

THE CASE FOR REPRESENTATION OF CHILD VICTIMS AND WITNESSES

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The number of children forced to interact with federal and state criminal courts in the past thirty years has increased significantly. In 2005, almost 900,000 children² in the United States were the subjects of child abuse or neglect reports that were substantiated, indicated, or assessed to have occurred or at risk of occurrence.³ In the same year, 1446 children in the United States were murdered.⁴ In 1991, almost 20% of violent offenders incarcerated in state prisons committed their crimes against children, and 78% of those convicted of sexual assault were convicted of crimes against children.⁵ Half of the violent crimes committed against children involved victims age 12 or under. The U.S. Department of Health and Human Services reported in 2004 that 78% of child fatalities due to abuse, neglect or both were caused by the child's parents.⁶

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

Members of the 1982 President's Task Force on Victims of Crime were unanimous in their findings that the criminal justice system poorly served victims and needed reforms from all avenues of government and the private sector in order to provide victims with some modicum of the rights and protections constitutionally afforded defendants. The Final Report of the task

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² Children, throughout the report, are defined as persons less than 18 years of age.

³ U.S. Dept. of Health and Human Serv., Admin. for Children and Families, Statistics and Research, *Child Maltreatment 2005*, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm05/index.htm>.

⁴ U.S. Dept. of Justice, Federal Bureau of Investigation. *Crime in the United States*, annual., available at <http://www.fbi.gov/ucr/05cius/>.

⁵ Lawrence A. Greenfield, U.S. Dept. of Justice Office of Justice Programs and Office of Juvenile Justice and Delinquency Prevention, *Child Victimized: Violent Offenders and their Victims* (March, 1996) (NCJ-153258).

⁶ Administration on Children, Youth & Families, U.S. Dept. of Health and Human Services, *Child Maltreatment 2004* at xvii (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.

force declared that “only the sustained efforts of federal, state, and local governments, combined with the resources of the private sector, can restore balance to the criminal justice system.”⁷ One task force witness said of victims, “It is hard not to turn away from victims; their pain is discomfoting; their anger is embarrassing; their mutilations are upsetting.”⁸ When children are victims, their pain is more discomfoting and their victimization more upsetting. Their reactions might be so incongruous to what the average person may expect that their stories are often difficult to believe. “Perhaps no crime is more misunderstood and less adequately treated by the criminal justice system than the sexual molestation of children...there is almost a need to find that the conduct is the result of mistake, misinterpretation, or psychological aberration.”⁹ David Lloyd, Attorney in the Child Protection Unit at Children’s Hospital of the National Medical Center in Washington, D.C., observed that “[c]hild victims of crime are specially handicapped. First, the criminal justice system distrusts them, and puts special barriers in their path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.”¹⁰

The 1982 President’s Task Force on Victims of Crime Report recommended 62 reforms, including many that have been codified in state and federal jurisdictions. These include sealing victims’ addresses from defendants, establishing victims of crime compensation funds, permitting victim impact statements during the sentencing phase of trial, and adding danger to the community as a consideration at bail hearings. It also recommended giving child victims the same understanding that youthful offenders receive in the juvenile justice system.¹¹ With regard to sexual abuse offenses, Prosecutor Recommendation #8 of the Report called on prosecutors to “recognize the profound impact that crimes of sexual violence have on both child and adult victims and their families.”¹²

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

MOVEMENT TOWARD RIGHTS FOR CHILD VICTIMS AND WITNESSES

The Victims of Child Abuse Act of 1990 (VCAA), that portion of the Crime Control Act which provides specific rights and protections to child victims and witnesses, was enacted in response to “an alarming increase in reports of suspected child abuse made each year.”¹³ “To address this nationwide emergency the 1990 VCAA ... amends the United States Criminal Code to ensure protection of children’s rights in court and throughout the criminal justice system.”¹⁴

⁷ *Final Report*, 1982 President’s Task Force on Victims of Crime, page ii, (1982).

⁸ *Ibid.* at vii.

⁹ *Ibid.* at 81.

¹⁰ *Ibid.* at 51.

¹¹ *Ibid.* See Recommendation for Federal Funding #5, recommending a study be commissioned at the federal level to evaluate the juvenile justice system from the perspective of the victim.

