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Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians, 43 Loy. U. Chi. L.J. 833 (2012)

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The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians

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I. INTRODUCTION

A recent and comprehensive report assessing the juvenile justice system in Illinois concludes that the quality of the representation of children in delinquency[1] proceedings falls well short of national standards[2] and that the "juvenile indigent defense system is in urgent need of attention and repair."[3] This conclusion is somewhat surprising since, historically, Illinois has been thought to be at the forefront in the creation of a "fair and equitable juvenile justice system."[4] Yet, in recent

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1. A delinquent act is an act committed by a minor that would be considered a crime if committed by an adult. SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW 446 (4th ed. 2011).

2. CATHRYN CRAWFORD, BERNARDINE DOHRN, THOMAS F. GERAGHTY, MARJORIE B. MOSS & PATRICIA PURITZ, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2007) [hereinafter ILLINOIS ASSESSMENT REPORT], *available at* http://www.state.il.us/defender/acrobatdocs/jreport.pdf. This report is the result of "The Illinois Juvenile Defense Assessment Project," which was created by the Children and Family Justice Center of the Bluhm Legal Clinic of Northwestern School of Law after it received a grant from the MacArthur Foundation Models for Change initiative. *Id.* at ix–x. As the report explains, "The project set out to conduct an independent assessment of juvenile defense practices across Illinois as a predicate for improving and enhancing the legal representation received by children in conflict with the law." *Id.* at 12. The goal of the assessment is to examine the scope and quality of legal representation of accused children in juvenile courts throughout Illinois and to provide recommendations aimed at strengthening the quality of defender services for these children. *Id.* The assessment examines "systemic and institutional barriers that impede a lawyer's ability to provide effective legal representation to indigent children within the Illinois juvenile justice system, while also documenting strengths and promising juvenile defense practices." *Id.*

3. *Id.* at 71.

4. *Id.* at 1. In fact, the report states "[f]rom the inception of the world's first juvenile court over 100 years ago [in Chicago] . . . Illinois has historically been a place where new ideas and strategies that impact children and families have been born, tested and refined . . . ." *Id.* at 1.

years, the juvenile justice system in the state has been characterized by numerous problems, including untimely appointment of counsel, inappropriate use of plea bargaining, confusion over the role of counsel, lack of zealous advocacy, inadequate resources, and incomplete data and information.[5]

Some of these problems are similar to those of the analogous adult criminal justice system and many can probably be adequately addressed by providing more resources and better supervision of the system. There is one particular problem, however, that is unique to the juvenile justice system. It is different in character because it is the result of a profound misunderstanding by courts and lawyers as to the function of attorneys in delinquency proceedings and because it is based on a flawed statutory scheme that, while supposedly designed to protect the rights of juveniles, actually operates to threaten them and to damage the credibility of the juvenile justice system.[6]

For these reasons, this particular problem can only be addressed by a fundamental change in the approach to the concept of juvenile justice as recognized in Illinois. This problem is the continuing confusion over the role of counsel in delinquency proceedings, particularly between the role of an attorney and the role of a guardian *ad litem*.[7]

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5. *Id.* at 2–5.

6. AM. BAR ASS'N JUVENILE JUSTICE CTR. & NEW ENGLAND JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (2003) [hereinafter MAINE ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/mereport.pdf (stating that conflicting approaches to the role of a minor's attorney in juvenile delinquency proceedings damages the credibility of the juvenile justice system).

7. It should be noted that the problem is not unique to Illinois. AM. BAR ASS'N JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 26 (1995) [hereinafter A CALL FOR JUSTICE], *available at* http://www.njdc.info/pdf/cfjfull.pdf ("[D]esire to 'help' children, sometimes at the expense of good legal claims, reflects profound confusion about the lawyer's ethical duty to juvenile clients. Although ethical and legal standards call for attorneys to represent children as zealously as they would adults," sometimes children's attorneys "abandon adversarial efforts in paternalistic deference to the court's efforts to intervene in the child's life."). There are a number of assessment studies just like the one conducted in Illinois that point to the same problem in other states. *See, e.g.*, ELIZABETH M. CALVIN, AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 3 (2003) [hereinafter WASHINGTON ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/wareport.pdf ("There is confusion and disagreement about the role of juvenile defenders in Washington and, as a result, important opportunities to effectively counsel and represent the interest of the child are lost."); TEXAS APPLESEED FAIR DEFENSE PROJECT ON INDIGENT DEFENSE PRACTICES IN TEXAS, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 24 (2000) [hereinafter TEXAS ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/TexasAssess.pdf (quoting a defense counsel as saying: "[My first task is] to get these kids help. If they don't agree with me, I don't care. I know what is in their best interest better than their parents do."); AM. BAR ASS'N JUVENILE JUSTICE CTR. &

MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (Elizabeth Cumming et al. eds., 2003) [hereinafter MARYLAND ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/mdreport.pdf ("Many public defenders did not appear to understand the critical role of defense counsel in providing zealous advocacy through an express interest model of representation."); ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, NAT'L JUVENILE DEFENDER CTR. & CENT. JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (2006) [hereinafter INDIANA ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/Indiana%20 Assessment.pdf (finding that one of the systemic barriers to effective representation in delinquency proceedings in the state is the misperception about the role of counsel as a guardian rather than as an advocate); AM. BAR ASS'N JUVENILE JUSTICE CTR. & SO. JUVENILE DEFENDER CENTER, NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 39 (Lynn Grindall et al. eds., 2003) [hereinafter NORTH CAROLINA ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/ncreport.pdf ("As a result of this confusion about counsel's role, many juveniles [do] not appear to be clear about who was representing them."); PATRICIA PURITZ ET AL., NAT'L JUVENILLE DEFENDER CTR., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 42 (2007) [hereinafter MISSISSIPPI ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/mississippi_ assessment.pdf ("Many juvenile defenders believe . . . that their role is to protect the 'best interests' of the child, not to assume an adversarial role in which they protect the legal interests of their clients."); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33 (Patricia Puritz et al. eds., 2002) [hereinafter KENTUCKY ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/Kentucky_Assessment.pdf (noting significant discrepancies regarding representation in delinquency proceedings, particularly the fact that in some counties assigned counsel were actually guardians *ad litem* assigned from the court's roster of attorneys used in dependency, neglect and abuse cases); MAINE ASSESSMENT REPORT, *supra* note 7, at 28 (identifying as a concern the systemic pressure for juvenile defenders to act in the best interest of the child, sometimes in opposition to their role as zealous advocates, that various judges interviewed affirmed that juvenile defenders' first duty is to consider the best interests of the child rather than acting as zealous advocates, and that zealous advocacy on legal grounds is not favored); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (Brock Albin et al. eds., 2003) [hereinafter MONTANA ASSESSMENT REPORT], *available at* http://www.njdc.info/ pdf/mtreport.pdf (identifying confusion among participants in the juvenile court system over whether the role of public defenders is to protect the "best interests" of the child and reported that judges seem to want public defenders to be advocates for the system rather that advocates for their clients); JESSIE BECK, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA 54 (2009) [hereinafter NEBRASKA ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/ nebraska_assessment.pdf ("[D]efense attorneys across the state showed that they erroneously thought that their role was to act in the client's best interest."); AM. BAR ASS'N JUVENILE JUSTICE CTR. & CENT. JUVENILE DEFENDER CTR., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 26 (Kim Brooks et al. eds., 2003) [hereinafter OHIO ASSESSMENT REPORT], *available at* http://www.njdc.info/ pdf/Ohio_Assessment.pdf ("[O]ne of the most disturbing trends noted by investigators and in survey data was the lack of clarity regarding the attorney's role in juvenile delinquency proceedings."); MARY ANN SCALI, JI SEON SONG & PATRICIA PURITZ, NAT'L JUVENILE DEFENDER CTR., SOUTH CAROLINA JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 21–

The confusion originates in the fact that, as it relates to juvenile justice, there are three possible lawyering models but not a consistent approach as to which one should apply to attorneys who represent juveniles in delinquency proceedings.[8] The three models can be described as follows: the "expressed interests lawyer or advocate," whose role is to advocate for the minor client's expressed interests, the "best interest lawyer or guardian," whose role is to substitute the lawyer's judgment for that of the minor client and to advocate for what the lawyer decides are the best interests of the minor, and the "judicially designated investigator," whose role is "to serve as the eyes and ears of the appointing authority, to gather information to share with the court, and to aid in making judicial decisions affecting the disposition of the

22, 51 (2010) [hereinafter SOUTH CAROLINA ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/south_carolina_assessment.pdf (noting that juvenile defenders and other court personnel across the state are unclear or have not accepted the proper role of the attorney in delinquency proceedings; ethical and role confusion leaves far too many children defenseless); *see also* A CALL FOR JUSTICE, *supra*, at 26 (stating that many of those who represent children do not understand their ethical obligations, and as a result, fail to zealously represent their young clients); NAT'L JUVENILE DEFENDER CTR., ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION: AN OVERVIEW OF THE *JUVENILE DELINQUENCY GUIDELINES* OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 3 (2006), *available at* http://www.njdc.info/pdf/ ncjfcj_fact_sheet.pdf ("Many juvenile justice practitioners mistakenly believe that juvenile defenders are obliged to argue for a child's 'best interests' in court."); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 592 (2006) ("[O]ften well-meaning professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need."); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 799–800 (2010) (identifying "persistence of best-interest representation" as one of the factors that contributes to inadequate representation unique to juvenile court); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 266–67 (2005) (pointing out that in Ohio "judges routinely appoint advocates to serve in delinquency cases as 'attorney/guardian *ad litem*,' notwithstanding statutes that require appointment of 'counsel' in those proceedings," that in Vermont a statute allows the appointment of either a guardian *ad litem* or counsel, and that the statutes in several other states confuse the role of counsel); Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 529 (2003) ("Confusion is generated by the fact that New York attempts to combine several traditional roles into one entitled 'law guardian.'").

8. *See generally* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking The Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1658 (1996) (summarizing current lawyering models and arguing that the empowerment perspective is the best model when the attorney-client relationship involves a client that is a child); Henning, *supra* note 7, at 250–51 (discussing scholarly commentary soon after the Supreme Court's decision in *In re Gault* regarding the role of counsel at the various stages of delinquency proceedings, some of which argued that "counsel's obligations to the client should be the same in adult and juvenile matters," while some argued that "best-interest advocacy was justified by the inherent difference between the rehabilitative goals of juvenile court and the deterrent-retributive focus of criminal courts").

child."[9] The term "guardian *ad litem*" is often used interchangeably to refer to either of the last two models.[10]

Since the publication of the American Bar Association's Juvenile Justice Standards,[11] which explicitly called for client-directed, expressed interest advocacy at all phases of delinquency proceedings, most organizations that set advocacy standards for juvenile defenders have emphasized the duty of lawyers to represent the client's expressed interests and not to advocate for some other person's determination of the juvenile's best interests, whether that person is a parent, a social worker, a judge, or a lawyer.[12] However, this emphasis has not necessarily resulted in a uniform approach to juvenile delinquency proceedings.

Thus, although in theory there is agreement that attorneys should advocate for the client's expressed interests, there is evidence to suggest that juvenile justice systems around the country operate based on representation of the best interest model. In Illinois in particular, there is significant evidence that there is confusion among attorneys and judges who regularly participate in juvenile proceedings as to the proper role of attorneys who represent minors.[13] In fact, the governing statute

9. The judicially designated investigator is a type of guardian *ad litem* used in some jurisdictions to serve as a reporter to the court. Bruce Boyer, *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1374 (1996); *see also* Somberg, *supra* note 7, at 529–30 (comparing the guardian *ad litem*, the attorney as advocate, and the attorney as investigator of the court). At least one commentator has objected to having guardians *ad litem* operate as agents for the court. *See* Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1817–18 (1996) (arguing that guardians *ad litem* "should be expected to perform the same functions in litigation as children's parents would perform").

10. Somberg, *supra* note 7, at 529 ("[C]onfusion is generated by the fact that New York attempts to combine several traditional roles into one entitled 'law guardian.'").

11. CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 75–76 (Robert E. Shepherd Jr. ed., 1996), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf.

12. AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 3.1(a), 9.4(a) (1979), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/83582.pdf; Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 967 (2010) (citing Henning, *supra* note 7, at 255–56); Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 86–90 (1984) (calling for a client-directed focus when children are old enough to provide effective guidance to attorney); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 294 (2003).

13. Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 NO. 3 CRIM. L. BULL. 371, 409 (2008) (suggesting that although there is agreement that attorneys should advocate for the client's expressed interests, there is also evidence to suggest that juvenile justice systems around the country operate based on representation of the best interest model). Additionally, the Illinois Assessment Report points out

in Illinois[14] has been interpreted to allow an attorney to act as an attorney and a guardian *ad litem* simultaneously.[15] In the end, as a result of the confusion about an attorney's role within the juvenile justice system, attorneys may end up acting contrary to their ethical duties or providing ineffective assistance of counsel.[16]

Regardless of whether there is still some debate as to the true nature of juvenile delinquency proceedings, given that the stakes for minors participating in those proceedings are higher than ever before, it should be recognized that juveniles are empowered to make important decisions about their participation in the legal system.[17] This, in turn, makes having access to quality legal representation critical. Thus, assuming that the minors are old enough to express their own interests, it should follow that courts should never allow an attorney to serve as an attorney and as a guardian *ad litem* at the same time. Instead, courts should demand that attorneys representing minors in delinquency proceedings act as advocates for their clients, representing their legitimate expressed interests as developed by the minor clients in consultation with their lawyers[18] and not some abstract "best interest"

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that "[m]any judges contribute to the muddled perception of the role of counsel in delinquency court." ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 63. Judges often had differing perspectives on the appropriate role of attorneys—a judge in a large county, for example, criticized the public defenders that appear in his courtroom who "focus too much on defense but not enough on best interests." *Id.* Similarly, a judge in a small rural county noted that defense counsel "can be in a 'difficult position' at times because parents want to 'beat the rap' rather than do what is in the 'best interest' of the child." *Id.* In addition, because of the confusion of the role of attorneys in the juvenile justice system, many of the attorneys representing minors "struggle mightily every day to remain zealous advocates" and some "succumb to the notion that the juvenile defense attorney plays an insignificant role in juvenile court." *Id.* at 5–6.

14. Juvenile Court Act, 750 ILL. COMP. STAT. 405/5 (2010).

15. The Act states that "[u]nless the guardian ad litem is an attorney, [the minor] shall be represented by counsel." *Id.* § 610(2). For the two most recent instances where courts interpreted the statute, see *In re Rodney S.*, 932 N.E.2d 588 (Ill. App. Ct. 2010) and *In re Austin M.*, 941 N.E.2d 903 (Ill. App. Ct. 2010).

16. Birckhead, *supra* note 12, at 978 n.95 ("[N]ational and state assessments of juvenile defender systems demonstrate that 'performance standards and ethical rules appear to be honored mostly in the breach.'" (quoting Fedders, *supra* note 7, at 771, 792)).

17. *See* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1423 (1996) (arguing that the policy expressed in *In re Gault* supports the conclusion that children possess the same autonomy rights that adult criminal defendants enjoy and that "young children are empowered to set the objectives of their criminal case to the same degree as an unimpaired adult").

18. As shall be discussed further below, this view is also consistent with the attorney's duties under rules of professional conduct. *See infra* Part IV; *see also* Federle, *supra* note 8, at 1674–75 (citing AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., *supra* note 12, § 3.1(b)(ii)[a]); Samuel M. Davis, *The Role of the Attorney in Child Advocacy*, 32 J. FAM. L. 817, 830 (1994) ("[R]epresenting the best interests of the child means what the child feels are his or her best interests, rather than what the attorney believes the child's best interest to be."); Guggenheim,

determined by having the attorney substitute his or her judgment for that of the client.[19]

Because minors involved in delinquency proceedings are entitled to the right to counsel,[20] it is imperative to abandon the approach to juvenile justice that allows the possibility of representation by an attorney who also acts as a guardian *ad litem*, or, stated in a different way, by an attorney who simply pursues what the attorney believes to be the best interests of his or her minor client. Minors involved in delinquency proceedings will benefit greatly from the adoption of a system that requires that different individuals perform the roles of attorneys and guardians.

