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Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation

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SIMON SAYS TAKE THREE STEPS BACKWARDS: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS RECOMMENDATIONS ON CHILD REPRESENTATION

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I. INTRODUCTION

In considering whether I wanted to submit a response to this conference, I turned back to the Fordham Law Review's *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, now referred to by this conference's participants as *Fordham*.[1] While the entire volume helped me to formulate this response, I want to begin by acknowledging Linda Elrod's and Ann Haralambie's two responses in *Fordham* as essential to my decision.[2] In a few short pages they encapsulated the essential message of *Fordham*: that by the end of the last century, the practice of lawyers for children was to be lawyers. Elrod and Haralambie both served on the committee that drafted the *American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases* ("*Standards*").[3] As Elrod plainly states, "the [*Standards*] take the position that lawyers should be appointed as lawyers and act as lawyers irrespective of the age of the client. . . ." and the consensus of *Fordham* was that "the lawyer should always be a lawyer and should not be forced into a hybrid role . . . ."[4] She then outlines how the newly created *Standards* combined with the *Fordham Recommendations* ("*Recommendations*") will prevent a lawyer for children from drifting into a guardian *ad litum* ("GAL") or hybrid role. In combination, the *Standards* and the *Recommendations* give lawyers a blueprint for their basic obligations to a child client, with the *Recommendations* providing a "how to" for lawyers to determine and then

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[1] 64 FORDHAM L. REV. 1301 (1996).

[2] Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999 (1996); Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. 2013 (1996).

[3] Elrod, *supra* note 2, at 2000 n.5. The *Standards* were adopted by the ABA House of Delegates in February 1996. The *Standards* can be found at http://www.abanet.org/child/childrep.html (last visited March 12, 2006) [hereinafter *Standards*].

[4] Elrod, *supra* note 2, at 2001.

to represent the child's legal interests.[5] Pursuing a child's legal interests is central to rejecting a GAL or hybrid role even for a child unable to direct representation. As Elrod explains, both the *Standards* and the *Recommendations* reject the idea that lawyers for children can or should be making best interest determinations on behalf of their clients.[6] Rather, the *Standards* explicitly require that "[t]o the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests."[7] Those legal interests can be determined by taking the myriad steps all lawyers take on behalf of their clients: thorough factual investigation, significant and appropriate contact with the client, understanding the objective criteria of the law related to the purposes of the proceeding, and participating fully and assertively in all aspects of the proceedings involving the client.[8]

Haralambie provides additional context for the move away from a lawyer serving in a GAL role by discussing the synergy between Rule 1.14 of the *Model Rules of Professional Conduct* ("*Model Rules*") and the *Recommendations*.[9] Rule 1.14 requires a lawyer, as much as possible, to maintain a normal attorney-client relationship with a client with diminished capacity, including a minor client. Haralambie points out that the *Recommendations* embrace the mandate of Rule 1.14 and provide guidance for its use, particularly through the detailed process outlined in the *Report of the Working Group on the Allocation of Decision Making*.[10] She notes that using this process will maximize the child's participation in reaching an understanding of the child's legal interests while minimizing the lawyer's subjective perspective. Haralambie warns, however, that for the child's legal interest to be fully protected, judges must embrace the lawyer's role of independent advocate and stop deferring to the lawyer's recommendations. Rather, through the adversarial process, the judge is presented with a full range of perspectives that permit the judge to make the ultimate decision on behalf of the child.[11]

Ten years later, at the *UNLV Conference*, the *Recommendations* of *Fordham* addressing the appropriate role for a lawyer representing a child were unequivocally reaffirmed that, "The recommendations . . . affirm and build upon the *Fordham Recommendations* regarding the role of counsel for the child, including the fundamental principle of client-directed representation for child clients." They also address some of the questions left open by the *Ford-*

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[5] Elrod, *supra* note 2, at 2002.

[6] The *Recommendations* affirmatively state that "Although other issues remain unresolved, the profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including 'best interests' determinations." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1309 (1996).

