58. *See Decision Making Report*, *supra* note 36, at 1329-36.

59. *See id.* at 1332-35.

*D. In Defense of GAL Representation*

GAL representation of children has come under attack in recent years.<sup>60</sup> Critics charge that the best-interest role of the GAL is paternalistic and has the potential for cultural bias and middle-class imperialism,<sup>61</sup> does not empower or give true voice to the child, and is vague and impossible to forecast. Further, it is suggested that GAL representation usurps the judicial role of determining best interest and is easily abused by judges who give GALs unfair procedural latitude or afford them undue credibility.<sup>62</sup> Also, critics argue that GALs are not held accountable for quality representation, given that most state legislatures grant GALs immunity from suit.<sup>63</sup> With regard specifically to attorneys who serve as GALs, the complaint is raised that attorneys are not trained to determine the best interest and that GAL representation requires counsel to function outside of the traditional ethical boundaries of the attorney-client relationship.

In support of the GAL model, perhaps the best argument is one arrived at by process of elimination. The GAL model may not be perfect, but it is preferable to the attorney-client model. The attorney-client relationship is based on the ability of the client to identify the goals of the litigation and direct the attorney consistent with those goals.<sup>64</sup> The adaptation of this relationship to young

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60. See Green & Dohrn, *supra* note 39, at 1294-95 (arguing that given the choice, a lawyer should represent a child as a lawyer, not a GAL); Peters, *supra* note 57, at 1507 (arguing that the GAL role as lawyers for children has outlived its historical usefulness); Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, but Who Am I?", 64 *FORDHAM L. REV.* 1917, 1942 (1996) (arguing that an attorney should initiate representation premised on the presumption that the child is competent and needs autonomy and empowerment, and that an attorney should leave the role of GAL or advocate for the child's best interest to CASAs or persons specially trained in child development or child psychology).

61. The potential for cultural, socioeconomic, moral, religious, or racial bias in best-interest representation should be taken seriously. However, this concern can arise in attorney-client representation as well as GAL representation. Training to heighten awareness of biases, increase vigilance against prejudices, and encourage greater consultation with experts is necessary to avoid biases in all models of representation.

62. See Haralambie & Glaser, *supra* note 30, at 92-93 (arguing that the remedy for undue judicial deference to the child's advocate is not barring advocacy for the child's interests, but rather educating judges to encourage their mandatory obligation to exercise independent discretion); Wilber, *supra* note 36, at 351 (explaining how attorneys for parents can avoid improper influence by challenging the child's representative for apparent biases and insisting that the court expressly provide the basis for its rulings).

63. While GAL immunity from lawsuit is offered as a criticism in current commentaries, it was initially intended to be, and continues to be, a safeguard for the diligent and aggressive GAL who may undoubtedly anger parents in the process of advocating for a child. See *IND. CODE ANN.* § 31-15-6-9 (West Supp. 1997) (providing that a GAL is immune from lawsuit if acting in good faith); *id.* § 31-17-6-8 (same).

64. According to Guggenheim:

The central premise of professional responsibility for lawyers cannot be applied to a large number of children (those too young even to communicate their views) and may be inappropriate to apply to an even larger number of children (those old enough to express themselves but who lack maturity or competence to have their

children who lack the cognitive skills, maturity, and desire to direct the litigation places the attorney in the awkward role under Rule 1.14 of the *Model Rules of Professional Conduct* of continually assessing the extent of the child's disability and deciding which decisionmaking the child should participate in or control. The concern with this adaptation is not that it is functionally a "best interest" representation, but that it is labeled "attorney-client" and that therefore the child and the other participants in the litigation may reasonably expect the ethical trappings of that relationship (i.e., zealous representation of stated desires, confidentiality, and client-directed litigation).

Another adaptation of the attorney-client relationship for young children also causes concern: seeking judicial appointment of a separate GAL for the child when counsel and the child disagree on what is best for the child. It is an ineffective use of resources to appoint two representatives for the child who may pit their advocacy skills against one another. Further, the court might not give credence to counsel's advocacy for the child once counsel has requested GAL appointment for the child, likely assuming that counsel's request was prompted by concern that the child's position is inconsistent with the child's best interest or safety.

