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THE ETHICS OF EFFECTIVE ADVOCACY FOR CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS

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I. INTRODUCTION

II. BACKGROUND
   A. Historical Development of the Practice of Law for Children
   B. Process and Law of the Dependency Case
   C. The Role of Counsel Debate
   D. Standards and Recommendations for the Representation of Children

III. REPRESENTATION OF THE DIMINISHED CAPACITY CLIENT
   A. Model Rules
   B. Representation of Elderly Clients
   C. Representation of Criminal Defendants

IV. EFFECTIVE REPRESENTATION OF CHILDREN IN DEPENDENCY PROCEEDINGS
   A. Determination of Capacity
   B. Respect for the Child’s Voice and Autonomy
   C. The Lawyer’s Duties
      1. Communication
      2. Investigation
      3. Protection of Legal Rights
   D. Case Exemplars
      1. The Child Who Lacks Capacity
      2. The Child Whose Position is Not in His or Her Best Interest

V. CONCLUSION

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I. INTRODUCTION

When a child enters the juvenile court system upon allegations of abuse and neglect, his life is in enormous turmoil. The decisions made have a profound impact upon every aspect of his life: where he lives, where he attends school, what contact he has with his family. Such a child needs a lawyer who can advise him, advocate for him, and protect his legal rights.1

Lawyers, who represent children in abuse and neglect proceedings, face ambiguities in the role they are to assume and the manner in which they must confront ethical issues that arise during the course of representation.2 Lawyers are often instructed to represent children as guardians ad litem and make recommendations to the court about the children’s best interests, without necessarily giving weight to the children’s opinions.3 In doing so, lawyers tend to bypass the ethical and professional rules that govern the lawyer-client relationship and are unable to effectively advocate for the child client’s legal rights.4

Preconceptions about children’s lack of capacity have led to a paternalistic approach to the representation of children. Our legal system assumes that children, in general, are incapable of rational decision-making. The common presumption is that children do not know what is in their best interests and that they often desire outcomes that conflict with what would be in their best interests. This may be true under some circumstances, but not all. In many cases, if not the majority, children can communicate with their lawyers, understand their options, and assist their advocates. In addition, when lawyers function in their traditional roles as advocates, they can assist the child clients in the comprehension of factual and legal issues involved in their cases and thereby facilitate the decision-making process.

Children involved in the court system need true legal advocacy in the form of the traditional lawyer-client model.5 Lawyers who take on the advocate role must operate within the ethical rules set forth by the profession. When faced with the task of representing diminished capacity clients, lawyers should look to the governing rules of professional conduct and represent their clients within that framework. This article addresses dilemmas lawyers face when representing children in abuse and neglect

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3 Sobie, supra note ___ at 752-753; Ventrell, supra note ___ at 267.
4 Valentine, supra note ___ at 1070-1071; Ventrell, supra note ___ at 268-269.
5 Ventrell, supra note ___ at 260.
THE ETHICS OF EFFECTIVE ADVOCACY FOR CHILDREN

proceedings and how lawyers can effectively advocate for their child clients.

Part II provides background on the history of child representation, the procedures and legal principles that govern juvenile dependency proceedings, the ongoing debate about the role of counsel for children, and the standards promulgated by various professional associations to address the representation of children in dependency proceedings. Part III discusses the representation of the diminished capacity client under the model rules and in the areas of elder law and criminal defense law. Part IV discusses how lawyers can effectively represent children in dependency proceedings with reference to specific case scenarios. The article concludes by addressing the importance of advocacy for children in dependency proceedings.

II. BACKGROUND

In recent years, it has been estimated that 700,000 children are victims of abuse and neglect annually.6 Approximately two-thirds of those children are placed in foster care.7 Many children are moved several times from placement to placement while in foster care, resulting in a lack of permanency.8 Child development research indicates that the consequences of child abuse and neglect can be quite severe, physically, psychologically and behaviorally.9 Children suffer detrimental effects not only from the abuse and neglect itself, but also from languishing in long-term foster care and separation from families.10

Abuse and neglect allegations lead to juvenile court proceedings where lawyers represent state agencies and parents, and advocate their respective positions. The appointment of counsel for children in these proceedings has developed in recent years. Lawyers for children in such proceedings can also advocate for the child’s positions and for protection of children’s legal

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7 Id.
8 DONALD N. DUQUETTE & ANN M. HARALAMBIE, CHILD WELFARE LAW AND PRACTICE, 169 (2d ed. 2010).
THE ETHICS OF EFFECTIVE ADVOCACY FOR CHILDREN

rights and interests including protection from further harm, preservation of
the family unit, and speedy resolution of cases.11 The likelihood of just
outcomes for children improves when children are represented by counsel.12

The need for effective advocacy for children is compelling. Effective
outcomes for children in the child welfare system depend upon the
recognition that children have legal rights and need legal counsel to
advocate for those rights.13 While courts and legislatures have taken steps
since the nineteenth century to protect children and address their needs, the
development of rights for children in legal proceedings has been slow.14

The status of children has evolved from the sixteenth century view of
children as chattel, to the nineteenth century view of children as welfare
recipients in need of saving, to the current view of children as rights-bearing
individuals.15 Children viewed as property received no legal services and
had no legal rights.16 Children as welfare recipients received services based
upon the state’s paternalistic view of what was best for them.17 When
viewed as rights-bearing individuals, children are positioned to receive
independent legal counsel who works to protect legal rights and give voice
to the child’s preferences.18

The role of counsel for children in dependency proceedings, however,
continues to be the subject of debate.19 The issue centers on whether the
child’s lawyer should function as a traditional advocate in compliance with
the Model Rules of Professional Conduct (MRPC) or whether the lawyer
should take on the paternalistic function of a guardian ad litem. Discussion
of the historical development of child representation provides the
framework for fully understanding the debate about the role of counsel.

A. Historical Development of the Practice of Law for Children

Prior to the nineteenth century, children were considered property of
their parents and the state refrained from interference with family life.20

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11 Sobie, supra note ___ at ____.
12 Erik Pitchal, Children’s Constitutional Right to Counsel in Dependency Cases, 15
13 DUQUETTE & HARALAMBIE, supra note ___, at 197.
14 Sandra Keen McGlothlin, No More "Rag Dolls in the Corner": A Proposal to Give
Children in Custody Disputes A Voice, Respect, Dignity and Hope, 11 J. L. & FAM.
15 DUQUETTE & HARALAMBIE, supra note ___, at 165.
16 Id.
17 Id.
18 Id.
19 See Suparna Malempati, Beyond Paternalism: The Role of Counsel for Children in
20 Ventrell, supra note ____ at 260.
The Ethics of Effective Advocacy for Children

Post-Civil War industrialization led to a rise in social conscience and to the “child savers” movement that promoted protection of impoverished or neglected children. This movement was based upon the concept of parens patriae, which refers to the sovereign power of the state to act as guardian of persons with disabilities, including children. The child savers advocated for the improvement of the lives of children, who were subject to abuse and neglect. Eventually, the legal system responded and created the first juvenile court system in 1899.

During this era of the early juvenile courts, cases were heard in the form of informal summary adjudications and children remained without legal rights. The parens patriae doctrine allowed the courts to interfere into family life and to make decisions about the welfare of the child, but without regard for the child’s point of view and without recognition of the child’s legal right to protection.

In the twentieth century, child abuse gained recognition as a significant societal problem and led to state child protection laws. In 1967, children’s legal rights came into recognition with the U.S. Supreme Court’s decision in In re Gault. There, the Supreme Court established constitutional due process rights in juvenile courts for children accused of committing crimes. The decision led to the recognition of children as independent persons and not merely property of their parents. In addition, as a result of In re Gault, juvenile courts began appointing legal counsel not only for children in delinquency matters, but also in dependency cases.