[7] *Standards*, *supra* note 3, at § B-4(2).

[8] *Id.* at § B-1.

[9] Haralambie, *supra* note 2, at 2016.

[10] *Id.* at 2017; *Report of the Working Group on the Allocation of Decision Making*, 64 FORDHAM L. REV. 1325 (1996); *see also Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 7, at pts. IV, V.

[11] Haralambie, *supra* note 2, at 2017.

ham Conference and recommend "additional prescriptions, methods, and strategies to achieve child-directed and child-centered representation . . . ."[12]

The *Working Group on Bests Interests and the Role of the Attorney*, which promulgated the recommendations on attorney role, provide a detailed set of prescriptions to assist a lawyer in sustaining this child-centered role, building, in essence, on the *Fordham Recommendations* and the *ABA Standards*.[13] The *UNLV Recommendations* purposefully advance the requirement that a child's lawyer must create a relationship with the client that will enable the facts of the child's life combined with the legal purpose of the representation to result in child-centered, child-driven advocacy. This approach affirmatively rejects any type of best interest role for the attorney. Even the lawyer representing a client unable to direct representation at all or in part, substitutes judgment on behalf of the child only after taking significant steps to determine what position the client would want the attorney to take.[14]

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[12] *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592, 613 (2006) [hereinafter *Recommendations of the UNLV Conference*].

[13] *Id.* This approach is fully explored in JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS (2001).

[14] These are the current recommendations:

A. *Children with Diminished Capacity:* When the child has diminished capacity, the child's attorney should promote client-directed representation by:

i. Adopting a position requiring the least intrusive state intervention;

ii. Being guided by goals that are respectful of and reflect what the client would want and the decision the child would make if the child could formulate a position;

iii. Respecting the child's family and social connections;

iv. Being familiar with the child's family, community and culture and take precautions to avoid imposing the attorney's personal standards and cultural values;

v. Giving special weight to the parent's preference in the absence of conflict regarding the particular matter at issue, parental incapacity, or harm to the child;

vi. Utilizing the following rights and values as further guidance:

(A) Limitation of state intervention in the child's life;

(B) The child's right to have his or her family respected;

(C) Child's liberty interest to be free from state custody; and

(D) The family's liberty interest in parental determination of what is in the child's interests.

d. *Children Lacking Capacity:* When the child lacks capacity to communicate a position, the child's attorney should by performing the following non-exhaustive list of duties, in addition to those listed in Part IV.A.2 above for the child with diminished capacity:

i. Obtain additional pertinent information through investigation and consultation;

ii. Involve parents in the process, but recognize that parents cannot direct the representation;

iii. Protect the child's legal interests.

Recommendations of the UNLV Conference, 6 Nev. L.J. 592, 615 (2006).

It should be noted that the National Association of Counsel for Children has carved out an exception for entirely client-driven representation in its proposal to modify the ABA Standards: The distinction between the *ABA Standards* and the *NACC Revised ABA Standards* is that where the ABA remained consistent with the client directed attorney throughout, the NACC carved out a significant exception where the client cannot meaningfully participate in the formulation of his or her position. In such cases, the NACC's version calls for a GAL type judgment using objective criteria. Additionally, the NACC's version *requires* the attorney to request the appointment of a separate GAL, after unsuccessful attempts at counseling the child, when the child's wishes are considered to be seriously injurious to the child. *Compare NACC Recommendations for Representation of Children in*

The participants in *UNLV*, like the participants in *Fordham*, represent a significant cross section of the legal profession's child advocacy leaders.[15] These leaders will continue to advocate for changes in federal and state laws and practices that curtail or inhibit the ability of lawyers fully to embrace client-centered and client-directed representation.[16] So why respond? Because there is a parallel process occurring that undermines these core principles and retreats from the commitment to lawyers for children being lawyers: The National Conference of Commissioners on Uniform State Laws' draft proposal on the *Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act.* ("NCCUSL draft").[17] Given the proximity of this conference and the NCCUSL drafting schedule, the work of the drafting committee cannot be ignored. Three aspects of the NCCUSL draft are particularly troublesome and need to be addressed: the definition of counsel, the appointment of counsel, and the role of the "Court-Appointed Advisor".