¹² *Ibid.* at 69.

¹³ Alberto R. Gonzelez, *2005 Attorney General Guidelines for Victim and Witness Assistance* at 48, available at <http://www.usdoj.gov/olp/final.pdf>.

¹⁴ *Ibid.*

The VCAA incorporates numerous federal rights for child victims and witnesses in criminal court that can be emulated in state statutes and rules. 18 USC 3509(h), for example, provides an effective mechanism for ensuring the protection of vulnerable children by providing for the appointment of a guardian ad litem for a child victim or witness of a crime, as follows.

(h) Guardian Ad Litem.—

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

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

(3) Immunities. – A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian’s lawful duties described in paragraph (2).¹⁵

Under this federal law, the representative does not have to be an attorney. However, the rule instructs the court to “consider a prospective guardian’s background in, and familiarity with, the judicial process, social service programs, and child abuse issues.”¹⁶ Duties of the guardian ad litem appointed in federal court include attending all the “depositions, hearings, and trial proceedings in which a child participates and mak[ing] recommendations to the court concerning the welfare of the child...”¹⁷ The federal act gives the GAL the right to reports, evaluations, and records necessary to effectively advocate for the child.

In May of 2005, after the passage of the Crime Victims’ Rights Act (18 U.S.C. § 3771), the United States Attorney General updated the Attorney General Guidelines for Victim and Witness Assistance.¹⁸ Article VI of the Guidelines list those recommendations specifically focused on

¹⁵ 18 U.S.C. §3509(h) (1990).

¹⁶ *Ibid.*

¹⁷ 18 U.S.C. 3509(h)(2).

¹⁸ *2005 Attorney General Guidelines for Victim and Witness Assistance.*

child victims and witnesses, but also emphasizes that victims' rights applicable to any victims are equally important for child victims.¹⁹ The Guidelines specify that "[a]t all times, Justice Department personnel should be aware of the trauma child victims and child witnesses experience when they are forced to relive the crime during the investigation and prosecution of a criminal case, and particularly while they are testifying in court. A primary goal of such officials, therefore, shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system. To that end, Department personnel are required to provide child victims with referrals for services and should provide child witnesses with such referrals."²⁰ This provision is consistent with the Crime Victims' Rights Act, which permits victims to choose an attorney to pursue their rights in criminal court and to seek enforcement of those rights by expedited appellate review.²¹ "In the case of a crime victim who is under 18 years of age...the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter..."²² 18 U.S.C. §3771(c)(2) requires federal prosecutors to "advise the crime victim that the crime victim can seek the advice of an attorney with respect to the [substantive] rights described in [the Act]."²³ In the case of children, this right is even more significant, as children generally lack the ability to assert their own rights in any court process and even if they try, their voices are rarely heard.

The 2005 Attorney General guidelines expand upon 18 U.S.C. 3509(h), the VCAA subsection that permits the court to appoint a guardian ad litem to protect the rights and interests of the child victim or witness. "Although 18 U.S.C. 3509(h) by its terms applies only to cases in which a child is a victim of or witness to abuse or exploitation, prosecutors should consider whether moving for the appointment of a guardian *ad litem* would be appropriate in any case in which a child is a victim of or witness to a crime."²⁴ State courts have similarly expanded upon the language of victims' protection statutes, concluding that the court's "inherent powers include its ability to protect witnesses."²⁵

The Child Abuse Prevention and Treatment Act (CAPTA) requires that "in every case involving an abused or neglected child which results in judicial proceedings," states receiving CAPTA funding should "insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem to represent and protect the rights and best interests of the child."²⁶ However, few states receiving CAPTA funding appoint guardians ad litem in criminal proceedings.

California Welfare and Institutions Code section 326.5 reads:

¹⁹ *Ibid.*, VI.B.2, at 49

²⁰ *Ibid.*, VI.A. Statement of Purpose, at 48.

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

²² 18 U.S.C. § 3771(e)

²³ 18 U.S.C. §3771(c)(2)

²⁴ *2005 Attorney General Guidelines for Victim and Witness Assistance* at 48.