Admittedly, the attorney-client model may be appropriate for older, unimpaired children. Even in this category, however, there are some additional concerns about the attorney-client relationship. Attorney-client confidentiality can prevent the attorney from revealing information essential to the safety or well-being of the child, including reporting the child as abused or neglected. Zealous advocacy for the child's stated desires may lock the attorney into seeking a result that the attorney knows, based on his investigation, is either the result of parent manipulation or pressure, or simply illogical or poor decisionmaking on the part of the child.<sup>65</sup> Counsel takes on an uncomfortable, if not unconscionable, burden in advocating for a child's desires that are inconsistent with his safety or best interest. Certainly an attorney can "counsel" a child client away from "bad" decisions, but counseling that compels a child to adopt the attorney's position may be overbearing and may contravene the policy of client-directed advocacy.<sup>66</sup>

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views dictate their lawyers' conduct).

Guggenheim, *supra* note 35, at 39.

65. See Wilber, *supra* note 36, at 354 (acknowledging that there is a risk in advocating a position for a child that is arguably ill-advised or irrational, but presuming that the judge can ascertain what is best for the child, and will not adopt a position contrary to the child's best interest, despite excellent advocacy for that position).

66. To the contrary, many would urge that attorney counseling is not inappropriate or heavy-handed. See Haralambie & Glaser, *supra* note 30, at 62 (suggesting that the child's attorney may form a decisionmaking partnership with the child, which will affect the child's decisionmaking); Stryker & Gordon, *supra* note 40, at 13 (arguing that when the attorney disagrees with the child's wishes, the attorney should reason with the client, discuss possible options, and recommend viable alternatives, and that if the attorney "works firmly and compassionately" with the child, many conflicts can be avoided); see also Peters, *supra* note 57, at 1520-21 (arguing that the child's lawyer must avoid the temptation to impose her beliefs upon a child client, and encouraging her to "confront herself with her own views of the client's best interests to remind herself to listen to the client's desires and not to superimpose her own").

Aside from the criticisms of the attorney-client model, the GAL model of representation has some affirmative strengths. Best-interest representation is consistent with society's notion that children have not attained the full measure of cognitive skills, maturity, and judgment necessary for autonomous decisionmaking. Children need and generally expect that an adult will oversee the major events of their lives. Perhaps in this sense GAL representation is paternalistic, but the negative connotations often associated with paternalism are not inherent within the GAL model of representation.<sup>67</sup> GAL representation allows the child to fully express his needs, concerns, and desires, but screens the child's position for accuracy and investigates the child's situation from the broader perspective of the family system and the long-range interests of the child. Children may appreciate the protection and oversight of their adult representatives if they are given adequate input and respect in the GAL's decisionmaking process. The ability of the GAL to disclose information and act in the child's best interest seems advantageous when compared to the moral dilemma of an attorney who is prohibited by his child client from disclosing information of abuse or self-harming behaviors.<sup>68</sup>

Finally, although it may be impossible to forecast best-interest for a particular child, the GAL model of representation provides the greater opportunity to investigate the interests and needs of the child and anticipate what would be better for the child. Two factors support this position. First, the GAL investigation garners information regarding the child and the parents that would not be offered as evidence by either parent. More information, appropriately screened for accuracy and relevance, increases the likelihood that the judge's custody or visitation order will "better" meet the needs of the child, even though it does not ensure that the best interest is truly obtained.<sup>69</sup>

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67. In the sense that the term "paternalistic" implies that a child will be belittled by a GAL who does not hear and consider the child's voices, this is objectionable. Although this could occur in GAL or attorney-client representation, it certainly is not intended or inherent within any form of representation of children and it is to be avoided at all costs. *But see* Wilber, *supra* note 36, at 358 (expressing concern about the "insidious tendency" of a child's attorney to assure that the child is incompetent when the child's viewpoint differs from his own, and the resulting potential for "undue paternalism").

68. The GAL model is not, however, a magic bullet for a good night's sleep. Although a GAL will not find himself advocating a position that he determines to be dangerous or inconsistent with the child's best interest, the burden of determining a child's best interest is very heavy and may indeed stave off a good night's rest.

