

## **ABA ENDORSES ATTORNEYS FOR CHILD-VICTIMS IN CRIMINAL CASES\***

At its 2009 Midyear Meeting, the American Bar Association (ABA) endorsed the appointment of independent attorneys for child-victims in criminal and juvenile cases to ensure the ability of children to assert their legal rights and to gain access to specialized services and protections.<sup>1</sup>

As victims' attorneys well know, the law is not self-executing. The assertion of one's rights requires knowledge that a right exists and that the ability to claim that right exists. Victims' attorneys have proven to be essential to victims' rights enforcement in criminal cases. But, most often, those rights have been litigated in the context of adult victims.

### **Unique Legal Issues in Child-Victim Representation**

When the victim in a criminal or juvenile justice proceeding is a child, there are a host of unique issues that may arise. For example, children are often abused within the family and may have an emotional attachment to their abuser; offenders, family or not, may intimidate or threaten the family or child into not testifying or cooperating with the prosecution; and children may fear facing the perpetrator in court, and may need the assistance of reasonably protective evidentiary and trial procedures to ensure their cooperation.<sup>2</sup> Additionally, criminal conduct against a child may trigger abuse and neglect actions and lead to adult criminal proceedings or juvenile delinquency proceedings. Each legal context may have different rules, different locations, different participants; and each court proceeding presents distinct legal challenges to rights enforcement. These complexities make the need for an attorney for the child-victim all the more compelling.

These unique needs of child-victims are accompanied by the need for unique legal protections. In the Report<sup>3</sup> accompanying the ABA Resolution, many of the legal interests and rights of child-victims and child-witnesses in criminal and juvenile cases were identified as follows:

- To obtain counseling, address safety and protective order concerns during the investigative stage;
- To obtain age-appropriate notice of court proceedings and of the status of the defendant/respondent;
- To be present or to have a representative present at all proceedings and to be consulted before a case is dismissed or a plea agreement is entered;
- To assert special protections, such as the use of age-appropriate questioning and remote testimony when necessary;

- To expeditious case handling and to have the victims' interests considered in resolving continuance requests;
- To present evidence at a competency hearing;
- To consult with the prosecution;
- To assert any statutory privacy and/or confidentiality interests regarding name and identifying information;
- To obtain protective orders if private and/or confidential information is admitted into evidence;
- To request that the courtroom be closed to all nonessential persons;
- To refuse to be interviewed by defense counsel;
- To have consideration be given to the best interests of the child in scheduling interviews, meetings, or hearings;
- To have an advocate or representative present at every interview, meeting, or hearing;
- To be reasonably protected throughout the proceedings;
- To make a victim impact statement at sentencing release proceedings; and
- To obtain appropriate restitution.<sup>4</sup>

Moreover, because children may be victimized in the presence of other children, or may be witnesses to domestic violence crimes, they are often witnesses to cases, which presents additional unique considerations. A recent Illinois case illustrates this point. In *In re K.S.*,<sup>5</sup> a 12-year old respondent was adjudicated delinquent for aggravated criminal sexual abuse involving the commission, at school, of fellatio on a victim under nine years of age.<sup>6</sup> K.S. attended a therapeutic school, and three of his classmates were eyewitnesses to the crime. In discovery, defense counsel subpoenaed the school, seeking "all incident reports, Individualized Education Programs (I.E.P.'s), statements, psychological reports and disciplinary reports" of the three classmates.<sup>7</sup> After the Chicago Board of Education refused to release the records without the students' consent or a court order, defense counsel moved for an order directing the release of the records.<sup>8</sup>

Defense counsel argued that because the witnesses "attended a therapeutic day school, it was reasonable to assume that they had mental or cognitive impairments."<sup>9</sup> The prosecutor objected, asserting that the records were privileged under the Illinois School Student Records Act<sup>10</sup>, and that the mere fact that the three witnesses attended a therapeutic school did not make any of the records material or relevant.<sup>11</sup> The trial court suggested that a competency hearing should be scheduled to enable the court to observe and examine the witnesses' demeanor and how they responded to questions, but defense counsel objected.<sup>12</sup> Defense counsel admitted that he did not know what the school records contained, but argued that he was entitled to the records "to examine the possibility of competency and to prepare for cross-examination of the witnesses."<sup>13</sup> The trial court disagreed, terming defendant's request a "fishing expedition," and finding that defendant had not alleged any factual basis for release of this statutorily protected information.<sup>14</sup>

Ultimately, defendant's challenge to the competency of these witnesses was a thinly disguised attack on their credibility. Under Illinois law, every person is presumed competent to testify, unless incapable of expressing himself or herself, or incapable of understanding the duty of a witness to tell the truth.<sup>15</sup> Defense counsel in *In*

*re K.S.* made no such claim. The appellate court nonetheless reversed, finding that a witness's credibility is especially important in deciding the guilt or innocence of the accused.<sup>16</sup>

