

Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases

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Introduction

Working in the best interest of children in abuse and neglect cases is a daunting task for both lawyers and social workers. The legal system is inadequate to meet the myriad needs of children and families in crisis. Yet only under the authority of the legal system can social work and other mental health professions intervene in families on behalf of children.¹ Collaboration is critical,² but collaboration does not come easily. The juvenile court system is one that has been buffeted historically by the competing values and methods of social work and law.³ The institution and its rules are still evolving today, sometimes quite dramatically. This dynamic environment means that even if

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¹ Robert Madden, *Legal Content in Social Work Education: Preparing Students for Interprofessional Practice*, in LAW & SOCIAL WORK PRACTICE 333-345 (Raymond Albert ed., 2000) (“Social services, consequently have become increasingly cast in legal terms, thus blurring the distinction between legal rights and service delivery.”).

² Phyllida Parsloe, *The Interface of Law and Social Work*, 4 CONTEMP. SOC. WORK ED. 183 (1981). (If the needs of clients are to be met and their rights are to be recognized, the development of greater cooperation and shared work between lawyers and social workers is required.).

³ H. Ted Rubin, *The Nature of the Court Today*, 6:3 THE FUTURE OF CHILDREN 40, 41 (1996). (The juvenile court has long been more than a court. Its judges have always known that the involvement of probation officers, social workers, educators, mental

competition for “ownership” of the system can be set aside; collaboration will be challenged by ever-changing expectations.

The adversarial system’s focus on “winning and losing” fails to adequately take into account the relationships that are at the heart of most child abuse and neglect matters.⁴

The American legal system often focuses on individual rights and responsibilities and is not very accommodating of a more inclusive view of a collective “family” right.⁵ The adversarial system’s focus on the individual (bad parent, victim child) neglects the relationships among many individuals, a critical component of permanency.⁶ This is

health professionals, parents, extended families, and foster parents were necessary to the accomplishment of the court’s mission.).

⁴ See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 83 (1997).

⁵ “The U. S. legal system has always emphasized individual rights and responsibilities and has never acknowledged the family as a unit in any significant way.” Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCH. PUB. POL’Y AND L. 951, 958 (1999) (citing Mary Ann Glendon, RIGHTS TALK 75, 109 (1991); Michael Grossberg, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 305 (1985)).

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By focusing on the identified patient, the system fails to address the needs and interests of other children who remain in the home. Furthermore, by “treating” the parents and patient separately, the legal system fails effectively to facilitate reunification between those parties. Moreover, by singling out the patient, that child may be empowered inappropriately in terms of the proper balance of power in the family, which requires parents to have the authority to make important decisions for their children. Most importantly from a family systems approach, the legal system fails to recognize the mutual responsibility of family members in whatever occurs in families. This mutuality is not about blame, but rather how families function, their strengths as well as their areas of weakness. By failing to recognize the importance of the family unit, child welfare law, in both its conception and its operation, undermines families’ efforts toward restoration and reunification. Finally, it neglects a critical component of permanency for children, which is the continuity of relationships with

particularly troubling in the context of a system where the law itself focuses on reunification and families, rather than on individuals.⁷ Furthermore, the adversarial system's focus on individual rights has led some to conclude that when the focus is on an individual, the individual whose rights are protected are those of a parent as opposed to a child.⁸ Finally, in the area of child welfare, "rights" must be viewed within the context of child protection. The adversarial system distorts the focus by pitting one party's rights against another's.⁹

Observers of the juvenile court system have long noted that the stakeholders in the system misunderstand or confuse their own roles and the roles of others.¹⁰ The source of these misunderstandings has been less thoroughly explored. Based in large part on a comprehensive study of social worker and attorney interaction undertaken by the author, in collaboration with a social worker, this article will highlight some of the problems encountered by professionals working in this truly interdisciplinary field and will suggest

people who are part of their family system, be they biological parents, aunts, grandparents, cousins, neighbors, or close family friends. Brooks, *supra* note 5, at 958-59 (citations omitted).

⁷ Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUBL. POL'Y 1, 10 (1996) (arguing for decision-making based on the best interests of the children in the context of continuing family relationships).

⁸ "[T]he best interests of any particular child always yields to the constitutional claims of their parents," Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 60 (1994); *see also* Cindy S. Lederman & Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court, Ameliorating the Effects of Maltreatment and Deprivation*, 10 PSYCHOL. PUB. POL'Y & L. 162, 164 (2004) (stating that until 1997 when the Adoption and Safe Families Act (ASFA) was passed, the parent, not the child, was the center of the child welfare system.).

⁹ Weinstein, *supra* note 4, at 138-139 (*citing* 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)).

methods for improving collaboration. Studies of social worker-attorney interaction, including the author's own, reveal that the professionals involved often lack a shared basis in language, ethical precepts and world view which leads to an inability to resolve those misunderstandings.¹¹ In Part I, the article will describe the study. Part II will examine the background, structure and history of the juvenile and family courts, emphasizing the tensions between social work and legal visions of the court.¹² Part III will examine the different roles of lawyers within the child protection system, demonstrating the many ways that role confusion and ambiguity interfere with effective shared decision making.¹³ Part IV will examine the role conceptions held by both social workers and attorneys within the system and describe the difficulties both groups have in reconciling their competing views of the goals and methods for child protection.¹⁴ Finally, in Part V, the article will suggest a variety of reforms that could facilitate more effective interdisciplinary cooperation between social workers and lawyers within the child protection system, including a description of the cross-training program designed by the author and her social worker partner.¹⁵

¹⁰ Sanford N. Katz, *The Lawyer and the Caseworker: Some Observations*, 42 SOCIAL CASEWORK 10-15 (1961).

¹¹ This is a long-standing problem. See e.g. Franklin B. Fogelson, *How Social Workers Perceive Lawyers*, SOCIAL CASEWORK 95-101 (1970) (suggesting that ignorance, misunderstanding and indifference have been major obstacles to cooperation between these professional groups).

¹² *Infra* at notes 25 – 81 and accompanying text.

¹³ *Infra* at notes 82 – 165 and accompanying text.

¹⁴ *Infra* at notes 166 – 216 and accompanying text.

¹⁵ *Infra* at notes 205 – 263 and accompanying text.

I. The Study

The study was the outgrowth of an effort to improve the delivery of services to children involved in the abuse and neglect system of the juvenile court division of Jackson County, Missouri. In the fall of 2001, the Juvenile Officer¹⁶ and Director of Family Court Services identified a need for a more collaborative effort among those working in the system, (hereinafter the stakeholders),¹⁷ which included primarily lawyers and social workers. He theorized that one of the obstacles to providing the best service possible was related to role ambiguities. He suggested that building a strong system of child protection involved the acceptance of the respective limited roles, acceptance of responsibility in those roles and a willingness to reach out to others as they performed their roles.¹⁸

The author, a lawyer and law professor, and a social work colleague¹⁹ offered to assist in this effort by conducting a study designed to ascertain the sources of the perceived role ambiguities and offer recommendations for solutions. In our study with attorneys and social workers working in the child abuse and neglect division of a juvenile court system, we first sought to explore these role conceptions. The project included representatives from all stakeholder groups: social work supervisors,²⁰ attorneys for the court who file

¹⁶ In Missouri the Juvenile Officer is given the responsibility to take charge of children before and after the hearing as may be directed by the juvenile court. MO. REV. STAT. § 211.401 (2005).

¹⁷ This term is used to describe those who have an interest in a decision, either as individuals or representatives of a group. It includes people who influence decision or can influence those affected by them.

¹⁸ Memo from David Kierst, Nov. 27, 2001 (on file with the author).

¹⁹ Walter Kisthardt, Ph.D., Chair, Associate Professor, Social Work Department, Park University.

²⁰ Supervisors, rather than front-line workers, were chosen for several reasons, including: logistics (numbers were manageable); level of responsibility (supervisors are ultimately

petitions, attorneys for the child welfare agency, attorneys from the office of the guardian ad litem and attorneys for the parents. Our study extended over a two-year period, with numerous face-to-face meetings and written communications.²¹ Virtually every attorney and social work supervisor working in the system at the time participated in the study.

We began with a series of homogeneous focus groups. Each group was asked to state what they believed to be the “purpose” of their work.²² They were then asked to detail their individual roles and activities performed in the system. They further identified what they perceived to be the appropriate role for the other stakeholder groups. The purpose of the detailed description concerning roles was to identify both what individual groups were actually doing and compare it to what other groups thought they were doing or should be doing.²³

There was a high degree of consistency amongst the focus groups in response to inquiries about the “purpose of the work.” Collectively, the groups defined their purpose as

responsible for the actions of workers); and consistency (the turnover rate among them is far less than that of the front line workers).

²¹ The study is described in detail in an Executive Summary that “highlights the findings related to how the members of each stakeholder group perceive their purpose and role within the Family Court and how others perceive their role. These findings suggest specific implications and lead to recommendations for future action...The data was collected through written surveys and focus group meetings. The data was analyzed using a thematic content analysis.” Walter Kisthardt and Mary Kay Kisthardt, *Executive Report on Findings, Implications and Recommendations of DFS/Family Court “Role Appreciation” Study*, Jackson County Family Court (June 7, 2003) (on file with the author).

²² *Id.* This was done through both a written instrument and a follow up general discussion. We used a written instrument both to allow more detailed feedback and also to accommodate those who were reluctant to speak in front of their colleagues.