The role of counsel, however, developed differently for children in dependency proceedings. Those children did not gain a constitutionally recognized right to counsel through the In re Gault decision. The Supreme Court limited its holding to delinquency matters and did not address other proceedings involving children.

Subsequently, in 1974, Congress enacted legislation that was designed to assist in the prevention of child abuse and that addressed the representation of children in dependency proceedings. The Child Abuse

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21 Id. at 262; Sobie, supra note ___ at 748.
22 Ventrell, supra note ___, at 262.
23 McGothlin, supra note ____, at 70.
24 Id.
25 Sobie, supra note ___, at 749-50.
26 Id.
27 Ventrell, supra note ___, at 264-65.
28 Id.: In re Gault, 387 U.S.1 (1967).
29 In re Gault, 387 U.S. at ___.
30 Ventrell, supra note ____, at 267.
31 Id.
32 In re Gault, 387 U.S. at ___.
Prevention and Treatment Act (CAPTA) conditions the receipt of federal funding upon the appointment by states of representatives for children in dependency proceedings.\textsuperscript{33} CAPTA mandates the appointment of a guardian \textit{ad litem} who makes a recommendation to the court about the best interests of the child.\textsuperscript{34} CAPTA permits the guardian \textit{ad litem} be a lawyer, but does not require this.\textsuperscript{35}

The CAPTA representative provided to children in dependency proceedings differs from the independent legal counsel provided to children in delinquency proceedings pursuant to the mandate of \textit{In re Gault}. Lawyers appointed to represent children in dependency proceedings are often instructed to assume the role of a guardian \textit{ad litem}, as opposed to the role of a traditional lawyer.\textsuperscript{36}

The role of counsel for children has, thus, developed upon two diverging paths. The role of the lawyer for the delinquent child is clearly that of a traditional advocate who gives voice to the client’s position and protects legal rights.\textsuperscript{37} The role of the lawyer for dependent children is unclear and inconsistent across states.\textsuperscript{38}

\section*{B. Process and Law of the Dependency Case}

The dependency case begins with the report of abuse or neglect of a child to the state welfare agency.\textsuperscript{39} The agency makes an initial determination of whether to remove the child from the home for safety reasons and then whether to file a petition in juvenile court.\textsuperscript{40} When the juvenile court receives a filing, it decides first, whether the child has suffered abuse or neglect and second, where the child should be placed.\textsuperscript{41}

\begin{footnotesize}
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  \item \textsuperscript{33} 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010).
  \item \textsuperscript{34}  \textit{Id.}
  \item \textsuperscript{35}  \textit{Id.}
  \item \textsuperscript{36}  Malempati, \textit{supra} note ___ at 99.
  \item \textsuperscript{39}  \textit{Duoquette \& Haralambie, supra} note ___, at ____.
  \item \textsuperscript{40}  \textit{Id. at} ___.
  \item \textsuperscript{41}  \textit{Id. at} ___.
\end{itemize}
\end{footnotesize}
preponderance of the evidence or a clear and convincing standard.\textsuperscript{42} The burden of proof rests with the party, generally the state agency, which filed the petition and made the allegation of abuse or neglect. This first step operates in many aspects as a traditional trial although the threshold for finding a child dependent is low and often times the determination is uncontested by the parents.\textsuperscript{43} The second phase of the proceedings concerns placement and may involve numerous hearing over the course of months and years.\textsuperscript{44} At issue is the placement of the child while the parents are provided an opportunity to correct the offending behavior. For example, a finding of dependency could be based upon neglect due to lack of proper food, clothing, and shelter. Once the finding is made, the law allows the parents to make appropriate living arrangements in order to receive return of the child to the home. The cases can become quite complex, however, depending on the individual circumstances of the family. Some parents may have drug addiction issues which take much longer to resolve. The placement of the child while such matters are addressed is the primary issue, but just as important are the child’s safety, well-being, educational needs, and contact with family members.

In making determinations about placement, the court is bound to follow two guiding principles: preservation of the family unit and the best interests of the child. The principle of family preservation originates in federal legislation which recognized that integrity of the family unit is a critical objective for the well-being of children.\textsuperscript{45} Federal law also requires state agencies to make reasonable efforts to preserve and reunify families.\textsuperscript{46}

The “best interests of the child” is a principle that governs many of the court determinations in a dependency case after the initial finding that the child is an abused or neglected child. The current juvenile court process is designed to focus on the safety and well-being of child and to consider the best interests of the child in many of its decisions.\textsuperscript{47}

Lawyers who represent parties in juvenile dependency proceedings work to present evidence and argue on behalf of their respective clients’ positions. They must do so with the understanding that the court makes determinations that are in the best interests of the child and that preserve the family unit.

\textsuperscript{43} Similar to many criminal cases where defendants enter guilty pleas, many parents in dependency cases do not contest the allegation at the adjudication phase and subsequently work to regain placement of the child.
\textsuperscript{44} D\textsc{U}QUETTE & H\textsc{A}RALAMBIE, \textit{supra} note \textsc{____}, at \textsc{____}.
\textsuperscript{45} D\textsc{U}QUETTE & H\textsc{A}RALAMBIE, \textit{supra} note \textsc{____}, at 195; Adoption and Safe Families Act.
\textsuperscript{46} 42 U.S.C. § 671 (2010).
\textsuperscript{47} D\textsc{U}QUETTE & H\textsc{A}RALAMBIE, \textit{supra} note \textsc{____}, at 194.
In addition, just as lawyers for parents seek to preserve parental rights and autonomy, lawyers for children must seek to preserve children’s rights to health, safety, and least restrictive alternatives.\textsuperscript{48} When children are in the custody of state welfare agencies, their liberty interests are at stake.\textsuperscript{49} State agencies may place children in foster homes, with relatives, with parents, or in more restrictive environments, such as group homes or juvenile facilities. The placement of the child is often the most difficult issue addressed in court proceedings and the lawyer must not only be aware of the consequences of the placement, but must advocate for the outcome that would be most in accord with the child’s point of view.

\textbf{C. The Role of Counsel Debate}

In dependency proceedings, as mentioned above, the role of counsel for the child has been and continues to be controversial among scholars and professionals.\textsuperscript{50} The debate centers on whether the attorney should act as a lawyer in the traditional sense, taking direction from the client and advocating for the client’s counseled position, or whether the attorney should act as a guardian \textit{ad litem}, substituting judgment for the client about the outcome that would, in the lawyer’s view, be in his best interests.

The guardian \textit{ad litem} model of representation gains support, in large part, based upon the notion that children cannot assist their counsel or meaningfully participate in their cases. When lawyers are directed to represent the best interests of children, they function as guardians \textit{ad litem} or social workers.\textsuperscript{51} In this role, they serve as officers of the court. Generally, guardians \textit{ad litem} investigate the case, make a conclusion about the outcome that would be in the child’s best interest, and make recommendations to the court.\textsuperscript{52} The guardian \textit{ad litem} owes a duty to the court, not to the client.\textsuperscript{53}

Proponents of the traditional attorney model argue that the child’s voice

\textsuperscript{48} Sobie, \textit{supra} note ____ at ____.


\textsuperscript{52} Id.