II. Definition of Counsel

The NCCUSL draft is a significant retreat from creating a single role for a child's lawyer. Instead two roles are created. The first is the "child's attorney" whose role is "to provide legal representation for a child."[18] The second, while rightfully rejecting the current practice in a significant number of states of a hybrid role of attorney and GAL, instead creates a new category of lawyer in child welfare proceedings: the "best interests attorney".[19] This attorney is "to provide legal representation for a child to protect a child's best interests without being bound by the child's directives or objectives."[20] "A best interests attorney shall advocate for a resolution of the proceeding consistent with the best interests of the child based on the facts relevant to the proceeding and according to criteria established by law related to the purposes of the proceeding."[21] Finally, the best interests attorney is relieved of her duty to maintain the confi-

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Abuse and Neglect Cases, http://www.naccchildlaw.org/training/standards.html (last visited March 5, 2006); *with Standards*, *supra* note 3.

[15] These leaders come from various professions, however, including social work, the mental health and medical professions, and the policy and academic worlds.

[16] As they did ten years ago in *Fordham*: "Laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child's guardian *ad litum* should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 6, at pt. I.A.1.

[17] At the time of this writing, I am referring to the draft that followed the February 3-5, 2006 meeting of the drafting committee. For purposes of this response, I am focusing on the representation of children in neglect and abuse proceedings and not custody proceedings. Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act, http://www.law.upenn.edu/bll/ulc/RARCCDA/2006FebChildRepStrikeScoreDraft.htm (last visited on March 12, 2006) [hereinafter NCCUSL draft].

[18] *Id.* at § 2(3). "A child's attorney owes to the child the duties imposed by the law of this state in an attorney-client relationship." Id. at § 12(a).

[19] As Barbara A. Atwood, reporter for the NCCUSL drafting committee, has so helpfully pointed out, the 2003 ABA Standards on Representing Children in Custody Cases originated the concept of the "best interests" attorney in custody matters.

[20] *Id.* at § 2(2).

[21] *Id.* at § 13(a).

dences of the client in order to "use such information, including communications received from the child in confidence, for the purpose of performing the duties of a best interests attorney without disclosing that the child was the source of the information."[22] The commentary then states, "The best interests attorney provides legal services for the purpose of protecting the child's best interests."[23] Somehow the drafters believe that by giving a new name to someone who looks an awful lot like a GAL or hybrid advocate but who has to be a practicing lawyer and use the best practices of a child's lawyer, they will resolve the ambiguities of those traditional roles. On the contrary, creating this role preserves two significant barriers to effective independent representation on behalf of a child. First, it repudiates the clear direction legal advocacy for children in child welfare proceedings has been moving in at least since *Fordham*: to ensure independent representation for all child clients, including clients unable to direct representation. The lawyer does this by being bound by the ethical rules of the profession, including the lawyer's ability to ask for a GAL if the lawyer cannot otherwise adequately represent the client.[24] Despite the drafters' assertions, creating another role perpetuates the confusion about how to represent children and stymies the extraordinary efforts to refine the role of the child's lawyer through the multi-disciplinary research and practice that has flourished in the last decade. Secondly, it reinforces what Martin Guggenheim, in his article in this Symposium issue, warns against: that too often lawyers for children have reinforced the state's interests and not served as independent representatives of their clients.[25] As Guggenheim points out, regardless of the definition of their role or the desires of their clients, lawyers for children are under enormous pressure in child welfare proceedings to follow a "safer course," that contains three elements: a presumption that a conflict between parent and child exists; an assumption that a parent charged in a neglect or abuse proceeding is unfit; and a form of risk aversion that assumes separating a child from a parent is more likely to keep the child safe.[26] Guggenheim posits that over time, lawyers find that by pursuing this safer course and supporting the state, they "win" more often, reinforcing all lawyers' natural desire to win.[27] But even more relevant for this discussion, Guggenheim identifies what happens to lawyers who believe their real role is to protect their clients:

> In addition, children's lawyers also get to perform a special role in our culture: that of "hero." Charged with a special duty to protect their "clients" from danger, chil-

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[22] *Id.* at § 13(d). This a particularly troublesome aspect of the role but beyond the purview of this response.