This Article will explore some of the many reasons that support this conclusion. Part II will provide a short history and description of the juvenile justice system in Illinois.[21] Part III will discuss the right to counsel under the Illinois Juvenile Court Act and the continuing confusion regarding the attorney's role in delinquency proceedings.[22] Part IV will describe the proper role for an attorney in juvenile delinquency proceedings.[23] Part V will discuss the negative consequences of the confusion between the roles of attorneys and

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supra note 12, at 87 (arguing that the rehabilitative nature of delinquency proceedings necessitates furtherance of the child's own interest); Daniel L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558, 580 (1968) (noting that where the interests of the parents and child diverge, counsel should lean towards representing the juvenile's interests); George L. Lyon Jr., Comment, *Ethical Obligations of Defense Counsel in the Juvenile Court*, 3 J. JUV. L. 135, 147 (1979) (discussing how a lawyer's representation of a juvenile in delinquency proceedings should be analogous to the lawyer's representation of a defendant in a criminal trial).

19. *See supra* note 12 and accompanying text. The argument can be made that the issue is different in cases where the children are unable to express their opinions as to their own interests. Given the ages of children typically involved in delinquency cases, however, this is more common in abuse and neglect or custody cases. It has been argued, for example, "It is a mistake to try to develop a single lawyer role for children in child welfare cases which tries to accommodate their developing capacities from infants to articulate teens. The older child needs a traditional attorney; the youngest child, incapable of directing counsel, needs a substitute to define and advocate for his or her best interests." Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1240 (2006). This line of argument also notes that:

> Trying to define a single lawyer role for children of all ages and all capacities is an impossible task. A better approach . . . would be to adopt a bright line age test, say at seven. At age seven (or eight or ten) and above the youth would receive a client directed advocate, that is, a child's *attorney*, and below the bright-line age a child gets a best interests (or substituted judgment) advocate.

Id. (emphasis in original)

20. Juvenile Court Act, 705 ILL. COMP. STAT. 405/5-170 (2010).

21. *See infra* Part II (discussing the juvenile justice system in Illinois).

22. *See infra* Part III (exploring the attorney's role in delinquency proceedings).

23. *See infra* Part IV (arguing that an attorney cannot maintain an attorney-client relationship and serve as a guardian *ad litem*).

guardians *ad litem*.[24] Part VI will discuss whether the approach currently used by the courts is justified.[25] Finally, Part VII will propose a solution to the problem.[26]

II. THE JUVENILE COURT SYSTEM IN ILLINOIS

Historically, Illinois has been thought to be at the forefront in the creation of a fair and equitable juvenile justice system.[27] In 1899, Chicago became the site of the first separate juvenile court in the United States, which transformed the national approach to the legal needs of children.[28] Influenced by the Chicago model, by 1925 forty-six states, three territories, and the District of Columbia had created separate juvenile courts.[29]

As originally instituted, the juvenile court system was created following a reform movement to protect children rather than to punish them.[30] Before this reform movement, children were subject to severe punishment and incarceration with adult criminals. Reformers sought to treat children differently. The new juvenile tribunals were to be kind places designed to take care of children rather than to judge them.[31] The system was designed to hold minors accountable for their anti-social conduct but was not based on the criminalization of that conduct.[32] The goal of the system was to provide support and rehabilitation rather than punishment, and its procedures were designed

24. *See infra* Part V (outlining the problems with the current confusion between the roles of attorneys and guardians *ad litem*).

25. *See infra* Part VI (rejecting current justifications for permitting both roles).

26. *See infra* Part VII (proposing that eliminating the guardian *ad litem* role will solve the problem at hand).

27. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 1.

28. *Id.* at ix; RAMSEY & ABRAMS, *supra* note 1, at 452; Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1191–92 (1970) (citing Illinois Juvenile Court Act, § 1, 1899 Ill. Laws 131–32 (repealed 1965)).

29. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at ix.

30. RAMSEY & ABRAMS, *supra* note 1, at 452. Some, however, advance the alternative, although not mutually exclusive theory, that the reform was based on an attempt to regulate the behavior of the children of lower class immigrant families. *Id.* at 453.

31. Marvin Ventrell, *The Practice of Law For Children*, 28 HAMLINE J. PUB. L. & POL'Y, 75, 86 (2006) (noting that reformers were "moved by the plight of poor children and sought to save them from their circumstances by removing them from their environment" and by creating an especially kind tribunal "which would care for children . . . as the *parens patriae*"); *see also* RAMSEY & ABRAMS, *supra* note 1, at 452 (citing Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909)) (stating that juvenile courts should treat juvenile offenders "as a wise and merciful father handles his own child").

32. Birckhead, *supra* note 12, at 970 ("Juvenile courts were originally designed over a century ago to be forums for the rehabilitation of youth, rather than the vehicle by which young offenders would be punished.").

to be more informal than those of criminal trials. For this reason, minors were rarely represented by attorneys and their rights were thought to be better served by allowing adults to decide what the minors' best interests[33] would be within the court's civil jurisdiction.[34] This view is exemplified by an article written by a prominent leader in the juvenile reform movement in 1909, which stated that:

> The ordinary trappings of the courtroom are out of place in [juvenile delinquency] hearings. . . . Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in its effectiveness of his work.[35]

This approach, however, has changed dramatically over the years.[36] One reason for the change, most likely, was the realization that juvenile delinquency proceedings have more in common with criminal justice proceedings than with civil cases. A civil jurisdiction approach is understandable in abuse and neglect cases where the children are victims and the court is seeking ways to protect them from harm.[37] However, in delinquency cases the court is looking to evaluate the

33. *Id.* at 970–71.

34. RAMSEY & ABRAMS, *supra* note 1, at 456–57 (explaining that the original juvenile court delinquency procedure was defined, among other things, by informal procedures within the court's civil jurisdiction); Ventrell, *supra* note 31, at 87–88 (stating that based on the philosophy of the child savers, "the juvenile courts throughout the country operated for a half century as largely process-less tribunals").

35. Mack, *supra* note 31, at 120; *see also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, REPORT ON JUVENILE JUSTICE AND CONSULTANT'S PAPERS 3 (1967) (arguing that lawyers were unnecessary and that adversary tactics were out of place).

36. McKeiver v. Pennsylvania, 403 U.S. 528, 543–44 (1971) ("[T]he fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized."); *see also* RAMSEY & ABRAMS, *supra* note 1, at 458 ("Public pressure has led legislatures to embrace a more punitive model that resembles the adult criminal process").

37. Other jurisdictions that allow attorneys to perform a dual role do so more commonly only in custody or abuse and neglect proceedings. *See, e.g.*, *In re* J.K., 656 N.W.2d 253, 259 (Neb. 2003) (stating that the juvenile code recognizes that roles of a guardian *ad litem* and counsel can be carried out by same lawyer except for special reasons); *In re* Christina W., 639 S.E.2d 770, 777 (W. Va. 2006) (holding that if a child's wishes are adverse to child's best interests in abuse and neglect proceedings, they simply cannot be followed). For an argument in support of assigning an attorney to serve as attorney and as guardian *ad litem* simultaneously in child protection proceedings, see Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guarding* Ad Litem *Model*, 6 NEV. L.J. 1284, 1289 (2006), in which the author concludes that the an appointment as attorney and guardian *ad litem* allows the attorney to advance his or her clients' best interests as well as to act as their lawyers and that, "[w]hile this dual capacity presents challenges, it allows for the most effective and efficient representation of children in child protection proceedings." According to this author, the two roles inform each other, and only rarely present unmanageable conflicts. *Id.*; *see also* RAMSEY & ABRAMS, *supra* note 1, at 455–56.

conduct of the children in order to impose some level of punishment, which can result in imprisonment.

For this reason, beginning with a series of decisions starting in the 1960s, the United States Supreme Court began to eliminate much of the distinction between juvenile proceedings and criminal trials.[38] To begin with, the Supreme Court decided that minors in delinquency proceedings must be accorded due process guarantees comparable to those provided to adult criminal defendants.[39] This was a reaction to the traditional informality of juvenile court procedures where due process and assistance of counsel were thought to be obstacles to the goals of juvenile courts.[40]

Once the Court decided juveniles were owed due process, it was not long before it decided they were owed the right to assistance of counsel. Thus, in *In re Gault,* the Court held that the Due Process Clause of the Fourteenth Amendment guarantees minors the right to counsel in delinquency proceedings.[41] Concerned about the lack of due process in the juvenile system, the Court asserted that "the condition of being a

38. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 727–28 (1979) (holding that Fifth Amendment right against self-incrimination applies in the juvenile context if, after reviewing the totality of circumstances, the child did not waive his or her *Miranda* rights); Breed v. Jones, 421 U.S. 519, 535–36 (1975) (finding that the constitutional protection of double jeopardy does not diminish the informality and flexibility inherent in juvenile court proceedings); *In re* Winship, 397 U.S. 358, 359, 366 (1970) (finding that juvenile delinquency proceedings are governed by the evidentiary standard of proof beyond a reasonable doubt, which is an "essential of due process and fair treatment"); *In re* Gault, 387 U.S. 1, 30–31 (1967) (holding that Fourteenth Amendment Due Process rights govern juvenile delinquency proceedings, just as they do criminal proceedings); Kent v. United States, 383 U.S. 541, 562 (1966) (finding that in waiver proceedings in Juvenile Court, a child is afforded substantially the same rights as criminal defendants, including a hearing and assistance of counsel); ROBIN WALKER STERLING, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 1 (2009), *available at* http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf (remarking that beginning in 1966, the aforementioned cases "extended bedrock elements of due process to youth charged in delinquency proceedings").

39. *See Kent*, 383 U.S at 563–65 (invalidating a juvenile court order transferring a teenager to criminal court); *see also* 705 ILL. COMP. STAT. 405/5-101(1)(d), (3) (2006) (requiring all procedures in the juvenile justice system to comport with the constitutional rights due to criminal defendants, unless specifically provided otherwise).

40. STERLING, *supra* note 38, at 2 ("[I]ntroduction of advocates to the juvenile court system was meant . . . to infuse the informal juvenile court process with more of the jealously-guarded constitutional protections of adult criminal court and their attendant adversarial tenor."); Katherine R. Kruse, *Standing in Babylon, Looking Toward Zion*, 6 NEV. L.J. 1315, 1318 (2006) ("[R]ight to adversary counsel in delinquency cases was established in a surge of realism about the widespread failure of juvenile courts to live up to their rehabilitative ideals.").

41. *In re Gault*, 387 U.S. at 41. The Court emphasized that providing legal representation for minors in delinquency proceedings was necessary to assure due process asserting that "no . . . action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel." *Id.* at 38 n.65.

boy does not justify a kangaroo court"[42] and also recognized that minors have the right to written notice of the charges against them, the right to confront and cross-examine witnesses, the right to appeal, and the protection provided by the right against self-incrimination.[43] In addition, a few years later, the Court held that minors' guilt must be proven beyond a reasonable doubt[44] and that a delinquency proceeding triggers the protection against double jeopardy.[45] Most recently, the Court also extended the protections of the so-called "Miranda rights" to juveniles.[46]

Given this line of cases, it can be argued that the Supreme Court's approach supports the view that juvenile delinquency proceedings are analogous to criminal trials and that attempts to distinguish juvenile delinquency proceedings from criminal trials by calling them "non adversarial"[47] would not exempt them from the application of Constitutional guarantees. The Court explicitly stated this notion in 1970 when holding that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."[48]

In Illinois, the development of the law and the practice of that law in juvenile courts have followed a similar path. Over the years, the juvenile court system that had originally been created to provide a non-criminal avenue for rehabilitation of juveniles has become much more like a criminal trial system for young defendants.[49] This is particularly true since 1998 when the Illinois General Assembly adopted changes to

42. *Id.* at 28; Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 301 (1998) ("Nearly everyone would identify 1967 as the most important year in the history of counsel for children in the United States.").

43. *In re Gault*, 387 U.S. at 33, 47–49, 58.

44. *In re* Winship, 397 U.S. 358, 367 (1970).

45. Breed v. Jones, 421 U.S. 519, 535–36, 538 (1975).

46. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2408 (2011) (reversing the lower court's holding that a minor was not entitled to a Miranda warning because children will often feel bound to submit to police questioning when an adult in the same circumstances would understand he or she is free to leave).

47. *In re* Rodney S., 932 N.E.2d 588, 594 (Ill. App. Ct. 2010) (deeming juvenile delinquency proceedings non-adversarial in the traditional sense); *In re* Austin M. 941 N.E.2d 903, 917 (Ill. App. Ct. 2010) (asserting that juvenile delinquency proceeding are not as adversarial as traditional, criminal proceedings).

48. *In re Winship*, 397 U.S. at 365–66. The Court, however, has not been entirely consistent on this point when it comes to the issue of whether juveniles should have the right to a jury in juvenile proceedings. *Id.* at 377 (Black, J., dissenting). In *McKeiver v. Pennsylvania*, the Supreme Court found that "juvenile court proceeding[s] ha[ve] not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment." 403 U.S. 528, 541 (1971).

49. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 23.

the Illinois Juvenile Court Act—changes that even the Illinois Supreme Court has admitted make the juvenile delinquency adjudicatory process more punitive and more criminal in nature.[50]

The result of those amendments was a new statute that "represents a fundamental shift from the singular goal of rehabilitation to include the overriding concerns of protecting the public and holding juvenile offenders accountable for violations of the law"[51] and that make the statute more like a penal statute that should be strictly construed in favor of the accused.[52] As adopted, the changes expanded the conditions under which a minor could be transferred to an adult court, shifted the focus from the needs of the child to the nature of the alleged offense,[53] mandated that some children would be committed to the Department of Juvenile Justice until the age of twenty-one,[54] expanded access to and sharing of a child's school and court records between law enforcement and other agencies,[55] lengthened the amount of time a child could be held at a police station,[56] and eliminated the confidential character of a number of aspects of the proceedings.[57] In addition, minors must register as sex offenders under the Sex Offender

50. *In re* Jaime P., 861 N.E.2d 958, 964 (Ill. 2006); People *ex rel.* Devine v. Stralka, 877 N.E.2d 416, 424 (Ill. 2007); People v. Taylor, 850 N.E.2d 134, 139 (Ill. 2006); *see also In re* Jonathon C.B., 958 N.E.2d 227, 265 (Ill. 2011) (Burke, J., dissenting) ("[T]he Juvenile Justice Reform Provisions of 1998, along with a number of other amendments to the Juvenile Court Act since 1999, have transformed the Act to such an extent that, for juveniles charged with criminal offenses, juvenile proceedings are now the equivalent of a criminal prosecution.").

51. *Taylor*, 850 N.E.2d at 139. On the other hand, the 1998 reforms also included provisions that appeared to attempt to achieve a more "restorative" approach to juvenile justice by encouraging the creation of community mediation programs and diversion and intervention programs in order to provide opportunities for minors to avoid having to appear before juvenile court proceedings or to be transferred to adult courts. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 23–24.

52. *In re Jaime P.*, 861 N.E.2d at 966. The Juvenile Court Act was "radically altered" when the General Assembly amended the Act to provide more accountability for the criminal acts of juveniles, thus making the statute more like a penal statute that should be strictly construed in favor of the accused. *Id.* at 964.

53. *See* 705 ILL. COMP. STAT. 405/5-130 (2010) (requiring that the offense be used to determine jurisdiction); 705 ILL. COMP. STAT. 405/5-805 (2010) (discussing transfer of jurisdiction based on offense).

54. 705 ILL. COMP. STAT. 405/5-815; 705 ILL. COMP. STAT. 405/5-820; 705 ILL. COMP. STAT. 405/5-750(2).

55. *See generally* 705 ILL. COMP. STAT. 405/5-901 (regarding confidentiality of records and expungements).

56. *See* 705 ILL. COMP. STAT. 405/5-410(c) (providing that a juvenile accused of committing a crime of violence may be detained up to twenty-four hours in a county jail or municipal lockup).

57. *See* 705 ILL. COMP. STAT. 405/5-901(5)(a) (allowing the general public to have access to a delinquent minor's name, address, and offense).