\textsuperscript{53} Id.
should be heard in the proceedings and that client-directed lawyers are better able to protect the legal rights of the child.\textsuperscript{54} In a traditional lawyer-client relationship, the lawyer must abide by the client’s stated preferences and objectives that are based on information and counseling provided by the attorney.\textsuperscript{55} The lawyer may not substitute his judgment and abrogate a client’s stated goals, even in situations where the lawyer regards the client’s position as erroneous or unsuitable.\textsuperscript{56} The dilemma occurs when the lawyer disagrees with the client and takes on a paternalistic view. Paternalism allows the attorney to use the guardian \textit{ad litem} role as authority to vitiate a client’s stated positions.\textsuperscript{57}

The controversy among the competing roles for attorneys in the dependency arena results in role confusion and a lack of uniformity in the manner in which children are represented.\textsuperscript{58} Such confusion and disparity leads to ineffective and inconsistent representation of children.\textsuperscript{59} Lawyers must have clear directives about their role as counsel in order to provide effective representation.\textsuperscript{60} How the lawyer proceeds in a particular case is dependent upon how his role is defined.\textsuperscript{61}

If lawyers are to be involved in the representation of children in dependency proceedings, their role must be clear. To be effective, lawyers should be lawyers and should not attempt to act as social workers or guardians \textit{ad litem}. Lawyers should not make decisions without consulting their clients.\textsuperscript{62} Lawyers should avoid the tendency to take on a paternalistic, or substituted judgment, approach to the representation of clients with diminished capacity.\textsuperscript{63}

The primary dilemmas occur when the child is too young to communicate with her lawyer or when the child seeks an outcome that may not be in her best interest. When lawyers confront such dilemmas in other areas of practice, they must look to the Model Rules of Professional Conduct (MRPC) for guidance. Standards promulgated by professional

\textsuperscript{54} See Malempati, \textit{supra} note ____ at ____.
\textsuperscript{55} J\textsc{ean} K\textsc{oh} P\textsc{eters}, \textsc{Representing the Child in Child Protective Proceedings: Ethical and Practical Dimensions}, 127 (International 3d ed, 2007).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Bernabe, \textit{supra} note ____ at ____.
\textsuperscript{59} See Malempati, \textit{supra} note ____ at ____.
\textsuperscript{60} Ventrell, \textit{supra} note ____ at ____.
\textsuperscript{63} David A. Green, “I’m Ok-You’re Ok”: \textit{Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” with a Client with a Mental Disability}, 28 J. LEGAL PROF. 65, 92 (2003-04).
associations can also assist the lawyer in defining his role.

D. Standards and Recommendations for the Representation of Children

In 1996, the American Bar Association issued standards of practice for lawyers representing children in abuse and neglect proceedings.\(^6^4\) The ABA standards define the role of the child’s attorney as a traditional lawyer who advocates for the stated positions of the child client, provides legal services, and owes duties of confidentiality and competency to the child client.\(^6^5\) The ABA Standards acknowledge that lawyers may be appointed as guardians *ad litem* but express a strong preference for the traditional attorney role.\(^6^6\)

The ABA Standards generally provide that attorneys for children share the same duties and obligations as lawyers who represent adults.\(^6^7\) For example, lawyers for children must investigates cases by obtaining copies of all relevant records, participate in court proceedings and zealously advocate for the legal rights of the child clients.\(^6^8\) In addition, a lawyer is bound by the child’s stated preferences and should maintain client confidentiality. In eliciting the child’s preferences, these standards provide that the lawyer should communicate in a developmentally appropriate manner and explain the relevant facts and law to the child.\(^6^9\) The standards also caution against usurping the child’s will.\(^7^0\) The ABA recognizes that the tendency toward paternalism is strong when a child’s objective may put her in harm’s way. In response, the standards emphasize the lawyer’s role as advisor and counselor, and propose that the lawyer take time to establish rapport and trust within the lawyer-client relationship.\(^7^1\)

In addition, in order to ascertain a complete understanding of the child’s situation and goals, the lawyer may have to consult with the child’s therapist, social worker, family members, teachers, and others involved in the care and life of the child. The lawyer will also likely have to review records from all such sources.

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\(^{65}\) *Id.* at Standard A-1.

\(^{66}\) *Id.* at Preface.

\(^{67}\) *Id.* at Standard A-1.

\(^{68}\) *Id.* at Standard B-1 and Commentary.

\(^{69}\) *Id.* at Cmt. B-4.

\(^{70}\) *Id.*

\(^{71}\) *Id.*
At about the same time that the ABA issued standards for lawyers in abuse and neglect proceedings, leading scholars convened at Fordham University and issued recommendations on the ethical representation of children.\(^{72}\) Ten years later, the University of Nevada Las Vegas held another conference, which also issued recommendations on the representation of children.\(^{73}\) Both the Fordham and UNLV recommendations support a traditional lawyer-client model of representation for children. They also emphasize that the attorney should take measures to help the child understand the situation and formulate a position.

The National Association of Counsel for Children (NACC) also sets forth recommendations for the representation of children in abuse and neglect proceedings.\(^{74}\) The NACC Recommendations acknowledge the existence of the two models of representation in the dependency area and provide guidance to lawyers regardless of the role in which they find themselves. The NACC, similar to the ABA Standards and the Fordham and UNLV Recommendations, calls for attorneys to present the child clients’ positions, maintain confidentiality of communications, and be involved in all phases of the litigation process.

Although the ABA standards provide guidance to lawyers for children, competing guidelines exist. For example, the Uniform Law Commission issued an act which recommended that attorneys who represent children in abuse and neglect matters should represent the child’s best interest as opposed to the child’s stated positions.\(^{75}\)

Additionally, state laws vary on the appointment of lawyers for children, with many states appointing guardians ad litem and a few states appointing attorneys as traditional advocates.\(^{76}\) The majority of states appoint attorneys to function as guardians ad litem without distinguishing the ethical obligations of the lawyer from the professional responsibilities of the guardian ad litem.\(^{77}\)

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\(^{73}\) Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, 6 NEV. L.J. 592 (2006) [Hereinafter UNLV Recommendations].


\(^{75}\) Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, 42 FAM. L. Q. 1, 10 (2008).

\(^{76}\) First Star Report.

\(^{77}\) Id.
The lawyer for the child in dependency proceedings receives conflicting directives about the goals of representation. If the goal is to make an objective recommendation to the court about the best interests of the child, the lawyer functions as an arm of the court and not a lawyer with ethical obligations to the child client. On the other hand, if the goal is traditional advocacy for the child client, the lawyer must operate within the rules of professional conduct that govern all lawyers.

III. REPRESENTATION OF THE DIMINISHED CAPACITY CLIENT

When lawyers for children in juvenile court abuse and neglect proceedings are instructed to take on the role of a guardian ad litem, the ethical obligations to the client become unclear. The primary rationale for the hybrid role for counsel is the assumption that children lack capacity to assist their counsel. Adults assume that children cannot make decisions about their situations and thereby discount children’s voices. The law also presumes children to be incompetent and the guardian ad litem role allows the attorney substitute his judgment for the child. The presumption of incompetency justifies the paternalistic approach. However, the status of being a minor does not automatically confer the status of diminished capacity such as to relieve the attorney from complying with the ethical obligations imposed by the MRPC.

The most common approach in cases of child abuse and neglect is for the lawyer to substitute his judgment for that of the child. The lawyer who is instructed to perform as a guardian ad litem investigates the case, makes a determination about the best interests of the child, and presents that recommendation to the court. The child’s preference is simply one of several factors the lawyer guardian ad litem will consider in reaching a best interest determination. The lawyer guardian ad litem is not necessarily required to adhere to the mandates of the MRPC in representing the child. The lawyer is not required to maintain confidentiality, give voice to the child’s preferences in court proceedings, or advocate for the child’s preferences. Lawyers for children can, however, provide effective

78 Bernabe, supra note ___ at ___.
80 Ventrell, supra note ___ at 268.
81 Bernabe, supra note ___ at ___.
83 Id.; See e.g., In the Interest of W.L.H., 739 S.E.2d 322, 323 (Ga. 2013); In the
representation to diminished capacity clients without substituting their judgment.® The question of how a lawyer can function as a traditional advocate when representing children gains guidance from the practice of law in other areas. Lawyers who represent elderly clients or defendants in criminal cases routinely face situations of diminished capacity clients. Following is a discussion of the MRPC pertaining to representation in situations involving clients with diminished capacity, and more specifically, the representation of elderly clients and criminal defendants.