²³ Executive Report, *supra* note 21.

“providing safe, permanent homes for children as soon as possible.”²⁴ However, the data also confirmed there was a significant disconnect between what some groups perceived their role to be in this effort and how others perceived their appropriate role. Furthermore, there were strong misperceptions about what others in the system were actually doing.

The purpose of the second series of meetings was threefold: to present the findings of the initial data collection, to ask for responses and to solicit recommendations for further training that could be designed to address some of the concerns that arose. In this set of meetings the groups were mixed. Each group contained individuals from each stakeholder group. The findings of the initial focus groups were presented. There was little surprise amongst the participants at the conclusions reached, as most of the participants anticipated the misperceptions. A significant advantage of presenting the findings on what people were actually doing (as opposed to what others thought they were doing) was that it was educational. The reaction to the sharing of this information informed one of the later recommendations concerning the importance of on-going communication.

The second part of this series of meetings focused on suggestions for future training. As an example of one possible approach, the authors presented a case study. The multidisciplinary groups were again divided into two groups that continued to contain representatives from all stakeholder constituencies. Each group was given a copy of the case study which described a family who had come to the attention of authorities based

²⁴ *Id.*

on suspicions of abuse and neglect. Each group was asked to discuss within their group how they thought the case should be handled.

At the conclusion of the discussions each group “de-briefed” for the entire group. The differences between the approaches taken by the two groups were further discussed and served to highlight the different perceptions of the individuals involved. The participants were then asked to comment on the value of continued “interdisciplinary” conversations using the case study method. Further suggestions for on-going training, as well as suggestions for structural system change, were discussed and ultimately informed the recommendations made and reported in part V.

II. The Working Environment

One of the fundamental challenges for collaboration in the juvenile justice system stems from the structure of the system itself. Much of the tension between mental health and legal professionals is simply a product of the historical development of the juvenile justice system.²⁵ The juvenile system grew out of social reform efforts that share many of the values and goals of the mental health system and was refined by the influence of legal professionals who tempered that value system with the values of procedural due process and governmental restraint. The resulting environment is one which mental health and legal professionals find alien and yet familiar. It is also an environment in

²⁵ See Timothy Dailey & Judith Cook, *Child Neglect and Dependency: Juvenile Court Structure and Conflict Between Law and Social Work*, 8 J. OF APPLIED SOC. SCIENCES, 267 (1984) (suggesting that the structure of a juvenile court is more likely to be a predictor of social worker-lawyer conflict than is inherent differences in professional normative and goal orientations.).

which competition, rather than shared “ownership” of the system, makes collaboration difficult.

A. History of the Juvenile Court System

The juvenile justice system was first a product of social reformers, shaped by the values of social work,²⁶ who sought to invoke the states’ *parens patriae* authority to protect and rescue children.²⁷ At its inception nearly 100 years ago,²⁸ the system was unique in its goals and methods: concerned with care and rehabilitation of children, but affording them no legal rights whatsoever.²⁹ The system began primarily to deal with juvenile crime, but grew to encompass a range of child protection matters.

²⁶ Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49, 79 (2004) (“The juvenile court was established at the turn of the twentieth century to operate as an informal court embodying the values and methods of social work. Even today, after nearly a half-century of due process reform, many of these informal elements remain, and there is considerable pressure on lawyers in juvenile court to behave more like social workers than like adversarial advocates.”).

²⁷ LESLIE J. HARRIS & LEE E. TEITELBAUM, *CHILDREN, PARENTS, AND THE LAW* 317 (2002):

The court’s process was conceived as informal, resembling the method by which parents deal with children in the home, rather than in terms of counsel, confrontation, and other characteristics of a criminal trial. And the treatment to be given was always understood in terms of therapeutic interventions rather than according to the criminal court’s retributive or deterrent goals.

See also, Patricia A. Schene, *Past, Present and Future of Child Protection Services*, 8:1 THE FUTURE OF CHILDREN 23 (1998).

²⁸ The Illinois legislature created the first juvenile court in 1899. By 1907, twenty-six states and the District of Columbia had enacted laws establishing juvenile courts. Richard E. Behrman et. al., *The Juvenile Court: Analysis and Recommendations*, 6:3 THE FUTURE OF CHILDREN 4 (1996).

²⁹ “Children did not have even basic rights in the juvenile courts, since these would have been inconsistent with the notion that the court's decisions were always made for the child's own good. Thus, rights for children were thought to be simply unnecessary.” U.S. Dept. of Health & Human Services, Admin. for Children & Families, *Child Maltreatment: History and Overview of the Juvenile Court at*

In most states today, the juvenile court has jurisdiction over several types of cases involving children. These include: children who are accused of committing an act that would be a crime if they were adults (delinquency);³⁰ children accused of acts that would not be crimes if committed by adults but, because they are the acts of a child are considered transgressions requiring court intervention (these are the “status offenses,” such as truancy, running away from home and incorrigibility);³¹ children who are alleged to be abused or neglected;³² and, in some jurisdictions, children who are to be adopted or other categories of juvenile cases.³³ More recently, efforts have been made to move toward unified family courts that would have jurisdiction over a wide range of issues

<http://nccanch.acf.hhs.gov/pubs/usermanuals/courtsb.cfm.cfm> (last visited Feb. 1, 2006). See also Sanford T. Fox, *The Early History of the Court*, 6:3 THE FUTURE OF CHILDREN 29-39 (1996).

³⁰ Not all criminal activity by children is addressed in juvenile court. In the past decade in almost every state, an increasing number of children have been tried in an adult criminal court, with current estimates at 200,000 children being tried as adults annually. This transformation of national practice has been accomplished through various methods, such as: (1) expanding the types of cases and offenders judges can transfer for adult trials after a hearing; (2) lowering the age of criminal jurisdiction; (3) shifting the transfer decision from judges to prosecutors; and (4) increasing the number of offenses and types of offenders that are automatically tried in criminal courts as mandated by legislatures. See YOUTH IN THE CRIMINAL JUSTICE SYSTEM: AN ABA TASK FORCE REPORT, at www.co.harris.tx.us/pretrial/documents/library/abayouthguide.pdf (last visited Feb. 3, 2006).

³¹ David J. Steinhart, *Status Offenses*, 6:3 THE FUTURE OF CHILDREN 86 (1996).

³² Richard P. Barth, *The Juvenile Court and Dependency Cases*, 6:3 THE FUTURE OF CHILDREN 100 (1996).

³³ Rubin, *supra* note 3, at 46 (noting that most juvenile courts grant adoption decrees, with the exception of a few states that maintain exclusive jurisdiction over these actions in the probate court. Other cases handled by some juvenile courts include “juvenile traffic offenses, guardianships, commitment procedures for juveniles with mental illness or developmental disabilities, contributing to the delinquency of a minor, consent to an abortion or marriage, and paternity and child support proceedings.”) *Id.*

affecting families.³⁴ Regardless of the particular category of juvenile case, a showing that the child is in need of care or treatment is generally required for juvenile court jurisdiction.³⁵

The jurisdiction over delinquent children began in 1899 in Illinois. Until that time, children were brought before the criminal court using the common law presumptions that applied to the capacity to commit a crime. The origins of the court lead to the conclusion that it was a paternalistic attempt to “save children from a future life of crime.”³⁶ The jurisdiction of the courts over children alleged to have been abused or neglected has a more recent history. The first reported case of a court intervention is the now famous story of Mary Ellen McCormick, whose advocates in 1874 were initially compelled to approach the Society for the Prevention of Cruelty to Animals to secure her protection from abusive parents.³⁷ The case raised public awareness about the plight of abused children. The legal system that responded was one that was built on discretionary decision-making and the substitution of the court as parent.³⁸

³⁴ For a description of this movement, see Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Court*, 32 FAM. L.Q. 31 (1998). Its implications for encouraging collaboration between social workers and lawyers are discussed more fully in Part V *infra*.

³⁵ See e.g. MO. REV. STAT. § 211.031 (2004).

³⁶ HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 10-12 (University of North Carolina Press 1927).

³⁷ NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *Child Maltreatment at* <http://naccchildlaw.org/childrenlaw/childmaltreatment.html> (last visited Feb. 1, 2006).

³⁸ U.S. Dept. of Health & Human Services, Admin. for Children & Families, *supra* note 29, at 6.

While both the delinquency and child protective aspects of the juvenile justice system began with a focus on care and treatment of children, the legal system nonetheless ultimately “owned” the decision-making. The legalization of that decision-making dramatically expanded in the twentieth century. For example, in child abuse and neglect matters, states routinely began to enact statutes governing the circumstances under which the state was justified in intervening in the family.³⁹ The battle lines were drawn early between those who argued for a high threshold of harm or misbehavior on the part of the parent before intervention was justified, (the Non-interventionists),⁴⁰ and those who argued for a lower threshold based not just on physical harm to a child but emotional harm as well (Interventionists).⁴¹ When viewed through the “care” lens of mental health professionals, these battles took on quite a different tenor than when fought on the grounds of “rights.”⁴²

It was not until 1967 that the system recognized procedural due process rights for children in the system. The series of United States Supreme Court cases affording children rights in the juvenile justice system reveal the competing values and visions for this system. In 1967, the Supreme Court’s decision in *In re Gault*,⁴³ first incorporated

³⁹ See e.g. MO. REV. STAT. § 210.001 (2004).