²⁵ *State of Florida v. Tarrago*, 800 So.2d 300 at 302 (2001); *See also Arey v. State*, 400 Md. 491, 507-509 (2007); *Wise v. State*, 708 N.W.2d 66, 69-70 (2006); *State ex rel. Fitas v. Milwaukee County*, 65 Wis. 2d 130 (1974).

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

The Judicial Council shall adopt a rule of court effective July 1, 2001, that complies with the requirement of the federal Child Abuse Prevention and Treatment Act (Public Law 93-247) for the appointment of a guardian ad litem, who may be an attorney or a court-appointed special advocate, for a child in cases in which a petition is filed based upon neglect or abuse of the child or in which a prosecution is initiated under the Penal Code arising from neglect or abuse of the child.²⁷ (Emphasis added)

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

In a move toward protection of child witnesses, the Uniform Child Witness Testimony by Alternative Methods Act was drafted by the National Conference of Commissioners on Uniform State Laws in the summer of 2002. The Act encourages states to allow for alternative means of testifying for child victims and witnesses under the age of thirteen. The Act itself contemplates a representative for the child who would be permitted to motion the court for alternative means of testimony.²⁸ To date, the Act has been adopted only in Idaho, Nevada, and Oklahoma.²⁹

A number of states have independently codified the right to a legal representative for a child victim into their statutes or state constitution. For example, Arizona Revised Statutes §13-4403(C) provides: “If the victim is a minor or vulnerable adult the victim’s parent, child or other immediate family member may exercise all of the victim’s rights on behalf of the victim. If the criminal offense is alleged against a member of the minor’s or vulnerable adult’s immediate family, the victim’s rights may not be exercised by that person but may be exercised by another member of the immediate family unless...the court finds that another person would better represent the interests of the minor...”³⁰ When, in 2004, the appointment of a representative for a child victim was challenged as not in full compliance with an Arizona statute allowing for the appointment of a representative for child victims in specified cases, the Court of Appeals of Arizona ruled that “[t]he ability of the court to appoint representatives for minor victims is not just a ‘power’ of the court, it is also a ‘right’ of victims.”³¹

A Florida criminal proceedings statute mandates appointment of a guardian ad litem or other advocate “to represent a minor in any criminal proceeding if the minor is a victim of or witness to child abuse or neglect, or if the minor is a victim of a sexual offense or a witness to a sexual offense committed against another minor.” The same statute permits appointment of a guardian ad litem “in any other criminal proceeding in which a minor is involved as either a victim or a

²⁷ California Welfare and Institutions Code § 326.5.

²⁸ The National Conference of Commissioners on Uniform State Laws, Uniform Child Witness Testimony by Alternative Methods Act, 2002, available at <http://www.law.upenn.edu/bll/ulc/ucwtbama/2002act.pdf>. The Act has also recently been introduced in Minnesota and New Mexico.

²⁹ See A Few Facts about the Uniform Child Witness Testimony by Alternative Methods Act, National Conference of Commissioners on Uniform State Laws, 2002, available at www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucwtbama.asp.

³⁰ ARS §13-4403(C).

³¹ State ex rel. Romley v. Dairman, 208 Ariz. 484, 489, 95 P. 3d 548, 553. (2004).

witness.”³² The Oklahoma Child Abuse Reporting and Prevention Act provides that “[i]n every criminal case filed pursuant to the Oklahoma Child Abuse Reporting and Prevention Act ... the judge of the district court may appoint an attorney-at-law to appear for and represent a child who is the alleged victim of child abuse or neglect.”³³ Similarly, North Carolina Superior Court Rule 7.1 provides, “[w]hen any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness.”³⁴

California Welfare and Institutions Code § 317 requires counsel for children involved in the child welfare system to “[i]nvestigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings.” The statute then mandates that the court “shall take whatever appropriate action is necessary to fully protect the interests of the child.”³⁵ Between California Welfare and Institutions Code §§317 and 326.5, either the criminal, delinquency or dependency court should appoint an attorney for the child victim of crime in criminal and delinquency courts. For consistency and the child’s comfort level, it stands to reason that the court would appoint the same counsel to represent the child in both forums. Despite the positive movement forward, enactment of statutes, and uniform rules, very few Courts actually appoint attorneys or representatives for child victims and witnesses.