A. Model Rules

Lawyers often deal with clients who are mentally, physically or developmentally disabled.® When faced with a client who lacks capacity to communicate or to make decisions, lawyers must first turn to MRPC 1.14.® Part (a) of the Rule states:

When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.®

The commentary to the rule does not specify or define a “normal client-lawyer relationship”.® However, the commentary indicates that the lawyer should maintain communication with the client, have family members or other persons participate in discussions and keep the client’s interests at the forefront.® The Rule and commentary also do not provide much specific guidance to the lawyer who faces the situation of an impaired client.® This lack of specificity in the Model Rules often leads to a departure from the traditional attorney role toward a substituted judgment model. Lawyers can interpret the MRPC to provide unchecked power in the attorney-client relationship to diminished capacity clients without substituting their judgment.®

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® See Peters, supra note ___ at ___.
® Id.
® Id.
Lawyers can use the vagueness of the rule to shed the traditional lawyer role and adopt a paternalistic best interest role through which they use their judgments to make decisions for the client.  Despite the seeming failure of Rule 1.14 in establishing clear procedures, lawyers can glean substantive guidance from the rule and be effective advocates for diminished capacity clients within the traditional lawyer role. In doing so, lawyers must understand that their responsibilities to their clients do not change when the clients have a mental impairments or disabilities.

Pursuant to the preamble of the MRPC, the lawyer is a “representative” of the clients. In that role, the lawyer must inform the client of his or her legal rights and obligations, as well as the practical implications of those rights and obligations. The lawyer must continue to advocate for the client’s position and seek a result advantageous to the client. Lawyers should maintain communication with clients regarding the representation and maintain the confidentiality of client communication and information. When representing a client who lacks capacity, the lawyer must adhere to such aspects of lawyering which form the basis of a “normal lawyer-client relationship”.

Model Rule 1.14 directs the lawyer to take reasonably necessary protective action when the lawyer believes that the client has diminished capacity, is at risk of harm, or cannot adequately act in his own best interest. Such action includes consulting with third parties.

Initially, the lawyer must make the determination that the client is so impaired that a normal lawyer-client relationship is not possible. Generally, impairment can be determined by the client’s ability to understand, deliberate and reach conclusions about matters relevant to the legal issue. However, lawyers cannot jump to conclusions about the client’s capacity. An individual’s awareness and ability to comprehend may change over time.

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91 Bray & Ensley, supra note ___, at 330.
92 Id.
93 Id. at 348; Fleming & Morgan, supra note ___, at 746.
94 Green, supra note ___, at 66.
95 ABA Model R. Prof. Conduct Preamble 1.
96 Id.
97 Id.
98 Id.
99 MRPC 1.14(b).
100 Id.
101 Bray & Ensley, supra note ___, at 333.
102 Id.
103 Id. at 335-337.
diminished capacity often have the ability to understand, deliberate upon and reach conclusions about matters affecting their own well-being.\textsuperscript{104} For example, children as young as five or six years of age can have opinions that are entitled to weight in legal matters concerning their own custody.\textsuperscript{105}

If a client is impaired to the extent that a normal lawyer-client relationship is not possible, the attorney can seek the appointment of a guardian \textit{ad litem}.\textsuperscript{106} However, the mere fact that a client \textit{may} demonstrate diminished capacity in some form does not automatically require the attorney to cease representation and seek the appointment of a guardian \textit{ad litem}.\textsuperscript{107} The commentary to MRPC 1.14 recognize that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being”.\textsuperscript{108} Attorneys must make diligent efforts to communicate with their impaired clients in a manner which facilitates their understanding of the legal issues.\textsuperscript{109} For example, the lawyer may have to meet with the client multiple times, speak slowly, ask open-ended and explain matters in basic terms rather than legal jargon.\textsuperscript{110} Lawyers may also need to consult with family members in order to gain a full understanding of the client’s concerns.\textsuperscript{111}

Lawyers often confront the situation of representing an impaired client in areas of practice outside of the juvenile dependency context, particularly in cases involving elderly clients and in cases involving persons accused of criminal conduct. The manner in which lawyers routinely handle diminished capacity clients in such contexts can provide guidance to lawyers for children.

\textbf{B. Representation of Elderly Clients}

Elder law attorneys deal with issues of diminished capacity or diminishing capacity of clients on a regular basis.\textsuperscript{112} Professors Morgan and Flowers emphasize that the elder law attorney should not substitute her

\begin{itemize}
\item \textsuperscript{104} MRPC 1.14 cmt 1.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} MRPC 1.14(b)
\item \textsuperscript{107} See MRPC 1.14.
\item \textsuperscript{108} MRPC 1.14 cmt. 1.
\item \textsuperscript{109} Fleming & Morgan, \textit{supra} note 
\item \textsuperscript{110} Fleming & Morgan, \textit{supra} note 
\item \textsuperscript{112} Rebecca C. Morgan & Roberta K. Flowers, \textit{ETHICS IN THE PRACTICE OF ELDER LAW}, 124 (ABA 2013)
\end{itemize}
judgment for that of the client because the client retains the right to make decisions about the matter.\textsuperscript{113} They recommend adherence to the rules and standards set forth in MRPC 1.14\textsuperscript{114} and discuss how the MRPC provide guidance to the elder attorney in dealing with diminished capacity clients.

Initially, the lawyer must determine the extent to which the client is impaired and whether the client is incapable of making decisions.\textsuperscript{115} Elder law attorneys are guided by the National Association of Elder Law Attorneys (NAELA) Aspirational Standards.\textsuperscript{116} The NAELA standards recommend a holistic approach to the representation of diminished capacity clients.\textsuperscript{117} In addition, the elder law attorney has the obligation to evaluate whether the client has the capacity to make legal decisions.\textsuperscript{118}

As explained above, MRPC 1.14 requires the attorney to maintain a normal client-lawyer relationship to the extent possible. The “normal client-lawyer relationship” involves the ability of the client to define the scope of the representation and the lawyer’s adherence to the core values of the attorney/client relationship, including communication (MRPC 1.4), confidentiality (MRPC 1.6) and commitment to the client (MRPC 1.7).\textsuperscript{119} Professors Morgan and Flowers explain that capacity is not static and changes.\textsuperscript{120} They instruct attorneys to take measures to improve the comprehension and decision-making capabilities of the diminished capacity clients. For example, attorneys must recognize the difference between diminished capacity and erratic behavior, and not be quick to presume incapacity based upon poor judgment or forgetfulness.\textsuperscript{121}

Attorneys must provide the same level of respect and attention to diminished capacity clients as they do to other clients.\textsuperscript{122} In doing so, attorneys must adhere to the mandates of the MRPC. Communication with the client plays a critical role in the “normal client-lawyer relationship”, pursuant to MRPC 1.4. Attorneys must communicate effectively with their clients and provide them with sufficient information to make informed decisions. In order to facilitate communication, the attorney for the elderly diminished capacity client must pay attention to the environment, to the interview process and to the method of communication. Attorneys may have to involve third parties, such as family members, counselors, or