⁴⁰ Douglas Besharov, *Rights v. Rights: The Dilemma of Child Protection*, 43 PUBLIC WELFARE 20 (Spring, 1985) (arguing that half of the children taken from their parents for maltreatment were in no immediate danger and could have been left with their parents).

⁴¹ SANFORD KATZ, *WHEN PARENTS FAIL* (1971); see also, Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745 (1987).

⁴² See James Donald Moorehead, *Of Family Values and Child Welfare: What is in the “Best” Interest of the Child?* 79 MARQ. L. REV. 517, 523 (1996) (asserting that there is no empirical evidence to support either the “interventionist” or “non-interventionist” approach because we cannot measure what happens when there is no intervention).

⁴³ 387 U.S. 1 (1967).

“rights” into the “care” of the juvenile justice system by requiring that juveniles charged with delinquency be afforded an attorney. The Court, while recognizing the benevolent intentions of social reformers in creating the juvenile justice system, also saw the need for the leavening role of the attorney as advocate. The Court noted that a child needs an attorney to "make skilled inquiry into the facts, to insist upon the regularity of proceedings and to ascertain whether he has a defense and prepare and submit it."⁴⁴

Not all Justices were supportive of this shift toward legalism in the juvenile justice system. For example, in *In re Winship*⁴⁵ the Court established the "proof beyond a reasonable doubt" standard for juvenile adjudications. Chief Justice Burger dissented, however, warning that “what the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive.”⁴⁶ Many social workers would agree with this sentiment.⁴⁷

⁴⁴ *Id.*, at 34.

⁴⁵ 397 U.S. 358 (1970).

⁴⁶ *Id.* at 376 (Burger, C.J., dissenting). For a comprehensive history and critique of the juvenile court, see Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1 (1992).

⁴⁷ James Scherrer, *How Social Workers Help Lawyers*, 21 SOCIAL WORK 279 (1976):
The failure of the juvenile courts to live up to their promise of reforming wayward children, coupled with their frequent and blatant disregard for the child’s constitutional rights, attracted the attention of the lawyers. In many instances they blamed social workers directly for the abuses they saw. Essentially, the supremacy of social workers in juvenile court was challenged by the lawyers who viewed their clients’ problems as legal rather than social or emotional. It is not surprising that the social workers resented this challenge.

Most recently, this legalization has been furthered by the federal government enacting statutes governing child abuse and neglect. These statutes conditioned federal funding on the states' willingness to accept federal guidelines concerning standards for intervention and policies relating to reunification.⁴⁸ The Adoption Assistance and Child Welfare Act⁴⁹ provided that children could only be removed from the home if they could not be protected there. More importantly, the law mandated the states to use "reasonable efforts" to reunify a child with his or her family.⁵⁰ This law achieved only minimal success at providing safe and permanent homes for abused and neglected children.⁵¹ In response to these failings, in 1997 Congress enacted the Adoption and Safe Families Act (ASFA) that focused more on safety and less on reunification and included a mandate to make permanent plans for children in a more expeditious manner.⁵² Further legalization, however, did not ease the tension between the "caring" and "rights" models.

⁴⁸ Jim Moye and Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 377 (2002). The federal government also provided funding for states to provide family preservation and support services with the hope that such services would keep families from entering the formal abuse & neglect system. *See also*, Nilofer Ahsan, *The Family Preservation and Support Services Program*, 6:3 THE FUTURE OF CHILDREN 157 (1996).

⁴⁹ Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in 42 U.S.C. §§620 et. seq. (1988)).

⁵⁰ 42 U.S.C. § 671(a)(15)(Supp. 1 1999).

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which ... provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

⁵¹ Barth, *supra* note 32, at 108. ("Federal and state laws still have not been able to create a child welfare system that can reliably promote timely and safe havens for abused and neglected children."); David T. Herring, *The Adoption and Safe Families Act – Hope and Its Subversion*, 34 FAM. L. Q. 329 (2000) (suggesting that ACCWA failed because its compliance review design was flawed).

⁵² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 USC § 671 (a)(15)(D)(i) (1994 & Supp. 1999) (providing exceptions to

B. The Adversary Structure as a Barrier to Collaboration

With each step toward increased legalism, lawmakers must struggle for balance between the rehabilitative and care ethic that founded the juvenile justice system and the adversarial ethic of legal process and protection. Law is the vehicle through which the state can serve children and families, and a legal system requires both procedural due process and individual advocacy.⁵³ Yet, mental health professionals and many lawyers alike agree that the very core structural and procedural elements of the legal system are ill-suited to address interpersonal relationships.⁵⁴ Abuse and neglect cases are in essence

the reasonable efforts requirement with proof of “aggravating circumstances”). There is now a rich body of literature commenting on the goals, problems and results of this legislation. *See e.g.*, Robert Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999); Sarah H. Ramsey, *The United States Child Protective System – A Triangle of Tensions*, 13 CHILD & FAM. L. Q. 25 (2001).

⁵³ *See* Kruse, *supra* note 23, at 90:

There are profound dangers in substituting a system of social work values and perspectives on social justice for the lawyer's procedurally-based vision. Looking back, it is easy to see how the most well-intentioned and forward-thinking of the nineteenth-century juvenile court reformers were limited in their vision by the prevailing social-scientific views, and the race and class biases of their day. However the lens of history does not reveal the limitations of our current thinking as clearly. Humility dictates that twin dangers - misguided altruism and masked malevolence - will inevitably haunt the implementation of any social justice mission. The promise of adversarial advocacy is that no one's social justice mission will go unchallenged by those who bear the consequences of its reforms.

⁵⁴ *See* Katherine van Wormer, *No Wonder Social Workers Feel Uncomfortable in Court*, 9:2 CHILD & ADOLESCENT SOC. WORK J. 117 (1992) (suggesting that social workers are uncomfortable before the august body of the *court*, not because of any lack of education or knowledge on their part but because of the nature of the adversary process itself). Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. CONST. L. 112 (1999); IRA. M. SCHWARTZ & GIDEON FISHMAN, *KIDS RAISED BY THE GOVERNMENT* (1999); Naomi Cahn, *Children's Interests In a Family Context: Poverty, Foster Care and Adoption*, 60 OHIO ST. L. J. 1189 (1999).

about interpersonal relationships and it has been suggested that the law is indeed a crude instrument for dealing with such relationships.⁵⁵ Nonetheless, in our culture we have come to rely heavily on the legal system to “remedy wrongs.”⁵⁶ Thus, the very system itself can work against its goals. Sometimes a team of skullers lose the race because they cannot pull their oars together; but sometimes it is the boat itself which is faulty.

Obviously, collaboration is difficult enough when everyone is working within a highly functional and efficient system. But when many, if not most, of the stakeholders agree that the system itself is a flawed, collaboration is further frustrated.

There are several particular aspects of the adversarial system that limit its ability to effectively handle complex family problems. The first is that the resolution of these issues often requires that the decision maker make predictions about future behavior (not unlike child custody in divorce cases).⁵⁷ The adversarial system is not particularly well

⁵⁵ JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT SOLNIT, *BEYOND THE BEST INTEREST OF THE Child* (1973).

DAVID A. BINDER Et Al., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 5 (1991):

[T]oo often lawyers conceive of clients' problems as though legal issues are at the problems' center, much as Ptolemy viewed the Solar System as though the Earth were at the center of the universe. But legal issues may be no more the essence of a client's problem than, perhaps, religion might be its essence if a troubled client chose to talk to a minister rather than to you, a lawyer. Whatever the legal aspects of a problem, nonlegal aspects frequently are at the heart of a client's concerns.

⁵⁶ See Sarah H. Ramsey, *Child Protection: New Perspectives for the 21st Century*, 34 *FAM. L. Q.* 301 (2000) (introducing a symposium issue devoted to critiques of the child protective system). In the area of child-centered disputes, that involve personal action, many helping professionals “view law itself as possessing vast powers to transform people’s behavior.” Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 *HARV. L. REV.* 727, 734 (1988) (footnote omitted).

⁵⁷ Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 251-52 (1975).

adapted to that task. Most legal decisions are made based on a finding of what has occurred in the past and assigning the appropriate consequence to it. Predicting future human behavior is far more difficult than making an assessment of what happened in the past. In addition, a judge is required to take a far more active role in order to ensure the child's continued protection.⁵⁸

The process is also not contextually oriented.⁵⁹ The mere existence of legal proceedings will change the very nature of the relationships being evaluated. Individuals who find themselves subject to legal scrutiny will behave in ways that may not be predictive of their future behavior.⁶⁰ For most families, their involvement in a court proceeding is a frightening and difficult experience.⁶¹

⁵⁸ The judge's role in these cases is comparable to that of a case manager, in contrast with the usual role of judges, who passively hear cases and controversies presented to them. Brooks, *supra* note 5, at 951. For further discussion of this role see Susan Brooks, *Reflections on the Tennessee Court Improvement Program for Juvenile Dependency Cases*, 65 TENN. L. REV. 1031 (1998).

⁵⁹ "The traditional adversary process, bound by definitions of legal action, remedies and relevance, is limited in its ability to examine problems contextually. Something either fits a definition or it does not. Lawyers, judges, and the law in general, have no application for the ecological perspective of family dynamics." Weinstein, *supra* note 4, at 98.