CASE EXAMPLES

Most child victims and witnesses testify unrepresented. However, the following examples, taken from actual cases, exemplify how an independent attorney can protect the child victim or witness while ensuring a more just and equitable process.

Case example #1 -- Marcus³⁶

Marcus was a witness to abuse of his younger sister who was brutally murdered. Although it was unclear whether Marcus, age 10, saw the horrific violent act that ultimately resulted in the young girl’s death, it was believed by the prosecutor and the defense that he had seen prior abuse of his sister and possibly experienced abuse himself. Both counsel believed that Marcus’ testimony could be critical to their case and wanted to interview Marcus at least once prior to trial. The prosecutor subpoenaed Marcus as a witness at the preliminary hearing and at trial. However, Marcus completely denied that his sister was murdered. He believed, through sheer wishing perhaps, that his sister had died simply because she was sick.³⁷ His therapist stated that being forced to face the fact of his sister’s murder, at the hands of one of his parenting figures, would be extremely detrimental to him. But his therapist’s opinion carried no weight because as an MSW, she lacked the qualifications required to quash the subpoena.

³² Fla. Stat. 914.17.

³³ Okla. Stat. tit. § 7112. Appointment of representative for child, also provides that the court may appoint a court-appointed special advocate or guardian ad litem for the child welfare proceeding.

³⁴ N.C. Sup. Ct. R. 7.1. Appointment of guardian ad litem for minors, adopted July 26, 1990.

³⁵ California Welfare and Institutions Code §317(e).

³⁶ Names and identifying information about Marcus and each case example have been changed to protect their privacy. Some of these case records were sealed following trial.

³⁷ The horrific bruising of the child ruled out illness as a cause for this child’s death.

In this case, which occurred in California, the child's abuse and neglect attorney petitioned under Welfare and Institutions Code §317 to be appointed to represent the child in the criminal case, to the extent necessary to protect his rights and interests as a victim and witness. She subsequently petitioned the juvenile court for an evaluation by a psychologist qualified to report to the criminal court. The psychologist determined that Marcus would suffer serious emotional distress if forced to testify at the preliminary hearing. With this evaluation in hand, the child's attorney moved to quash the subpoena. However, the psychologist also established a therapeutic plan for Marcus which would possibly enable him to safely testify at the trial. An agreement was thereafter reached between the prosecutor, defense counsel, and the child victim's attorney through which Marcus was excused from testifying at the preliminary hearing, but provided the therapeutic plan worked, the child's attorney would arrange to have one meeting in which the prosecutor and defense attorney could question the child – with the child's counsel and a support person for the child present – and then, if the child was emotionally strong enough, he would be made available to testify at trial. By the time of trial, Marcus was strong enough to testify, consistent with his best interest and the interests of justice.

Case Example #2 -- Alicia

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

Case Example #3 -- David

In another federal case, a guardian ad litem was appointed to represent a victim of sexual abuse who was unable to testify. Fortunately, there was sufficient evidence of the crime that the defendant pled guilty. The guardian ad litem conducted an independent investigation into the child's life before and after the abuse and undertook numerous conversations with the child. In this way, the guardian ad litem was able to provide an accurate and compelling victim impact statement for the jury at time of sentencing.³⁸

Case Example #4 -- Javier

In a state case, Javier witnessed a crime of violence which he would rather have forgotten. He received a subpoena, met with the prosecutor, and presented himself at trial to testify. Halfway through his testimony, a gang member in the courtroom made a threatening gesture toward him, prompting Javier to ask for a break to use the bathroom. Out of the courtroom and terrified, Javier ran out of the courthouse and did not return. Because Javier was in the foster care system and had recently changed his placement, he never received a second

³⁸ See 18 USC 3509(f), 18 USC 3771(a)(4) and (e), defining who can speak for a child victim.

subpoena. Javier's foster care attorney was not aware of the criminal case but was working with Javier to apply for legal residence. A few weeks after leaving the trial, Javier accompanied his attorney to the criminal courthouse to obtain a statement of good standing for immigration purposes. When Javier's name was given to the desk clerk, not only was he unable to receive his statement of good standing, but an officer was called to immediately incarcerate him until the next calling of the criminal trial. (Javier was, at this point, eighteen, and therefore eligible to be incarcerated as an adult). If not for the intervention of Javier's foster care attorney, who just happened to be present, Javier may have been incarcerated for three weeks until the next calling of the case, which would have forced him to miss his interview for permanent residence. Instead, Javier's attorney provided Javier with advice regarding his safety concerns and his rights and obligations under the subpoena. With the advice of his attorney and discussion with the prosecutor, Javier was released, testified at the next calling of the criminal trial, and later received his United States permanent residence card.

