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Child-Victims: Better Served By A Traditional Attorney Or By A Guardian Ad Litem?

I. Framing the Issue

The epidemic of child-victimization is a problem of national concern. The National Survey of Children's Exposure to Violence, the most comprehensive study of the incidence and prevalence of children's exposure to violence conducted to date, confirms that the majority of children in our society are exposed to violence in their daily lives.¹ More than 60% of the children age 17 and younger who were surveyed between January and May 2008 were exposed to violence in the prior year, with nearly half subject to assault (46.3%), roughly a quarter falling victim to robbery, vandalism, or theft (24.6%), and a significant percentage reporting child maltreatment (10.2%) or sexual abuse (6.1%).^{2,3}

When children (whether they are infants or adolescents) are abused or victimized and the offense is reported to the authorities, both law enforcement and social services may respond to the report. In some cases, the reported violence eventually results in prosecution in the criminal or juvenile delinquency courts. This means that child-victims may find themselves thrust into a myriad of unfamiliar justice systems and court processes.

Notably, more than thirty state constitutional amendments and every state and federal statutory scheme provide crime victims—including child-victims—with general rights to privacy, protection, participation, and financial recovery. Additionally, laws have been passed that provide protections tailored specifically to the needs of child-victims.⁴ Navigation of the legal systems involved in responding to crime against child-victims is incredibly complex, even for trained lawyers, and it is entirely unsurprising that child-victims struggle to comprehend and traverse the legal landscapes they face. Without effective legal representation, child-victims and their family members often lack the knowledge and skill to assert and seek the protection of their victims' rights, and these statutory and constitutional entitlements remain largely unfulfilled paper promises.

Children victimized by crime are one of the most vulnerable victim populations and, in addition to the challenges facing all crime victims, they confront additional hurdles to accessing justice that do not necessarily plague adult victims of crime. As the 1982 President's Task Force on Victims of Crime noted, “[c]hild victims of crime are especially handicapped . . . [T]he . . . system distrusts them, . . . puts

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special barriers in their path of prosecuting their claims to justice[, and] . . . seems indifferent to the legitimate special needs that arise from their participation.”⁵ Without legal representation, not only may child-victims be unable to enforce their rights, but they may not even be capable of gaining a meaningful understanding of them. Recognizing this, the American Bar Association (ABA) recommended in 2009 that laws and policy be changed “to provide that child victims of criminal conduct have independent attorneys who can assist them in accessing applicable victims’ rights.”⁶ The question, then, is whether child-victims can be best assisted by lawyers functioning in the traditional role of an attorney or by lawyers serving as *guardians ad litem* (GALs).⁷

II. The Benefits and Drawbacks of Traditional Attorney Representation

Lawyers representing child-victims who function in the traditional attorney role are bound by the same ethical rules that apply to attorneys representing any other type of client. For example, the lawyer must be competent to represent the child-victim, the lawyer must maintain the confidentiality of information relating to the representation of a child-victim, the lawyer must keep the child-victim reasonably informed about the status of any matter, and the lawyer must explain issues to the child-victim in a way that allows her to make informed decisions about the representation.⁸

Lawyers acting as traditional attorneys advocate in accordance with the child-victim’s expressed wishes. As one lawyer who works with children explains, “I repeatedly explain to my clients that they are in charge, that I will fight for what they want, as long as they tell me what to fight for.”⁹ This type of representation “gives the child the greatest measure of autonomy and represents the child’s perspective to the greatest extent,”¹⁰ it “empowers children and leads to better judicial decision making,”¹¹ and it makes

sure “that children’s views are heard in legal proceedings.”¹²

Ensuring that victims—including child-victims—are empowered to assert their rights and participate in the justice system to the extent they desire is the impetus behind many victims’ rights provisions. As the Ninth Circuit has noted, “[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard.”¹³ The promulgation of victims’ rights law was designed to “change this by making victims independent participants in the criminal justice process.”¹⁴