69. *See* Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 641 (1990). The "better interest" phrase was coined to distinguish the recommendation of the child's representative from the court's final determination of best interest, and to clarify the role of GAL as follows:

The guardian ad litem's role is to engage in creative exploration to link resources, services, and the needs of the child and families. Guardians ad litem, therefore, examine the "better interests" of the child, as the balance shifts from parental decision making to judicial decision making . . . in a custodial proceeding. The term "better" denotes that the status quo of the child has changed and that a range of options should be examined to assist parents in enhancing or maintaining their relationship with the child and ensure the most appropriate placement for the child.

Second, there are commonly held beliefs or values concerning children and their welfare that facilitate best-interest analysis.<sup>70</sup> Those values are often expressed as statutory criteria or presumptions for determining the child's best interest in custody.<sup>71</sup> Also within easy access to lawyers serving children is the body of social-science research that gives greater insight into attachment and separation, the effect of dysfunctional parenting behaviors (mental illness, domestic violence, drug abuse, and child neglect) on children, and a host of other issues affecting custody and visitation options.<sup>72</sup> Commonly held values on parenting (if clearly identified by the GAL as the basis of a recommendation), statutory factors, and current behavioral research are tools that increase the predictability of what is best for the child. When these are combined with a thorough investigation of the child's situation and an appropriate appreciation of the child's desires, there is a likelihood the GAL's recommendation will approximate the best, or at least better, options for the child.

### *E. Should Lawyers Serve as GALs?*

Separate from the general criticisms of best-interest representation is the additional question of whether attorneys,<sup>73</sup> as opposed to lay persons or social-

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*Id.*

70. See Haralambie & Glaser, *supra* note 30, at 75 (arguing that an attorney's determination of a child's best interest can be based on the following commonly held "presumptions and assumptions" about the needs of children, rather than the attorney's subjective values: provision of basic needs, stability, continuity, and nurturance; maintenance of family and sibling ties; and avoidance of unnecessary disruptions that may interfere with the child's growth and development); Wilber, *supra* note 36, at 363 (suggesting that child advocates can apply generally accepted public policies of child rearing and development to generate custody recommendations in the child's best interest).

71. See IND. CODE ANN. § 31-17-2-8 (West Supp. 1997) (enumerating the factors to be considered in determining best-interest); UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987) (enumerating the factors for determining a child's best interest, including: (1) wishes of the child's parent or parents as to his custody; (2) wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved).

72. See BENJAMIN M. SCHUTZ ET AL., SOLOMON'S SWORD 16-24 (1989); LOIS A. WEITHORN, PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS (1987).

73. A comparative study of GAL-appointment statutes does not definitively clarify each state's position on whether the GAL may or shall be a practicing attorney. However, the following six states do appear to specify that the GAL *may* be an attorney: Alaska, see ALASKA STAT. § 25.24.310(c) (Michie 1996); Florida, see FLA. STAT. ANN. § 61.401 (West 1997); Illinois, see 750 ILL. COMP. STAT. ANN. 5/506 (West Supp. 1997); Indiana, see IND. CODE ANN. § 31-9-2-50 (West Supp. 1997); Montana, see MONT. CODE ANN. § 40-4-205(1) (1997); South Carolina, see S.C. R. CIV. P. 17(d)(2). The following five states specify that the GAL *shall* be an attorney: Kentucky, see KY. REV. STAT. ANN. § 403.090(1) (Michie 1996) ("friend of the court"); New Mexico, see N.M. STAT. ANN. § 40-4-8(A) (Michie 1978); Virginia, see VA. CODE ANN. § 16.1-266(A) (Michie Supp. 1997); West Virginia, see W. VA. CODE § 48-2-11(b) (1996); Wisconsin, see WIS. STAT. ANN. §§ 757.48(1)(a), 767.045(3) (West 1993 & Supp. 1997).

science experts, should serve as GALs.<sup>74</sup> The argument supporting GAL representation by lawyers hinges on the strengths of the legal profession.<sup>75</sup> Attorneys are trained to be assertive fact finders and are capable of sorting out “gut feelings” from proven facts. Their experience in logic and constructing a chronology helps them recognize information gaps or inconsistencies. They appreciate the applicable legal standards, evidentiary issues, and case precedent, and thus present information in a format that maximizes their advocacy for the child. Lawyers are skilled in interviewing, accessing information, and counseling. Their sense of due process should ensure that they deal fairly with all parties and not attempt procedural improprieties such as *ex parte* communications with the judge. Their legal tools enable them to protect the child from, and empower the child through, the legal process.