Case Example #5 -- Kristie

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

DUTIES OF THE CHILD'S REPRESENTATIVE

The representative for the child has many duties, including assisting the child in his or her understanding of the proceedings and his or her rights and protections throughout the proceedings. Pursuant to 42 U.S.C. 10607(b), codifying federal services to victims, victims must be informed of their rights "at the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation."³⁹ Examples of the rights and interests of child victims and witnesses that can be provided through statute but may be lost if not independently pursued by the child's representative include:

- A. To be represented and have the child's rights asserted during the investigation of child abuse. Assistance at this stage can mean the difference between the child

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

- obtaining therapeutic services or not and with attorney-client privilege between the child and attorney, can lead to revelations of physical threats received by the child as well as threats that he or she may be implicated in the crime. A representative can assist the child to make appropriate safety requests or seek civil stay away orders.
- B. To be notified of all criminal proceedings and to be kept apprised of the status of the defendant throughout the proceedings and following sentencing.⁴⁰ In the case of a child victim, such information should be communicated to the child in an age-appropriate manner, possibly in a therapeutic setting or by the child's designated support person.
 - C. To be present or have a representative present at all proceedings and to be consulted before a case is dismissed or a plea agreement entered.⁴¹ Under federal law, victims have a right to attend proceedings "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."⁴²
 - D. To forego or to present evidence at a competency hearing. 18 USC 3509(c) clarifies that children are presumed competent and provides a mechanism to establish competence upon a written motion and offer of proof of incompetency by a party.⁴³ The child's guardian ad litem may be best suited to assert concerns during this hearing on behalf of the minor.
 - E. To confidentiality of the victim's name and identifying information, to obtain protective orders when needed, maintain privilege of all records, including school records, IEP records, therapeutic relationships, and medical records when warranted⁴⁴ and request that the courtroom be closed to all nonessential persons.⁴⁵
 - F. To refuse to be interviewed by defense counsel. It is unlikely that a child or even a child's parent unschooled in legal rights would refuse an interview. The child's representative can sort through the calls from the prosecutor and other attorneys in order to protect the child from unnecessary or unnecessarily burdensome processes.

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

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

⁴² See 18 USC 3771(a)(3). See also MD Rule 5-615(b)(5) "A court shall not exclude pursuant to this Rule a victim of a crime of violence or the representative of such a deceased or disabled victim to the extent required by statute."

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

⁴⁴ See e.g. *Fisher v. State*, 128 Md. App. 79 (1999), in which the court appointed a "Nagle v. Hooks" attorney to represent a child victim in a criminal court proceeding with respect to the child's psychotherapist-patient privilege, authorized under MD Courts and Judicial Proceedings Article 9-109(b). *Nagle v. Hooks*, 296 Md. 123 (1983) authorized the Courts, most commonly in domestic relations proceedings, to appoint an attorney for the child for the purpose of protecting any privileges.

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

- G. To have an advocate or representative present during any related interview and to have interviews coordinated, particularly in the case of multi-jurisdiction cases, so as to minimize harm to the child.⁴⁶
- H. To a separate and private waiting area. The first right of the crime victim enumerated in the Crime Victims' Rights Act is the right to be reasonably protected from the accused.⁴⁷ In the case of children, without counsel, the child may be forced to sit with family members who may be testifying for the defendant, and the pressure on the child may become unbearable.
- I. To make a statement at sentencing or pre- and post-trial release proceedings. 18 USC 3509(f) permits a child's victim impact statement to be completed by the child abuse team, the guardian ad litem, and/or the child. Specifically, the Act requires the guardian ad litem to "make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization."⁴⁸
- J. To obtain appropriate and accurate restitution. A guardian ad litem can assist the prosecution by rendering a full and accurate account of the restitution due the child victim.⁴⁹
- K. To participate fully in any financial victims of crime program.
- L. To have a support person or adult attendant available whenever the child is questioned or at any official meeting. 18 USC 3509(i) provides for an "adult attendant," also defined as "an adult ... who accompanies a child throughout the judicial process for the purpose of providing emotional support."⁵⁰ The adult attendant acts as a resource for the child separate and apart from the guardian ad litem or attorney.