Registration Act for the same period of time as adults[58] and, just like convicted adults, all minors found guilty of the commission of a felony must provide a DNA sample to the Illinois Department of State Police so that genetic marker grouping analysis information may be included in adult state and national DNA databases.[59] Finally, although not as important in terms of substance, but certainly illustrative of the trend, even the terminology used regarding delinquency proceedings was changed and is now almost indistinguishable from the terminology used in criminal proceedings.[60]

This shift in focus within the juvenile justice system has led commentators, attorneys, and some justices of the Illinois Supreme Court to conclude that the attributes of the adult criminal justice system are already permanent features of the juvenile justice system.[61] For

58. 730 ILL. COMP. STAT. 150/3-5. However, the Illinois Supreme Court has adopted the view that applying sex offender registration requirements to minors does not support the conclusion that the juvenile delinquency system has become more punitive. It has found that "requiring a juvenile sex offender to register, and allowing very limited public access to notification concerning the juvenile's status as a sex offender, does not constitute punishment." *In re* Jonathon C.B., 958 N.E.2d 227, 247 (Ill. 2011) (Burke, J., dissenting) (citing *In re* J.W., 204 Ill. 2d 50, 75 (2003)). It is difficult to understand how the exact same consequence is considered punishment if applied to an adult but not if applied to a child. It is also difficult to accept that the consequences do not constitute punishment when one considers, as argued by Justice Burke in *In re Jonathon C.B.*, that "[w]ith registration comes the potential that restrictions will be placed on the minor's movement (730 ILL. COMP. STAT. 150/7 (2006)), schooling (730 ILL. COMP. STAT. 152/121 (2006)), and housing (730 ILL. COMP. STAT. 150/8 (2006)), as well as other societal repercussions which could continue throughout the minor's lifetime." *Id.* at 266 (Burke, J., dissenting).

59. 730 ILL. COMP. STAT. 5/5-4-3(a)(3.5) (2010). Interestingly, however, the Court has unconvincingly tried to support the view that applying DNA collection and storage requirements to minors should not be used to support the argument that the juvenile delinquency system has become more punitive. It has claimed that, as applied to juveniles, DNA collection and storage has a "deterrent and rehabilitative effect because it identifies those at risk of offending." *In re* Lakisha M., 882 N.E.2d 570, 579 (Ill. 2008). According to the court, this makes it consistent with the Juvenile Court Act's purpose of rehabilitating juveniles to prevent further delinquent behavior. This view was recently reaffirmed in *In re Jonathon C.B.*, 958 N.E.2d at 250. Setting aside the doubtful assertion that collecting DNA identifies those at risk of reoffending, it is difficult to understand how deterrence as a punishment contributes to rehabilitation in any way that is different than when applied to adults. *Id.* at 265–66 (Burke, J., dissenting). In other words, the collection of DNA adopted to inspire deterrence in juveniles is exactly the same as in cases involving adults. *Id.* The fact that in one case the court is using it against a juvenile does not make the use of the measure any less punitive. *Id.*

60. What used to be referred to as an "adjudication hearing" is now called a "trial." An adverse result for the juvenile at that hearing, which used to be called an "adjudication of delinquency," is now called a "finding of guilt," which now results in another hearing called a "sentencing hearing." *In re Jonathon C.B.*, 958 N.E.2d at 265 (Burke, J., dissenting); People v. Taylor, 850 N.E.2d 134, 139 (Ill. 2006).

61. *See In re Jonathon C.B.*, 958 N.E.2d at 272–74 (Burke, J., dissenting) (explaining how amendments to the Juvenile Court Act have introduced attributes of criminal proceedings to juvenile proceedings held under the Act); *In re* G.O., 727 N.E.2d 1003, 1017 (Ill. 2000) (Heiple,

example, in a dissenting opinion in a case decided in 2000, Justice Heiple argued that:

> In past decisions, this court has emphasized that delinquency proceedings are not criminal in nature because the overriding concern of these proceedings is rehabilitation, not punishment. . . . The prior analysis on this issue is flawed, however, because it relied on an outmoded characterization of the juvenile justice system. Much has changed . . . . Rehabilitation no longer occupies its once preeminent status in the juvenile justice system; punishment and public safety are now the juvenile justice system's overriding concerns.[62]

Likewise, more recently, Justice Burke opined,

> I believe that legislative changes to the Juvenile Court Act . . . have placed juvenile offenders on par with adult offenders and, as a practical matter, have resulted in a convergence of the juvenile justice system with the adult justice system. The revisions to our Juvenile Court Act have turned juvenile delinquency proceedings into an adversarial system in which punishment of the minor and protection of society are the primary goals. The protective *parens patriae* ideals, which were the hallmark of the juvenile justice system . . . have given

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J., dissenting) ("[M]ost attributes of the adult criminal justice system are already permanent fixtures of the juvenile justice system."); Brief and Argument for Respondent-Appellant, *In re* Austin M., (Ill. Sep. 6, 2011) (No. 111195) [hereinafter Brief for Austin M.] (arguing that since 1967, juvenile delinquency proceedings have become more punitive and less focused on rehabilitation); Brief of Juvenile Law Center et al. as Amici Curiae Supporting Respondent-Appellant at 9, *In re* Austin M., 941 N.E.2d 903 (Ill. App. Ct. 2010) (No. 4-08-0435) (discussing the 1999 amendments to the Juvenile Court Act and arguing that these amendments shifted the focus of delinquency proceedings to "protecting the public and holding juvenile offenders accountable" for their crimes (internal citations omitted)); ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 2 (identifying the inappropriate use of plea bargaining in juvenile proceedings as one of the major shortcomings of the Illinois juvenile justice system). Some commentators had been arguing this even before the state supreme courts began to pay close attention to juvenile proceedings. *See* Federle, *supra* note 8, at 1672 (citing Chester J. Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387, 387–91 (1961)) (noting that some commentators prior to 1967 believed that "distinction between the juvenile and criminal courts . . . was not a meaningful one and the constitutional requisites of due process mandated certain procedural protections, including the right to counsel"); Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957) ("If the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling."); Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1160 (1968) ("Despite attempts to purge the term 'juvenile delinquent' of pejorative implications, it has come to have as much dramatic significance for community disapproval as the label—'criminal'—which it replaced."); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 281 (1967) ("Because the child may on occasion be subjected to punishment as a result of a juvenile court adjudication, it has been argued that the Constitution requires the state to provide the full panoply of procedural safeguards normally associated with the criminal process.").

62. *In re G.O.*, 727 N.E.2d at 1015 (Heiple, J., dissenting).

> way to a new reality—one in which juveniles are treated more like adult criminal defendants.[63]

The Illinois Juvenile Court Act itself contributes to the ongoing debate over the true nature of juvenile delinquency proceedings. It expresses the notion that juvenile proceedings are like criminal trials, but it immediately undermines the strength of that statement by implying that the state does not have to recognize all the rights recognized in criminal trials.[64]

The underlying idea behind this statement is that, although juvenile delinquency proceedings are like criminal trials, they are not similar enough to criminal trials to require the state to approach them in exactly the same way it approaches criminal trials. Illinois courts, including the Illinois Supreme Court, have been relatively consistent in expressing this apparently inconsistent view. Courts have, thus, sometimes

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63. *In re Jonathon C.B.*, 958 N.E.2d at 275 (Burke, J., dissenting). Based on this view, Justice Burke concluded,

> [W]hen a minor is charged and tried in juvenile court for having committed an offense that would be a felony if committed by an adult, and the minor is subject to the possibility of being confined for more than six months, it can scarcely be denied that the delinquency prosecution is the legal equivalent of a criminal prosecution [and that the] right to a jury trial, granted to an accused "in criminal prosecutions" . . . must apply to juveniles.

Id.

64. The Act states that "minors shall have all the procedural rights of adults in criminal proceedings," only to immediately qualify the statement by adding that this is only true "unless specifically precluded by laws that enhance the protection of such minors." 705 ILL. COMP. STAT. 405/5-101(3) (2010). Interestingly, one of the rights the Act assumes would *not* enhance the protection of minors is the right to a jury trial. The Act specifically provides juveniles the right to a jury trial in only three instances: when the juvenile is tried under the extended juvenile jurisdiction provision; as a habitual juvenile offender; or as a violent juvenile offender. *See* 705 ILL. COMP. STAT. 405/5–810 (describing the process of extended jurisdiction for juvenile prosecutions); 705 ILL. COMP. STAT. 405/5–815 (stating that a habitual juvenile offender is an individual that has been adjudicated twice for offenses as a minor, which would have been felonies had the child been an adult); 705 ILL. COMP. STAT. 405/5–820 (defining a violent juvenile offender as one who has been adjudicated as a minor for a crime that would have been a Class 2 or greater felony had the child been an adult). A recent attempt to declare the denial of the right to jury trials in delinquency proceedings was rejected in *In re Jonathon C.B.*, 958 N.E.2d at 246 (citing *In re* Fucini, 255 N.E.2d 380, 382 (Ill. 1970); *In re* Presley, 264 N.E.2d 177, 179 (Ill. 1970); *In re* Jones, 263 N.E.2d 863, 864 (Ill. 1970)). In *In re Jonathon C.B.*, the court considered whether the section of the Juvenile Court Act, which denies the right to a jury trial, is unconstitutional. *In re Jonathon C.B.*, 958 N.E.2d at 238. Finding that the 1999 amendments to the Juvenile Court Act do not render it punitive and criminal in nature, the court concluded that there are still significant differences between juvenile proceedings and criminal trials to justify the difference in approach. *Id.* at 251. Thus, it concluded that § 5-101(3) does not violate the Illinois Constitution. *Id.* at 249. In dissent, Justice Burke argued that the changes to the Act have rendered juvenile proceedings "fundamentally more criminal in nature" and, thus, that § 5-101(3) should be held to be unconstitutional. *Id* at 261.

asserted that juvenile delinquency proceedings are like criminal trials,[65] but more often than not have taken the view that they are still sufficiently different to justify differences in approach and in the recognition of applicable rights.[66] In *People v. Taylor*, for example, the court explicitly stated that:

> The policy that seeks to hold juveniles accountable for their actions and to protect the public does not negate the concept that rehabilitation remains a more important consideration in the juvenile justice system than in the criminal justice system and that there are still significant differences between the two, indicating that 'the ideal of separate treatment of children is still worth pursuing.'[67]

Also, and perhaps due to this type of ambivalence, the extent to which states guarantee the right to counsel in delinquency proceedings varies among jurisdictions.[68] In some states, children are guaranteed attorneys only in certain proceedings and in some states children are allowed to waive their right to counsel.[69] In Illinois, however, all children have the right to an attorney at every stage of juvenile court

65. *See In re* Jaime P., 861 N.E.2d 958, 964 (Ill. 2006) (citing People v. Taylor, 850 N.E.2d 134, 138 (Ill. 2006)) (discussing the punitive focus of the most recent amendments to the Juvenile Court Act); People v. Giminez, 319 N.E.2d 570, 572–73 (Ill. App. Ct. 1985) (finding that a detention hearing is akin to an adult probable cause hearing, which requires that counsel be appointed for minors); *see also In re G.O.*, 727 N.E.2d at 1017 (Heiple, J., dissenting) (arguing that most attributes of the adult criminal justice system were already permanent features of the juvenile justice system).

66. *See In re Jonathon C.B.*, 958 N.E.2d at 275 (Burke, J., dissenting) (stating that the Juvenile Court Act has equated juvenile criminal offenders with adult criminal offenders, and therefore a jury trial analogous to a criminal trial should be given to juveniles).

67. *Taylor*, 850 N.E.2d at 141; *see also In re* A.G., 746 N.E.2d 732, 735 (Ill. 2001) (finding that, even though the Juvenile Court Act has been significantly amended, "proceedings under the Act are still not criminal in nature and are to be administered in a spirit of humane concern for, and to promote the welfare of, the minor").

68. RAMSEY & ABRAMS, *supra* note 1, at 513, 515 ("Thousands of juveniles are urged or cajoled into waiving their rights without adequate representation." (quoting N. LEE COOPER, *Conveyor Belt Justice*, ABA J., July 1997, at 6)).

69. RAMSEY & ABRAMS, *supra* note 1, at 513, 515; *see also, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-221(A), (H) (2011) (counsel appointed only if offense can result in detention); DEL. FAM. CT. R. CRIM. P., 44(a) (2012) (stating that a minor can waive right to counsel); 705 ILL. COMP. STAT. 405/1-5(1) (2010) (stating that a minor has a right to be present, heard, and present evidence, as well as the right to be represented by counsel); N.H. REV. STAT. ANN. § 169-B:12 (LexisNexis 2010) (stating that the court shall appoint counsel at the time of arraignment for a minor, provided that the minor does not have a valid waiver); N.J. STAT. ANN. § 2A:4A-39 (West 2011) (describing that a juvenile shall have the right to counsel); N.M. STAT. ANN. § 10-223(A) (West 2011) (requiring the appointment of counsel in a delinquency hearing within five days of the filing of the petition or before the commencement of the detention hearing); OR. REV. STAT. ANN. § 419C.200 (2011) (mandating that a the court must appoint counsel to a child in any case in which the court would be required to appoint counsel to an adult charged with the same offense); WASH. REV. CODE ANN. § 13.40.140(2) (West 2004) (stating that children have the right to be represented by counsel at all critical stages of the proceedings).

proceedings[70] and children under the age of seventeen are not allowed to waive their right to counsel in any proceeding.[71] Also, it is clear that minors are entitled to effective assistance of counsel in proceedings under the Illinois Juvenile Court Act.[72] Thus, at first sight, Illinois appears to continue to be at the forefront of the movement to protect the rights of minors. Unfortunately, however, the reality is quite different.

III. THE RIGHT TO COUNSEL UNDER THE ILLINOIS JUVENILE COURT ACT AND THE CONFUSION REGARDING THE ATTORNEY'S ROLE

The Illinois Juvenile Court Act provides that minors have the right to be represented by counsel in all juvenile court proceedings.[73] However, it also states that if a guardian *ad litem* has been appointed for the minor and the guardian *ad litem* is a licensed attorney, "the court may not require the appointment of counsel to represent the minor unless the court finds that the minor's interests are in conflict with what the guardian *ad litem* determines to be in the best interest of the minor."[74] Although this provision appears in the section of the Act that applies solely to abuse and neglect proceedings,[75] and not in the section that applies to delinquency proceedings,[76] courts have interpreted it to apply

70. Section 1-5(1) of the Act provides that "[n]o hearing on any petition or motion filed under [the] Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel." 705 ILL. COMP. STAT. 405/1-5(1).

71. 705 ILL. COMP. STAT. 405/5-170(b); 725 ILL. COMP. STAT. 5/115-1.5 (2010).

72. *See In re* D.M., 631 N.E.2d 341, 343–44 (Ill. App. Ct. 1994); *In re* F.N., 624 N.E.2d 853, 859 (Ill. App. Ct. 1993).

73. 705 ILL. COMP. STAT. 405/1-5.

74. *Id.* Other states that allow hybrid appointments include California, Georgia, Michigan, Pennsylvania, and Wyoming. Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 50 n.48 (2011). The term guardian *ad litem* may have different meanings, but it appears that in the context of the Illinois statute it refers to what the working group on confidentiality of the Fordham University School of Law's Conference on Ethical Issues in the Legal Representation of Children referred to as a "best interests guardian *ad litem*" as opposed to a "judicially designated investigator." Boyer, *supra* note 9, at 1368–69. For more on these different roles, see *supra* note 9 and accompanying text.

75. 705 ILL. COMP. STAT. 405/1-5.