The dual roles of the GAL—investigator and advocate—are becoming an increasingly good match for attorneys. Although the traditional law school education did not include training in the social sciences relevant to children and families, this is changing with the proliferation of children’s-law clinics and specialized curricula in children’s, women’s, and family law.<sup>76</sup> Within and beyond our law schools is an emerging specialty in children’s law.<sup>77</sup> This is not to imply that the new breed of children’s lawyers are a substitute for social workers and psychologists, only that trained lawyers know when and how to access needed expertise for the benefit of assessing the child’s best interest.

The argument that lawyers can serve effectively as GALs does not mean that they are the only suitable choice for the job. The interdisciplinary approach that combines the skills of a lawyer and a professional in social work or psychology is obvious.<sup>78</sup> Teaming lawyers with lay volunteers is another combination. This

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74. This point is ably raised by panel member Professor Bruce Green in his article, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the “Legal Ethics” Perspective*. See Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the “Legal Ethics” Perspective*, 73 IND. L.J. 665 (1998).

75. See Fraser, *supra* note 29, at 30 (arguing that lay persons cannot safeguard the legal rights of children given the complexities of litigation and cannot use the legal system most effectively to obtain the child’s interests).

76. See Haralambie & Glaser, *supra* note 30, at 74-75; see also Green & Dohrn, *supra* note 39, at 1287 (listing innovative law school programs and clinics in children’s law, including: the Civitas Child Law Center and Clinic at Loyola University School of Law, the Children and Family Justice Center at Northwestern Legal Clinic at Northwestern University School of Law, the Child Advocacy Project at Fordham University, the Child Advocacy Clinic at the University of Michigan Law School, the Children’s Advocacy Institute at the University of San Diego School of Law, the Mandel Legal Aid Clinic at the University of Chicago Law School, and the Juvenile Law Center and Family Law Center at New York University School of Law).

77. Some nationally known organizations involved in ongoing judicial and legal training in children’s issues are: the ABA Center on Children and the Law, the National Association of Counsel for Children, and the National Council of Juvenile and Family Court Judges.

78. See Daniella Levine, *To Assert Children’s Legal Rights or Promote Children’s Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023, 2029 (1996) (expounding on the benefits of “hybrid mixed models” for representing children in which attorneys and trained volunteers work effectively together for the benefit of children). See generally Tara Lea Muhlhauser & Douglas D. Knowlton, *The “Best Interest Team”: Exploring the Concept of a Guardian Ad Litem Team*, 71 N.D. L. REV. 1021 (1995) (arguing in favor of combining the

latter relationship has the likely outcome of both a larger time commitment by volunteers to knowing the child and a larger continuity of representation. These combinations can result in economic savings and more effective representation of children, if the roles and limitations of the professionals and the volunteers are clarified.

#### *F. Ethical Concerns for Attorneys Serving as GALs*

The Clinic at IU takes the position that an attorney acting as a GAL is not bound, and cannot be bound, by all the attorney ethics rules.<sup>79</sup> The basis for this assertion is that the GAL does not have an attorney-client relationship with the child.<sup>80</sup> Some of the obligations stemming from the traditional attorney-client relationship do not apply to GAL representation because they conflict with the best-interest representation of the child,<sup>81</sup> and may be contrary to the GAL's fact-

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talents of attorneys, volunteers, social workers, and psychologists in a representation team).

79. Some ethical considerations are clear and certainly apply to lawyers regardless of the model of child representation utilized. For instance, attorneys are forbidden from making affirmative misstatements of fact to third parties. *See* IND. R.P.C. 4.I. Similarly, they are forbidden from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See id.* Rule 8.4(c). Other ethical issues are not particularly clear. No one would ever argue that the *Model Rules of Professional Conduct* are intuitive or somehow likely to be self-executing. Even within the confines of traditional representation, difficult questions arise about how attorneys must balance their duties to clients against the needs of society, the court, and other third parties. Still other cases provide clear ethical rules for attorneys operating within traditional parameters, but legitimate and troubling questions arise when an attorney functions as a GAL. A crucial question for a clinic operating under a best-interest standard is which rules apply.