\textsuperscript{113} Id. at 128.
\textsuperscript{114} Id. at 130.
\textsuperscript{115} Id. at 127.
\textsuperscript{116} NAELA Aspirational Standards
\textsuperscript{117} Id. at Standard D.2; see also, Morgan & Flowers, supra note \textsuperscript{___}, at 133.
\textsuperscript{118} Morgan & Flowers, supra note \textsuperscript{___}, at 133.
\textsuperscript{119} Id. at 129.
\textsuperscript{120} Id. at 131.
\textsuperscript{121} Id. at 132-33.
\textsuperscript{122} Id. at 130.
medical personnel to facilitate communication and understanding on the part of the client. The goal of the communication process between lawyer and the diminished capacity client should be to maximize the client’s capacity.\(^{123}\)

In addition, the representation of the diminished capacity client should be guided by the clients’ needs and desires.\(^{124}\) Model Rule 1.2 provides that the client determines the objectives of the representation.\(^{125}\) Nevertheless, the attorney retains the obligation to determine the means by which the client’s objectives are accomplished.\(^{126}\)

C. Representation of Criminal Defendants

Lawyers for criminal defendants also routinely face difficult ethical issues and uncertainty in representing their clients.\(^{127}\) In the context of criminal defense, the lawyer’s duty is to be a zealous advocate for the client within the confines of the law.\(^{128}\) Criminal defense lawyers generally prioritize commitment and loyalty to the client above all else.\(^{129}\) This role becomes ethically complex when the client suffers from diminished capacity.\(^{130}\) When a criminal defendant suffers from mental impairment or diminished capacity, the lawyer faces the dilemma of whether to continue with an advocacy role or take on a paternalistic approach to the representation.\(^{131}\)

In an adversarial system, the client’s autonomy is considered paramount.\(^{132}\) The client’s right to make decisions about the goals of representation is not only required by the rules of professional conduct, but also fundamental to due process protections afforded in criminal defense cases.\(^{133}\) Adequate legal representation is a corollary to the protection of the legal rights of criminal defendants.\(^{134}\) Thus, the attorney must navigate the often unclear path between allowing the client control over the litigation

\(^{123}\) Id. at 142.
\(^{124}\) Id. at 139.
\(^{125}\) MRPC 1.2.
\(^{126}\) Id. at 144; See also Green, supra note ___, at 82.
\(^{128}\) Id.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id. at 73-74.
\(^{133}\) Id. at 1619.
process and the attorney’s own duty to provide effective representation and serve the best interests of the client.\textsuperscript{135}

Added to this controversial issue is the duty of candor to the court. The defense lawyer must balance the obligation to inform the court of concerns regarding the client’s competence against the obligation to protect the client’s confidences.\textsuperscript{136} Criminal defendants must be legally competent in order to stand trial.\textsuperscript{137} They must have a rational understanding of the proceedings against them and be capable of assisting their counsel.\textsuperscript{138} This requirement is rooted in the due process protections afforded to criminal defendants.\textsuperscript{139}

Several commentators suggest that defense attorneys have an obligation to inform the court whenever issues of competency are present.\textsuperscript{140} This would, often times, require attorneys to place the obligation of candor to the court above other ethical obligations, such as client confidentiality.

However, competency in the criminal context is not an all-or-nothing concept.\textsuperscript{141} Many mentally impaired defendants are capable of understanding the proceedings and communicating with their counsel, and thus, are legally competent to stand trial.\textsuperscript{142} When a client is clearly incapable of functioning or when a mental health expert deems a client to be incompetent, the criminal defense lawyer has little choice but to raise the competency issue before the court. The result is generally a competency hearing during which the fact-finder determines whether or not the defendant is competent to stand trial.

The dilemma for the criminal defense attorney occurs when the client has some mental impairment or deficiency which affects the client’s rational thinking and decision-making. Not all such cases require the lawyer to raise the competency issue with the court. For example, if a defendant faces a minor charge with minor consequences, a competency hearing might result in a greater restriction on his liberty. A defendant may end up in a mental health facility for a much longer period of time than if he simply enters a guilty plea to a minor offense.\textsuperscript{143} In addition, a defendant may not want his attorney to raise the issue of competency during the case.

\begin{footnotes}
\footnoteref{136} \textit{Id.} at 215.
\footnoteref{138} \textit{Id.}
\footnoteref{140} King, \textit{supra note }\_\_\_, at 234; Cohen, \textit{supra note }\_\_\_, at 532-33.
\footnoteref{141} Slobogin & Mashburn, \textit{supra note }\_\_\_, at 1586.
\footnoteref{142} Uphoff, \textit{supra note }\_\_\_, at 70.
\footnoteref{143} Uphoff, \textit{supra note }\_\_\_, at 72; King, \textit{supra note }\_\_\_, at 239.
\end{footnotes}
What is clear in the area of criminaldefense is that the lawyer should respect the client’s autonomy and should adhere to the ethical obligations of maintaining client confidentiality and engaging in advocacy for the client’s wishes. Many commentators oppose a form of paternalistic representation of the mentally impaired client.144

Professor Uphoff argues that the lawyer’s duty to the court should not override the lawyer’s duty to zealously advocate for the client’s wishes.145 Uphoff critiques Standard 7-4.2 of the ABA Standards for Criminal Justice which requires the criminal defense attorney to raise competency whenever counsel has a good faith doubt about the client’s competency.146 He takes the position that defense counsel should not take on a “friend of the court” role at the expense of the advocate role.147 He emphasizes respect for the client’s autonomy and decisions throughout the course of representation.148 Counsel should discuss the competency issues with the client to determine whether to raise the issue with the court.149 Defense counsel should first make an assessment of the client’s ability to understand the proceedings and to assist counsel.150 Counsel should also assess the advantages and disadvantages to the client of raising the competency issue with the court.151

Some cases involve clients whose mental disorders interfere or impede communications with their attorneys. Individuals facing involuntary civil commitment proceedings may be delusional, incoherent or even catatonic. The role of the lawyer in such cases is to continue to act in the traditional role of counsel as a zealous advocate.152 At a civil commitment hearing, the client faces confinement in a mental health facility.153 Thus, at stake are fundamental liberty interests that require due process protection and the right to representation by a zealous advocate. 154 Professor Stone argues that the guardian ad litem model of lawyering undermines the nature of the civil commitment process.155 He proposes that the role of the attorney for the mentally ill defendant is to advocate for the liberty interests of the client.
by challenging involuntary hospitalization and by pursuing the least restrictive form of intervention.\textsuperscript{156} Even when the client is unable to communicate with the lawyer or lacks capacity to make coherent decisions, the attorney can maintain the traditional role of counsel and zealously advocate for discharge of the silent or incompetent client.\textsuperscript{157}

IV. EFFECTIVE REPRESENTATION OF CHILDREN IN DEPENDENCY PROCEEDINGS

Lawyers who function as guardians \textit{ad litem} and make recommendations to the court on behalf of a party do not necessarily comply with the ethical rules that govern lawyers or provide adequate and effective advocacy. Just as lawyers represent elderly clients and criminal defendants, lawyers for children can nevertheless operate within the MRPC and be effective advocates. To do so, lawyers must understand the parameters of child representation and their duties and obligations regarding the diminished capacity client.