[23] *Id.* at § 13 cmt.

[24] *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002), *available at* http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.htm (last visited March 12, 2006).

[25] Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

[26] *Id.* at 830-31.

[27] *Id.* at 830. Criminal defense lawyers long ago gave up the idea of being seen as heroes. They understand that their role is to ensure that their client gets the due process a defendant deserves, even if it makes their lawyer very unpopular. Guggenheim challenges lawyers for children to understand they have the same responsibility, that they can't represent their clients and expect to be the hero. *Id.*

> dren's lawyers are rewarded professionally and emotionally when they step forward and argue for intervention to prevent possible future harm. We have not designed or conceived of the children's bar as having been erected to prevent state overreaching. Quite the opposite. The children's bar exists to ensure that all children who need state protection receive it. And sometimes the children's lawyer gets to be the protecting hero.[28]

Guggenheim warns that as long as lawyers are trapped in this safer course mode, they fail to be independent advocates for their clients. This, in essence, is what is so problematic with the NCCUSL best interests attorney who continues to be the hero by seeing the role as a method to protect his or her client and not to represent them. Ultimately, the lawyer who is sometimes appointed as the child's attorney and sometimes as the best interests attorney will find it difficult to give up the hero role that best interests advocacy provides and assume the harder role of being a child's attorney. Instead lawyers will persist in usurping the role of the judge in determining best interests and undermine the full presentation and consideration of relevant information, including the child's counseled wishes and legal interests. Creating two roles for children's lawyers is the first step backward; the method of appointing those lawyers is the second.

III. Appointment of Counsel

In calling for a mandatory appointment of counsel for children in abuse and neglect proceedings, the NCCUSL draft permits the court to "appoint either a child's attorney or a best interests attorney."[29] The judge is to appoint the attorney "as soon as practicable to ensure adequate representation of the child and in any event before the first court hearing that substantially affects the interests of the child."[30] The court is to take into consideration factors like "the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child's best interests."[31] The commentary points out that it is both a legislative and a judicial function to determine which type of attorney to appoint.[32] Essentially, a state can direct the court either to begin with the presumption that a child should be appointed a best interests attorney or begin with the presumption that a child should be appointed a child's attorney. The court then applies that presumption in each individual case.[33]

This proposal undermines the independence of a lawyer for a child in two significant ways: first, by allowing the legislature to define the nature of the

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[28] *Id.*

[29] NCCUSL draft, *supra* note 17, at § 4(a).

[30] *Id.*

[31] *Id.* at § 4(b).

[32] *Id.* at § 4 cmt. The draft puts the two types of attorneys in brackets so that the state can determine which kind of attorney to presume.

[33] Remarkably, despite the lengthy Prefatory Note that praises both the *Fordham* Recommendations and the *ABA Standards* and which cites authors who would start with the presumption that a child should be appointed a child's attorney, the drafters fail to recommend to legislatures that they adopt a presumption in favor of appointing a child's attorney. *Id.* at Prefatory Note.

attorney-client relationship and second, by allowing the judiciary to interfere with the independent judgment that any lawyer brings to representing a client.