⁶⁰ *Id.* at 99. The legal environment also can result in a distortion of "facts." Carrie Menkel-Meadows, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, MO. J. DISP. RESOL. 31 (1988).

⁶¹ For children especially, their limited ability to understand the judicial environment and processes can make the experience a traumatic one. See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA L. REV. 237, 307-08 (1999) (describing children's understanding of courts and judges at various developmental stages). See also Emily Buss, "You're My What?" *The Problem of Children's' Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996).

Finally, the process is not inclusive. The focus on individuals at the adjudicatory stage often dictates who will be involved in the disposition or solutions stage. The care of children involved in these matters often requires the involvement of a number of individuals who are not “parties” to the court proceedings. Limiting their involvement in the fact finding process and then seeking their cooperation in the disposition phase presents additional problems.⁶²

C. The Problem of Sharing “Ownership” of Decision-Making

The very weaknesses of the adversary system – the ability to make predictions and work within context – are the strengths the mental health profession can bring to decisionmaking.⁶³ Social workers and other mental health professional’s work with a “systems” perspective on problems – they take into account an individual’s social environment: his family, community, resources and pressures.⁶⁴ The legal child welfare system has failed to adopt this orientation in any meaningful way.⁶⁵ Yet, social workers

⁶² Weinstein, *supra* note 4, at 100 - 101. This “disconnect” and attempts to address it is at the foundation of Family Group Conferencing, discussed in footnotes 235 – 240 and accompanying text *infra*.

⁶³ See Brooks, *supra* note 7, at 3.

⁶⁴ CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS (NASW), approved by the 1996 NASW Delegate Assembly and revised by the 1999 NASW Delegate Assembly at <http://www.socialworkers.org/pubs/code/code.asp> (last visited Feb. 1, 2006).

⁶⁵ Brooks, *supra* note 5, at 952:

The law has failed to embrace contemporary mental health theory about what is good for children and families, which may be referred to as a family systems approach. The reasons child welfare law has failed to embrace a family systems approach have historical, social, and political dimensions. One significant factor is that there is not an easy fit between the structure of the U.S. legal system as it relates to child welfare cases and a family systems approach. Current laws and practices tend to focus on individuals and to follow an outmoded psychoanalytic, medical model.

have the skills and resources to address the non-legal barriers to long-term resolution of the crises families face in the legal system.⁶⁶

Research indicates that collaboration is the best problem-solving strategy when the problem to be addressed is too large for one organization to resolve independently.⁶⁷

This certainly describes the child protection system. Both lawyers and social workers have much to gain from the professional perspective of the other. Lawyers have little expertise in dealing with families in crisis.⁶⁸ Obviously then, shared decision-making is essential.⁶⁹ Because their professional training emphasizes interpersonal communication

Another important factor is that judges and lawyers are uninformed about mental health theories, especially family systems theory, and often act simply on their gut feelings.

⁶⁶ Jane Aiken & Stephen Wizner, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: Law as Social Work*, 11 WASH. U.J.L. & POL'Y 63, 66 (2003).

⁶⁷ Susan Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216, 220 (2004) (citing BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* (1989)).

⁶⁸ Aiken & Wizner, *supra* note 66, at 67:

Except in law school clinical programs, lawyers typically do not receive instruction in the skills of interacting with clients, particularly those from different economic, social, racial, ethnic, or religious backgrounds. There is no professional expectation or ethical rule that requires a lawyer to learn these professional skills, other than the general rule requiring lawyers to be "competent." In contrast, one ethical principle of the social work Code of Ethics provides that "social workers respect the inherent dignity and worth of the person."

⁶⁹ See Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices For People*, 7 CLINICAL L. REV. 227, 239 (2000):

There are four reasons for collaboration in serving at-risk families: 1) to create an environment where at-risk families can access the services they need by providing peer support or intensive case management; 2) to remove nonlegal barriers to creating effective legal strategies by dealing with family stress and conflict, health factors, and by providing information and education; 3) to address the legal problems families face, both at the individual level and at the systems level; and 4) to evaluate the effectiveness of the services they provide.

and counseling skills,⁷⁰ social workers may be able to transcend boundaries of distrust with children and families better than legal professionals.⁷¹ The social workers become the conduit for information that all the professionals in the process need for effective decision-making.⁷² Thus, studies of successful programs addressing children and families at risk indicate that one of the key elements of these programs is the ability of committed and empowered professionals to “transcend professional boundaries” and work collaboratively.⁷³

⁷⁰ See Sia Arnason, et al., *The Successful Marriage of Law and Social Work*, CLEARINGHOUSE REV. 450 (1989).

⁷¹ Lawyers could benefit additionally from a social work perspective in dealing with their clients. “A client-centered contextual approach requires that a lawyer be open to an expansive concept of relevance in the lawyer-client relationship and to the idea that a theory of a case may be changed in the light of the context of a client’s life... Collaboration with other professionals may expand what is ‘relevant’ for the lawyer and client. It may help the client gain perspective on his or her own interpersonal dynamics and assist the lawyer in exploring the boundaries of his or her own knowledge and biases.” Mary Ann Forgey, et al., *The Professional Mandate for the Use of “Strategic Collaborations” by Lawyers and Social Workers in Child Maltreatment/Intimate Partner Violence Cases*, in *SOCIAL WORK IN THE ERA OF DEVOLUTION: TOWARD A JUST PRACTICE*, 239 (Rosa Perez-Koenig & Barry Rock eds. 2001).

⁷² Trubek, *supra* note 69, at 257-58. “The client's fear is assuaged and other concerns surface since the secrecy over many aspects of her life now become clear. The fear of going directly to the lawyer is overcome through the trust in the collaborator.”

⁷³ Richard P. Barth, Ph.D., Sheryl Goldberg, Ph.D., Jeanne Pietrzak, M.S.W., Amy Price, M.P.A., & Tyan Parker, M.S.W., *Abandoned Infants Assistance Programs: Providing Innovative Responses on Behalf of Infants and Young Children* (1995), available at <http://socrates.berkeley.edu/aiarc/pubs/innovate.htm>:

Coordinating the involvement of professionals from multiple systems ... is a key element of effective practice in virtually all of the AIA programs ... The task of working out a common mission and focus among varying disciplines sometimes generates conflict and frustration and requires a significant expenditure of time. But ... there is a shared belief that coordination and collaboration offer the best hope of an effective response for these families and enables communities to continue providing core services to the neediest families in the face of growing resource constraints. A sense of crisis, the commitment of the participating individuals, their interpersonal collaborative skills, and the maintenance of clear and open channels of communication are cited as factors critical to the success of collaborative efforts.

While shared decision-making is critical to a successful juvenile justice system, the historical development of the system has been simply to “add social worker and stir,” rather than reformulate the system to facilitate collaborative decision-making.⁷⁴ The adversary system is not built on collaboration but on competition and power. The frustration for social workers is that cases, so clearly dependent upon a family systems approach, are being decided in an adversarial forum where the lawyers appear to be in control.⁷⁵ It is, as Janet Weinstein suggests, “the tail wagging the dog.”⁷⁶ Social workers resent being placed in a role that is secondary to the “legal” process. They often feel they have more to contribute but they must play second fiddle to the attorneys. Lawyers have the judge’s ear, but social workers have the “evidence” that can truly effect the greatest change for children and families.

To make matters worse, lawyers often have little regard for social workers’ expertise.⁷⁷ They sometimes view social workers as people who complain that the law hampers the

⁷⁴ Forgey, *supra* note 71, at 224:

Lawyers and social workers need to look to the norms of their own professionalism to overcome the professional and systemic differences that may be standing in the way of proper representation and assistance for their clients. Those norms suggest that the needs and rights of the partners and children in a particular family will be met only when professionals initiate collaborative approaches that are tailored to uncover and resolve the professional and systemic differences that are standing in the way of specific client goals.

⁷⁵ van Wormer, *supra* note 54, at 120. (“The dissonance between the legal and welfare principles that guide the juvenile court is resolved in favor of the legal. The dissonance between lawyers and social workers is resolved in favor of the lawyers. The adversary system has thus re-emerged in the juvenile courtroom.”).

⁷⁶ Weinstein, *supra* note 4, at 84.

⁷⁷ See Aiken & Wizner, *supra* note 66, at 63 (describing their students’ complaints that their clinic work “isn’t law, it’s social work” and their historically defensive response to that protest).

effective resolution of a social situation, but who do not know how to alter the law.⁷⁸

Rather than educate their collaborators, however, professionals may be inclined to hoard their own expertise.⁷⁹ For legal professionals in particular, professional norms prohibiting the unauthorized practice of law heighten this tendency.⁸⁰

Given that child protection will not be removed from the legal system,⁸¹ the question is how the system can be structured to best facilitate collaboration and build on the strengths of the multiple professionals necessary to achieve justice for children and families. There is tremendous confusion about the nature of the practice. Should it be less adversarial? If so, will anyone know what the rules of the game are? Absent fundamental structural changes (taking child protection cases out of the legal system altogether or devising an entirely new branch of law), these structural features are likely to continue to create challenges to collaboration. The answer to improved collaboration, then, is more likely to be found in the collaborators themselves.

⁷⁸ DONALD BRIELAND & JOHN ALLEN LEMMON, *SOCIAL WORK AND THE LAW* 11 (2d ed. 1985).