The traditional attorney function is the role that has been approved and promoted by several national organizations in the context of representation for children involved in abuse and neglect cases. For example, the ABA expresses “a clear preference” for a lawyer acting as a “child’s attorney . . . who provides

legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.”¹⁵ The ABA’s position is that, “[i]n all but the exceptional case, such as with a preverbal child, the child’s attorney will maintain this traditional

relationship with the child client.”¹⁶ If a child is unable to express a preference, such as in the case of a preverbal child or a child who is unable to understand the legal or factual issues involved, “the child’s attorney shall make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a *guardian ad litem*.”¹⁷

The National Association of Counsel for Children agrees that “[c]hildren need an opportunity to present their positions to the court through counsel”¹⁸ and further specifies that when the client-directed model cannot be implemented, a lawyer may either “call for the

appointment of a guardian ad litem” to determine the best interests of the child or “substitute his/her judgment for the child’s and formulate and present a position which serves the child’s interests,” as determined by the use of “objective criteria.”¹⁹

An additional benefit associated with child-victims retaining lawyers acting in the traditional attorney role is that these child-victims clearly constitute “represented persons” under the ethical rules governing attorneys and are protected against unauthorized contact by counsel, including counsel for the perpetrator.²⁰

The primary challenge facing lawyers functioning in the traditional attorney role is that disagreement with the child’s perspective or a belief that the child is making unwise choices “does not, in itself, warrant refusing to advocate the child’s position.”²¹ And because confidentiality requirements prohibit the disclosure of the information giving rise to these concerns, the traditional attorney may be placed in a situation where they are asked to advocate for a position they believe may ultimately prove to be harmful to the child.²² Critics also contend that this model “does not work for young children who cannot meaningfully direct their litigation or for older children who may misdirect their litigation.”²³ Further, there is some concern that attorneys who choose not to request the appointment of a separate guardian ad litem for a child who cannot direct the representation are given “unfettered and unreviewed discretion” in identifying and advocating for the child’s interests.²⁴

III. The Benefits and Drawbacks of Guardian Ad Litem Representation

Lawyers representing child-victims who function in the guardian ad litem role advocate for what the lawyer “believes (not necessarily what the child believes) is in the child’s ‘best interests.’”²⁵ In this model of representing children, the attorney does not take direction

GAL representation requires advocating for positions that are in the best interests of the child-victim.

from the child about what she wants to accomplish; rather, the GAL is “charged with forming the client’s position by using his/her own judgment.”²⁶ Lawyers preferring the GAL model of representation are “generally driven by a concern that children need to be protected from their own bad decision making, and from the bad actors in their lives, whom they may be unwilling to betray.”²⁷ Advocates of the GAL approach often believe that children “lack the maturity of judgment, even the cognitive decision making, necessary to assess appropriately their own interests, particularly their long-term interests.”²⁸

Further, even if a child’s “judgment is no worse than that of adults, proponents of the GAL approach would argue that society has a greater obligation to protect children from their own bad judgments.”²⁹ In addition, lawyers functioning in the GAL role can protect against the danger of the child-victim capitulating to pressure from influential third parties, including parents, to “misidentify and/or misarticulate their own interests.”³⁰

An additional benefit of using a lawyer who acts as a GAL is that federal law provides for compensation for GALS who are appointed by the court to assist child-victims of abuse or exploitation.³¹ Federal law also seemingly establishes that GALS can examine reports that victims and their lawyers may find difficult to access in some jurisdictions.³²

Although the argument has been made that an attorney functioning in the role of a GAL is not acting as a lawyer at all and that the “ethical obligations unique to lawyers . . . are inapposite,”³³ to the extent that a GAL is obligated by statute to function as a lawyer in some respects (making motions before the court, presenting arguments, etc.), a lawyer functioning as a GAL continues to owe the child-victim the basic duties of honesty, respect, and an explanation of the lawyer’s role.³⁴ Of course, not all lawyers who adopt the GAL model of representation view the child as non-client. To

the extent possible, these GAL-style lawyers apply the legal ethical duties to interactions with the child. However, commentators warn that the “broader confidentiality obligation, so central to representation by a lawyer with undivided loyalties, cannot be squared with the GAL approach.”³⁵