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

⁴⁷ 18 U.S.C. 3771(a)(1).

⁴⁸ See 18 USC 3771(a)(4). 18 USC 3509(f) further delineates the GAL's duties by mandating the use of "forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability."

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

⁵⁰ See 18 USC 3509(i) re adult attendant; See also MD Rule 5-615(c) "The court may permit a child witness's parents or another person having a supportive relationship with the child to remain in court during the child's testimony." See also MD Crim. Proc. Art. §11-303(d)(v), allowing for the support person to be present during remote testimony.

- M. To petition the court for permission to testify by remote means.⁵¹ Among its provisions, 18 USC 3509 calls for federal courts to provide alternatives to live in-court testimony by a child, including testimony by two-way closed circuit television and the opportunity to take a videotaped deposition of the child. The federal law is detailed in its protocol and includes critical safeguards for the defense. Nevertheless, in a study of child sexual abuse cases in an urban center involving 250 cases and 400 child witnesses in the 1990s, most of these children still testified in open court.⁵²
- N. To encourage age-appropriate questioning and communication.⁵³ 18 USC 3509 provides the right of the child witness to use testimonial aids, such as anatomical dolls in testifying.⁵⁴
- O. To a speedy trial. 18 USC 3509(j) permits the guardian ad litem, the prosecutor, or the court to motion to designate a proceeding involving a child witness as a case of special importance and so expedite the proceeding while giving it precedence over other cases.⁵⁵
- P. To consult with the prosecutor. The Crime Victims Rights Act calls for the reasonable right to confer with the attorney for the government.⁵⁶ This right is meaningless for a child without an adult representative.

An argument can be made that the prosecutor can and should ensure the provision of the above rights. In fact, many prosecutorial offices work closely with Children’s Advocacy Centers, provide children’s waiting rooms, and have prosecutors and/or Victims Witness Advocates who specialize in and are knowledgeable about working with child victims.⁵⁷ These efforts are to be encouraged as model programs for the many offices that do not offer special protections for children. Still, many of the prosecutors who are most concerned about the safety and protection of child victims are those who also advocate for independent attorneys to be appointed for them. The reason for this is differentiation in role. Prosecutors ensure that justice is done for the community; they do not and cannot always represent the individual needs of the child victim or witness, particularly when those needs conflict with the safety needs of the community. Under the Model Rules of Professional Conduct, attorneys must ensure that unrepresented parties do not misunderstand their role and must correct mistaken beliefs that the

⁵¹ See 18 USC 3509(b); New Hampshire RSA 517:13-a; V.R.E. Rule 807; W.Va. Code §62-6B; MD Crim Proc Code §9-102; Alaska Stat § 12.45.046; Iowa Code §915.38; 725 ILCS 5/106B-5; Fla Stat § 92.54; A.R.S. §13-4253; KRS §421.350; MD Courts and Judicial Proceedings Article § 11-303, allowing for the child’s attorney to be present during the remote testimony.

⁵² Thomas D. Lyon and Karen J. Saywitz, *From Post-Mortem to Preventive Medicine: Next Steps for Research on Child Witnesses*, The Society for the Psychological Study of Social Issues, 2006, at page 27, NACC Children’s Law Manual-2007 Edition, citing 1999 study by Goodman, Quas, Bulkely & Shapiro.

⁵³ See e.g. Cal. Evid. Code § 765.

⁵⁴ 18 USC 3509(l).

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

⁵⁶ 18 USC 3771(a)(5).

⁵⁷ For example, the San Francisco Office of the District Attorney has instituted a Child Assault Unit, utilizing vertical prosecution and specifically geared toward working with child victims of abuse.

attorney represents them.⁵⁸ Similarly, the Model Rules prohibit lawyers from communicating with “third persons” in a way that the lawyer “knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege.”⁵⁹ The most effective means of doing both in the case of child victims and witnesses may be to afford them an independent attorney who can ensure their rights and privileges are protected.