A. Determination of Capacity

The determination of the client’s ability to participate in the legal process is the initial step in representing clients who may have diminished capacity. Generally, the lawyer makes the initial assessment about the client’s abilities to comprehend and make decisions about his situation. The law does not impose a single uniform standard for capacity because different decisions require varying degrees of understanding.\textsuperscript{158} Additionally, capacity does not necessarily equate with the ability to understand the nuances of the law. Although a child may not understand the legal underpinnings of the case, he may have an opinion or preference regarding some of the issues involved in the case.\textsuperscript{159} Thus, there are differing levels of capacity.\textsuperscript{160} The question of capacity must be addressed within the context of the goals of representation.\textsuperscript{161}

If the goal is to represent the child’s best interest, the standard for capacity might necessarily be high.\textsuperscript{162} The child would need to be capable

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} at 614.
\item \textsuperscript{157} \textit{Id.} at 617.
\item \textsuperscript{159} Peters, \textit{supra} note \textsuperscript{\textdegree{}}, at 128.
\item \textsuperscript{160} Knauer, \textit{supra} note \textsuperscript{\textdegree{}}, at 325-329.
\item \textsuperscript{162} \textit{Id.} at 306.
\end{itemize}
of making a “correct” decision, one which improves or furthers his situation.\(^{163}\) When the goal is to represent the client’s positions, the standard might involve whether the child has the ability to express a preference related to a particular issue.\(^{164}\)

But the ability to answer a question should not be the end of the assessment of capacity. Comprehension of information provided and of consequences of decision-making, as well as risk assessment, is part of capacity determinations. With children, the capacity to understand their situation and make rational choices depends in part on their cognitive abilities, but also depends in part on the manner in which they are engaged in communication.

The lawyer can focus on the ability of the child to engage in the decision-making process rather than the child’s ability to reach a “correct” decision.\(^{165}\) Such an approach would guard against the paternalistic tendency to decide what would be best for the child.\(^{166}\)

The problem for children’s lawyers on the capacity issue is that while adults are presumed to be competent unless declared otherwise by a court, children are presumed to lack capacity in many circumstances.\(^{167}\)

For legal purposes, capacity is synonymous with competency and is, in essence, the ability to make a decision.\(^{168}\) Capacity is determined not on absolutes, but on a varying spectrum.\(^{169}\) Children pose particular challenges because they experience changes in growth and development on a daily basis. Attorneys are appointed in dependency proceedings to represent children across the spectrum of ages. Attorneys may represent a child who initially is too young to communicate verbally or too immature to engage in decision-making, but who becomes communicative or more mature over time.

The question is how attorneys are to assess the child client’s ability to make decisions relevant to the dependency proceeding. Some commentators recommend imposing an age-based threshold. For example, several authors propose seven as the age above which children should be presumed to be competent.\(^{170}\) This age, it is proposed, is when children’s

\(^{163}\) \textit{Id.}
\(^{166}\) \textit{Id.}\n\(^{167}\) Cunningham, \textit{supra} note ___ at 285.
\(^{168}\) \textit{Id.} at 279-81.
\(^{169}\) \textit{Id.} at 281.
\(^{170}\) Martin Guggenheim, \textit{The Right to be Represented But Not Heard: Reflections on Legal Representation for Children}, 59 N.Y.U. L Rev. 76, 104-05 (1984); Ramsey, \textit{supra} note ___, at ___.
cognitive development reaches a sufficient level for rational thought. However, some children as young as age five can communicate about their preferences.\textsuperscript{171} A five-year-old child may be able to state whether she was beaten by her mother and for placement purposes, whether she has a closer relationship with her aunt or with her grandmother. These are the types of decisions an attorney can pose to the child client, rather than asking the more complex, legally conclusive questions, such as whether the parent-child relationship should be terminated.

One additional point regarding capacity is that the child’s competency is irrelevant to the issue of the child’s rights in dependency proceedings.\textsuperscript{172} The Supreme Court in \textit{In re Gault} held that fundamental due process rights applied to children in delinquency proceedings.\textsuperscript{173} The Court, however, did not discuss whether children in such proceedings had the capacity to understand or exercise those rights.\textsuperscript{174} Due process protections apply regardless of the client’s capacity.

In dependency proceedings, children are entitled to protection, safety and preservation of their family units.\textsuperscript{175} State agencies must make reasonable efforts to preserve and reunify families.\textsuperscript{176} Dependent children also have the right to least restrictive state intervention into their lives.\textsuperscript{177} Regardless of the child’s actual decision-making capacity, lawyers have the responsibility to advocate and juvenile courts have the responsibility to make determinations in light of such principles.

\textbf{B. Respect for the Child’s Voice and Autonomy}

A typical dependency proceeding in juvenile court often involves several participants, including the parents of the child, attorneys for the parents, attorney for the state welfare agency, social workers, and foster care providers. The child, whose interests and well-being are the primary issue in the case, often has no voice without an attorney.

When the child’s welfare is the subject of a legal proceeding in juvenile court, the court should consider the child’s position on matters relevant to the litigation.\textsuperscript{178} Children have significant interests at stake in dependency cases where their safety, health, well-being and family relationships hang in

\begin{footnotesize}
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\item[\textsuperscript{171}] ABA Standards
\item[\textsuperscript{172}] See Cunningham, supra note \_, at 357-59.
\item[\textsuperscript{173}] \textit{In re Gault}, 387 U.S. at \\
\item[\textsuperscript{174}] Cunningham, supra note \_, at 357-59.
\item[\textsuperscript{175}] Sobie, supra note \_, at \\
\item[\textsuperscript{176}] Adoption and Safe Families Act.
\item[\textsuperscript{177}] Sobie, supra note \_, at \\
\item[\textsuperscript{178}] Malempati, supra note \_, at \\
\end{itemize}
\end{footnotesize}
The Ethics of Effective Advocacy for Children

The balance. The consideration of the child’s position and the respect for the child’s autonomy is a clear advancement from the paternalistic approach of the child saver’s movement of the 1800’s and the early juvenile courts of the 1900’s. The current trend in the practice of law in juvenile court is to hear and consider children’s voices. The weight of scholarly opinion and professional standards also falls on the side of respecting the child’s voice and autonomy. And practically, the child’s opinion on matters relating to his own well-being should be considered.

The American legal system is fundamentally rooted in the emphasis on individual rights and autonomy of litigants. The lawyer provides the means through which individual litigants pursue and protect their legal rights. When a lawyer fails to advocate for the client’s position, he not only fails to respect the client’s autonomy but also excludes the client’s voice from consideration by the court.

Respect for an individual’s position regarding issues in his legal proceeding corresponds to and supports the respect for client autonomy. Our legal system is premised on the idea that individuals retain the right to make decisions regarding their own legal matters, regardless of the correctness of those decisions. This is reflected in the Model Rules of Professional Conduct which require lawyers to abide by the client’s decisions regarding the objectives of representation.

Thus, in general, the role of counsel in legal proceedings is to advocate the client’s position rather than to make decisions for the client. When a lawyer takes on a paternalistic approach to representing clients, they not only violate ethical rules but also diminish the client’s autonomy. The criticism of paternalistic treatment of adult clients by lawyers applies equally in the context of child clients. Allowing the client to make decisions in his case demonstrates respect for the individual, his values, and his autonomy.

B. The Lawyer’s Duties

1. Communication

Communications between the lawyer and client are governed by MRPC

\[\text{179 See e.g. Kenny A.}\]
\[\text{180 See Melissa L. Breger, Against the Dilution of a Child’s Voice in Court, 20 Ind. Int’l & Comp. L. Rev. 175 (2010).}\]
\[\text{181 Wilber, supra note ___, at ___}.\]
\[\text{182 Wilber, supra note ___, at 353.}\]
\[\text{183 MRPC 1.2.}\]
\[\text{184 Ramsey, supra note ___, at 295.}\]
\[\text{185 Id.}\]
THE ETHICS OF EFFECTIVE ADVOCACY FOR CHILDREN

1.4 which provides in part that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the case; and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.\textsuperscript{186} Lawyers must also, pursuant to MRPC 1.2 abide by the client’s decisions regarding the objectives of the representation.\textsuperscript{187} The ethical obligation of the lawyer is to allow the client to make the key decisions in a case.\textsuperscript{188} In order to make key decisions, the client must have adequate information.\textsuperscript{189} It is incumbent on the lawyer to communicate the information necessary for the client to make decisions in his or her case.