A. *Legislative Role**

In *Polk County v. Dodson*, the Supreme Court addressed the question of whether a public defender was a state actor for purposes of being subject to a §1983 civil rights action for failing to represent a client adequately.[34] The Court held that the public defender was not a state actor for this purpose.[35] In discussing the role of the public defender, the Court emphasized the independent role of assigned counsel, free from state interference:

> But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."[36]

The Court continued:

> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainwright* established the right of state criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.[37]

This standard was reconfirmed twenty years later in *Legal Services Corporation v. Velazquez*,[38] where the Court addressed the independence of federally funded civil legal services attorneys. The Court cited *Polk County* favorably in distinguishing between activities that legal services attorneys can be barred from doing generally, such as lobbying, and activities they may do on behalf of individual clients. The Court recognized that Congress had created a legal program to assist the government to achieve a specific end:

> By providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the state and federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys

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* As this reply was going to press, the author was informed that the final NCCUSL draft would not propose a legislative presumption. This would not prevent a legislature from using such a presumption, however, so the author believes her discussion is still relevant for lawmakers and advocates.

[34] 454 U.S. 312 (1981).

[35] *Id.* at 324-25.

[36] *Id.* at 321 (citing IOWA CODE OF PROF'L RESPONSIBILITY FOR LAWYERS DR5-107(b)); *compare with* MODEL RULES OF PROF'L RESPONSIBILITY R. 5.4(c) (2002)) (internal citations omitted).

[37] *Polk County*, 454 U.S. at 321-22 (citing Gideon v. Wainwright, 372 U.S. 335, 345 (1963) which quoted Powell v. Alabama, 287 U.S. 45, 69 (1932) (alteration in original)) (internal citations omitted).

[38] 531 U.S. 533 (2001).

. . . . [Congress] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.[39]

Congress could have declined to create a legal program to represent indigent civil clients at all or in only certain types of cases. But once Congress created the program, "[t]he Constitution does not permit the Government to confine litigants and their attorneys in this manner."[40] If a state requires the appointment of counsel for children in abuse and neglect proceedings, the same principles of independence must apply. Once the state has determined that representation is necessary to protect the due process rights of a class of individuals, the nature of that representation must then be governed by the ethical rules of the profession.

State legislatures should not be encouraged to circumvent the independence of attorneys assigned to represent children. On the contrary, legislative drafters should be protecting the independent role criminal and civil lawyers have fought so long to achieve. Moreover, if Guggenheim is correct that states like child advocates because they are likely to support the position of state agencies, states are more likely to prefer best interest lawyers in their legislation and start with the presumption that a best interests lawyer be assigned.[41]

B. Judicial Role

Having created two roles for lawyers, the NCCUSL drafters then permit the judge to appoint the kind of lawyer *the judge* wants to be representing the child. The court's "need for information and assistance" can be a determining factor in what kind of lawyer to appoint.[42] The judge's fundamental responsibility to be impartial and the lawyer's obligation to provide independent and zealous representation are fatally eroded by this scheme. Furthermore, on a practical basis, the judge's ability to make this determination "as soon as practicable to ensure adequate representation of the child and in any event before the first court hearing that substantially affects the interests of the child,"[43] is clearly impossible. With the exception of age, the criteria that the draft asks the judge to consider—"the child's age and developmental level, any desire for an

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[39] *Id.* at 534.

[40] *Id.* at 548.

[41] Guggenheim, *supra* note 25, at 830-31.

> Because the children's bar is behaving in precisely the way the state officials expect them to, they are embraced by state officials. Lawyers for children may be feisty in various dimensions of child welfare practice, but they infrequently attack head-on the imbalances in the system. Lawyers for children rarely publicly oppose the removal of children as occurring too frequently or as being rubber stamped by judges. That kind of criticism seems to be out of bounds for children's lawyers.

Id. at 831.

> Children's lawyers who are known as fighters for their clients commonly engage in fights which state officials do not mind. They are far more likely to insist upon keeping siblings together in foster care than in opposing placement in foster care. They are more likely to insist on regular supervised visitation with parents than on pushing for return before the agency believes return is appropriate. They are also more likely to press for "permanence" and be equally comfortable with adoption as with reuniting children with their families of origin.