Critics contend that lawyers without additional specialized training “have no objective basis upon which to determine a position for a child,” as “[o]ne’s subjective views are colored by biases, prejudices, cultural perspectives, life experiences, and individual values.”³⁶ For this reason, an “attorney’s subjective view of the child’s best interests is an inappropriate standard upon which to base a client’s position.”³⁷ To help mitigate this concern, an attorney acting in the GAL role should use objective criteria to determine what legal position is in the best interests of the child-victim.³⁸ In addition, the lawyer acting as a GAL may “seek the expertise of appropriately qualified medical, mental health, and social work professionals” to determine what course of action is in the child’s best interests.³⁹ Other criticisms emphasize the old-fashioned, paternalistic nature of the representation, alleging that it “treats children as chattel rather than empowering them in the system.”⁴⁰ A number of critics of the GAL model condemn it as enabling attorneys to disregard the historical obligations of confidentiality and zealous representation in favor of a “relaxed advocacy” that “has contributed to substandard representation of children across the country.”⁴¹

Practice Pointers

Lawyers serving as advocates for child-victims of crime should consider carefully which form of representation is most appropriate and will better serve the needs of the child-victim they are representing. Lawyers should consider the age and maturity of the child and the child’s relationship to the offender, in

addition to any relevant laws, statutes, or orders defining the lawyer’s role.

In most circumstances, the traditional attorney role will best provide child-victims with the advocacy they require to effectuate their rights and empower them to participate in the justice system to the extent they desire. However, traditional attorney representation alone may not be appropriate in circumstances where the child-victim is unable to meaningfully direct her representation or where the attorney otherwise believes that the appointment of a separate GAL is necessary to present the best interests position to the court. Ideally, either a lawyer or non-lawyer GAL should be appointed in these circumstances, in addition to the child-victim’s traditional attorney.

If, however, a separate GAL cannot be appointed and the representation of the child-victim requires that the lawyer function in the GAL capacity for some or all of the representation, the lawyer should be cognizant of the fact that the need for GAL-style representation may not apply to the entirety of the relationship; the child-victim may be capable of participating in the traditional client-directed model of attorney representation with respect to a particular issue at one time, while requiring the best interests approach at another.⁴² A lawyer acting in the GAL capacity should utilize objective criteria and consult qualified medical, mental health, and social work professionals to determine what course of action will best further the child’s best interests.

Effectively communicating the role of the attorney to the child-victim is of paramount importance, whether the lawyer is operating as a traditional attorney or as a GAL. It is also critical that child-victims comprehend the extent to which a lawyer's ethical obligations will apply. It is particularly important for the lawyer to ensure that the child-victim understands the duty of confidentiality. As one practitioner notes, a "child's understanding of his lawyer's duty to keep his secrets is key to his true understanding of the lawyer's role."⁴³ For lawyers functioning as traditional attorneys, "[b]y pledging to maintain a child client's secrets, a lawyer sends the child the most powerful, comprehensible message about client control."⁴⁴

Lawyers should keep in mind that verbal explanations alone are often insufficient and that children may be unlikely to understand the role of the lawyer if the lawyer "simply explain[s] things more clearly."⁴⁵ This means that child-victims may need to see their attorney "in action," either arguing the child's position or advocating in accordance with the child's best interests in order to truly understand the role of the lawyer.⁴⁶

If it is not feasible for the child-victim to witness her lawyer in the courtroom, other forms of interactive learning, including "modeling and role-playing exercises" or programs designed to familiarize children with the courtroom setting, can be valuable.⁴⁷