80. *See* Guggenheim, *supra* note 35, at 44 (arguing that the behavior of a GAL is not constrained by the *Model Rules* for attorneys—even when the guardian happens to be an attorney); *see also* Buss, *supra* note 51, at 1731-49. Buss acknowledges that attorneys may not always function in an attorney-client relationship when appointed as GALs. She states:

First, the assumption of the GAL role may reflect a determination that the entire normal client-lawyer relationship is not "reasonably possible." Under this reading, the GAL role replaces the lawyer-client relationship with a new relationship in which the lawyer does not act as a lawyer, the client is not really a client, or, perhaps, some combination of both. Second, the assumption of the GAL role may reflect a determination that client-driven decision making is not reasonably possible, but that the rest of a normal client-lawyer relationship (and hence the lawyer's ethical obligations flowing from that relationship) remains the same as for adult clients.

*Id.* at 1732. Buss's concern with the wholesale rejection of the attorney-client relationship model stems from the belief that the judicial system and the child may lose the benefits and safeguards of attorney ethics. *See id.* at 1731-49. While the Clinic justifies its variance from the ethical rules by the absence of the attorney-client relationship, it does not reject the rules. In our Clinic, the GAL's practice varies from the rules only where best-interest representation directly conflicts with the rules.

81. *See* Hartz, *supra* note 40, at 334 (discussing three areas of conflict for attorneys serving as GALs, including best-interest versus: wishes of the child, privileged communications, and provision of testimony); *Recommendations*, *supra* note 56, at 1314 (observing that an attorney appointed to serve as a GAL may have specific direction to act

finding responsibilities as an officer of the court. Although not strictly bound by attorney ethics when serving as GALs, Clinic students abide by the ethical rules that are not in direct conflict with best-interest representation. Specific ethics rules are discussed below as they relate to Clinic law students serving in the role of GAL.

### 1. Communication

In an attorney-client relationship, Rule 1.4<sup>82</sup> directs the attorney to communicate with the client to facilitate informed decisionmaking. An attorney in an attorney-client relationship with a child is therefore ethically locked into full communication with the child. GAL representation, on the other hand, does not so require, and indeed recognizes that full communication in the form of absolute disclosure may be detrimental to the child. For example, it may not be in the best interest of a particular child to be informed of the full dimensions of a parent's dysfunction or the contested issues being raised by the parties. Based upon the GAL's assessment of the needs and decisionmaking capacity of the child, the GAL may withhold or disclose information as appropriate to the best interest of the child.

### 2. Client-Directed Litigation

Rule 1.2 governs the scope of attorney-client representation. An attorney functioning as a GAL, however, clearly deviates from the mandate that a lawyer "abide by a client's decisions concerning the objectives of representation."<sup>83</sup> The theory of GAL representation is that children are not fully mature or capable of setting the parameters of the representation, and hence the structure of the representation is best-interest, not client-directed. Given that a child is not served as a traditional client in best-interest representation, a GAL is not technically bound by Rule 1.2. Nevertheless, Rule 1.2 might inform or at least set a tone for the nature of the relationship, directing the GAL to involve the child in the litigation to whatever extent is appropriate given the needs, maturity, and desires of the child.

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contrary to the obligations of a lawyer representing a client); Edward Sokolnicki, *The Attorney as Guardian Ad Litem for a Child in Connecticut*, 5 CONN. PROB. L.J. 237, 259-60 (1991) (discussing the ethical conflicts of functioning as both a GAL and counsel for the child); Pamela A. Gordon & Wadine Gehrke, *Risk Factors for the Guardian Ad Litem*, 22 COLO. LAW. 45, 45-46 (1993) (listing ethical issues for attorneys appointed as GALs, including: (1) statutory duty to investigate versus prohibition against communication with adverse parties; (2) testimony by and cross-examination of the GAL regarding the GAL's personal investigation versus prohibition against an attorney's serving as a witness; and (3) confidentiality of a child's disclosures to a GAL versus the necessity of disclosing relevant information to the court).

82. IND. R.P.C. 1.4. The *Indiana Rules of Professional Conduct* mirror the *Model Rules of Professional Conduct* with regard to the ethical issues discussed in this section of the paper.