Id. at 832.

[42] NCCUSL draft, *supra* note 17, at § 4(b).

[43] *Id.* at § 4(a).

attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child's best interests"[44]—cannot possibly be determined at the outset of the proceedings. The drafters urge the judge to draw on the insights of "the abundant literature of children's psychological, cognitive, and emotional development,"[45] as if understanding the theoretical literature provides the basis of an appointment for an individual child whose case is suddenly before the court but who is rarely, if ever, produced on the day of the appointment of counsel. Even if the child were present in court, how would the court know what to do? The judge cannot interview the child at this point in the proceedings, will have little information other than the allegations in the initial pleadings, is unlikely to have any relevant information from the mental health professions, and is faced with a child suffering significant trauma through neglect or abuse, the ensuing investigation, and/or through removal from her parents. The very reason for appointing counsel for the child as early as possible is so the lawyer can begin implementing the myriad obligations of effective assistance of counsel that will ultimately shape the representation the lawyer provides.[46] As we have memorialized in the recommendations of this conference, the scope and meaning of those obligations has become increasingly complex.[47] A judge appointing counsel cannot possible "know" what kind of counsel to provide when the parties first appear in court.

Beyond this practical barrier is the fundamental problem of the court defining the nature of the attorney-client relationship in clear violation of a lawyer's ethical obligations. The attorney, once appointed, must make that determination. Perhaps one of the most succinct statements of how an attorney shoulders the responsibility to determine the relationship with his or her client is from the *First Star Principles on Representation of Children*:

> Every child is presumed competent and entitled to contribute to his or her representation to the fullest extent feasible given the child's cognitive and developmental capacities, absent a showing that he or she is unable to comprehend or make adequately considered decisions in connection with the representation after being counseled by his or her attorney. If the child's attorney determines that it is necessary to substitute judgment for the child, the attorney must continue to maintain an attorney-client relationship with the child, to the fullest extent feasible given the child's cognitive and developmental capacities, as well as inform the court of the child's wishes.[48]

This standard recognizes, as does the ABA Model Rule 1.14, *Client with a Diminished Capacity,* that an essential component of independent representation is struggling with the potential challenges a client with diminished capacity presents.[49] If the child is going to benefit from independent representation, this

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[44] *Id.* at § 4(b).

[45] *Id.* at § 4 cmt.

[46] As all child advocates have experienced, it is very difficult to take a reasoned position early in proceedings without the opportunity to investigate fully.

[47] See for example, the *Report of the Working Group on the Lessons of International Law, Norms, and Practice* which outlines the transnational nature of child clients and their families. 6 NEV. L.J. 856 (2006).

[48] First Star Principles on Representation of Children (unpublished manuscript on file with author).

[49] MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

remains the lawyer's struggle. Moreover, because the client is a child, the nature of the potential incapacity may change over time. The lawyer must be attuned to the client's developing capacity and adjust the representation to reflect these changes. The NCCUSL draft also shifts that adjustment from the lawyer to the judge. Only a judge can change an appointment from a best interests attorney to a child's attorney.[50] The attorney essentially has to go back to court and provide information that would justify this change, once again impermissibly involving the judge in the very core of the attorney-client relationship. Ironically, in the prefatory note, even the NCCUSL drafters concede that a bests interests attorney is ultimately not necessary to achieve a child's best interests: "[A] child-directed lawyer functioning in the role of a child's attorney will ultimately facilitate the court's resolution in the child's best interests, . . . and the child's attorney may, in situations justifying substituted judgment . . . advocate a position the lawyer believes is in the child's best interests."[51] Given this acknowledgment, there is no justification for creating an entirely new legislative system which undermine the court's impartial role and ultimately damages the substantial efforts of conferences like *Fordham* and *UNLV* to define and clarify a single role for lawyers for children.