⁷⁹ Trubek, *supra* note 69, at 258-59. (“[P]rofessional training often emphasizes the complexity of professional knowledge in a way that can reduce hope of finding solutions to real-world problems.”).

⁸⁰ Anthony Bertelli, *Should Social Workers Engage In The Unauthorized Practice Of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998). This concern has recently been highlighted by the debate in the American Bar Association over revisions to the Model Rules of Professional Conduct to facilitate multi-disciplinary practice. See Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000).

⁸¹ There have been suggestions for removing much of the “status offender” jurisdiction from the juvenile court system and into social service and diversion programs. See Steinhart, *supra* note 31, at 86-88 (noting the trend during the 1970’s to

III. Roles of Professionals in the Juvenile Justice System

One approach to understanding collaboration is through the lens of role expectations and conflict. A person's conception of his role in a system will affect his behavior. When role conceptions or expectations are ambiguous or shift, the system as a whole undergoes stress.⁸² In the juvenile courts, role conceptions for all stakeholders are very confused.⁸³ Moreover, the confusion is not confined to one professional group but may also change according to the type of case, the jurisdiction and the judge.

The results of the instant study revealed significant role confusions both within and across disciplines. For example, an attorney defending a child against a delinquency charge may feel comfortable in his role as protector of the due process rights of the child and justified in taking a position as a zealous advocate for the child against the amassed power of the state. The mental health professional in such a case is less likely to view the problem as an adversarial stand-off between the state and the child than as a crisis point in the child's development for which the state, and others, are resources to be called upon to provide assistance.

“deinstitutionalize” status offenders and address the needs of these children through community services and the recent reversals to that trend).

⁸² D.J. Abramis, *Work Role Ambiguity, Job Satisfaction, and Job Performance: Meta-Analyses and Review*, 75 PSYCHOL. RPTS. 1411-1433 (1994); see also Bruce J. Biddle, *Recent Developments in Role Theory*, 12 ANN. REV. OF SOC. 67-92 (1986).

⁸³ For early work on this issue, see Robin Russell, *Role Perceptions of Attorneys and Caseworkers in Child Abuse Cases in Juvenile Court*, 67 CHILD WELFARE 205, 213-14 (1988).

However, these same professionals might find their sense of role confidence and confusion reversed in another type of case, for example a child abuse and neglect action. An attorney appointed as a guardian ad litem in a status offense or child neglect matter may feel intellectual vertigo from the changing perceptions of her proper role. Is she an attorney for the child, an advocate for her own perception of the child's best interest, or merely an investigative arm of the court? The social worker in such a case, however, might view the case as the routine work of his profession: bringing together persons and services in a therapeutic method to help the family function more effectively.

With such confusion over their own ever-changing roles, it is little wonder that each professional misunderstands the role of the other. We found a striking example of this when social workers see attorneys as having a unitary role in the child advocacy system regardless of the identity of the attorney's client. This results in social workers being confused by the positions taken by attorneys. The attorney for the state may be arguing that it is safe for the child to return home when the child's attorney is recommending continued foster care. Or the methods adopted by attorneys - such as tactical choices regarding evidence or procedure - may confuse social workers.

The complexity of these role ambiguities and conflicts bears particular examination. Only by recognizing and resolving these role conflicts and misunderstandings can successful collaborations occur. This section will address the difficulties of assuming various roles for attorneys and mental health professionals involved in abuse and neglect cases. The importance of this discussion to the overall theme of interdisciplinary collaboration cannot be minimized. Mental health workers cannot be faulted for failing

to appreciate the roles attorneys play, when the attorneys themselves have so much difficulty doing so. Likewise, the ability of attorneys to collaborate with social workers and other mental health professionals turns on their genuine understanding of the role conceptions held by those professionals.

A. Role Ambiguities for Attorneys

Lawyers are trained in the adversarial model, one that is based on the premise that vigorous advocacy for each party's position will result in the discovery of the "truth."⁸⁴ Lawyers believe that justice is achieved by the imposition of objective rules on situations.⁸⁵ Some of the difficulties inherent in using this model for the resolution of intra-family disputes have already been identified. For attorneys, the first challenge is recognizing the differences between traditional adversarial settings and the juvenile court system.

The difference between the juvenile court and those courts with which attorneys are most familiar becomes apparent from the attorney's first contact with the pleadings used in juvenile court. Attorneys initially notice that a somewhat foreign language is being employed. Cases are styled "In the matter of" as opposed to the traditional adversarial

⁸⁴ See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469-70 (1969) (noting argument that aggressive criminal defense furthers the truth-seeking process); see also LON L. FULLER, *The Adversary System*, in TALKS ON AMERICAN LAW 34, 35-36 (Harold J. Berman ed., rev. ed. 1971) (discussing lawyer's role as an advocate in the adversary process). But see DAVID LUBAN, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 93-97 (David Luban ed. 1983) (arguing that partisan advocacy does not further the truth-finding function).

designation of one party versus another party or the state. This is designed to emphasize that the focus of the juvenile court is on the welfare of a child, and is not about creating an adversarial situation where blame is assigned.⁸⁶ Hearings are referred to as adjudications rather than trials, and the most important aspect of the proceeding is called the disposition, whose corollary in the criminal context is the sentencing and the judgment in the civil courts.⁸⁷

This difference in terminology reflects a difference in approach with which the attorney is generally unfamiliar. This is compounded by the frequently perceived notion that everyone is working toward the same goal (the best interest of the child) and therefore less than zealous advocacy of a client's position is necessary or even desirable.⁸⁸ It further leads to the perception that the work of attorneys in the juvenile court is "deal

⁸⁵ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 36 (1982) (noting that the third party application of objective rules for decision-making is part of the lawyer's standard philosophical map).

⁸⁶ The designation "in re" or "matter of" is also traditionally used to designate cases involving the determination of ownership of property. BLACK'S LAW DICTIONARY 796 (7th Ed. 1999). That the same designation should be used in child protection actions may reflect in part the historical treatment of children as the property of their parents. See e.g. Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. FIGHTING POVERTY 313, 314 (1998) (describing the historical "property" theory of parental rights).

⁸⁷ David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1776 n. 43 (1991) (noting the differences in terminology between adult and juvenile court proceedings).

⁸⁸ Attempts to reduce adversarialness in the system have left professionals, particularly attorneys and judges, in an awkward void. Trained in the adversary process and the zealous advocate role, lawyers are concerned about the role they are to play in an undefined, but less adversarial process. Often, the result is that they do not zealously advocate, but do retain their adversarial posture, a confusing situation for all involved. Trial skills become sloppy, and records on appeal are incomplete and/or undiscernible. Role confusion creates tension and results in counter-accusations of poor performance.

making.”⁸⁹ The situation is further complicated by uncertainty concerning who is involved in making the deal. In many juvenile courts, attorneys for the court are seen as “insiders,” while those representing parents are perceived to be “outsiders.”⁹⁰ An examination of each of the roles attorneys play in the juvenile justice system reveals further role confusions and conflicts.

1. Representing the parent: traditional advocacy with some angst

Attorneys who represent parents in abuse and neglect cases rarely suffer from significant role confusion. Theirs is a more traditional advocacy role; after all, they have the luxury of competent clients. But theirs is not an easy job; indeed, advocating for the parents is the position that many attorneys find the most difficult.

One challenge is that others perceive these attorneys in the system in a negative way.

Social workers, in particular, have difficulty understanding the professional obligation to advance the interest of a client, and confuse the identity of the lawyer with his client.⁹¹ If the parent is “bad,” then the lawyer is “bad.”⁹² This is particularly difficult when the

⁸⁹ Executive Report, *supra* note 21.

⁹⁰ *Id.*

⁹¹ Attorneys as well may professionally identify themselves with the clients they serve or the legal positions they take or both, despite the rules of professional conduct which indicate that such identification should not be presumed. See ABA Model Rules of Professional Conduct, Rule 1.2 (2004): “a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.” See generally Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 16 (2003) (suggesting a typology of attorney-client identifications).

⁹² The extent to which an attorney is morally responsible for the selection of his or her client is a subject of heated debate among legal ethicists. DAVID LUBAN, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 93-97 (David Luban ed. 1983); see also David Luban, *Reason and Passion in Legal Ethics*,

same lawyer may act as a guardian ad litem in another case involving the same social worker. Human nature being what it is, even those social workers who have some intellectual understanding of the differing roles one must play have a hard time working with the attorney on an on-going basis.

A social worker's professional norms hold that the worker is morally responsible for the clients they serve and the outcomes they seek.⁹³ Some in the legal academy argue that attorneys should have this same moral obligation,⁹⁴ but the ethical standards of the profession dictate that an attorney's independence of professional judgment requires that the attorney's representation of a client does not identify the attorney with that client's goals or viewpoints.⁹⁵

A significant predictor of how comfortable the parent's attorney will be with that role is the method of selection. Because many of the parents' attorneys are appointed, the first hurdle they face is unfamiliarity with the system. Some jurisdictions mandate that all attorneys licensed to practice therein are subject to appointment.⁹⁶ While such a system has the advantage of ensuring an ample supply of counsel, it is no guarantee that those

51 STAN. L. REV. 873 (1999), (citing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 1 (1998)).

⁹³ Code of Ethics of the National Association of Social Workers, *available at* <http://www.socialworkers.org/pubs/code/code.asp>. (last visited Feb. 3, 2006).

⁹⁴ See, Aiken & Wizner, *supra* note 66, at 72.