Lawyers representing child-victims should also investigate

additional educational and training opportunities relating specifically to the representation of children, as effectively working with children "demands a different approach to interviewing, communication and representation than acting as counsel for an adult."⁴⁸ Indeed, the ABA recommends that all lawyers working with children receive training specifically focused on child advocacy and the representation of child clients.⁴⁹

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¹ David Finkelhor, Heather Turner, Richard Ormrod, Sherry Hamby & Kristen Kracke, *Children's Exposure to Violence: A Comprehensive National Survey*, Juv. Just. Bull. (Office of Juvenile Justice and Delinquency Prevention, D.C.), Oct. 2009, at 1, available at www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf.

² *Id.*

³ Note that reports of crimes committed against children often do not account for the phenomenon of underreporting. Studies have found that children are less likely than adults to report their victimization. An analysis of 1995 to 1996 National Crime Victimization Survey data found that only 28% of violent crimes committed against juveniles between the ages of 12 to 17 become known to the police, while 48% of the violent crimes committed against adults were brought to the attention of law enforcement. See David Finkelhor & Richard K. Ormrod, *Factors in the Underreporting of Crimes Against Juveniles*, 6 Child Maltreatment 219, 222 (2001). Because juvenile victims are often dependent on adults to complete the process of reporting a crime to law enforcement after the child makes an initial disclosure, this can present an additional barrier to the reporting of crimes against children. See David

Finkelhor, Janis Wolak & Lucy Berliner, *Police Reporting and Professional Help Seeking for Child Crime Victims: A Review*, 6 *Child Maltreatment* 17, 19 (2001). Even taking into account juvenile reporting of crime to non-police authorities, such as schools, crimes committed against children are still less likely than crimes committed against adults to be reported to any type of law enforcement or non-law enforcement authority (44% versus 55%). Finkelhor & Ormrod, *supra*, at 222.

⁴ See, e.g., Victims of Child Abuse Act, 42 U.S.C. § 13001 *et seq.*; Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509; Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.*

⁵ *Final Report President's Task Force on Victims of Crime*, 51 (Dec. 1982).

⁶ Am. Bar Ass'n, Criminal Justice Section, *Child Victims of Crime Resolution and Report* (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/recommendations/101D.authcheckdam.pdf>.

⁷ Note that non-attorney GALs may also be appointed by the court. Because non-attorney GALs cannot file motions to enforce a child-victim's rights or otherwise engage in the practice of law, the analysis of their role in this context is limited.

⁸ Model Rules of Prof'l Conduct R. 1.1, 1.4(a)(3), 1.4(b), 1.6.

⁹ Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of their Lawyers' Roles*, 64 Fordham L. Rev. 1699, 1699 (1996).

¹⁰ Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. Rev. 939, 952 (1995).

¹¹ LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605 (2009).

¹² Nat'l Ass'n of Counsel for Children, *Recommendations for Representation of Children in Abuse and Neglect Cases*, 5 (2001), available at http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf.

¹³ *Kenna v. United States Dist. Ct. for the Cent. Dist.*

of Cal., 435 F.3d 1011, 1013 (9th Cir. 2006).

¹⁴ *Id.* Some studies suggest a positive relationship between victims' satisfaction and mental health and the ability to participate in the criminal justice process. For a discussion of the positive and negative effects of victims' involvement in the criminal justice system, see, e.g., Jim Parsons & Tiffany Bergin, Vera Inst. of Justice, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182 (2010).

¹⁵ Am. Bar Ass'n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 1-2 (1996), available at http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 5.

¹⁸ Nat'l Ass'n of Counsel for Children, *supra* note 12, at 7.

¹⁹ Nat'l Ass'n of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (NACC Revised Version), 9 (1999), available at <http://www.naccchildlaw.org/?page=PracticeStandards>.