This conclusion – that credibility is an issue that overrides all privacy and confidentiality protections because it is important to determining guilt or innocence – is simply wrong. Nonetheless, the appellate court decided that “a reasonable inquiry of a witness’[s] mental health history” would be permitted, and ordered an *in camera* review of all of the requested records.<sup>17</sup> Yet, merely being a witness to a crime does not open the door to a full-scale fishing expedition into a child’s school records. Defendant did not state any basis for his challenge other than the fact that these children attended the same school as the offender and were eyewitnesses to his crimes. As a result, these children, who lacked legal representation, will have all of their school incident reports, IEP statements, psychological reports, and school disciplinary records scrutinized by a court for release to defense counsel without any showing that their competence, motive, or bias was at issue, but merely because defendant sought to uncover evidence to challenge their credibility.

### **Need for Appointment of Independent Attorneys for Child-Victims**

Prosecutors, like the one in *In re K.S.*, will often object on behalf of victims and witnesses as a matter of public policy. In some jurisdictions, the advent of Child Advocacy Centers has made multidisciplinary case coordination, including advocates, routine in certain cases. Prosecutors may also have specialized victim-witness personnel to work with children. But, given the caseloads, the need for specialized knowledge, the time intensity, and the limited resources of the public prosecutor’s offices, many prosecutors welcome the assistance of child attorneys who can assert the varied independent rights and interests of child-victims and child-witnesses. As the ABA Report notes, “[p]rosecutors ensure that justice is done for the community; they do not and cannot always represent the individual needs of the child victim or witness, particularly when those needs conflict with the safety needs of the community.”<sup>18</sup>

Still, as Professor Myrna Raeder notes in her recent article on this topic, some judges, prosecutors, and defense counsel may be concerned and hostile to the notion of the presence of a child-victim’s rights attorney in the case.<sup>19</sup> Ultimately, however, she concludes that federal law already provides for victim attorneys, and that this practice has given voice to the most vulnerable of victims and benefited the justice system by giving courts the power to appoint an attorney where a child’s interests are not otherwise protected.<sup>20</sup>

In addition to attorneys, the law may provide for representation of child-victims through a guardian ad litem (GAL). There are conceptual differences between these roles. A child-victim’s attorney represents his or her client’s interests, whereas a GAL may make recommendations based on his or her view of the best interests of the child. These differences, of course, may not result in the same advocacy strategies.<sup>21</sup>

Courts have inherent power to protect witnesses, and, even in the absence of positive law, can appoint an attorney or GAL where it is in the best interest of a child.<sup>22</sup> The Adam Walsh Child Protection and Safety Act (AWCPSA)<sup>23</sup> provides that, to protect the best interests of the child, a court may appoint a GAL for a child-victim or child-witness of a crime involving abuse or exploitation.<sup>24</sup> Under the AWCPSA, the GAL does not have to be an attorney.<sup>25</sup> The statute also provides that the GAL has access to records; may attend all depositions, hearings, and trial proceedings in which the child participates; may not be compelled to testify, but may make recommendations to the court regarding the welfare of the child.<sup>26</sup> It further provides that GALs have immunity from civil and criminal liability.<sup>27</sup> Additionally, the Child Abuse Prevention and Treatment Act (CAPTA)<sup>28</sup> requires that states that receive funding under CAPTA must ensure the appointment of a GAL or other representative for a child in cases involving child abuse or neglect,<sup>29</sup> but few do in criminal or juvenile

delinquency proceedings. State victims' rights law may also provide the victim with the right to have a representative, without identifying the status of that representative.<sup>30</sup>

### **Need for Specialized Training**

Given the complexities and challenges of cases involving child-victims or child-witnesses in criminal and juvenile delinquency proceedings, as more attorneys begin to represent children in these settings, it is important to obtain specialized training or form collaborations with experienced attorneys, such as those who represent children in abuse and neglect courts. For example, one expert in child law recommends that child attorneys should be competent in: "(1) understanding child and adolescent development from a psychological and legal perspective; (2) communication, consultation, and confidentiality issues; (3) issues relating to the child-parent relationship; and (4) issues regarding the determination of the objectives of the representation."<sup>31</sup>

In addition to raising these concerns about the unique needs of child-clients, the representation of child-victims also gives rise to a distinct set of ethical considerations. Marvin R. Ventrell, the former Executive Director of the National Association of Counsel for Children, notes that, in addition to ordinary ethical rules, attorneys for child-victims and witnesses should adhere to a set of "fundamental ethical advocacy rules that specifically address the special considerations of age, maturity and needs of their minor clients."<sup>32</sup>

The ABA Resolution recognizes that the effective representation of child-victims requires training in how to address such unique concerns. Accordingly, it calls upon government and bar associations to initiate pilot programs or demonstration projects to provide for child rights enforcement; it also calls upon bar associations, law schools, and victim and child rights organizations to initiate pilot programs or demonstration projects to develop standards of practice and training requirements to provide for child-victims' rights enforcement.