⁹⁵ ABA Model Rules of Professional Conduct 1.2 (2004).

⁹⁶ See Barbara Glesner-Fines, *Almost Pro Bono: Appointed Attorney Representation in Family Court*, 72 UMKC L. REV. 337 (2003) (describing and critiquing comprehensive appointment systems for representation in juvenile court actions).

appointed will be committed in any meaningful way to the representation.⁹⁷ As discussed earlier, the juvenile court is a world unknown to many legal practitioners. Those “forced” to practice there often lack the incentive to work zealously; the financial rewards are low,⁹⁸ the clients are often difficult, and they are likely to perceive that spending the time needed to acquaint themselves with juvenile practice is not an efficient use of their time.⁹⁹

Furthermore, appointed attorneys are “outsiders” in a system where they perceive that the repeat players, (everyone involved in the case except them and their clients), are “insiders.”¹⁰⁰ These “insiders” are adept at making deals that the appointed attorneys are unsure are in their clients’ best interest. This may lead them to be too eager to accept the recommendation of the state’s attorney or the guardian ad litem; or on the other end of

⁹⁷ Kathleen Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285 (1998):

Arguing that indigent parents are legally out-matched in child protective proceedings, one commentator notes: “The most striking thing about the practice of law in [the child protective] area is the gross inequality of representation. This is the only area of law in which the party most in need of effective assistance of counsel is least likely to obtain it.” *quoting*, Martin Guggenheim before the Assembly Standing Committee on Children and Families (Dec. 1, 1993).

⁹⁸ See Sheri Bonstelle and Christine Schessler, *Adjourning Justice, New York State’s Failure to Support Assigned Counsel Violates Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L. J. 115 (2001); *see also*, Symposium, *Report of the Parent Representation Working Group*, 70 FORDHAM L. REV. 399 (2001).

⁹⁹ *See e.g.*, Mark Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases*, 6:3 THE FUTURE OF CHILDREN 111, 118 (1996) (noting that “[i]t is not unusual for parents’ attorneys to come to the courthouse unprepared, not having discussed their case with their clients.”)..

¹⁰⁰ This “clubby” atmosphere fosters the development of a set of unwritten rules and shared expectations that govern the expected and accepted behavior of players in the system.” Amy Sinden, “*Why Won’t Mom Cooperate?*”: *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 352 (1999).

the spectrum, they may assume a very adversarial stance making them suspicious of offers from the “other side.”¹⁰¹ This latter approach may result in an uncooperative attitude from the “insiders” on whose guidance in navigating this strange terrain the outsiders must rely.¹⁰²

Not only is the system unfamiliar, but attorneys appointed to child abuse and neglect cases may have difficulty relating to their clients. These clients are often from a different socioeconomic group¹⁰³ than the attorneys and there may be racial and cultural differences as well.¹⁰⁴ Unlike social worker education where cultural competency is a key component of the social worker’s professional education, lawyers are unlikely to have had training with cross-cultural interviewing and counseling.¹⁰⁵ Without this training, these appointed attorneys might have difficulty understanding the client’s goals. They may also be unwilling to probe beyond the client’s initial stated goal of wanting his or her child back. It may also be that others involved in the case recognize that while the client

¹⁰¹ Bailie, *supra* note 97, at 2312:

Both the lawyer for the child welfare agency and the law guardian have the advantage of being recognized as important actors in the protection of children. In contrast, the dearth of legal scholarship devoted to the role of the lawyer for parents most likely reflects society's unease and unwillingness to work with parents charged with neglect. These negative attitudes find their way into systems of legal representation which, in return, fail to fully assert parents' interests.

¹⁰² See Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GA. L. REV. 1079, 1079-1101 (1988).

¹⁰³ Sinden, *supra* note 100, at 352 (citing MICHAEL R. PETIT & PATRICK A. CURTIS, CHILD ABUSE & NEGLECT: A LOOK AT THE STATES, 1997 CWLA STAT BOOK 208 (1997) (in which the authors report on a 1996 study of the U. S. Department of Health & Human Services Children’s Bureau finding that reports of child abuse and neglect tend to be “overwhelmingly concentrated among the lowest income families.”)).

¹⁰⁴ See *Smith v. Offer*, 431 US 816, 833-35 (1977) (in which the court noted that children in foster care are disproportionately non-white).

¹⁰⁵ Aiken & Wizner, *supra* note 66, at 73.

says that reunification is the desired outcome, the client's actions belie that notion.

Without sufficient conversation the attorney may not come to this realization until much later in the representation.

Attorneys who regularly represent parents in child abuse and neglect cases may understand their clients and the system better, but they face difficulties as well.¹⁰⁶

Juvenile court work is notoriously not lucrative and, among legal professionals, does not enjoy a high status.¹⁰⁷ Furthermore, often the judge will appoint an attorney that she knows has an interest in child advocacy. In some communities, this is almost exclusively the practice.¹⁰⁸ Many who develop a practice in this field began their career as child advocates often working for the court or the state. These attorneys usually enter the field in an effort to enhance the quality of life of the children they represent. The problem is that these same attorneys have come to identify with children as their clients. All too often their role as advocate for the parent puts them at odds with the goal of enhancing the lives of children. While there are certainly many occasions when the best interest of the child is aligned with that of the parent, the cases in which this is not true are difficult for the attorney. This move to the "other side" can pose moral dilemmas as they struggle with whether the vindication of their client's rights will serve the best interest of the child.

¹⁰⁶ See generally William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Severance Cases*, 27 LOY. U. CHI. L. J. 195 (1996).

¹⁰⁷ Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L. Q. 417, 418-420 (1993).

¹⁰⁸ Glesner-Fines, *supra* note 96, at 346.

Zealous advocacy also presents problems when short term interests (getting a child back) conflict with long term goals (protection of the child, rehabilitation of parents). The threat of criminal proceedings also complicates matters.¹⁰⁹ Use of an “ethical judgment” approach tempers zealous advocacy for individual clients with the recognition that a resolution in the child’s best interest is the primary legal value to be sought in a child care proceeding.¹¹⁰

These role confusions and interdisciplinary tensions could be mediated if attorneys were given the option of advocating for an outcome that they consider fair to all parties. The model has been advocated as a general model of lawyering by scholars in professional responsibility.¹¹¹ That the model has taken hold in practice can be seen in the trend toward holistic family law.¹¹² The central question for these attorneys is, “Can we seek a result in this case that will benefit the child as well as our client and heal, not injure, this family?”

2. Attorneys Representing the State

The court, the prosecutor’s office or the state agency responsible for protecting children may employ attorneys for the state. These attorneys often suffer under heavy caseloads and limited resources inhibiting their ability to perform their tasks.¹¹³ Moreover,

¹⁰⁹ Weinstein, *supra* note 4, at 131.

¹¹⁰ Deborah Weimer, *Ethical Judgment and Interdisciplinary Collaboration in Custody and Child Welfare Cases*, 68 TENN. L. REV. 881, 884 (2001).

¹¹¹ See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

¹¹² See, e.g., J. Kim Wright & Dolly M. Garlo, *Law As a Healing Profession: New Trends Are Expanding Choices In Law Practice*, 63 OR. ST. B. BULL. 9, 12 (2003).

¹¹³ Edwards, *supra* note 107, at 419.

attorneys who represent state agencies often see their clients subject to brutal attacks from the media.

Equally challenging to collaboration, the roles and responsibilities of these attorneys can be confusing for other professionals to understand, often even for the attorneys themselves.¹¹⁴ They may owe their allegiance to the court responsible for filing abuse and neglect petitions or they may serve as a sort of corporate counsel to a state agency. While the overall mission may be to protect children, a state's fiscal interests may also need to be accommodated, resulting in a balance that may not always be clear or comfortable.

The attorneys for the court or the state are responsible for filing most of the petitions that come before the court. Usually their first job is to ascertain whether a petition should be filed. This initial encounter with the social workers that brought the situation to the attorney's attention can be fraught with frustration. The attorneys understand that they will bear the burden of proving that jurisdictional requirements have been met. In other words, they must establish that a child has been abused or neglected and that the child is in need of treatment or care.

At this juncture, the social workers are usually quite certain that legal action must be taken, since they are concerned about the welfare of a child they have identified. The lawyer's focus is on whether the petition can be sustained. What is crystal clear when viewed by the social worker is far murkier when the juvenile officer applies the lens of

the law. Several competing philosophical interests can be identified that lead to a misunderstanding of appropriate roles.

The lawyers have generally not seen the child or had contact with the family. Their view is “more objective” on two levels. First, they are less likely to be swayed by the emotion of having established a relationship with the children or parents involved, or by having invested themselves emotionally in “doing something.”¹¹⁵ Second, the lawyers view the facts through a narrower, more categorical lens. Their concern is not necessarily whether the abuse or neglect occurred, but rather whether or not they can prove it. There are at least two potential areas of disconnect at this juncture: the problem of uncertainty related to the philosophical leaning of the decision maker, and the more general concern about whether the workers can be relied on to produce the “necessary evidence.”

Unfortunately, the quantum of evidence necessary to sustain the burden of proof is not always predictable. Given the tremendous amount of discretion afforded juvenile court judges, the outcome on similar cases may depend on the identity of the judge.¹¹⁶ The judge in Courtroom A may have a different philosophical approach than the judge in Courtroom B. This is often a difficult concept to explain to mental health workers who have the layperson’s positivist outlook that the “law is the law.” They become frustrated

¹¹⁴ For a description of various models for legal representation of a state child welfare agency, see David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. R. 603 (1993).