²⁰ See Model Rules of Prof'l Conduct R. 4.2. Case law addressing whether a lawyer-GAL representing the best interests of a child "represents" that child for the purpose of the ethical rules prohibiting unauthorized contact by a lawyer with a "represented person" is sparse, and lawyers functioning as GALs may need to be prepared to argue the issue before a court. See, e.g., *People v. Quiroz*, 841 N.Y.S.2d 221 (Table) (N.Y. Dist. Ct. 2007) (finding that the victim was not a represented "party" under New York's ethics rules, but noting that the child-victim was "represented" by an attorney appointed as a GAL).

²¹ Haralambie, *supra* note 10, at 954.

²² The Model Rules of Professional Conduct, as well as the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, provide for the disclosure of confidential information to prevent reasonably certain death or serious injury. See Model Rules of

Prof'l Conduct R. 1.6(b)(1); Am. Bar Ass'n, *supra* note 15, at 5-6.

²³ See, e.g., Nat'l Ass'n of Counsel for Children, *supra* note 12, at 13.

²⁴ See, e.g., *id.* at 14.

²⁵ *Id.* at 10.

²⁶ *Id.*

²⁷ Buss, *supra* note 9, at 1731.

²⁸ *Id.* at 1702.

²⁹ *Id.*

³⁰ *Id.*

³¹ See 18 U.S.C. § 3509(h).

³² See 18 U.S.C. § 3509(h)(2) (providing that upon appointment, a guardian ad litem "may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child."). Some courts have held that victims are not entitled to unrestricted access to presentence reports. See, e.g., *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (noting that the victim refused the district court's offer to consider disclosing select portions of the presentence report and holding that the district court did not err in determining that the Crime Victims' Rights Act does not confer general right on victims to obtain disclosure of the presentence report); *United States v. BP Prods. N. Am. Inc.*, Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008) (collecting cases). However, some states afford crime victims an independent right to review presentence reports. See, e.g., Ariz. Const. art. 2, § 2.1(A)(7) (giving a victim the right to review the presentence report when it is available to the defendant); Ariz. Rev. Stat. Ann. § 13-4425 (a victim's right to review the presentence report "except those parts excised by the court or made confidential by law"); Idaho Const. art 1, § 22(9) (giving the victim the right to "read presentence reports relating to the crime"), Idaho Code § 19-5306(1)(h) (a victim has the right to review the presentence report); Ind. Stat. Ann. 35-40-5-6(b) (giving a victim right to read and "respond to" material contained in the presentence report); Or. Rev. Stat. Ann. § 137.077 (presentence report may be made available to a victim). See also Colo. Rev.

Stat. § 24-72-304(5) (affording the prosecutor the discretion to allow the victim or the victim's family to see the presentence report).

³³ Buss, *supra* note 9, at 1732.

³⁴ *Id.* at 1734-35.

³⁵ See, e.g., *id.* at 1744.

³⁶ See, e.g., Haralambie, *supra* note 10, at 955.

³⁷ See, e.g., *id.* at 956.

³⁸ *Id.* See also Joseph Goldstein, et al., *Best Interests of the Child: The Least Detrimental Alternative* (1996); Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (1993).

³⁹ Haralambie, *supra* note 10, at 957.

⁴⁰ See, e.g., Nat'l Ass'n of Counsel for Children, *supra* note 12, at 10.

⁴¹ See, e.g., *id.*

⁴² See Nat'l Ass'n of Counsel for Children, *supra* note 19, at 5.

⁴³ Buss, *supra* note 9, at 1727.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1755.

⁴⁶ *Id.* at 1753-61.

⁴⁷ *Id.* at 1761. See, e.g., *King County Kids' Court*, available at <http://www.kingcounty.gov/prosecutor/kidscourt.aspx> (last accessed Mar. 10, 2011).

⁴⁸ Rachel Birnbaum & Nicholas Bala, *The Child's Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers*, 25 Can. J. Fam. L. 11, 65 (2009).

⁴⁹ See, e.g., Am. Bar Ass'n, *supra* note 15, at 18-20.

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