76. The section of the statute on juvenile delinquency proceedings states that a court may appoint a guardian *ad litem* for the minor whenever it finds that there may be a conflict of interest between the minor and his or her parent, guardian or legal custodian or that it is otherwise in the minor's interest to do so, and that "[u]nless the guardian *ad litem* is an attorney, he or she shall be represented by counsel." 705 ILL. COMP. STAT. 405/5-610(2) (2010). In addition, the statute points out that minors are not allowed to waive their right to counsel. 705 Ill. Comp. Stat. 405/5-170(b) (2010); *see also* Diane Geraghty, *Ethical Issues in the Legal Representation of Children in Illinois: Roles, Rules and Reforms*, 29 LOY. U. CHI. L.J. 289, 293 (1998) ("[A] strong argument can be made that the Act's language, history and context support a conclusion that it envisions the creation of a traditional attorney-client relationship.").

to delinquency proceedings as well.[77]

For this reason, at least according to the interpretation of the Illinois courts, a court can satisfy its duty to provide counsel by providing a guardian *ad litem* who is also a lawyer.[78] Thus, according to this view, the statute expressly recognizes the distinct possibility that an attorney may be asked to serve as an advocate for a minor client in a delinquency proceeding at the same time he or she is asked to serve as a guardian *ad litem*. Given this approach to the right to counsel, it is not surprising to learn that it has been reported that "[j]uvenile defenders in a majority of Illinois' counties represent youth according to the 'best interest' model, which substitutes the attorney's judgment for the client and can constrain counsel to the expectations of the court thus limiting advocacy."[79]

In fact, according to the assessment of the Illinois juvenile justice system by the Children and Family Justice Center of Northwestern University School of Law and the National Juvenile Defender Center, many of the delinquency proceedings' lawyers interviewed as part of the study expressed confusion as to their ethical obligations and responsibilities to their clients.[80] As stated in the report,

> Many of the defense attorneys interviewed understood their role as that of advancing what they determined to be the "best interest" of their client as opposed to their client's "expressed interest." In numerous cases, this confusion was exacerbated when the attorney was appointed as both attorney and guardian *ad litem*. Team interviews and observations made clear that in a majority of the

77. For the two most recent instances, see *In re Rodney S.*, 932 N.E.2d 588 (Ill. App. Ct. 2010) and *In re Austin M.*, 941 N.E.2d 903 (Ill. App. Ct. 2010). Interestingly, *In re J.D.*, 815 N.E.2d 13, 15–16 (Ill. App. Ct. 2004) is a reverse example of this confusion. In this case, in order to resolve the issue in the context of an abuse and neglect controversy, the court supported its conclusion on a delinquency case that had been decided before the amendments to the Juvenile Court Act that were in place when *In re J.D.* itself was decided. *Id.* at 15–16.

78. *See supra* notes 67–68 and accompanying text (describing the ability of Illinois courts to provide counsel to a minor by appointing a lawyer as a guardian *ad litem*).

79. ILL. JUVENILE JUSTICE COMM'N, ANNUAL REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY FOR CALENDAR YEARS 2007 AND 2008, at 12–13 (2009), *available at* http://www.dhs.state.il.us/OneNetLibrary/27897/documents/CHP/Reports/AnnualReports/IJJCAnnualReport2007-2008.pdf. The confusion is exacerbated by the decision in *In re K.M.B.*, 462 N.E.2d 1271, 1271–72 (Ill. App. Ct. 1984), decided before the 1998 revisions to the Juvenile Court Act, in which the Illinois Appellate Court held that at the dispositional stage of a proceeding, a lawyer has a duty to make recommendations to the court as to what is in the child's best interest, even when the recommendations are in conflict with the child's wishes. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 23.

80. The report states that "[m]any attorneys interviewed as part of the assessment expressed confusion over their roles, which they attributed to the fact that they are often appointed as 'Attorney-Guardians *Ad litem*.'" ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 62.

> Illinois counties surveyed, juvenile defenders are operating under the "best interest" model, *substituting their judgment for that of their client.* In these counties, there seems to be an expectation among all concerned (defense lawyers, prosecutors, judges, and probation officers) that the role of defense counsel is to do what is "best" for her client.[81]

The report also mentions the specific case of a public defender who expressed how the situation left her "ill at ease."[82] How can a situation that leaves the attorney "ill at ease" be adequate when the attorney is the person the minor depends on to fulfill her ethical obligations and duties of zealous representation?

The answer is that such a situation cannot be adequate.[83] As the assessment report concludes, the expectation of serving the minor client as an advocate and a guardian at the same time "places severe and unwarranted constraints upon the independence of defense counsel and improperly limits zealous advocacy on behalf of children who appear in Illinois' juvenile courts."[84] It also places the attorney in a position where the attorney violates his or her duties under the rules of professional conduct because attorneys are tempted to, or do indeed,

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81. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 2–3, 126 n.21 (emphasis added). The assessments in other states reflect similar conclusions. *See supra* note 7 (providing details regarding multiple state assessments).

82. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 62–63.

83. This is one of the arguments raised by the appellant in *In re Austin M.*, 941 N.E.2d 903, 917 (Ill. App. Ct. 2010). In that case, the attorney was not appointed as a guardian *ad litem*. *Id.* at 906. He was hired by the juvenile to appear as his lawyer, yet the attorney apparently understood his role to be that of a guardian instead. *Id.* As stated in appellant's brief before the Illinois Supreme Court, "It is axiomatic that adolescents share an almost universal inability to vindicate their constitutional rights without the assistance of an attorney." Brief for Appellant Austin M., *supra* note 61, at 19 (citing *In re* Gault, 387 U.S. 1, 36–37 (1967)). Granting minors the rights against self-incrimination and double jeopardy, and the rights to notice, confrontation, cross-examination, and a reasonable doubt burden of proof thus would have little meaning in the absence of a zealous advocate to vindicate those rights. *See In re Gault*, 387 U.S. at 38–39 (citing PRESIDENT'S COMMISS'N ON L. ENFORCEMENT & ADMIN. JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86–87 (1967)) (describing the importance of why counsel should be appointed to a child in a juvenile proceeding); Brief for Appellant Austin M., *supra* note 52, at 19; *see also* Birckhead, *supra* note 12, at 962 (comparing and contrasting the norms of criminal defense practice with the culture that permeates many juvenile courts in the United States to show how rigorous advocacy and accurate fact-finding become compromised in the name of consensus-building and helping the child).

84. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 3; *see also* Boumil et al., *supra* note 74, at 50 (arguing that "the potential for conflicting obligations in the course of representation is uncomfortably palpable" when an attorney is asked to act as attorney and guardian *ad litem* simultaneously); David R. Katner, *Coming to Praise, Not to Bury, The New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103, 108 (2000) (explaining that determining what is in a child's best interest "creates some serious ethical problems for a licensed attorney").

substitute their judgment for that of their clients.[85] This, in turn, makes the attorneys vulnerable to attacks of ineffective assistance of counsel, malpractice, and breach of fiduciary duties.

This situation displays a misunderstanding of the very notion of the attorney-client relationship and the duties of an attorney under the rules of professional conduct. The notion that some attorneys are attempting to serve as guardians *ad litem* and advocates for the minors at the same time as long as there is no conflict is a contradiction in terms. There is no need for a court to have to determine if there is a conflict, as the statute suggests, because taking on the two roles simultaneously is, by definition, a conflict of interest.[86]

IV. THE PROPER ROLE OF AN ATTORNEY IN JUVENILE DELINQUENCY PROCEEDINGS

The most basic principle of the attorney-client relationship is that attorneys owe fiduciary duties to their clients, which include the duty to avoid conflicts of interests and the duty of confidentiality. Given the

85. Birckhead, *supra* note 12, at 962 (arguing that even in jurisdictions where attorneys are trained to advocate for their minor client's expressed interests rather than relying on what the attorneys deem to be in the child's best interests, the informal culture that permeates most juvenile courtrooms in the United States makes it difficult for lawyers to act according to their professional duty); Kruse, *supra* note 40, at 1319–20 ("Confronted by the realities of overloaded dockets, routinized [sic] disposition and permanency plans, and punitive attitudes toward children and their parents, expressed wishes representation becomes more difficult" because these realities put pressure on lawyers for children to take up the void created by the lack of resources by "developing an independent, individualized and multidisciplinary determination of their child clients' best interests that may or may not coincide with their expressed wishes."); *see also infra* Parts IV and V (discussing the role of the rules of professional conduct on attorneys representing children in juvenile courts).

86. *In re* Shaquanna M., 767 A.2d 155, 165 (Conn. App. Ct. 2001) ("[C]ourts do not condone the policy of appointing one person to fill the different roles of guardian *ad litem* and attorney."); Birckhead, *supra* note 12, at 962 (stating that the informal culture that permeates most juvenile courtrooms makes it difficult for lawyers to act according to their professional duty); Katner, *supra* note 84, at 103 (stating that the guardian *ad litem* role is "inconsistent with the traditional functions of an attorney representing a client"); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1523 (1996) (explaining that lawyers playing the role of guardian *ad litem* often violate professional duties by acting as witnesses, disclosing confidential information, disregarding their client's requests and not including their clients in the decision making process); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1615 (1996) (arguing that there are stark differences between the roles of attorney and guardian *ad litem*); *see also* Geraghty, *supra* note 76, at 291.

> [T]he most common practice in Illinois is to appoint one person to simultaneously act as a child's attorney and guardian *ad litem*. . . . [T]his practice creates an ethical dilemma for attorneys required to perform both roles because there are inherent differences between the customary duties of attorneys and guardians *ad litem*.

Id.

differences between the roles of an attorney and a guardian *ad litem*, when an attorney attempts to fulfill both roles at the same time, all of these basic elements of the attorney-client relationship, and the ethical duties created to protect them, are threatened.

Saying that attorneys owe fiduciary duties to their clients' means, broadly speaking, that the attorney is an agent of the client and that there is an obligation to respect the client's autonomy to make decisions, at a minimum, as to the objectives of the representation,[87] and to pursue the client's objectives with diligence.[88] Thus, if the attorney represents the client as an attorney, as opposed to as a guardian, the lawyer must allow the client to decide the objectives of representation.[89] If the attorney disagrees with the client's position, or believes that pursuing the client's stated objective is not in the client's best interest, the lawyer can counsel the client accordingly, explaining the disadvantages and dangers of the client's choice, but should ultimately follow the client's instructions rather than substitute his or her judgment for that of the client.[90]

These duties are reflected in the rules of professional conduct[91] and lawyers must observe them fully and without reservation. Anything less would be a violation of the lawyer's duties to the client. As explained by a noted legal ethicist and scholar, "[a]ny lawyer who seeks to lessen or qualify the degree of his or her duties to a client must expect to be

87. This view is reflected in Rule 1.2 of the Illinois Rules of Professional Conduct, which requires an attorney to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued." ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.2(a) (2010); *see also* RONALD ROTUNDA & JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE § 1.2-2(a) (2010) (stating that a lawyer is the agent (not the guardian) of the client, and must "abide by the client's decisions concerning the objectives of the representation").

88. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 68–69 (2009).

89. Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1294–95 (1996).

90. *See* State v. Joanna V., 94 P.3d 783, 786 (N.M. 2004) ("[A]lthough counsel may advise the client on counsel's view of the client's best interests, counsel is ultimately required to advance the client's expressed wishes."); *see also* Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1959–60 (1996) ("[L]awyers may not normally substitute their own opinions regarding the goals of the representation."); Green & Dohrn, *supra* note 89, at 1295 (describing a number of tenants that a child's lawyer must abide by, including that the child's lawyer must respect the child with undivided loyalty, and that the lawyer must communicate with the child).

91. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1–1.3 (2010) (discussing the fact that a lawyer must provide competent and diligent representation of a client); ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.1–1.3 (2010) (outlining the role of a lawyer to be competent, respectful and diligent in the representation of a client). If the lawyer finds the situation intolerable, he or she may try to withdraw from representation, though. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2010); ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.16(b)(4) (2010).

met with the response that the claim is inconsistent with the lawyer's fiduciary status"[92] and with a possible claim for civil liability.[93]

A second element of the attorney's fiduciary duty to the client is the duty to avoid conflicts of interest—i.e., a duty to avoid situations where the attorney faces the risk that his or her duty to a client might be compromised. Neither the lawyer's own interests nor those of others "can be permitted to impede or compromise fulfillment of the lawyer's duties to the client."[94] In fact, merely operating under circumstances where this risk exists is a conflict of interest. There does not need to be a violation of a specific duty under the rules of professional conduct for there to be a violation of the duty to avoid conflicts. Finding oneself in a situation where there is a significant risk of a violation of a duty to a client is, in and of itself, a violation of a duty to the client.[95]

Again, the rules of professional conduct and their comments clearly express this view.[96] As stated in the comment to Rule 1.7, "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities."[97]

The reason for this approach to conflicts of interests is simple. Allowing lawyers to operate under circumstances where there is a risk that the lawyers will be tempted to violate their duties to their clients would damage the trust and confidence upon which the attorney-client relationship must be based. Clients need to be assured that their lawyers will not be tempted to violate their duties in order to trust them fully

92. GILLERS, *supra* note 88, at 76.

93. *Id.* (explaining that a fiduciary duty "is a legal concept so that violation of the duty carries enforceable civil law remedies"). Courts in Illinois have recognized a civil remedy for damages caused by a breach of fiduciary duty by lawyers. *See, e.g.*, Bauer v. Hubbard, 593 N.E.2d 569, 572 (Ill. App. Ct. 1992) (stating that the plaintiff alleged a basis for recovery due to the lawyer charging excessive fees and violating her fiduciary duty); Doe v. Roe, 681 N.E.2d 640, 645–46 (Ill. App. Ct. 1997) (discussing that a fiduciary relationship exists between an attorney and his client as a matter of law); Kling v. Landry, 686 N.E.2d 33, 39 (Ill. App. Ct. 1997) (reviewing whether an attorney breaches his fiduciary duty by coercing a client to engage in sexual relations). For a discussion on possible civil liability based on the conduct of lawyers for children, see Katner, *supra* note 84, at 115–20. The Restatement of the Law Governing Lawyers recognizes a cause of action for breach of fiduciary duty if the breach is the legal cause of an injury to the client. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000).

94. GILLERS, *supra* note 88, at 18 (basing this idea on the fact that a lawyer has a fiduciary duty to his or her client).

95. *Id.* at 135.

96. ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.7 (2010); MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010).

97. ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.7 cmt. 8 (2010); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 (2010).

with their confidences and concerns.[98]

Although establishing an attorney-client relationship with a minor raises some concerns because of the fact that the client is, in fact, a minor,[99] the general principles reflected in the rules do not change much.[100] This conclusion is expressed in Rule 1.14 of the Illinois Rules of Professional Conduct, which explains the approach an attorney must follow when establishing an attorney-client relationship with a client with diminished capacity, in dealing with the allocation of authority within that relationship, and the general fiduciary duties of the attorney.[101] The general principle expressed in the rule is that regardless of the age of the client, the attorney should maintain a normal client-lawyer relationship with his or her client,[102] which, of course, means the attorney has a duty to comply with all the duties any attorney owes an adult client.

Rule 1.14 does, however, recognize the possibility that because of the client's age, it may be difficult for the attorney to establish a "normal" attorney-client relationship[103] and expresses alternative approaches for such cases. Thus, the rule provides that:

> [W]hen the lawyer reasonably believes that the client has diminished

98. GILLERS, *supra* note 88, at 135; MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt 6 (2010); ILL. SUP. CT. R. OF PROF. CONDUCT R. 1.7 cmt. 6 (2010); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000).

99. Henning, *supra* note 7, at 280 (arguing that real and perceived limitations in a child's decision-making capacity make it difficult for the attorney-client relationship in delinquency cases to completely mirror that in adult criminal cases).

100. *See* Guggenheim, *supra* note 17, at 1424 (arguing that the role of counsel in juvenile delinquency proceedings is the same as that of counsel in criminal proceedings involving adults); Henning, *supra* note 7, at 280 ("[C]urrent impediments to a normal attorney-child relationship may not be so insurmountable as to require or justify a model of advocacy that differs so radically from the representation of adults.").

101. ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 (2010); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2010).

102. Rule 1.14(a) 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." ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14(a) (2010). Also, the comment to Rule 1.14 explicitly states that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 cmt. 1 (2010).

103. *See* ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 cmt. 1 (2010) ("When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects."); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1301 (1996) (stating that the role of the child's lawyer may vary somewhat depending on whether the child has capacity to direct the representation, but the lawyer for a child who does have capacity should allow the child to set the goals of the representation as would an adult client).

> capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.[104]

It is clear, however, that these measures are not to be taken routinely but only in rare circumstances.[105] In addition, although it is important for the lawyer to understand what the client's best interests might be, a lawyer should respect the client's autonomy when deciding to take protective action.[106] This is why the rules prefer that the attorney seek the appointment of a guardian rather than have the attorney substitute his or her judgment for that of the child.[107] This course of action reflects the view of the Institute of Judicial Administration and the American Bar Association's Juvenile Justice Standards.[108]

In other words, the clear message throughout Rule 1.14 and its comment is that, other than in rare situations, an attorney representing a minor should act as an advocate for the minor and should avoid deciding for the minor what in the attorney's opinion may be in the minor's best interest. Moreover, even in emergency situations, the attorney is only permitted to use his or her judgment to make decisions for the client in limited circumstances to protect the client from possible harm. In addition, the attorney needs to understand that, even in those circumstances, he or she "has the same duties . . . as the lawyer would

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104. ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14(b) (2010).

105. The lawyer is to take action only if the client lacks sufficient capacity to communicate or to make adequately considered decisions and if the attorney "reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and . . . a normal client-lawyer relationship cannot be maintained." ILL. S. CT. R. OF PROF. CONDUCT R. 1.14 cmt. 5 (2010); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 87, § 1.14-2.

106. On this point, the comment to the rule states that

> [i]n taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 cmt. 5 (2010).

107. *See* ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 cmt. 7 (2010) ("If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator or guardian is necessary to protect the client's interests.").

108. AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., *supra* note 12, §§ 3.1, 5.2. According to the ABA/IJA standards, if the attorney believes that the minor is not capable of making an informed judgment or is compromised in some way, she can request that the court appoint a guardian *ad litem* specifically for the purpose of representing the client's "best interest." *Id.* § 3.1(b)(ii)(c)(2).

with respect to a client"[109] and that substituting the attorney's judgment for that of the client should end as soon as it is possible "to regularize the relationship or implement other protective solutions."[110]

In contrast, the relationship between a guardian *ad litem* and a minor is fundamentally different. An attorney's role is to be a legal advocate for his or her client, which means that the attorney has a duty to advance the client's objectives as defined by the client. The role of the guardian *ad litem*, on the other hand, is to use the guardian's judgment to seek whatever he or she decides is in the best interest of the child, and often, to gather information to share with the court in order to aid it in making judicial decisions affecting the disposition of the child. The attorney-advocate owes his or her duties to the child. The guardian owes his or her duties to the court.[111]

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109. The comments to the rule discuss the proper approach to take in emergency situations as follows:

> In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available, except when that representative's actions or inaction threaten immediate and irreparable harm to the person. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.
>
> A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.14 cmt. 10 (2010).

110. *Id.*

111. *Id.*; *see also In re* Tayquon H., 821 A.2d 796 (Conn. App. Ct. 2003) (describing the duties of a guardian as case-specific and should be set by trial judge); Ireland v. Ireland, 717 A.2d 676, 687 (Conn. 1998) (stating that in a custody matter, a child's attorney is an advocate for the child, while the guardian *ad litem* is the representative of the child's bests interests); Clarke v. Chi. Title & Trust Co., 66 N.E.2d 378, 383–384 (Ill. 1946) (holding that guardians are agents or officers of the court); Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (explaining that the guardian *ad litem*'s role is that of an investigator, monitor, and champion for the child while the traditional role of an attorney is that of advisor, advocate, negotiator, and intermediary who is not free to independently determine and advocate the child's "best interests" if contrary to the preferences of the child); Estate of Milstein v. Ayers, 955 P.2d 78, 83 (Colo. App. 1998) (holding that a guardian acts as a special fiduciary, while counsel is an advocate for and represents the legal interests of the minor); Henning, *supra* note 7, at 266 (describing how the term "counsel" is

As explained by the New Jersey Supreme Court in a case involving the custody of a young woman with Down's syndrome,[112]

> [T]he attorney's role differs from that of a guardian *ad litem*. . . . A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate . . . and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed. A court-appointed guardian *ad litem*'s services are to the court . . . . The [guardian *ad litem*] acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The [guardian *ad litem*] submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a [guardian *ad litem*] would be appointed. The [guardian *ad litem*] can be an attorney, a social worker, a mental health professional or other appropriate person . . . .[113]

For these reasons, representing a minor client while attempting to operate as a guardian *ad litem* at the same time threatens the validity of the representation itself by disregarding the basic principles of the attorney-client relationship. Thus, the approach that permits the possibility of attorneys assuming a hybrid role of attorney and guardian *ad litem* threatens the quality of representation provided to minors and should be abandoned.

V. THE CONSEQUENCES OF ROLE CONFUSION

An attorney who is also a guardian will have to choose between advancing the client's desired objectives, as required by the duties prescribed in the rules of professional conduct, or violating those duties in order to advocate for what the attorney believes to be in the best interest of the minor. If the attorney chooses the first option, the attorney disregards his duty as a guardian. If the attorney chooses the second option, the attorney violates his professional duties as a lawyer.[114] Either way, the attorney will fail at one of his or her duties.

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hard to define, while the term "*ad litem*" is often defined by statutes).

112. *In re* M.R., 638 A.2d 1274, 1283 (N.J. 1994).

113. *Id.* at 1283. Note, however, that the court here seems to be using the term guardian *ad litem* to refer to a combination of what has been called a "best interests" guardian and a "judicially designated investigator," whose role is "to serve as the eyes and ears of the appointing authority, to gather information to share with the court, and to aid in making judicial decisions affecting the disposition of the child." Boyer, *supra* note 9, at 1374.

114. Interestingly, to eliminate the choice, statutes in Michigan and Colorado actually mandate that the attorney act as a guardian *ad litem* rather than as an attorney. MICH. COMP. LAWS § 712A.17d(1)(h)(i) (2009) (stating that a lawyer-guardian has a duty "[t]o make a determination regarding the child's best interests and advocate for those best interests according

Thus, this is a classic example of a conflict of interest[115] that can, and usually does, result in ineffective assistance of counsel[116] because when an attorney chooses to represent the client according to what the lawyer thinks are the best interests of the client, the attorney may forgo challenging the State's evidence, or otherwise decide not to pursue a vigorous defense. This situation, in turn, leaves the client, who may be facing lifelong negative consequences, legally vulnerable.[117]

Making matters worse, confusion over the role of an attorney can affect the duty of confidentiality owed to a minor.[118] An attorney for a minor, just like any other attorney with any other type of client, is bound by the duty of confidentiality expressed in the rules of professional conduct.[119] For this reason, the attorney has an obligation to keep information related to the representation confidential unless an

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to the lawyer-guardian's understanding of those best interests, regardless of whether the lawyer-guardian's determination reflects the child's wishes"); COLO. REV. STAT. § 14-10-116(2) (2009) ("[T]he legal representative of the child is not required to adopt the child's wishes in his or her recommendation or advocacy for the child.").

115. People v. Daly, 792 N.E.2d 446, 450 (Ill. App. Ct. 2003) (stating that a guardian's duty to the court may put an attorney in a position of having to choose between conflicting duties). The Report of the working group on conflicts of interest of the Fordham Conference on Ethical Issues in the Legal Representation of Children expresses the following conclusion:

> In some jurisdictions, the lawyer may be assigned to serve simultaneously as a child's lawyer and a child's guardian *ad litem*. Depending on how those different roles are defined, and on the expectations for a lawyer serving in both roles simultaneously, this presents the possibility of having conflicting sets of obligations. For example, the role of the child's lawyer may be to advocate for what the child wishes, while the role of the guardian *ad litem* may be to advocate for what the guardian *ad litem* personally believes to be in the child's best interests. When the child's wishes differ from what the lawyer perceives to be in the child's best interests, the lawyer serving in both roles will be obligated to advocate for inconsistent positions.

Report of the Working Group on Conflicts of Interest, 64 FORDHAM L. REV. 1379, 1381 (1996). The standards adopted by the Family Law Section of the American Bar Association in 1995 reached the same conclusion. Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999, 2007 (1996).

116. *Report of the Working Group on Conflicts of Interest*, *supra* note 115, at 1387.

117. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 22; *see also* Henning, *supra* note 7, at 288 (explaining that it is never appropriate for a lawyer to abandon his loyalty to the client and assume the role of best-interest guardian).

118. The issues related to the competing duties regarding confidentiality as they relate to the confusion of roles of attorneys and guardians is examined in Boyer, *supra* note 9, at 1386–87. The report identifies three different possible roles with three different levels of protection for confidential information. *Id.*; *see also supra* note 9 and accompanying text (describing the three models as "expressed interests lawyer or advocate," "best interests lawyer or guardian," and "judicially designated investigator").

119. ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.6 (2010); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

exception to the rule applies.[120]

In contrast, to fulfill the duties as a guardian, the attorney must be available to testify at the request of the court about the attorney's conclusions regarding what the attorney believes to be the best interests of the child. For this reason, information provided to an attorney serving as a "best interest guardian *ad litem*" is only partially protected[121] and information provided to a guardian judicially designated as an investigator to report to the court is not protected at all.[122] Thus, an attorney representing a child and simultaneously acting as a guardian has a conflicting duty to keep the child's information confidential *and* to disclose it. Obviously, this is an irreconcilable conflict, as already recognized by the Illinois Court of Appeals.[123]

If there is a disagreement or a misunderstanding regarding the attorney's role, the attorney will have to decide whether to reveal confidential information against his client's wishes or to refuse to reveal it. If the attorney does disclose the information, the attorney violates the duty of confidentiality.[124] If, on the other hand, the attorney

120. STERLING, *supra* note 38, at 12. Juvenile defense counsel has an affirmative obligation to safeguard a client's information from parents or guardians. *Id.* Parents or guardians do not have any right to inspect a juvenile defense counsel's file, notes, discovery, or any other case-related documents without the client's consent. *Id.* Even if revealing the information might allow the client to receive sorely-needed services, defense counsel is bound to protect the client's confidences, unless the client gives the attorney express permission to reveal the information to get the particular services, or disclosure is impliedly authorized to carry out the client's case objectives. *Id.*

121. Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998) (stating that while it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian *ad litem* is not prohibited from disclosure of client communications absent the child's consent); *see also* Boyer, *supra* note 9, at 1372 (explaining that information disclosed to a "best interest guardian *ad litem*" can and should be disclosed when disclosure is in the best interest of the child).

122. The principal responsibility of a guardian-investigator lies in serving the needs of the court rather than the interests of the child. Any information shared with a person acting in this capacity should be communicated to the court, regardless of the desire of the individual child to keep the information confidential. As a result, a child has no legitimate expectation that this type of communication will be kept in confidence. Boyer, *supra* note 9, at 1374.

123. *In re* J.D., 815 N.E.2d 13, 16 (Ill. App. Ct. 2004) ("Independent counsel would be required when an attorney's dual representation creates a conflict between his roles of attorney and guardian, e.g., when a minor is of an age to share with his attorney confidences the attorney would not be permitted to share with the guardian *ad litem*.").

124. Hollister v. Hollister, 496 N.W.2d 642, 644 (Wis. 1992) (holding that a guardian appointed under statute in custody matters functions as lawyer and therefore could not be called as witness or cross-examined in a custody proceeding); *Clark*, 953 P.2d at 152–53 (holding that an attorney appointed as guardian *ad litem* should act as an advocate for the child and still has the same ethical responsibilities in the proceeding as any other attorney and should not engage in *ex parte* communications with the trial court); State Bar of Michigan, Informal Op. RI-318 (2000) (holding that a lawyer-guardian for minor in protective proceeding is bound by rules of

chooses not to violate this duty, the attorney will fail in his duty to the court as a guardian.

From the minor's point of view, there is a similar concern. Minors who do not fully comprehend counsel's conflicting obligations will feel betrayed when they realize the person they thought would guard their confidences will reveal them. On the other hand, minors who do understand the possibility that the attorney may have to disclose the information, may not freely disclose it, which can affect their representation. This is contrary to the public policy that supports recognizing the duty of confidentiality in the first place. These minors will not feel that they can trust their attorneys and the attorneys will not be able to provide competent representation.[125]

Thus, again, any attempt to simultaneously serve as an attorney and a guardian *ad litem* in a delinquency proceeding inevitably places the attorney in a position to violate a duty or to fail in his or her performance of a duty.[126] Obviously, again, this is a classic example of a conflict of interest because the attorney finds himself or herself in a position where he or she cannot perform one duty because of a competing obligation.[127]

Surprisingly, however, this type of conflicted representation is currently permitted across the state of Illinois and, for all the reasons discussed here, in each and every one of the cases in which this has happened the representation was (or is) of questionable validity. It can easily be argued that in all those cases the minor client has been (or is being) deprived of his or her statutory and constitutional right to counsel or his or her right to effective assistance of counsel.[128]

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professional conduct and, therefore, must not reveal child's confidences); Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857, 1871 (1996) (questioning whether attorney who conceives of his or her role as representing the attorney's view of the child's best interests is engaged in the practice of law at all).

125. Emily Buss, *"You're my What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1713–16 (1996).

126. Stuckey, *supra* note 9, at 1801 (requiring attorney serving as a guardian *ad litem* to keep information confidential makes no sense because it would defeat the purpose of the guardian *ad litem* appointment).

127. *See* Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1823 (1996) (explaining that a common example of a possible conflict of interests arises when an attorney serves both as the child's attorney and as guardian *ad litem* because the guardian *ad litem* is traditionally viewed as an agent of the court, to which she owes her primary duty of allegiance while an attorney is the child's representative and, as such, will typically be expected to advocate the child's wishes and desires).

128. This was one of the conclusions of the Fordham Conference on Ethical Issues in the Legal Representation of Children. *See Report of the Working Group on Conflicts of Interest*,

The cruel irony of the position taken by the Illinois courts is that while the courts claim that their interpretation of the Juvenile Court Act is designed to protect the rights of minors facing delinquency proceedings, in actuality, it threatens those rights. Every time a court fails to assign an attorney to a minor because it has assigned a guardian who is also an attorney, the court is actually depriving the minor of representation in violation of the constitutional right to counsel.[129] Every time that an attorney acts as a guardian after having been assigned as an attorney, the minor is deprived of effective assistance of counsel, also in violation of a constitutional right. In addition, in a case like the second one, the attorney violates his or her duties of professional conduct and acts in a way that may give rise to civil liability for malpractice or breach of fiduciary duty.[130] Any way you look at it, the role confusion created by the courts' interpretation of the Juvenile Court Act ends up hurting, rather than helping, the minors they are supposed to be protecting.[131]

VI. SERVING AS ATTORNEY AND GUARDIAN SIMULTANEOUSLY: IS IT REALLY JUSTIFIED?

If attempting to serve as an advocate and a guardian at the same time is really such a bad thing, why do courts in Illinois seem to be oblivious to the problem? How do they justify exposing minors who face delinquency proceedings to this type of problematic representation?

The answer—developed by the courts and then repeated over the years—is twofold. The first part of the answer is to continue to assert that juvenile proceedings are fundamentally different from criminal trials. The second part, which to a certain extent follows from the first one, is simply to assert that there really is no problem. For example, in

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supra note 115, at 1387. The standards adopted by the Family Law Section of the American Bar Association in 1995 reached the same conclusion: that serving as advocate and guardian at the same time would deny the minor effective assistance of counsel. Elrod, *supra* note 115, at 2007. The case of *In re Austin M.* provides a good example. In that case, the attorney arguably did not file a meritorious motion to suppress an involuntary confession, among other things because he believed that his duty was to help the prosecution and the court to find the truth related to the facts of the case. *In re* Austin M., 941 N.E.2d 903, 916 (Ill. App. Ct. 2010).

129. This problem is specifically mentioned in the assessment report of South Carolina when it says that "[t]he ethical and role confusion that often characterizes juvenile court practice leaves far too many children literally defenseless." SOUTH CAROLINA ASSESSMENT REPORT, *supra* note 7, at 51.

130. For a discussion on possible civil liability based on the conduct of lawyers for children, see Katner, *supra* note 84, at 115–20.

131. Henning, *supra* note 7, at 285 ("[A] model of advocacy that denies the child a meaningful voice in the attorney-client relationship, and thus in the juvenile justice system as a whole, may actually hinder the rehabilitative and public safety objectives of the court.").