When the client is a child, effective communication in compliance with the MRPC requires the attorney to engage in age appropriate methods of speaking. A lawyer may have to spend additional time establishing a rapport and trust with a child. A lawyer may have to meet with the child in the child’s home or other location where the child is comfortable. A lawyer’s office, an interview room in the courthouse, and other formal environments may not be conducive to making a child feel comfortable and may actually add to anxiety and fear. Such locations would not be ideal or conducive settings for an attorney to have effective discussions about a child client’s case.

In addition, the lawyer may have to involve other persons to facilitate the communication process. For example, communicating with a child along with a therapist or counselor who has been working with the child is one way to ensure that the child understands and receives the information in an appropriate manner. The lawyer may need to involve or to consult separately with family members or care providers of the child.

To effectively communicate with the child client, lawyers should adopt a holistic, collaborative, and an engaged client-centered approach to representation.\textsuperscript{190} Client counseling literature proposes several models of lawyering to increase client participation in the legal process and to reduce the risk of lawyer infringement upon client autonomy.\textsuperscript{191} When the client is a child, the attorney must be cognizant of the potential for influence over

\begin{itemize}
  \item \textsuperscript{186} MRPC 1.4.
  \item \textsuperscript{187} MRPC 1.2.
  \item \textsuperscript{188} Henry Dlugacz & Christopher Wimmer, The Ethics of Representing Clients with Limited Competency In Guardianship Proceedings, 4 St. Louis U. J. Health L. & Pol'y 331, 343 (2011).
  \item \textsuperscript{189} \textit{Id.}
  \item \textsuperscript{190} See, Katherine Kruse, Fortress in the Sand: Plural Values of Client-Centered Representation, 12 CLINICAL L. REV. 369, 371 (2006).
  \item \textsuperscript{191} See Katherine Kruse, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 FORDHAM L. REV. 1655 (1996).
\end{itemize}
the child’s decisions and take efforts to appropriately communicate with the child depending on the age and circumstances. Ethical lawyering encompasses methods of communication that empower and enable the client to make choices and decisions that will impact her own life, and ultimately allow her voice to be heard in the legal proceedings.\textsuperscript{192}

2. Investigation

An essential element of adequate representation of any client involves the determination and analysis of facts and law.\textsuperscript{193} Holistic representation requires the lawyer to gain an understanding of the client's world, i.e. the context in which the legal issue or issues arose. Lawyers outside of juvenile court engage in the discovery process through which they obtain necessary documents and records that illustrate the matters in a case. In juvenile court dependency proceedings, lawyers may have some discovery processes, but often, the lawyer must obtain necessary documents and information about the child client from the state child welfare agency. The lawyer should also obtain, through subpoena power or other means, additional documents about the child such as school records, health records, and counseling records. Family members, school teachers, counselors, social workers, coaches, foster parents are all sources of information about a child's circumstances. Lawyers for children have an obligation to speak with as many people involved in the child's life as possible. In this manner, a lawyer can begin to understand the child client's world, the context within which the allegations of abuse or neglect arose, and the relationships which impact the child's life.

Lawyers for children cannot merely rely on the client's description of events or recitation of the case. Lawyers routinely must review other documents concerning the client's legal matters and speak with potential witnesses and other persons who may have information relevant to the case.

With child clients, the people who have relevant information about the client may or may not be apparent from the records and documents in the state child welfare agency's file. Lawyers cannot rely solely on the agency's caseworker to provide all necessary information. Nor can lawyers rely on the parents or other guardians to provide adequate information. Lawyers must consult with the child client, obtain information from other parties, and then seek out additional information from other sources.

The duty to investigate in a child abuse and neglect case involves resourceful thinking, patient listening, and constant legwork.

\textsuperscript{192} Id.
\textsuperscript{193} MRPC 1.1, cmt. 5.
3. Protection of Legal Rights

As discussed above, preservation of the family unit is one guiding principle in abuse and neglect proceedings. Federal law recognizes the right that family members have to live with each other. In an abuse and neglect case, where the state agency removes a child from his home, the agency must make reasonable efforts to preserve and reunify the family. Such efforts include placing the child with family members and providing visitation with family members while the child is in foster care.

The reality of the child welfare system is that many caseworkers, while well-meaning, may overlook a family member or may fail to prioritize visitation with family members. Caseworkers also face overwhelming bureaucracy to approve family members, for example, when the family members reside in a different county or jurisdiction. A typical caseworker will handle multiple cases at one time and inevitably, high caseloads lead to oversights. The lawyer for the child can step in and advocate for preservation of the family unit by requesting placement with family members and visitation with family members.

Children are also entitled to receive adequate education and health care, and to be in a safe environment while in the custody of the state agency. Lawyers for children must advocate for all these rights as well. To do so, the lawyer must regularly communicate with the child client and family members, and must understand the client’s situation. For example, if the child is taken from the home and required to attend a different school, the lawyer must ensure that child receives any educational accommodations he was receiving at the former school. If a child was receiving therapy, the lawyer must ensure that the therapy continues during state custody.

The representation of the child in abuse and neglect proceedings involves numerous challenges for the lawyer and requires the lawyer to step outside of the box of typical lawyering methodologies. With children’s cases, understanding the context, engaging in appropriate communication with the client and others involved in the child’s care, and pursuing all avenues to obtain information about the child’s situation are as important as knowledge of the law.

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194 Adoption and Safe Families Act
195 Id.
196 See Sobie, supra note ___ at 784.
197 Id. at 782-783.
D. Case Exemplars

1. The Child Whose Position is Not in His or Her Best Interest

The primary ethical dilemma inevitably raised in discussion of dependency cases is the situation of a child client seeking an objective that may place him or her in harm's way. Following are three examples of such cases. The analysis of such ethical issues is not easy with adult clients who raise similar questions when seeking objectives that may have harmful consequences. The answer, while not easy or clear in any situation, depends upon application of ethical mandates which do not permit the attorney to substitute judgment for the client as a guardian ad litem would.

Ben

Take for example, thirteen-year old Ben who lives with his mother and her boyfriend. The boyfriend beat Ben and left visible marks. Ben wants to remain in the home with his mother and the boyfriend whom he considers a father figure. The state caseworker learns that there has been a pattern of abuse against Ben by the mother's boyfriend and that the mother refuses to remove the boyfriend from the home.

The lawyer who speaks with Ben will learn that Ben wants to go home where he will likely be beaten again. A guardian ad litem could easily ignore the child's voice. A guardian ad litem could take the position that placing Ben back in the home would not be in the child's best interest and recommend to the court that he remain in foster care or placed with another family member. A guardian ad litem is not required to communicate with the Ben about his legal rights or his options under the law.

A lawyer, however, has the obligation to follow the directives of the client and to explain the law to the client. Ben's desire to return home is not surprising as most adolescents would want to be in a familiar environment, the home in which they were raised. Most adolescents would want to remain with their mothers. The lawyer's ethical obligation is discuss the situation with Ben to ascertain why Ben chooses to return home, to explain the potential harm, and to discuss alternatives. Just as ignoring the child’s voice would be adequate or effective legal representation, simply voicing Ben's stated desire to a judge would also not be adequate representation because lawyers are more than mouth-pieces for their clients.

One possibility would be to require extensive counseling and therapy for the mother and her boyfriend, and to allow Brain to return home pursuant to a protective order. The protective order would allow Ben's placement in the home on the condition that mother and boyfriend refrain
from engaging in physical violence against Ben. Violation of the protective order could lead to criminal or contempt charges for the mother and her boyfriend. Another option would be to place Ben with a family member and allow for visitation with the mother while she and her boyfriend complete counseling. A third option would be to impose a restraining order preventing mother’s boyfriend from having any contact with the child. Because such an order would require the mother to move out or have the boyfriend move out of the home, the attorney should communicate with the mother or her lawyer to determine the likelihood that she would comply. The court could also require frequent review hearings, such as at two-week intervals, until the family becomes stabilized.