83. *Id.* Rule 1.2.

### 3. Confidentiality

A significant issue in GAL representation is the confidentiality of child communications. Four factors indicate that the traditional stance of confidentiality does not apply in the GAL-child relationship. First, because the GAL is appointed by the court, serves as the eyes and ears of the court, and reports to the court, it seems obvious that there is no confidentiality vis-à-vis the court. Second, at least in the State of Indiana, it is clear that the parties to the divorce litigation have access to the underlying data and reports compiled in the GAL investigation,<sup>84</sup> although not the confidential communications between the GAL and her attorney or the work product of the GAL's attorney. Third, the sharing of the child's communication is often vital to acting in the child's best interest. Fourth, the ethical rule of confidentiality, Rule 1.6,<sup>85</sup> clearly anticipates a lawyer-client relationship that does not exist in GAL representation.

In GAL representation the confidentiality issue generally arises when the GAL learns information from the child that the child would prefer not be reported. This can occur when a child confides a clear preference to the GAL to live with one parent but, fearing reprisal or hurt feelings by the other parent, requests that the GAL not reveal the information. The duty of the GAL is conflicted by competing notions of "best interest" and the guardian's duty to the court. On the one hand the GAL must report to the court information relevant to the child's best interest. The child's custody preference is a vital piece of information for the judge in making that determination. Yet, disclosure of the child's preference may not be in her best interest because of a real or perceived harm to the parent-child relationship. Ultimately, the GAL must determine whether it is or is not in the best interest of the child to reveal her statement, and/or whether there is an effective mechanism to protect the child by obfuscating the source of the information.

Although a GAL may not be locked into confidentiality by the professional code of responsibility or state privilege or confidentiality laws, the duty to be discreet and respectful obviously applies in full force—perhaps even more strongly because the child cannot fire the GAL for loose-lipped indiscretions. A GAL should not discuss a case with anyone except a party who has a legal right to the information, unless such discussions are impliedly authorized or necessary to promote the child's best interest. Generally, the GAL should be a repository, not a dispenser, of information.

### 4. Conflicts of Interest

Technically, the conflict-of-interest rules may not apply to GALs who do not serve in an attorney-client relationship with the children they represent. However, rules to resolve conflicts of interest are necessary in GAL representation, just as in attorney-client representation, to ensure fairness and a

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84. See IND. CODE ANN. § 31-17-2-12(c) (West Supp. 1997).

85. IND. R.P.C. 1.6.

sense of propriety. For instance, a GAL should not advocate for the best interest of two children with directly competing interests.<sup>86</sup> Furthermore, fairness to all concerned indicates that the GAL should not have any prior relationship with the parties or stand to gain personally from any particular result.

The Child Advocacy Clinic shares space with the IU Community Legal Clinic, in which students serve as traditional lawyers and represent parents in dissolution, abuse and neglect, termination of parental rights, and other family-law cases. Obviously it would be unfair to parents and unethical of their attorneys at the Community Legal Clinic to tolerate conflicts of interest with our program. A parent discussing confidential concerns in a custody proceeding should not have to worry that disclosures might be made (or even be accessible in the office) to the child's GAL. Therefore, the Child Advocacy Clinic applies the *Indiana Rules of Professional Conduct* on conflicts of interest to GAL representation. Application of the *Rules* provides a model for conflicts resolution and informs students on the ethical rules they will use when they are attorneys.

### 5. Dealing with Represented and Unrepresented Parties

Similarly, as GALs, our students are arguably not technically required under Rule 4.2 to request an attorney's permission to speak to his client in the custody investigation. However, the spirit and purpose of Rule 4.2—maintaining the relationship between attorney and client as well as protecting the rights of citizens<sup>87</sup>—mandate that we honor this rule. Again this policy affords an important teaching tool about the ethical rules and protects the rights of parties to the dissolution.

Additionally, Clinic law students observe the spirit and letter of Rule 4.3<sup>88</sup> and deal extraordinarily carefully with unrepresented parties. In particular, the Clinic stresses how important it is for the GAL to explain her role to the parents and other people involved and to avoid even the appearance of offering legal advice to the parties. This can sometimes be difficult, particularly where it is apparent to the GAL that a party misunderstands his legal rights or is being taken advantage of.