Prosecutors who have worked with children’s representatives attest to the value of having a attorney for the child appointed, both to free the prosecutor up to work on the case without fear of further traumatizing the child and to help the child prepare to testify, when necessary. One federal prosecutor who has asked for a child’s attorney to be appointed pursuant to 18 USC 3509(h) explained that while the prosecutor represents the victim’s general interest in prosecution, she cannot possibly represent the unique needs of each victim.⁶⁰ “The child’s representative develops a relationship and rapport with the child that neither a prosecutor nor the prosecutor’s victim witness assistant, who works with the prosecutor and has limited contact with the child, could.”⁶¹

WHO CAN REPRESENT A CHILD VICTIM OR WITNESS

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

EVIDENTIARY STANDARDS – AN OBSTACLE TO CHILD VICTIMS’ RIGHTS?

There has been some concern that precedent such as Maryland v. Craig, calling for protections for child victims and witnesses during court proceedings, would not withstand changes in the law and enforcement of the confrontational clause under Crawford v. Washington.⁶² However, in U.S. v. Pack the court held in a military case that the remote testimony permitted in Craig is still permissible post-Crawford.⁶³ Similarly, a Kansas case held that Crawford does not impact the constitutionality of KSA 22-3434, a Kansas statute permitting child victims to testify by closed circuit television.⁶⁴ In State v. Henriod, the Utah appellate court held that Crawford did not abrogate Craig⁶⁵ and the Wisconsin Court of Appeals upheld remote testimony by a child when “the child would likely be further traumatized by having to

⁵⁸ See Model Rules of Professional Conduct, Rule 4.3. Dealing with Unrepresented Person.

⁵⁹ See Model Rules of Professional Conduct, Rule 4.4(b). Respect for Rights of Third Persons

⁶⁰ Comments of Tina Miller, Assistant U.S. Attorney for the Western District of Pennsylvania, telephone interview, September 29, 2008. Ms. Miller recommends appointing a child’s representative particularly in cases involving young children and children who are also faced with custody or dependency proceedings.

⁶¹ *Ibid.*

⁶² Maryland v. Craig, 497 U.S. 836 (1990); Crawford v. Washington, 541 U.S. 36 (2004).

⁶³ U.S. v. Pack, 65 M.J. 381 (2007).

⁶⁴ State v. Balanchette, 134 P.3d 19, 22 (Kan Ct App 2006).

⁶⁵ State v. Henriod, 131 P.3d 232, 237 (Utah, 2006).

face his abuser at trial.”⁶⁶ While the lower courts have upheld protections for child victims and witnesses post-Crawford, the more stringent requirements increase the likelihood that more children will be forced to testify. Attorneys for these children can make the case for them to testify by alternative means, ensure they have adult attendants available to them, and pursue additional protections as they will need.

DEFINING DUTIES, TRAINING, AND APPOINTMENT STANDARDS

The Model Rules of Professional Conduct require lawyers to provide competent representation to their clients and specify that competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁶⁷ Model Rules of Professional Conduct, Rule 1.14, discussing the duties of lawyers working with clients with diminished capacity, would apply to child victims’ representatives. The Model Rules require that lawyers “maintain a normal client-lawyer relationship with the child.”⁶⁸

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

CONCLUSION

Criminal cases involving children as victims and witnesses have increased in numbers over the past thirty years. In various forums, the federal government and the states have responded by providing rights and protections for child victims in the criminal and delinquency systems. Yet, the reforms have not proved to be as effective as they might. Conflicting pressures of the criminal justice system prevent their enforcement on a regular basis, and there has been no

⁶⁶ *State v. Vogelsberg*, 724 N.W.2d 649, 650 (Wis. Ct. App. 2006)

⁶⁷ Model Rule of Professional Conduct 1.1. Competence.

⁶⁸ See Model Rule of Professional Conduct 1.14(a).

uniform measure to ensure that child victims are heard, particularly when there is no parent or guardian to act in the child's best interest. The appointment of counsel for child victims and witnesses in criminal and delinquency cases will provide for the enforcement of protections already in place, take the onus of these obligations off the court and the prosecutor, provide a safer system for child victims, utilize court resources more efficiently, and create a more just court process and better outcome for all involved.