III. Appointment of a Court Advisor

If the NCCUSL draft was not convoluted enough, the final complication is the introduction of a "Court-Appointed Advisor" ("Advisor") to the design in abuse and neglect proceedings. The Advisor is "an individual appointed to assist the court in determining the best interests of the child."[52] Currently two different alternatives are available for states to consider:

1. If a child's attorney is appointed, the court *shall* appoint an Advisor; if a best interests attorney is appointed, the court *may* appoint an Advisor; or
2. Regardless of whether the lawyer is a child's attorney or a best interests attorney, the court *may* also appoint an Advisor.[53]

In either case, the Advisor is directed to meet with the child, meet with the child's lawyer (of whatever ilk), carry out an independent investigation, and "if appropriate" make recommendations to the court regarding the child's best interests.[54] In conducting the investigation, the Advisor is required to "determine, in a manner appropriate to the child's developmental level, the child's expressed objectives in the proceeding."[55] In essence, this proposal requires the child not only to talk, perhaps repeatedly, to another adult about the nature and meaning of the proceedings (until that person figures out the child's

[50] NCCUSL draft, *supra* note 17, at § 10 & cmt.

[51] *Id.* at § 2 cmt. (text omitted in current draft). Moreover, the child's attorney, even as defined in the draft, can take steps to seeks the assistance of what would be the equivalent of a GAL if the attorney determined that step were necessary. *Id.* at Prefatory Note & n.20, § 12(d)(3) & cmt., § 13 cmt.

[52] *Id.* at § 5. This article is not addressing the issue of appointments in custody cases where an Advisor may also be appointed.

[53] *Id.* at 19. There are other factors involved in the appointment that are unnecessary to elaborate at this point.

[54] *Id.* at § 14(6).

[55] *Id.* at § 14(2).

expressed objectives), but also to have this person significantly interfere with the attorney-client relationship. The commentary states, "[i]f the child is represented by counsel, whether child's attorney or best interests attorney, the court-appointed advisor must notify counsel and permit counsel to be present during any interview."[56] Permit? The child is represented by counsel! The Advisor cannot be given the authority to permit counsel to be present; counsel decides whether to subject her client to yet another interview by an adult who has no obligation to maintain the client's confidences.[57] As with the appointment issue, this proposal further undermines a lawyer's ability to represent a client. The National Association of Counsel for Children succinctly stated its concerns with the Advisor system in a June 15, 2005 memorandum to the NCCUSL drafters:

> We believe the reliance on a court advisor in general is misplaced. It forces the child to have yet another adult to deal with and it is a mistake to assume this advisor will have a special protective relationship with the child such that the child would disclose information to such a person that the child would not disclose to his/her own lawyer with whom there is a confidential relationship.[58]

The purported purpose of the Advisor is to substitute for the maligned GAL.[59] Used properly—not as a substitute for independent counsel—however, the GAL remains an important and legally defined resource for a lawyer who determines within ethical boundaries that she requires protective assistance for her client.[60] There is no justification for the Advisor role that interferes with the attorney-client role, subjects children to multiple interviews and other interventions, and adds tremendous cost to an already under-resourced system.

IV. CONCLUSION

The disparity between the direction of child advocacy in the last fifteen years and the proposals contained in the NCCUSL draft cannot be reconciled. These proposals fail to embrace the role of counsel for children as a fully independent attorney with the tools and support necessary to shoulder a complex but rewarding job. Instead, the proposal confuses roles—of the legislature, the judiciary, and the lawyer—and leaves the reader with the unhappy conclusion that the drafters substituted their judgment on behalf of children without determining what position those children would have wanted the drafters to take.

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[56] *Id.* at § 14 cmt.

[57] The Advisor determines whether to maintain confidentiality unless other laws of the state apply. *Id.* at § 14(5).

[58] Memorandum from The National Association of Counsel for Children to NCCUSL (June 15, 2005) (on file with author).

[59] NCCUSL draft, *supra* note 17, at Prefatory Note.

[60] *See supra* note 25 and accompanying text.