### **Conclusion**

Effective child-victim advocacy requires an attorney to understand the capacities and limits of a child. Confidentiality and communication concerns pose additional challenges to a child-victim attorney. The limits and scope of the parent-child relationship also add to the challenge of representing child-victims in criminal and juvenile court.

The reality remains, however, that a child-victim has little chance of successfully navigating a court system without legal representation. The need for victims' rights attorneys in this area is undeniable. Perhaps more than anywhere else, there is a need for collaborative relationships between attorneys and social and community service providers in this context. Hopefully, the ABA Resolution urging courts to appoint attorneys for children to ensure they have prompt access to legal advice and counsel will move from paper to practice with the assistance of the expertise of NCVLI and the attorneys in its clinical network.

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<sup>1</sup> A.B.A. Crim. Just. Sec., Resolution, *Child Victims in the Criminal Justice System*, Feb. 2009, <http://www.abanet.org/crimjust/policy/my09101d.pdf> (hereinafter "Resolution"). The Resolution was the result of much hard work by the Victims Committee of the ABA's Criminal Justice Section, spearheaded by committee co-chairs Russell Butler (Maryland Crime Victim Resource Center) and Meg Garvin (NCVLI), vice-chair Angela Downes (MADD), and the excellent research and drafting of Law Professor Wendy Seiden (University of Baltimore). Law Professor Myrna Raeder (Southwestern Law School), Eva Klain (ABA Center for Children & the Law), and I rounded out the advisory board for a child-victims' grant, secured by the Criminal Justice Section, to make recommendations on improving the treatment of children in criminal cases.

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<sup>2</sup> See Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 *Crim. Just. Mag.* 12, 14 (Spring 2009) (discussing sexual abuse victims).

<sup>3</sup> A.B.A. Crim. Just. Sec., Report, *Child Victims in the Criminal Justice System*, Feb. 2009, <http://www.abanet.org/crimjust/policy/my09101d.pdf> (hereinafter "Report").

<sup>4</sup> *Id.* at 9-12.

<sup>5</sup> 900 N.E.2d 1275 (Ill. App. Ct. 2008).

<sup>6</sup> *Id.* at 1276.

<sup>7</sup> *Id.* at 1277.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 105 Ill. Comp. Stat. 10/1 to 10/10.

<sup>11</sup> *In re K.S.*, 900 N.E.2d at 1277.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 725 Ill. Comp. Stat. 5/115-14.

<sup>16</sup> *In re K.S.*, 900 N.E.2d at 1280.

<sup>17</sup> *Id.*

<sup>18</sup> Report at 12.

<sup>19</sup> See Raeder, *Enhancing the Legal Profession's Response*, 24 *Crim. Just. Mag.* at 19-20 (noting that some prosecutors are particularly concerned that the pool of available "child" attorneys is comprised of those from the defense bar).

<sup>20</sup> *Id.* (citing 18 U.S.C. §3771(c)(2)).

<sup>21</sup> See, e.g., Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship* 26 *Loy. U. Chi. L.J.* 259, 268-69 (1995) (stating that a guardian ad litem considers the child's wishes, but makes decisions based on his or her view of the child's best interests, and that an attorney owes the same duty to a child as to an adult client and therefore represents the child's expressed desires). *But see* Shari Shink, *Justice For Our Children: Justice For a Change*, 82 *Denv. U. L. Rev.* 629, 644 (2005) (arguing that there is no single definition of the child attorney's role).

<sup>22</sup> See, e.g., John E. B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 *Pac. L.J.* 3, 61-62 (Fall 1996).

<sup>23</sup> 18 U.S.C. § 3509.

<sup>24</sup> *Id.* at § 3509(h).

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<sup>25</sup> 18 U.S.C. § 3771(e) (allowing a court to appoint a “suitable” representative for a child).

<sup>26</sup> 18 U.S.C. § 3509(h)(2).

<sup>27</sup> *Id.* at § 3509(h)(3).

<sup>28</sup> 42 U.S.C. §§ 5101 *et seq.*

<sup>29</sup> 42 U.S.C. § 5106(b)(2)(A)(xiii).

<sup>30</sup> *See, e.g.*, Report at 6-7 (discussing Arizona, Florida, and Oklahoma state laws that allow or mandate the appointment of representatives, GALs, or attorneys in criminal cases).

<sup>31</sup> Ventrell, *Rights and Duties*, 26 Loy. U. Chi. L. J at 272-73; *see also* 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, 1360 (2006) (“Advocacy is strengthened when other professionals [such as social workers] are brought into the effort, and it is weakened when lawyers do what they are not trained to do.”).

<sup>32</sup> Ventrell, *Rights and Duties*, 26 Loy. U. Chi. L.J. at 270-72. This article also provides an appendix of additional readings for children’s attorneys. More current material appears on the National Association of Counsel for Children’s webpage: <http://www.naccchildlaw.org>.