¹¹⁵ Professional training for social workers should prevent this transference, but training is spotty at best.

¹¹⁶ Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 501-503 (1998).

with the attorneys who insist on a different type of evidence depending on the venue. Social workers are also plagued by yet another doubt about the attorneys who refuse to file a petition because Judge A will not grant it. They sometimes perceive that the attorney is more concerned about “winning” than about protecting the child. The attorneys themselves are in a quandary concerning the appropriate course of action. Filing a petition that the attorney knows is groundless is unethical,¹¹⁷ but few situations are clear enough to allow the attorney to withdraw. More frequently, cases fall in a gray area where, though the attorney has concerns about the safety of the child, the attorney also has concerns about the evidence. The social worker’s response to this dilemma is to suggest that the attorney file all petitions that the social worker deems worthy. It is suggested that the decision be made by the judge, not the attorney.

While this may sound like a reasonable or attractive course of action, attorneys face a different dilemma. They are “repeat players” and remain sensitive to the impressions of the judge, not just in the present case, but in future ones as well.¹¹⁸ They are concerned that by consistently bringing petitions that the judge will not sustain, their reputation for doing so will be established and will have negative consequences for future cases.¹¹⁹

Additional confusion results from the fact that while social workers often have their own attorneys. The primary professional allegiance of those attorneys is to the entity they

¹¹⁷ ABA Model Rules of Prof’l Conduct R. 3.1; Fed.R.Civ.P. 11.

¹¹⁸ See generally Marc Galanter, *Why the Haves Come Out Ahead?: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (stating the classic description of the influence of being a repeat player in the legal system).

¹¹⁹ This concern can rise to the level of a conflict of interest. See Comments to Model Rules of Prof’l Responsibility Rule 1.7.

represent, rather than to individual workers. This presents two dilemmas. First, the nature of child protection agencies is one of chronic under funding. The size of the legal staff is often woefully inadequate and consequently the attorneys must resort to triage lawyering.¹²⁰ This in turn causes the social workers to perceive their own attorneys as inaccessible. The attorneys with whom the social workers have regular contact are those who use them as witnesses. As a result, the social workers begin to view the attorneys for the court as their attorneys. This misperception in role is exacerbated by the social workers' belief that since both sets of attorneys are working for the "best interest of the child," their representational relationship is interchangeable.

When the attorneys for the court do not meet the social workers' expectations (these attorneys do not view themselves as attorneys for the social workers) additional frustration sets in. The problem usually manifests itself when the social workers wish to pursue a case that their own attorneys do not. They will sidestep their own counsel, appealing directly to the attorneys for the court. This same scenario plays itself out when social workers seek advice about interpreting a court order. If they can get a faster response from the attorney for the court they will go to her, resulting in a lack of consistency in interpretation throughout the state agency. Finally, an individual worker may wish to have an order modified (to change service providers, for instance) and the attorney for the court can usually accomplish this much more expeditiously (there is also the perception that the court's attorneys have the judges' ear as "insiders" in ways the attorneys for the state agency do not). Quite understandably the attorneys for the state agency feel undermined when their clients seek advice elsewhere.

¹²⁰ Hardin, *supra* note 99, at 119.

3. Attorneys for Children

Nowhere is the confusion over appropriate roles more dramatic than among attorneys who represent children. Because of their minority status, children are precluded from being direct parties to a lawsuit. An adult must represent their interests. In most situations a parent is permitted to bring an action on behalf of a child and represent the child's interest. When it is determined that a parent is not an appropriate representative, such as when the parent's actions vis-à-vis the child are the subject of the proceeding, a third party is called upon to represent the child's interest.¹²¹ In fact, the Federal Child Abuse Prevention and Treatment Act (CAPTA) requires that all children involved in abuse or neglect case have representation.¹²² The nature of this representation, however, is undefined, leaving the issue essentially unresolved.¹²³

¹²¹ See Catherine T. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571 (1996); see also Robert F. Kelly & Sarah H. Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? – A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 *J. FAM. L.* 405 (1982-83).

¹²² 42 U.S.C.A. § 5106(a) (2000).

¹²³ Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 *CONN. PUB. INT. L. J.* 326, 339-340 (2004):

Difficulties in ascertaining the proper role for **child's** counsel in state intervention proceedings often stem from inconsistent definitions. The **Child** Abuse Prevention and Treatment Act (**CAPTA**) conditions federal funding to states on the appointment of a guardian ad litem for **children** in abuse and neglect cases. However, **CAPTA** does not specify the role the guardian must play, and different states meet the requirement differently. Some states provide "counsel," while others provide "guardian ad litem," "attorney guardian ad litem," "lawyer-guardian ad litem," or "law guardians." Of states that provide for guardian ad litem or other **representatives** of a **child's** "best interests," some require the guardian ad litem be an attorney; while others allow laypersons. Even if terminology were consistent, application remains murky. Whether "counsel," "guardian ad litem," "attorney ad litem," or another form of representation, there is no specific guidance regarding the role. Without

There are at least three competing models of representation for children. The first is the traditional guardian ad litem (GAL) appointed by the court to present to the court a recommendation on the course of action that would serve the child's best interest. This guardian ad litem is seen as an officer of the court whose function is to make an independent judgment about the child's welfare.¹²⁴ The representative may also be a layperson who may or may not have an attorney to present her recommendations, evidence, witnesses and testimony.¹²⁵ To protect the GAL from liability many states provide quasi-judicial immunity for the person who acts in this role.¹²⁶ Traditionally this person gathers factual information, consults with the child and makes a recommendation to the court. While the GAL, in making her recommendation, considers the child's wishes, they are not seen as directive. Most states adopt this role of the GAL for two reasons. First, courts have sought to impose objectivity into the process by appointing

qualifications or training, the advocate is expected to make decisions for children and, as a result, many decisions are based on personal values and opinions. To prevent this, regardless of whether a state provides "counsel", or a "guardian ad litem", the presumptive reunification model can and should be applied.
(Footnotes omitted)

See also Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L. 765 (1999); Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Right and Responsibilities Act and the Policies of Child Protection and Education*, 57 OHIO ST. L. J. 393 (1996).

¹²⁴ *See* Danielle Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 24 FORDHAM L. REV. 2023, 2025 (1996).

¹²⁵ For a description of the nature of this role, *see* Michael S. Piraino, *Lay Representation of Abused and Neglected Children*, 1 J. CENTER FOR CHILDREN & CTS. 63 (1999) (providing a history of the national CASA program). For an endorsement of a system whereby lay volunteers are used to collect information and attorneys are used to present it *see* Bridget Kearns, *A Warm Heart But a Cool Head: Why a Dual Guardian ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, WISC. L. REV. 699, 730-733 (2002).

¹²⁶ *See e.g.*, *Bird v. Weinstock*, 864 S.W.2d 376, 386 (Mo. App. 1993).

the guardian and then clothing her with quasi-judicial immunity.¹²⁷ Second, courts have come to rely heavily on the guardian's recommendation because it is based on professional judgment after a marshalling of the relevant facts. It also saves the judge from having to make difficult decisions.

Advocating for an outcome that may be contrary to a client's stated wishes, however, remains problematic for many guardians.¹²⁸ Some resolve the dilemma by informing the judge of the child's wishes and then indicating why their recommendation is different. Some states allow the guardian to request that the judge appoint an attorney for the child, although that still leaves the guardian in a somewhat difficult situation regarding confidential information she has already received from the child.¹²⁹

The second model is based on principles of traditional representation. The attorney representing the child takes his direction from the client just as he would if the client were a competent adult.¹³⁰ Of course, not all children have the competence to direct their attorneys and therefore certain guidelines must be employed.¹³¹ The third and theoretically most troubling model is a hybrid version of the other two. In this third

¹²⁷ *Id.* at 382-383 (citing *Tindell v. Rogosheske*, 428 N.W.2d 386,387 (Minn.1988)).

¹²⁸ Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protection Proceedings*, 64 *FORDHAM L. REV.* 1505, 1515 (1996).

¹²⁹ Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76 (1984).

¹³⁰ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *Fordham L. Rev.* 1399, 1408 (1996).

¹³¹ See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 *LOY. U. CHI. L. J.* 1, 26 (2000).

model, the attorney both ascertains what she perceives to be in the child's best interest but also reports to the court the stated wishes of the child.¹³²

The issue of the appropriate role of an attorney for a child has commanded an astonishing amount of attention from the bar. In 1995, Fordham Law School brought together the foremost experts on the representation of children to examine this issue and make recommendations.¹³³ The outcome of the Fordham Conference was a series of papers published in the Fordham Law Review the next year.¹³⁴ The Recommendations favored the traditional representational role for attorneys.

In addition, both the American Bar Association¹³⁵ and the American Academy of Matrimonial Lawyers¹³⁶ have developed Standards for the representation of children.

The ABA standards are also clearly based on the traditional representation model. The Standards provide that (1) when a child is old enough or mature enough to express a

¹³² ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY, A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993).

¹³³ Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, *Recommendations of the Conference*, 64 FORDHAM L. REV. 1301-1323 (1996).

¹³⁴ Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. (1996).