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86. See Utah State Bar Ethics Advisory Opinion Comm., Op. 95-08 (1996), available in 1996 WL 227375. The representation of siblings by an attorney will generally be appropriate in the following situations: (1) the interests of the siblings are not adverse; (2) the representation of one sibling will not materially limit the lawyer's representation of another sibling; and (3) it is not reasonably foreseeable that the lawyer will obtain confidential information relating to the representation of one sibling that might be used to the disadvantage of another sibling represented by the lawyer. Cf. IND. R.P.C. 1.6. See generally Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819 (1996) (asserting that conflict-of-interest issues regarding the representation of children are more complex than those regarding the representation of adults).

87. IND. R.P.C. 4.2.

88. *Id.* Rule 4.3.

## 6. Provision of Testimony

The prohibition in Rule 3.7 that an attorney shall not serve as a witness in the litigation conflicts with the GAL's duty to bring information relevant to the child's best interest before the court.<sup>89</sup> Because this rule conflicts with the obligation to represent the child's best interest and because the GAL is not in an attorney-client relationship with the child, Clinic GALs testify in court and are subject to cross-examination.

### IV. OPPORTUNITIES AND CHALLENGES IN GAL REPRESENTATION BY LAW CLINICS

The tension between protection and autonomy for the child and the other dynamics of representation of children discussed in this paper create significant challenges and opportunities for the best-interest representation of children in a law school clinic.

#### *A. Experiencing Best-Interest Firsthand*

Even if our graduating law students never represent children as GALs in their own practices, determining and advocating for a child's best interest is a powerful experience given that the "best interest of the child" is the pivotal concept in family law. Through their Clinic experience students are sensitized to the stresses on children and family from the divorce process, and students develop appropriate empathy for future clients. Unfortunately, experiencing the dynamics of divorce and the burden of a best-interest recommendation is also stressful to the students. A significant challenge to clinic staff is mentoring students through what can be consuming and spirit-zapping situations while still ensuring that the students maintain primary responsibility for their cases. Staff can model appropriate coping skills and limit-setting that will assist the students in their future practice of law.

#### *B. Competency and Effectiveness of Law Students*

The Clinic's challenge is to ensure excellence in representation through rigorous student training and faculty supervision without impeding student ownership of the cases. A policy and procedure manual sets basic requirements so students are not "reinventing the wheel" in conducting investigations and preparing reports for court. Student summaries of all interviews keep the Clinic staff informed and the tenor of student writing alerts staff to biases and evidentiary gaps. Regular review of case files and detailed student memos facilitates appropriate staff feedback to students. The primary safeguard for

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89. See Heartz, *supra* note 40, at 336 (noting that attorneys serving as GALs may be prohibited from testifying); see also Curley & Herman, *supra* note 39, at 130 (observing that under Wisconsin law and practice, the attorney GAL is prohibited from testifying).

quality representation is scheduled and informal supervision meetings to track students' ongoing work. Allowing students to control and direct these interactions maximizes the learning opportunity.

While there is little research on what constitutes effective GAL representation of children in custody and visitation proceedings, some common sense notions of effectiveness exist: (1) expediting cases to final judgment; (2) obtaining out-of-court settlements; and (3) reducing relitigation.<sup>90</sup> Other measures of effectiveness are the length of time expended in the representation, the thoroughness of the investigation, the satisfaction of the children served, and the appraisals of the judiciary and the local bar. Finally, since children of divorce may experience parental abuse or neglect and suffer the effects of their parents' substance abuse or domestic violence, another measure of successful representation may be obtaining services and treatment for children and families, as well as emergency or other protective orders.

Although any assessment of the Child Advocacy Clinic after only two years is necessarily preliminary, some areas of effectiveness and concern are emerging. The strengths of student representation appear to be time commitment, extensiveness of interviews and observations, efforts to obtain treatment and other records of children and parents relevant to custody issues, and the detail of the written GAL reports.<sup>91</sup> Although students are initially shy in initiating settlement negotiations, they become more astute and assertive once the process is started and can be very effective. Unfortunately, settlement efforts have been hampered by the lack of party status for the child and GAL in custody proceedings, the relative unfamiliarity of the local bar with the role and abilities of the Clinic, and the reluctance of the local bar to deal with students. With regard to expediting litigation, the students have been earnest in filing motions for early hearing dates and objections to continuances, but administrative delays in the court system have sometimes blocked these efforts. Most students have been diligent, persistent, and successful in seeking evaluations and services for children and families.