In re R.D., the First District of the Appellate Court of Illinois expressed both ideas when it stated:

> The responsibility of the court-appointed juvenile counsel . . . is different than that of other court-appointed counsel. The juvenile counsel must not only protect the juvenile's legal rights but he must also recognize and recommend a disposition in the juvenile's best interest, even when the juvenile himself does not recognize those interests. As our supreme court stated in *In re Beasley* . . .: Although such proceeding [under the Juvenile Court Act] retains certain adversary characteristics, it is not in the usual sense an adversary proceeding, but it is one to be administered in a spirit of humane concern for and to promote the welfare of the minor as well as to serve the best-interests of the community.[132]

This view, however, misses the problem entirely. Whether juvenile proceedings have evolved to be considered akin to criminal trials, thus, requiring the same level of Constitutional protection for juveniles may still be under debate.[133] However, there should be no debate that allowing an attorney to serve as an attorney and as a guardian at the same time *is* a problem.

A few cases will suffice to illustrate the problem. In *In re K.M.B.*,[134] for example, a thirteen-year-old asked her court appointed attorney to argue in favor of allowing her to remain at home.[135] Instead, the attorney argued exactly the opposite.[136] Stating that he agreed with the State's position, he argued in favor of removing the client from her home.[137] On appeal, the minor argued that this resulted in a violation of her constitutional right to counsel, but in a decision that illustrates the confusion over the roles of attorneys and guardians as interpreted in Illinois, the court held that a court-appointed juvenile counsel is obligated to protect a child client's legal rights and best interests simultaneously.[138] Defying logic, the court held that this simultaneous

132. *In re* R.D., 499 N.E.2d 478, 481–82 (Ill. App. Ct. 1986).

133. *See supra* notes 48–70 and accompanying text (explaining that the juvenile justice system in Illinois has become like a criminal trial system for young adults, straying from its intended rehabilitative principles); *see also In re* Jonathon C.B., 958 N.E.2d 227, 244–53 (Ill. 2011) (rejecting a constitutional challenge to the Juvenile Court Act and upholding the position that juvenile proceedings are not criminal in nature and thus do not warrant a jury trial in all instances); *id.* at 263–74 (Burke, J., dissenting) (arguing that the Juvenile Justice Reform Provisions and amendments to the Juvenile Court Act have made juvenile proceedings criminal in nature and thus juvenile defendants have a constitutional right to a jury trial).

134. 462 N.E.2d 1271 (Ill. App. Ct. 1984).

135. *Id.* at 1271.

136. *Id.* at 1272.

137. *Id.*

138. *Id.* at 1272–73.

advocacy of diametrically opposed positions did not constitute a conflict between the roles of an attorney and a guardian *ad litem* for a minor.[139] The court's position would have required the attorney to argue simultaneously that the court should allow the child to remain at home and that it would be better that the court did not allow her to stay at home.

The court justifies this impossible-to-achieve mandate by simply stating that "[i]t is not always possible for a juvenile's counsel to carry out his unique responsibility to protect the juvenile's best interest without alienating the juvenile" because "[a] delinquent juvenile's wishes are often not in his best interest."[140] The court then firmly concluded that "[i]f protecting a juvenile's best interest requires that the counsel make a recommendation contrary to the juvenile's wishes, then the counsel has . . . a 'professional responsibility and obligation' to make that recommendation."[141]

Ironically, the court's position amounts to asserting that the attorney has a professional responsibility to violate his or her duties of professional responsibility. The attorney should have recognized that it was the prosecution's duty to prove the case against the client and the court's duty to determine the proper adjudication of the case. Joining the prosecution and the judge in a common effort meant the attorney was willing to act against his own client's wishes and, thus, constituted a betrayal of his duty of loyalty.

Similarly, in *In re B.K.*, the court acknowledged that it was "mindful [that] there are inherent conflicts that exist when an attorney acts as both a juvenile's attorney as well as his guardian *ad litem*."[142] Yet, despite this, the court concluded that there is no *per se* conflict of interest when an attorney acts as both the guardian *ad litem* and defense counsel.[143] The court, however, fails to explain how it is possible that an "inherent" conflict is not a "per se" conflict. If the conflict is, in fact, inherent to the relationship, it is, by definition, a permanent and defining characteristic of it.

Yet, these illogical conclusions have been reaffirmed throughout the years in both abuse and neglect cases and delinquency proceedings by simply repeating the outdated rhetoric that a juvenile proceeding is different than a trial and by citing mostly cases decided before the

139. *Id.* at 1272–73.

140. *Id.* at 1273.

141. *Id.*

142. *In re* B.K., 833 N.E.2d 945, 949 (Ill. App. Ct. 2005).

143. *Id.* at 952.

changes to the juvenile justice system in 1998. In fact, just last year, the court of appeals reiterated this old approach to the problem in two cases.[144] In both cases, *In re Rodney S.* and *In re Austin M.*, the minors alleged on appeal that their attorneys operated as guardians rather than as advocates for their rights, resulting in a violation of their constitutional right to counsel. In both cases, the court of appeals rejected the argument.[145]

Just like in *In re K.M.B.*, if the attorneys had been specifically appointed to serve as guardians *ad litem*, the minors in *In Re Rodney S.* and in *In Re Austin M.* had no legal representation during the proceedings, resulting in a violation of their rights. If, on the other hand, the attorneys were supposed to have been acting as attorneys for their clients, obviously their job was to represent their clients' expressed interests, not to advocate *against* them.

Given the attorneys' duty to establish an attorney-client relationship with the minors and to zealously advocate for their position, by arguing against their clients and in favor of the state's position, the attorneys in both of these cases essentially ceased representing their clients. Thus, even though the children supposedly had attorneys providing legal representation, in reality, they merely had guardians who were not performing the duties of an attorney. The minors were, in fact, forced to face the proceedings without legal representation in violation of the Constitution and the Juvenile Court Act. Thus, these cases illustrate why appointing a guardian *ad litem* should not be considered to comply with the state's obligation to provide attorneys for minors.

When the minor in *In re Rodney S.* appealed arguing, among other things, that he was denied his right to counsel because his court-appointed lawyer acted as a guardian *ad litem* rather than as his attorney,[146] the case presented a perfect opportunity to address the problem. Unfortunately, the court of appeals did not agree with the appellant and in an extremely brief statement it cursorily dismissed the argument as follows:

> Proceedings under the Juvenile Court Act are not adversarial in the

144. *See In re* Austin M., 941 N.E.2d 903, 917 (Ill. App. Ct. 2010) ("[W]e are unpersuaded and adhere to the established, above-cited case law in Illinois, which allows and, in most cases, encourages counsel for juvenile respondents to protect both minors' legal rights and the best interests of minors and society."); *In re* Rodney S., 932 N.E.2d 588, 593–96 (Ill. App. Ct. 2010) ("Accordingly, we adhere to our previously expressed view that the appointment of a lawyer to act as both a juvenile's trial attorney and guardian *ad litem* does not create a *per se* conflict of interest.").

145. *In re Austin M.*, 941 N.E.2d at 918; *In re Rodney S.*, 932 N.E.2d at 596.

146. *In re Rodney S.*, 932 N.E.2d at 591.

> traditional sense. "Unlike a purely adversarial proceeding, a juvenile case requires the juvenile's welfare and best interests to be considered." In *In re Beasley*, the supreme court described proceedings under the Juvenile Court Act as follows:
>
> > Although such a proceeding retains certain adversary characteristics, it is not in the usual sense an adversary proceeding, but it is one to be administered in a spirit of humane concern for and to promote the welfare of the minor as well as to serve the best interests of the community.
>
> Put another way, a delinquency proceeding under the Juvenile Court Act is not a traditional criminal prosecution. A lawyer's responsibility in a juvenile case is unique because counsel has to protect the juvenile's best interests even if those interests do not correspond with the juvenile's wishes. As this court has previously stated, "[t]he roles of a guardian *ad litem* and minor's counsel are not inherently in conflict" because "[b]oth have 'essentially the same obligations to the minor and to society.'"[147]

Again, lacking any support other than the repeated and outdated rhetoric that a juvenile proceeding is different than a criminal trial, the court concludes that its interpretation of the Juvenile Court Act follows what it refers to as a "common sense approach."[148] The court fails to explain, however, why it is considered common sense to appoint an attorney to a task that, as discussed above, is inevitably destined to either fail or violate duties of professional responsibility.

Two months later, the appellate court reaffirmed this view in *In re Austin M.*, which again exemplifies the problem.[149] In this case, a lawyer was hired to represent two minors in a delinquency proceeding.[150] The attorney was hired to appear as the minors' lawyer, and at a pre-trial hearing the trial court underscored this by informing the boys' parents that the appointed counsel "represented" the minors and not them (the parents).[151] However, the judge then stated that the attorney "represents what's in the best interest" of the boys.[152] To make matters worse, notwithstanding the fact that the lawyer was hired to appear as the attorney for the minors, the attorney apparently

147. *Id.* at 594 (citations omitted).

148. *Id.* ("[W]e adhere to the wisdom shown by the cases that we have cited, which we conclude suggest a commonsense approach to protecting juveniles in delinquency proceedings.").

149. *In re Austin M.*, 941 N.E.2d at 916.

150. Interestingly, the fact that the attorney represented the two minors jointly also gave rise to a claim of conflict of interest based on the joint representation itself. *Id.* at 912–13.

151. *Id.* at 906.

152. Brief for Appellant Austin M., *supra* note 61, at 3, 28; Brief of Juvenile Law Center et al. as Amici Curiae in Support of the Respondent-Appellant, *supra* note 61, at 35.

understood his role to be that of a guardian instead.[153] He even expressed that he understood his role to be the same as that of the prosecutors.[154]

On appeal, one of the minors alleged that he was denied his right to counsel because the attorney aligned himself with the prosecution and the judge in what was referred to as "a common search for the 'truth'," and took the position that the defendants should be found guilty.[155] In addition, one of the minors also argued that in order to pursue this "search for truth," the attorney failed to challenge the admissibility of some statements at trial, did not cross-examine three witnesses, and did not file a motion to suppress a statement to the police.[156]

These circumstances demonstrate how complex the misunderstanding of the lawyer's role can be. The problem began with the judge who first suggested that the attorney would serve as an advocate for the children, but then described the attorney's role as that of a best interest guardian *ad litem*. Then, as if that was not enough, the attorney explicitly stated he understood his role as a judicially appointed guardian whose role would be the same as that the prosecutor.[157] It is difficult to envision a more profound misunderstanding within one case.

Given the facts of the case, particularly the fact that the attorney representing juveniles accused of delinquent conduct thought his role was the same as that of the prosecutors, the end result was that the juveniles either did not have legal representation or were the victims of ineffective assistance of counsel. For this reason, after the minors were convicted, one of them appealed, arguing among other things, that he had been denied his right to counsel because the attorney acted as a guardian *ad litem* and as a defense counsel simultaneously.[158]

On appeal, the court agreed that even though the attorney had not been officially appointed as a guardian, it was clear he thought his role was to act like one and, in fact, did act like one, thus creating a problematic issue of role confusion.[159] The court, therefore, treated the

153. Brief of Juvenile Law Center et al. as Amici Curiae in Support of the Respondent-Appellant, *supra* note 61, at 38.

154. Brief for Appellant Austin M., *supra* note 61, at 29; Brief of Juvenile Law Center et al. as Amici Curiae in Support of the Respondent-Appellant, *supra* note 61, at 33.

155. Brief for Appellant Austin M., *supra* note 61, at 29.

156. *Id.* at 35; Brief of Juvenile Law Center et al. as Amici Curiae in Support of the Respondent-Appellant, *supra* note 61, at 21–27.

157. Brief for Appellant Austin M., *supra* note 61, at 29; Brief of Juvenile Law Center et al. as Amici Curiae in Support of the Respondent-Appellant, *supra* note 61, at 33.

158. *In re* Austin M., 941 N.E.2d 903, 906, 912, 916 (Ill. App. Ct. 2010).

159. *Id.*

issues raised by the minor as if the trial court had formally appointed the attorney as guardian *ad litem*.[160]

However, the court did not find that the minor's rights had been violated and affirmed the lower court's decision. Once again, the court based its conclusion on the rhetoric that "the responsibility of the court-appointed juvenile counsel varies from that of other court-appointed counsel because juvenile proceedings under the Act are not as adversarial as traditional, criminal proceedings."[161] The court cited the terms of the Juvenile Court Act to support the position that "appointment of separate counsel is unnecessary when the trial court has already appointed a guardian *ad litem* who is also a licensed attorney,"[162] which simply misses the point of the argument.

The point of the argument is that having an attorney simultaneously serve as guardian and as an attorney results in a violation of the minor's rights. The court's response is that it does not violate the minor's rights because the Act allows it. In other words, there is no conflict because the Act says there is no conflict.

This circular argument lacks logic and, perhaps not surprisingly, leads to a conclusion that explains the underlying approach to juvenile justice in Illinois: "by permitting an attorney to fulfill both roles, the Act recognizes that '[t]he roles of a guardian *ad litem* and minor's counsel are not inherently in conflict' because '[b]oth have essentially the same obligations to the minor and to society.'"[163]

In other words, according to the court, when representing a minor in a delinquency proceeding, the lawyer's role *is* that of a guardian *ad litem*. According to the court, there is no difference between the two, or, if there is a difference, the role of guardian takes priority.[164]

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160. *Id.* at 916.

161. *Id.* at 917.

162. *Id.*

163. *Id.* (citing *In re* J.D., 815 N.E.2d 13, 15 (Ill. App. Ct. 2004)).

164. *See* Buss, *supra* note 125, at 1702 (arguing that hybrid models of representation are essentially variations on the guardian *ad litem* model, "because they all allow for substitution of the lawyer's judgment for that of the client, and a communication of this substituted judgment to the court"); *see also In the Interest of* K.M.B., 462 N.E.2d 1271, 1273 (Ill. App. Ct. 1984) (holding that a minor's right to counsel was not violated when an assistant public defender, acting as the minor's guardian *ad litem*, recommended a disposition contrary to her wishes). This view should be contrasted with the approach taken in *In re A.W.*, 618 N.E.2d 729 (Ill. App. Ct. 1993), where the court came close to breaking away from the trend. In this case, again, the attorney refused to advocate for the expressed interest of a minor. *Id.* at 731. Unlike in the other cases, however, the minor reacted to the attorney's decision to advocate against his desired position by requesting the court to appoint a new attorney who would do so. *Id.* The state objected to the request, but the trial court granted the motion for substitution of counsel and the appellate court affirmed. *Id.* at 732. However, the decision is still confusing because while holding that a

The problem with this analysis is that it eliminates the effectiveness of the attorney's role as an attorney, affects the attorney-client relationship, destroys the necessary trust upon which that relationship must be based, creates a mandatory duty to disclose confidential information that does not exist according to the rules of professional conduct and essentially leaves the minor without legal representation. These are significant drawbacks, all of which can easily be avoided by simply taking the position that the roles of attorney and guardian should be performed by different individuals.

It is precisely because a guardian and an attorney do *not* have the same obligations to the minor that the roles are in conflict. The New Jersey Supreme Court explained the basis for this conclusion in *In re M.R.*, a case in which the lower court had been asked to determine with which parent a client with diminished capacity should live.[165] Having considered the differences in the roles of an attorney and a guardian *ad litem*,[166] the court went on to conclude that the proper role for an attorney must be that of a zealous advocate, leaving the role of the guardian to someone else:

> [T]he role of an attorney in abuse or neglect cases and in termination of parental rights cases must be as an advocate for the child. Nothing short of zealous representation is adequate to protect a child's fundamental legal rights . . . . Requiring attorneys to act as counsel for children in these cases, does not deprive the court of the benefit of the type of assistance afforded by a guardian *ad litem*. Clearly, as counsel for the child, an attorney could request the additional appointment of a guardian *ad litem*, and the court sua sponte could do so if deemed necessary. Yet by clarifying an attorney's role as counsel for the child, substantial evidentiary and procedural dilemmas could be solved. Under the present situation where attorneys assume a hybrid role of attorney/social investigator, questions arise such as the right of the attorney to speak with the parties outside the presence of their counsel; whether communications between a child and the attorney are privileged; and whether an attorney who submits an investigative report is subject to cross-examination. Finally, having attorneys act as counsel for children insures that they are being utilized for a role for which they are trained and suited.[167]

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minor's right to counsel is "almost coextensive to that afforded to adults," the court again declared that attorneys and guardians *ad litem* "have essentially the same obligations to the minor and to society." *Id.* at 732–33 (citing *In re* R.D., 499 N.E.2d 478, 482 (Ill. App. Ct. 1986)).