In addition to conditions on the mother and boyfriend, the lawyer could speak with the parties, including the mother and the state welfare agency social workers, to determine if Ben himself is in need of services. Many children suffer from learning disorders or attention disorders that cause them to display difficult behaviors and affect their ability to respond to disciplinary strategies of adults. Enrolling Ben in an athletic program or after school tutoring may benefit him and improve his behavior and thereby, improve his relationship with the mother's boyfriend.

Anna

Another difficult example would be fifteen year old, Anna, a diabetic who lives with her alcoholic mother. Anna’s condition requires the administration of regular medication to control her diabetes. Her mother, however, is not capable of keeping up with Anna’s medical needs due to her own bouts of alcohol induced disorders. Anna’s doctors are concerned that she may enter into diabetic coma or die from lack of appropriate medication and management of her diabetes. Anna is adamant in her refusal to leave her mother. She insists that she is capable of administering her own medications and does not share the doctor’s concerns.

A guardian ad litem for Anna would easily recommend that Anna be removed from her mother's care and placed in a foster home or other placement where her diabetes medication would be properly administered.

A lawyer who communicates with Anna, however, might explore the reasons why Anna refuses to leave her mother. Anna’s lawyer could work to obtain assistance for the mother with her addiction. Anna’s lawyer should also advise her about the consequences of her stated objective and the low likelihood that a court would agree to her objectives when presented with other evidence. There may be family members willing to assist the child. There may be programs, such as in-home healthcare assistance, that would be beneficial to both Anna and her mother.
Anna needs a lawyer who will advise on her options based upon the existing facts and law. Only then can she make informed decisions about her case. Her ultimate goal may be attainable but may take patience and time to achieve.

Sarah

Sarah is six-years old and made an outcry of sexual abuse. Sarah told her maternal aunt that her step-father touched her private area. Sarah's mother refuses to believe the child and the step-father denies the allegation. Sarah has refused to repeat the allegation to anyone else and wants to return home to her mother and step-father.

Procedurally, the state agency removed Sarah from her home and placed her with a grandparent. The court upheld the removal and placement of the child at the initial probable cause hearing. The case is scheduled for an adjudicatory hearing, or trial, where the court will determine if Sarah is in fact an abuse or neglected child.

This scenario poses, in theory, one of the most difficult ethical situations for a lawyer. In practice, the standard for the determination of dependency is low - preponderance of the evidence in most jurisdictions. The burden of proof is upon the state agency. If there are other factors to support the allegation such as physical evidence, the determination for the juvenile court judge is straightforward. If the child recants the allegation or there is no other supporting evidence, the determination may be more difficult. The court will rely upon evidence of expert witnesses, such as a child psychologist. The child’s attorney should likewise become familiar with the recommendations of the professionals involved with the child and family.

The attorney owes a duty to the client and should not interject his own opinions about what did or did not occur. The attorney, however, also has an ethical obligation to investigate the facts and advise the client about the probable outcome. With a young child, the attorney cannot simply ask the child what happened in a situation of sexual abuse. The attorney must facilitate the child's understanding of the legal process through communication and consultation with the child's therapist and other professionals. The child's therapist will be able to guide the attorney in the appropriate method of communication. The attorney can also analyze the case based upon the conclusions of the professionals involved with the child.

Ultimately, the attorney may or may not be able to present evidence during the adjudication. The state agency will present evidence in support of sexual abuse and the parents will likely present evidence in defense
against such allegations. If the court determines that the child is dependent based upon the evidence presented, the subsequent issue is placement. Placement may very well be the child’s main concern because the child likely would seek return to her home and to her mother. In such a situation, the attorney can advocate for return to the home with the condition that the step-father have no contact with the child. This would involve the mother’s agreement to have the step-father move out. A no contact provision would accomplish the goal of the child and would satisfy the court about the child’s protection from possible harm. If the mother is uncooperative with such an arrangement, the court may not be willing to send the child home regardless of what an attorney for any party advocates. Family members may also provide a resource for placement and the child may be able to have regular visitation with her mother. The continued monitoring of the family’s circumstances would be paramount in a case such as this.

In the end, while there is no easy solution for the court or for the child’s attorney, the respective roles must be clear. The court will make the ultimate determination about the child’s placement. The attorney should function as a traditional advocate, communicate with the client, and advise the client based upon the law and facts.

2. The Child Who Lacks Capacity

The child who lacks capacity may present an easier situation for the lawyer. Preverbal children would not have the capacity to communicate with counsel. As discussed above, lawyers may face the situation of representing an adult who is incapable of communicating. In circumstances of clear diminished capacity, lawyers can request the appointment of a guardian ad litem. Lawyers must, however, recognize that capacity may change with time. A two year old child may become verbal and able to communicate with counsel over the course of the representation. Dependency cases generally take months or years to resolve. The initial determination by the court that the child is a dependent child is the beginning of a case, not the end.

In addition, lawyers for preverbal children can continue to protect legal rights, such as preservation of the family which includes placement with family members.

Take for example, a child who is abandoned at the hospital at birth. Certainly, because the client is clearly incapacitated, the attorney representing the newborn can ask for the appointment of a guardian ad litem. The attorney’s obligations to advocate and protect the child client’s

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198 MRPC 1.14.
legal rights and interests, however, do not cease.\(^{199}\) The attorney should continue to independently determine the client's interests and work in collaboration with the guardian \textit{ad litem}.\(^{200}\)

V. CONCLUSION

In cases of abuse and neglect, the general agreement is that children should receive just outcomes; outcomes that protect the child’s well-being and preserve the family unit to the extent possible. Agreement also exists that children need representation to effectuate just outcomes. The disagreement is the manner and mode of representation.

To require an attorney to take on a dual role as advocate and guardian \textit{ad litem} places the attorney in a position to violate the MRPC. The potential for conflict between the child’s wishes and the child’s best interests as defined in dependency law exists inevitably in every case. The best interest determination is properly a decision for the juvenile court judge.

In any legal proceeding, the judge hears from all parties before reaching a decision in the case. The judge relies upon the lawyers to present their respective client’s case. Ineffective lawyering can detrimentally impact the court’s decision, while effective representation will necessarily enhance the likelihood of just outcomes.

Lawyers cannot ethically take on a dual role to represent a party and simultaneously make a neutral determination. This duality is unacceptable in all other areas of legal practice.

In most areas of legal practice, effective representation by a lawyer means advocacy for the client’s counseled positions and protection of the client’s legal rights. This is no different when the client is a child. The condition of being a child or having diminished capacity does not justify a “kangaroo” court that undermines procedural and substantive due process.\(^{201}\) Only when attorneys function as advocates for the child or alleged incapacitated person is due process protected.\(^{202}\)

In addition, the general way to make a neutral determination would be to ignore the child’s voice or to consider the child’s voice as one of many factors. But for lawyers, the client drives the objectives of the litigation. To ignore the client’s voice is to violate the ethical rules that are central to the legal profession.

\(^{199}\) Duglacz & Wimmer, \textit{supra} note \textit{\textit{\ldots}}, at 359.

\(^{200}\) Id.


\(^{202}\) Id.
As advocates, lawyers can function in the role for which they are suited and comply with the mandates of ethical conduct that are essential to effective lawyering. While no easy answer exists to the myriad of problems an attorney will face when representing children in abuse and neglect proceedings, traditional advocacy for the child client will allow the child’s voice to be heard and the representation to be effective and ethical.