The challenge for student representation is the lack of legal experience and confidence to take full control of the case. Clinic staff must mentor students to build self-confidence and competency. With regard to the best-interest determination, the Clinic recognizes that some students lack the life experiences relevant to family-law issues. The Clinic social-work staff alerts students to possible biases from lack of knowledge or experience and suggests application

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90. See Shepherd & England, *supra* note 60, at 1924-32 (providing extensive discussion of national and state research on effectiveness of attorneys, law students, and volunteers representing children in child-abuse and neglect proceedings). See generally Donald N. Duquette & Sarah H. Ramsey, *Using Lay Volunteers to Represent Children in Child Protection Court Proceedings*, 10 CHILD ABUSE & NEGLECT 293 (1986) (discussing outcome variables to evaluate effectiveness of representation of children by attorneys and lay volunteers); Robert F. Kelly & Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 RUTGERS L. REV. 1217 (1988).

91. Judicial feedback indicates that the local bench is pleased with student performance, finding investigations and reports to be thorough and court testimony to be credible.

of appropriate behavioral-science concepts in child development or family systems.

*C. Role and Ethics Confusion for Students in GAL  
Representation*

In the classroom and supervision components of the Clinic, staff members challenge students to recognize when and how best-interest representation necessitates variance from the *Indiana Rules of Professional Conduct* with regard to confidentiality and concepts of client-directed litigation. Because most students serve as an attorney for a student GAL in a Clinic case separate from the case in which they serve as a GAL, they experience the traditional attorney-client relationship during the semester. It would be desirable if students could additionally serve as counsel for children in some litigation. This may be facilitated in the future by the Clinic's acceptance of status-delinquency or school-law cases.

*D. Continuity of Representation*

At the beginning of the semester, the Clinic gives the clear expectation to all students that they are responsible for their cases during holidays and school vacations and that they are expected to carry cases through to settlement or trial. Every effort is made to complete cases within a semester time frame. However, when litigation cannot be completed within the semester and a student cannot continue his representation on a volunteer basis, the Clinic staff completes the necessary negotiations and the student testifies at trial, if needed, regarding his investigation. Cases that require ongoing monitoring are transitioned to new students, maintaining the same Clinic supervisors.

*E. Bar Antagonism*

Unfortunately, there is a tendency for some members of the local bar to ignore student litigators, refusing to return phone calls and perpetrating a variety of other slights upon the students. This problem is compounded in GAL work where parents' counsel may not fully understand the role of the GAL, may view the GAL as an adversary, and may intentionally seek continuances, conduct settlement discussions, or schedule depositions without notice to the GAL. Hopefully, community education on GAL representation and Clinic professionalism will reduce this problem. Further, there is a tendency by the local bar to be dissatisfied and generally critical of GAL investigative work. A 1993 Family Law Newsletter<sup>92</sup> in Colorado chronicled the problems in GAL representation and offered several practice tips: (1) work cooperatively with counsel to clarify the responsibilities and limitations of GAL representation and obtain information about the child and parents; (2) always act as though you are "on record" and scrupulously avoid careless, demeaning, and biased-sounding

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92. See Gordon & Gehrke, *supra* note 81, at 46-48.

characterizations of parties and family members; (3) thoroughly document interviews and other investigative efforts; and (4) request that parents prepare written statements of their concerns and goals.

#### CONCLUSION

Children's law calls to those who are creative and compassionate. They must be humble to hear the sometimes tiny voice of the child and persistent to find the best or better way for the child. Law schools must be committed to educating and mentoring students to serve children. In the supervised environment of law clinics, students will develop the competence to be effective advocates for children. The hands-on experience of clinical education trains tomorrow's lawyers in the uniqueness and subtleties of representing children and the necessity of an interdisciplinary approach. As our students fan out throughout the country—whether to serve children as traditional lawyers or as GALs, and whether to represent children full-time or as occasional pro bono counsel—they take the knowledge, skills, and heart imparted through their law school experience.