165. *In re* M.R., 638 A.2d 1274 (N.J. 1994).

166. *See supra* notes 112–113 and accompanying text (discussing the court's approach to the distinction between the roles as attorney/advocate and guardian *ad litem*).

167. *In re M.R.*, 638 A.2d at 1284; *see also* Jacobsen v. Thomas, 100 P.3d 106, 111 (Mont. 2004) (holding that the role of a guardian *ad litem* is different from the traditional advocacy role

If this is so in cases of visitation, custody, and abuse and neglect, it is even more critical in delinquency proceedings. Given the close analogy to criminal proceedings, the role of an attorney in delinquency proceedings must be that of a zealous advocate for the child as prescribed by the rules of professional conduct. Nothing short of such zealous representation would be adequate to protect a child's fundamental legal rights.[168] As expressed by the team that conducted an assessment of the juvenile justice system in Nebraska,

> The professional rules of responsibility, relevant legal scholarship, and professional standards and guidelines are unanimous that juvenile defense attorneys have an ethical duty to advocate for the client's expressed interests, as opposed to the client's best interests as determined by the attorney, the judge, the prosecutor, the probation officer, or the client's parents. These roles are very distinct, with different, often opposing, ethical mandates. Ethical canons require defense counsel to act in the child's expressed interest, serving as the child's voice in court proceedings and zealously advocating for what the child wants. In contrast, the [guardian *ad litem*], unmoored from the child's expressed interest, acts in the child's best interest. In other words, the [guardian *ad litem*] can substitute her own judgment for the child's, and advocate for what she believes should happen in the case, regardless of the child's wishes. Juvenile defenders owe their clients the same ethical duties of loyalty, communication, and confidentiality that adult criminal defense attorneys owe their clients, and are bound by the Model Rules of Professional Conduct, the ethical code for attorneys, to "zealously assert the client's position under the rules of the adversary system."[169]

It is precisely for these reasons that many have adopted the view that attorneys should operate as advocates for the child's expressed wishes

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played by attorneys and, thus, an attorney appointed by the court to represent a child is not also the guardian *ad litem*).

168. As the Supreme Court stated in *In re Gault*, 387 U.S. 1, 36–37 (1967),

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

Id. Since the publication of the American Bar Association's Juvenile Justice Standards, which explicitly called for client-directed, zealous advocacy at all phases of delinquency proceedings, those who train and set advocacy standards for juvenile defenders have emphasized the duty of lawyers to represent the client's expressed interest and not to advocate for some other person's determination of the juvenile's best interests. Birckhead, *supra* note 12, at 967; AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., *supra* note 12, §§ 3.1(a), 9.4(a); Guggenheim, *supra* note 12, at 86–90; Marrus, *supra* note 12, at 342.

169. NEBRASKA ASSESSMENT REPORT, *supra* note 7, at 53 (citations omitted).

and not as guardians *ad litem*.[170] For example, this is the view of the American Academy of Matrimonial Lawyers.[171] This is also the approach adopted by the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.[172] According to these standards, an attorney for a child "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client" because "to ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position."[173]

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170. STERLING, *supra* note 38, at 3 (quoting Henning, *supra* note 7, at 255–56) (stating that since the early 1980s there has been "professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients" which means there is a duty to "represent the legitimate 'expressed interests' of their juvenile clients, and not the 'best interests' as determined by the attorney"); Appell, *supra* note 90, at 1965–68 (arguing that conventional legal training and education does not equip attorneys to make decisions on behalf of children); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 382 (2011) ("Over the past two decades, children's rights scholars and child advocacy groups have argued with increasing force that children's lawyers should function as traditional, client-directed attorneys and that lawyers overstep their professional role . . . when they engage in discretionary best interests representation."); Elrod, *supra* note 115, at 2001 ("Nothing in a lawyer's training qualifies a lawyer to make decisions on behalf of a client, especially a child client."); Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 110–13 (2010) (noting that the "value of a client-directed lawyer for the child cannot be underestimated" and that "[l]awyering models that undermine client autonomy also undermine rights"); Geraghty, *supra* note 76, at 293 (showing, by way of example, the way in which the roles of attorney and guardian *ad litem* can conflict); Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIMONIAL LAW 251, 261–69 (2009) ("[L]awyers should be used [for children] . . . *only* when courts want children's lawyers to advocate for the outcome desired by the child."); LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 607–15 (2009) (arguing for a number of reasons, including due process concerns, that children in dependency proceedings receive client-directed attorneys).

171. Ann Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. 2013, 2013–14 (1996) (citing AM. ACAD. OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 2.3–2.4 (1995)) ("The AAML Standards view children as either 'impaired' or 'unimpaired,' with the child's lawyer taking a position in the case generally only as directed by the unimpaired client.").

172. AM. BAR ASS'N, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 1–2 (1996) [hereinafter AM. BAR ASS'N STANDARDS], *available at* http://www.abanet.org/family/reports/standards_abuseneglect.pdf; *see also* Elrod, *supra* note 115, at 2000–01 ("[T]he [ABA Standards] take the position that lawyers should be appointed as lawyers and act as lawyers irrespective of the age of the client.").

173. AM. BAR ASS'N STANDARDS, *supra* note 172, at 1–2. Although the standards do not seem to recognize an inherent conflict in having an attorney serve as attorney and guardian at the same time, they explicitly state it is preferable for an attorney to serve as an attorney rather than as a guardian. *Id.* at 1–3. They also state that in case of a conflict, the attorney should resign as

In sum, when it comes to delinquency proceedings, the approach of the courts that have allowed, or, worse, encouraged, attorneys to serve as attorneys and guardians at the same time, although based on good intentions, generates circumstances that threaten minors' rights.[174] This approach is based on the romantic notion that juvenile delinquency proceedings should consist of a group of people—including the juvenile's lawyer—whose responsibility is to put their arms around the minor's shoulder to provide comfort and to work together to determine the minor's best interests in order to plan his or her future.[175]

That is a description of the original approach to juvenile justice, according to which legal representation of minors was considered to be an obstacle, rather than a benefit, to the process. It is certainly not a description of the current, nor of an ideal, system. However, courts in Illinois seem to prefer to follow this antiquated approach.[176]

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guardian and continue to represent the client as a lawyer advocate. *Id.* at 3–4; *see also* Elrod, *supra* note 115, at 2000–01 ("The [ABA Standards] favor the appointment of a lawyer as advocate, rather than as a guardian *ad litem* or in a dual capacity."); Peters, *supra* note 86, at 1507–08 (noting that the guardian *ad litem* role in child protective proceedings "has outlived its historical usefulness" and "should be abandoned" because it "requires lawyers to make decisions which they are not qualified to make, and because it deprives children of the traditional competencies of a good legal representative").

174. A national report issued just two years ago supports the conclusion that, because they have an antiquated view of the goals of juvenile courts, many judges and other system participants undermine attorneys' efforts to challenge the government's evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth functioning of the court. STERLING, *supra* note 38, at 6 (noting that judges, prosecutors, and probation officers often view zealous juvenile defense attorneys as obstructionists). As a result, many juvenile courts still operate in ways that deny juveniles the rights recognized by *In re Gault* and its progeny. *Id.* at 5.

175. *See, e.g.*, *In re* Beasley, 362 N.E.2d 1024, 1026 (Ill. 1977) (stating that although a juvenile delinquency proceeding "retains certain adversary characteristics, it is not in the usual sense an adversary proceeding, but it is one to be administered in a spirit of humane concern for and to promote the welfare of the minor as well as to serve the best interests of the community"). Additionally, the Mississippi Assessment Report quotes a juvenile defense attorney as saying "I don't always listen to what [the clients] say. Mine is not the role of the typical defense attorney; I must consider what is best for the child, and I do not take the position that I must 'get the child off at all costs.'" MISSISSIPPI ASSESSMENT REPORT, *supra* note 7, at 42. Based on the study of the system in the state, therefore, the assessment then concludes that "[t]he expectation to serve the child's best interest, instead of the child's expressed interest, creates an enormous amount of pressure on defenders to be team players, at the expense of safeguarding their client's interests." *Id.* at 43.

176. According to the express terms of the Juvenile Court Act, at the disposition stage of a juvenile delinquency hearing, for example, once a minor is found delinquent, it is the trial court's duty to "determine whether it is in the best interests of the minor or the public that he or she be made a ward of the court, and, if he or she is to be made a ward of the court, the court shall determine the proper disposition best serving the interests of the minor and the public." 705 ILL. COMP. STAT. 405/5-705(1) (2010). By the terms of the statute itself, this is the role of the court, not of the attorney for the delinquent minor. Enlisting the attorney for the minor to help the court (or the prosecution, for that matter) do its job adds to the confusion of the role of the lawyer and,

VII. A POSSIBLE SOLUTION TO THE PROBLEM

Lawyers serve children best when they serve as advocates for the minors' expressed interests rather than as guardians *ad litem*. If the minor client's expressed wishes and lawyer's view of the minor's best interests differ, the lawyer should seek appointment of someone else as a guardian to protect the client's best interests.[177] The lawyer may then continue to represent the minor's position before the court.

This is the approach adopted by a number of state and local bar associations,[178] the American Bar Association,[179] the Institute for

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again, places the attorney in a position to betray his or her client. *See also* STERLING, *supra* note 38, at 5–6, 8 (explaining that without a clear understanding of the role of juvenile defense counsel, juveniles are subjected to a pre-*Gault* proceeding).

177. Obviously, representing a child as an attorney by advocating for the child's express interests does not mean the attorney cannot advise the client as to what the attorney believes to be the best interests of the client. This is part of all lawyers' professional duty as an advisor. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, 2.1 (2010) (defining the allocation of authority between lawyer and client and imposing on lawyers a duty to exercise "independent professional judgment" and to render "candid advice"); ILL. SUP. CT. R. OF PROF'L CONDUCT R. 1.2, 2.1 (2010) (same). When a lawyer believes the client is making a bad decision, the lawyer is expected to help the client understand the consequences of the decision the client wants to make. The lawyer should help the client make the decision and to do this, the lawyer must first establish a relationship with the child, listen to the child, and, most importantly, engage the child in a conversation about the possible approaches to the issue the child is facing. In other words, effective advocacy requires that the attorney learn to reconcile "what the child wants with what the decision maker may perceive to be in the child's best interests." *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 684 (2006). Once the decision is made, unless the attorney withdraws from representation, however, the attorney's duty is to advocate for the client's position.

178. Buckler v. Buckler, 466 S.E.2d 556, 560–61 (W. Va. 1995) (holding that if a conflict between roles of attorney and guardian *ad litem* arises, a lawyer should seek appointment of new guardian); State Bar of Arizona, Op. 86-13 (1986) (stating that if there is conflict between a client's wishes and the lawyer-guardian's determination of client's best interests, the lawyer must request appointment of new guardian; the lawyer may not retain role of guardian and request appointment of new attorney, since this would present an unwaivable conflict of interest); Connecticut Bar Ass'n, Informal Op. 94-29 (1994) (explaining that if a conflict exists between a minor client's expressed wishes and the lawyer's view of minor's best interests, the lawyer should seek the appointment of a guardian to protect the client's best interests and may then represent the client's position before the court; if the lawyer finds doing so repugnant or imprudent, the lawyer may seek to withdraw; the lawyer may not express opinion of merits or use client confidences to advocate position not favored by the client); Massachusetts Bar Ass'n, Op. 93-6 (1993) (determining that if 13-year-old client instructs her lawyer to pursue a course of action the lawyer believes is not in the client's best interest, then the lawyer must comply with the instructions unless the lawyer determines the client is incapable of making reasoned decisions in the matter; alternatively, the lawyer may seek to withdraw); Los Angeles Cnty. Bar Ass'n, Formal Op. 504 (2000) (stating that if a lawyer believes her minor client is capable of making an informed decision, the lawyer must follow the client's instructions). Likewise, the Nebraska Assessment Report states:

> The professional rules of responsibility, relevant legal scholarship, and professional standards and guidelines are unanimous that juvenile defense attorneys have an ethical duty to advocate for the client's expressed interests, as opposed to the client's best

Judicial Administration, the National Juvenile Defender Center,[180] the American Council of Chief Defenders,[181] and the Children and Family

interests as determined by the attorney, the judge, the prosecutor, the probation officer, or the client's parents.

NEBRASKA ASSESSMENT REPORT, *supra* note 7, at 53; *see also* Peters, *supra* note 86, at 1507–08 (arguing that the guardian *ad litem* role in child protective proceedings should be abandoned, among other reasons, because it deprives children of the benefit of a traditional legal representative); Stuckey, *supra* note 9, at 1818 ("[L]awyers who serve as guardians *ad litem* should not be asked also to perform as the child's lawyer."). *But see, e.g.*, Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998) (holding that the dual role of lawyer and guardian "necessitates a modified application of the Rules of Professional Conduct"); South Carolina Bar Ethics Advisory Comm., Op. 98-02 (1998) (stating that a lawyer-guardian in an abuse and neglect matter represents the guardian, not the child; thus, he may reveal confidences of the child and act in the child's best interests even if the child contests); Virginia State Bar Standing Comm. On Legal Ethics, Op. 1729 (1999) (holding that when the specific duty of a guardian *ad litem* conflicts with the ethical duties of the lawyer, the specific duty of the guardian *ad litem* should prevail).

179. AM. BAR ASS'N STANDARDS, *supra* note 172, at 3–4. According to the standards, an attorney for a child "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." *Id.* at 1–2. The comment to the standard explains that this view is based on the principle that "to ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position." *Id.* at 2. If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian *ad litem* and continue to represent the child's expressed preference. *Id.* at 3–4; *see also* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 96-404 (1996) (stating that except in the most exigent of circumstances, a lawyer should not act as or seek to have himself appointed guardian of a client and, even under exigent circumstances, the lawyer should do so only on a temporary basis making sure to take appropriate steps for the appointment of a formal guardian, other than himself, as soon as possible). This is also the view adopted by the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act drafted by the National Conference of Commissioners on Uniform State Laws. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT 5–6 (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf (explaining that a child's attorney should advocate for the child's expressed interests, while providing that the child's attorney "may . . . request appointment of a best interests advocate or a best interests attorney"). This Uniform Act mandates that the court shall appoint either a child's attorney or a best interests attorney but leaves it to the court's discretion to decide which of the two roles to choose. However, if a child has voiced a desire for a lawyer, that request typically would weigh on the side of appointing a child's attorney to provide the child with a traditional advocate. *Id.* at 5; *see also* Guggenheim, *supra* note 12, at 154–55 (concluding that one cannot "'represent' a young child and yet still be a 'lawyer'"); Katner, *supra* note 84, at 104 (supporting the adoption of the ABA standards as an enforceable ethics code and arguing that states should abandon the current practice of appointing attorneys to serve as guardians *ad litem* in dependency proceedings); Marrus, *supra* note 12, at 342 ("What is important is that the child knows he or she has a say in the outcome."); Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123, 1154–60 (1996) (explaining that lawyers for juveniles must serve as "zealous advocates" and resolving the manner in which social workers can assist attorneys in this role).

180. STERLING, *supra* note 38, at app. B n.1.

181. The National Juvenile Defender Center and the American Council of Chief Defenders

Justice Center of Northwestern University School of Law, all of which have enacted standards or published reports that conclude that juvenile defense must be based on the client's directives.[182] This is also one of the main conclusions reached by numerous scholars and by the two most important national conferences on issues related to the representation of children.[183] The first one of these explicitly concluded that a lawyer should not serve as both a child's lawyer and guardian *ad litem*, that laws authorizing the appointment of lawyers to serve as children's guardians *ad litem* (or in a dual capacity as lawyer and guardian *ad litem*) should be amended or eliminated, that lawyers appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer and "should assume the obligations of a lawyer, regardless of how the lawyer's role is labeled" and that, given the choice, a lawyer should elect to represent the child as a lawyer rather

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have articulated a set of core principles designed to assist public defender systems in reevaluating their programs for children. The very first of these core principles upholds juveniles' right to counsel throughout the delinquency process and recognizes the need for zealous representation to protect children. *See* NAT'L JUVENILE DEFENDER CTR. & NAT'L LEGAL AID & DEFENDER ASS'N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS 1 (2008), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf (listing the ten core principles).

182. Similarly, the Nevada Supreme Court has explicitly adopted the view that the role of counsel in delinquency cases is to advocate for the child and that counsel may request the appointment of a guardian *ad litem*, or may elect not to oppose such an appointment, "only when very unusual circumstances warrant such an appointment." THE SUPREME COURT OF NEV., IN THE MATTER OF THE REVIEWING OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL AND JUVENILE DELINQUENCY CASES 44–45 (2008), *available at* http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/53/.

183. *See* Green & Dohrn, *supra* note 89, at 1294 ("Laws currently authorizing the appointment of lawyers to serve as children's guardians *ad litem* (or in a dual capacity as lawyer and guardian *ad litem*) should therefore be amended to authorize the appointment of lawyers to represent children as their clients."). The first of these conferences was the Fordham University School of Law's Conference on Ethical Issues in the Legal Representation of Children, held in 1995. The second conference, the University of Nevada-Las Vegas William S. Boyd School of Law's Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, was held in 2006. The reports of the different working groups of the conferences as well as their recommendations and other articles written for and in response to the proceedings at the conferences are collected in the 64th volume of the *Fordham Law Review* and the 6th volume of the *Nevada Law Journal* respectively.

The 1995 Fordham Law School conference was probably the first national meeting dedicated exclusively to discuss ethical issues in the representation of children. The participants in the conference sought to answer two major questions: whether children need lawyers and whether children's lawyers should follow their clients' direction or substitute their own judgment for that of their clients. In the end, the conference reached a strong consensus that children do need lawyers and that children are best served when their lawyers provide representation within the traditional, ethically-dictated expectations for an attorney-client relationship, and not when lawyers serve as guardians *ad litem* or otherwise substitute their views of what is best for the child. Bruce A. Green & Annette R. Appell, *Representing Children in Families—Foreword*, 6 NEV. L.J. 571, 571–72 (2006).

than to undertake the role of a guardian *ad litem*.[184] The most recent of the two conferences enthusiastically reaffirmed these conclusions.[185] A

184. Hollister v. Hollister, 496 N.W.2d 642, 644–45 (Wis. Ct. App. 1992) (holding guardian appointed under statute in custody matter functions as lawyer and therefore could not be called as witness or cross-examined in custody proceeding); Green & Dohrn, *supra* note 89, at 1294 ("Given the choice, a lawyer should elect to represent the child as a lawyer, not to undertake the role of guardian *ad litem*."); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 103, at 1301–02 ("A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer."); *see also* Henning, *supra* note 7, at 255–56 (demonstrating that the weight of academic opinion since the early 1980s has been that the appropriate role of counsel in delinquency cases was that of an expressed-interest advocate); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 260 (1995) ("[T]he law supports a modern concept of zealous child advocacy."); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 349 (1993) ("As a general rule, the attorney [appointed to represent a child] should advocate the wishes of the child—even if the attorney questions the correctness of the child's view."); Wu, *supra* note 124, at 1859 (citing Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 74 (1995)) (asserting that the academic literature reveals a growing consensus that the proper role of an attorney for a child is to represent the client's wishes [as opposed to the attorney's conception of the minor's best interests] consistent with the minor's age and cognitive ability); Angela D. Lurie, Note, *Representing the Child-Client: Kids Are People Too, An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 207 (1993) ("[T]he only ethically proper role for an attorney assigned to a mature child as a law guardian or legal counsel is that of an advocate for the child's expressed wishes."); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 681–82 (1987) (arguing that standards of professional responsibility should be extended to provide guidance to attorneys who represent children and noting that such action would "confine the attorney to the traditional role as [the child's] agent").

185. The more recent conference, held at the University of Nevada-Las Vegas William S. Boyd School of Law in 2006, with the purpose to continue the discussion of the issues where the Fordham conference left off, reached similar conclusions. Green & Appell, *supra* note 183, at 571–72. It concluded that children still need lawyers to serve as lawyers and that lawyers need to respect their young clients' autonomy so that they can participate fully in their representation and in the legal process. *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, *supra* note 177, at 682–83 (arguing that a lawyer appointed or retained to represent a child in a legal proceeding should serve as the child's lawyer, regardless of how the lawyer's role is labeled or the age of the child). The recommendations caution lawyers not to make assumptions about what children want and need and about how best to serve children based on biases and stereotypes. *Id.* at 684. As explained in the foreword to the conference recommendations and other articles generated for and in response to the conference, the recommendations "go far beyond those developed at Fordham a decade earlier. But they also resoundingly reaffirm the earlier recommendations." Green & Appell, *supra* note 183, at 584. In particular, they reaffirm the conclusion that children's lawyers should serve consistently with the norms governing the attorney-client relationship and that lawyers should advocate for their clients' expressed objectives. Green & Appell, *supra* note 183, at 584; *see also id.* at 684 ("[The UNLV Recommendations] reaffirm[] that children need lawyers in a variety of contexts not limited to delinquency and dependency cases, and further, that children's lawyers should serve consistently with the norms governing the attorney-client relationship."); Erik Pitchal, *Buzz in the Brain and Humility in the Heart: Doing it all, Without Doing Too Much, On Behalf of Children*, 6 NEV. L.J. 1350, 1358–61 (2006) (providing a ringing reaffirmation of the Fordham Conference Recommendations while also adding significant new findings and determinations based on experiences developed in the intervening ten years since that first landmark gathering); *Report of the Working Group on the Best Interests of the Child and The Role of the Attorney*, *supra* note

conference dedicated to the discussion of similar issues in Illinois also reached the same conclusions.[186]

Accordingly, the Juvenile Delinquency Guidelines of the National Council of Juvenile and Family Court conclude that an attorney for a minor in a delinquency proceeding must be "an advocate, zealously asserting the client's position under the rules of the adversary system."[187] This is so because, as explained in an assessment study of the juvenile justice system in the state of West Virginia, "[a]lthough the primary goal of a juvenile court case is the successful rehabilitation of an adjudicated child . . . , the method to reach that goal is an adversarial process that relies on the prosecution's proving its case beyond a reasonable doubt and the defense's zealous protection of a child's due process rights."[188]

177, at 682–83 (reaffirming the Fordham commitment to client-directed representation); *Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616, 621 (2006) (reaffirming the general principle of the Fordham Conference that lawyers should not substitute their own judgment of what is best for children for the child' wishes).

186. The Conference on Ethical Issues in the Legal Representation of Children in Illinois was held in 1998 in the Loyola University Chicago School of Law. Two of the specific recommendations of this conference were that "[i]n all proceedings involving children, the attorney for the child should not function in more than one role" and that "[c]ounsel in delinquency proceedings should assume the role of the traditional attorney when representing the client." *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children in Illinois*, 29 LOY. U. CHI. L.J. 377, 382 (1998).

187. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES, IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 30 (2005). The same is true for abuse and neglect cases according to the standards adopted by the Family Section of the American Bar Association. *See* Elrod, *supra* note 115, at 2007 (asserting that if a lawyer is appointed as guardian *ad litem* or in a dual capacity and a conflict arises, then the lawyer must act as the child's attorney).

188. PATRICIA PURITZ & ROBIN WALKER STERLING, WEST VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY COURT 56 (2010) [hereinafter WEST VIRGINIA ASSESSMENT REPORT], *available at* http://www.njdc.info/pdf/West_Virginia _Assessment.pdf. The assessment reports in the states of Montana, Nebraska, Washington, and South Carolina also express the same idea. *See* MONTANA ASSESSMENT REPORT, *supra* note 7, at 8 (recommending that attorneys should "[e]nsure zealous advocacy for the expressed interest of the child, rather than the best interest"). In addition, the Nebraska Assessment Report concluded:

> The Nebraska Supreme Court . . . should clarify the ethical and role confusion that characterizes juvenile court practice . . . . Consistent with the [ABA's] Model Rules of Professional Conduct, the Institute for Judicial Administration/ABA *Juvenile Justice Standards*, and the National Coalition of Juvenile and Family Court Judges Delinquency Court *Guidelines*, the Commission on Children in the Courts should take the position that youth in law violation proceedings must be represented by defense attorneys who advocate for the clients' stated interest and protect their clients' due process rights, and acknowledge that juvenile courts are adversarial fora in which zealous advocacy is expected and not penalized.

NEBRASKA ASSESSMENT REPORT, *supra* note 7, at viii; *see also* SOUTH CAROLINA ASSESSMENT REPORT, *supra* note 7, at 21 ("The juvenile defender's role, as that of an adult defender, is to

Moreover, the standards of the American Bar Association and the Institute for Judicial Administration[189] specifically state that "the lawyer's principal duty is the representation of the client's legitimate interests" and that "[c]ounsel for the respondent in a delinquency . . . proceeding should ordinarily be bound by the client's definition of his or her interests."[190] Similarly, the standards of the National Juvenile Defender Center state that the duty of the juvenile defense counsel is to:

> [A]dvocat[e] for the client's expressed interests, not the client's "best interest" as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge. With respect to the duty of loyalty owed to the client, the juvenile delinquency attorney-client relationship mirrors the adult criminal attorney-client relationship.[191]

Finally, the recommendations of the report by the Children and Family Justice Center of Northwestern University School of Law and the National Juvenile Defender Center concludes that all juvenile defense attorneys should "[r]epresent the expressed interest of their clients as opposed to what the defense attorney believes to be in the 'best interest' of the child"[192] because, in part:

> While it is understandable to want to do what is in the best interest of the child, that is the responsibility of the court, not the juvenile defense attorney. If a lawyer concludes that a child is not capable of forming and maintaining a meaningful lawyer-client relationship, a guardian should be appointed to assist with decision making.[193]

In sum, the duties of an attorney for a minor client are fundamentally different than those of a guardian *ad litem*.[194] They are so different, in

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represent the stated interests of the young client."); WASHINGTON ASSESSMENT REPORT, *supra* note 7, at 22 ("[I]t is not the defense attorney's role to decide what is in the best interest of the child-client. . . . [An attorney should] not [be] a guardian to the child, nor an advisor to the court, nor in the role of protector of the community.").

189. The Illinois Assessment Report states:

> Beginning in 1971, and continuing over a ten-year period, the Institute for Judicial Administration and the American Bar Association collaborated to produce 23 volumes of comprehensive juvenile justice standards. The final standards, adopted by the ABA in 1982, were designed to establish a juvenile justice system of lasting excellence that would not fluctuate in response to transitory headlines or controversies.

ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 10 (footnote omitted).

190. AM. BAR ASS'N & INST. OF JUDICIAL ADMIN., *supra* note 12, § 3.1.

191. STERLING, *supra* note 38, at 7; *see also* ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 111 ("At every stage of court proceedings, a defender is ethically bound to advocate for the legitimate interests and goals expressed by the child.").

192. ILLINOIS ASSESSMENT REPORT, *supra* note 2, at 77–78.

193. *Id.* at 74 (footnote omitted).

194. Katner, *supra* note 84, at 103 (arguing that the guardian *ad litem* role is inconsistent with the traditional functions of an attorney representing a client); Ross, *supra* note 86, at 1615

fact, that attempting to serve as an attorney and a guardian at the same time in a delinquency proceeding eliminates the effectiveness of the attorney's role as an attorney and essentially makes it impossible for the attorney to provide the type of effective assistance of counsel that is guaranteed by the Constitution.

VIII. CONCLUSION

As expressed by the organizers of the Fordham University School of Law's Conference on Ethical Issues in the Legal Representation of Children, "improving professional representation will matter to the lives of children" because a lot is at stake in delinquency proceedings and because "[w]hat happens in court shapes children's futures."[195]

For this reason, and because individuals whose interests are at stake in delinquency proceedings have the right to effective legal assistance, the recommendations and adopted standards of numerous organizations, scholars, commentators, and conferences are in agreement that it is imperative to abandon the approach to juvenile justice that allows the possibility of representation by an attorney who, in reality, acts as a guardian *ad litem*.[196] To achieve this goal, the ambiguity in Illinois law and practice concerning the role of defense counsel in a juvenile delinquency proceeding must be eliminated.

In delinquency proceedings, the difference between attorneys and guardians *ad litem* is critical and the two roles should never be combined or confused. To the extent that this is what is happening now across Illinois, attorneys are attempting to do the impossible. In order to fulfill one role they must fail at the other. Remedying this problem is a critical element in the effort to improve the quality of juvenile justice in Illinois and necessary to return the state to the leadership position it assumed in 1899. Thankfully, the problem can be avoided simply by making sure that the appointed guardian *ad litem* is someone other than the minor's lawyer, thus allowing the lawyer to fulfill his or her role as an advocate and preserving and protecting the minor's right to counsel.

There should be no doubt that minors will benefit from the adoption of a system that requires that the roles of attorney and guardian be performed by different individuals.[197] There are many reasons that

(concluding that differences in the roles of attorney and guardian *ad litem* are stark).

195. Green & Dohrn, *supra* note 89, at 1284.

196. WEST VIRGINIA ASSESSMENT REPORT, *supra* note 188, at 23, 56 (stating that even though "[t]he purpose of the West Virginia youth code is faithful to the traditional rehabilitative animus of juvenile delinquency court, as evidenced by its specificity and family-centered approach," the way to reach that goal is an adversarial process that relies on zealous advocacy).

197. STERLING, *supra* note 38, at 6–7. Based on the decision in *In re Gault*, 387 U.S. 1, 30–

support this conclusion. First, such a system would reduce the danger of having lawyers interjecting their personal opinions and values into the proceedings.[198] Second, it would promote the same type of performance from all lawyers, regardless of who happens to represent the minors in any given case.[199] Third, it would place the lawyers in the best position to perform the role for which lawyers are best trained.[200] Fourth, children will be assured that the state will comply with its duty to protect their right to counsel. Fifth, if the child needs a guardian, he or she will get the benefit of one in addition to the benefit of an attorney. Sixth, the best interests of the child are better served if the child's attorney can work together with a guardian who is not an attorney and who is trained to operate as a guardian.[201] Also, children will benefit from being able to participate in their own defense with full confidence that their attorney will not disclose their confidences and will be committed to advocating their preferences. Finally, by not having the attorney for the child act as a guardian, the state will be forced to do its own investigation in order to prove its case against the minor beyond a reasonable doubt.[202] The result will be a system that protects the rights and the interests of minors more efficiently.

31 (1967), "the juvenile defense attorney is a critical check on the power of the state as it imperils the client's liberty interests." STERLING, *supra* note 38, at 6. "Defenders are not obstructionists; they protect the child's constitutional rights." *Id.* at 6–7. For a response to those who argue that it is not in the minors' best interest to think of delinquency proceedings are adversarial, see Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 751 (2011) (arguing that "advocacy in our legal system's litigation process" is "ethically positive" and is "pivotal to fair and effective dispute resolution").

198. Guggenheim, *supra* note 170, at 312–13.

199. *Id.* at 313.

200. *Id.*

201. For a discussion of this topic, see Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023, 2032–33 (1996) (arguing for a hybrid model of representation and suggesting that "lawyers working alone on behalf of children are not enough"); *see also* Katner, *supra* note 84, at 103 (determining what is in a child's best interest creates some serious ethical problems for an attorney).

202. STERLING, *supra* note 38, at 8, 16 (arguing that a client-centered model of advocacy allows juvenile defense counsel to enhance immeasurably the fundamental fairness of the system; given that minors are owed due process under constitutional principles, juvenile defense counsel ensures fairness in the courtroom by litigating the case vigorously consistent with the presumption of innocence, regardless of counsel's opinion concerning either guilt or innocence or the client's need for social, educational, and other services).