¹³⁵ See *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* at <http://www.abanet.org/child/childrep.html> (last visited Jan. 31, 2005). The National Association of Counsel for Children has a revised version of the ABA standards, recommending some differences in the standards for the representation of very young children. *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* at <http://www.ncjrs.org/pdffiles1/fs99113.pdf> (last visited Jan. 31, 2005). For a more comprehensive presentation of the NACC standards see Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice*, NACC Children's Law Manual Series (1999).

preference on the outcome, the child should control the choices of the lawyer by setting the objectives of the litigation; (2) when lawyers are required to choose what position to advocate they may only advocate for a result that clearly appears to be correct; and (3) when more than one option could be correct they are expected to present multiple options to the court.¹³⁷ In ascertaining this “definitively preferable option,” the attorney should make a judgment based on the child’s “legal interests,” needs and preferences, expeditious resolution to ensure a safe home with stability, and the use of the least restrictive means or “least detrimental alternative.”¹³⁸

The comments to the Standards suggest that their goal is to minimize the discretion of lawyers to reduce the effect of lawyers’ personal biases.¹³⁹ The assumption underlying the recommendation is that such narrow standards will ensure that all children’s lawyers will utilize the same standards. In addition, this role will best serve child clients because lawyers are trained to advocate for a client’s preference, not determine a client’s best interests.¹⁴⁰

These standards are not without their critics. The primary concern appears to be the difficulty in ascertaining whether the child is “competent.” The ABA standards do not provide a minimum age at which children are to be considered competent, nor is a

¹³⁶ American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, (With Commentary) 13 J. AM. ACAD. MATRIM. LAW. 1 (1995).

¹³⁷ Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 329 (1998).

¹³⁸ *Id.*

¹³⁹ ABA Standards, *supra* note 135, at 12.

¹⁴⁰ Guggenheim, *supra* note 137, at 313.

decision to be made globally. A child may be competent for purposes of some decisions but not others. Some commentators find the notion that lawyers are trained to make such an assessment of competency incredible.¹⁴¹ Lawyers are not trained to identify the developmental needs of children or measure their capacity.¹⁴² Others suggest that a model of “empowerment” permits adults to abandon their role as protectors of children.¹⁴³

The standards promulgated by the AAML, while designed to apply to custody decisions, are nevertheless instructive on this question. These standards are similar to the ABA but contain presumptions about the age at which children are considered “unimpaired” and thus entitled to set the objectives of the representation.¹⁴⁴ Beyond the chronological qualifications, the standards seem to suggest that the criterion for determining whether a child is competent is whether the child can explain the reasoning behind her decision in a way that makes it understandable to an adult.¹⁴⁵ However, the AAML standards go beyond the ABA in prescribing the role of the attorney who represents an “impaired”

¹⁴¹ *Id.* at 321-322. This issue is also explored in Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L.REV. 895, 948-949 (1999).

¹⁴² It has been suggested that social workers could provide valuable assistance to lawyers in making assessments concerning the child client’s competency. Jean Koh Peters, *Concrete Strategies for Managing Ethically –Based Conflicts Between Children’s Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILD RTS. J. 15, 16 (March, 1991).

¹⁴³ Frank P. Cervone & Linda M. Mauro, *Responses to the Conference: Ethics, Cultures, and Professions in the Representation of Children*, 64 FORDHAM L. REV. 1975, 1981 (1996). (“Unbridled rights theory... is like the unbridled adolescent himself. Even incorporating the compelling arguments that children deserve competent and aggressive advocacy to the full extent of the law, one must question whether the adversarial model works as an approach.”).

¹⁴⁴ AAML Standards, *supra* note 136, at 13.

client, suggesting that the attorney present evidence to the court but refrain from making a recommendation to the court.¹⁴⁶

Perhaps the most difficult role of all is the so-called hybrid model where the attorney is expected to both ascertain the best interests of the child and advocate for the child's stated position.¹⁴⁷ The wishful thinking inherent in this model is that there will not be a conflict between these positions. If such a conflict arises, some state statutes require the GAL to make her recommendation but bring to the court's attention the contrary desires of her client.¹⁴⁸ Other standards permit the GAL to request that the court appoint an attorney for the child to advocate for the child's goals.¹⁴⁹ Most often the standards fail to address the ethical issues concerning confidentiality likely to arise in these situations.¹⁵⁰

Unfortunately, while the bar strives to arrive at a consensus about the appropriate role of the child's attorney, those in the position of appointing such attorneys seem to have paid little attention. A survey by Jean Peter Kohs indicates that when it comes to CAPTA's mandate to appoint a representative for a child, there are at least 56 variations among the

¹⁴⁵ Again this standard has its critics, see Ann Haralambie & Deborah Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57, 61 (1995).

¹⁴⁶ AAML Standards, *supra* note 136, at 24-27.

¹⁴⁷ See Donald Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441, 457, 464 (2000).

¹⁴⁸ See e.g. ME. REV. STAT. ANN., tit.22 § 4005 (1)(E) (West 2004); 42 PA. CONS. STAT. ANN. § 6311 (b) (9) (2004).

¹⁴⁹ Guggenheim, *supra* note 137, at 305-06.

¹⁵⁰ Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM. L. REV. 1785, 1793 (1996).

50 states.¹⁵¹ In addition, despite their widespread endorsement by child advocates, no state has yet to adopt the ABA standards. It is no wonder that confusion persists about the role of the child's attorney both within and beyond the legal profession.¹⁵²

The need for clarity concerning roles is strong. Lawyers remain confused about their roles, asking "Are we traditional lawyers or are we agents of the court?"¹⁵³ The challenge for collaboration here is obvious. Being unsure of the role of the GAL makes it difficult for the social worker to know what types of information should be shared. Social workers may believe they share a common goal and approach with the attorney, only to discover at a later point in the proceedings that they are subject to adversarial conflict.

¹⁵¹ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 32 (2d ed. 2001).

¹⁵² This point can be illustrated by examining the plethora of articles devoted to this topic. See e.g. Charles T. Cromley, Jr., *[A]s Guardian ad Litem I'm in a Rather Difficult Position*, 24 OHIO N. U. L. REV. 567 (1998); Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA. L. REV. 769 (2001); Sharon S. England & Robert E. Shepherd Jr., "I Know the Child is My Client, But Who Am I?," 64 FORDHAM L. REV. 1917 (1996); Stephen F. Florian, *Guardian ad Litem Representation of Children in Kentucky Circuit Courts*, 9 KY. CHILD RTS. J. 1 (2001); Albert E. Hartmann, *Crafting an Advocate for a Child: In Support of Legislation Redefining the Role of the Guardian Litem in Michigan Child Abuse and Neglect Cases*, 31 U. MICH. J. L. REFORM 237 (1997); Brian E. Jones, *Guardians Ad Litem: Minnesota's Response to the Growing Dissatisfaction with a "Friend,"* 17 HAMLIN J. PUB. L. & POL'Y 427 (1996); George S. Mahaffey, Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J. L. & FAM. STUDY 279 (2002); Michelle Markowitz, *Is a Lawyer Who Represents the "Best Interests" Really the Best for Pennsylvania's Children?*, 64 U. PITT. L. REV. 615 (2003); Andy Shookhoff & Susan L. Brooks, *Protecting our Most Vulnerable Citizens*, 38 TENN. B. J. 13 (2002).

¹⁵³ 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, 106 (2000).

Continuation of the discussion concerning the roles of attorneys representing children with an eye toward establishing clearer standards is essential.¹⁵⁴ Clarification of this role will make collaboration made much easier.

B. Role Stress and Social Workers

Social workers play an integral role in the work of the juvenile court in abuse and neglect cases.¹⁵⁵ While psychiatrists, psychologists, psychiatric nurses, and a host of other counselors may work with children and families in abuse and neglect cases, it is the clinical social worker who most often plays the front line collaborative role in the juvenile justice system. Social workers are responsible for identifying families where intervention is needed, for supplying the evidence necessary to legally justify that intervention, and for working with children and families throughout the court process and beyond.¹⁵⁶ While their work is obviously essential to the system, the movement of family problems to the legal arena places them in a world that is both foreign and uncomfortable. For the most part, social workers have been poorly trained to enter this “legal” world.¹⁵⁷

¹⁵⁴ For an excellent attempt at such a daunting task see, Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183(2005).

¹⁵⁵ See MARILYN STRACHAN PETERSON & ANTHONY J. URQUIZA, *The Role of Mental Health Professionals in the Prevention and Treatment of Child Abuse and Neglect at nccanch.acf.hhs.gov/pubs/usermanuals/menthlth/index.cfm*(1993) (last visited Feb. 3, 2006).

¹⁵⁶ *Id.*

¹⁵⁷ Janice Harris & Barton Bernstein, *Lawyer and Social Worker as a Team: Preparing for Trial in Neglect Cases*, 59 CHILD WELFARE 469, 470 (1980). “Child abuse and neglect literature has become voluminous in the last decade, but there is still no solid knowledge base to help the social worker.”

There are two readily apparent problems associated with the work of social workers in the juvenile court. The first is the lack of professional credentials. Regardless of who they represent, all attorneys involved in the abuse and neglect jurisdiction of the juvenile court have a minimum level of education, are licensed by the state, and are bound to a professional code of conduct. Mental health professionals involved with families may span the spectrum from highly specialized psychiatrists with subspecialties in aspects of abuse and neglect to masters level social workers to caseworkers with no specialized training other than that provided on the job.¹⁵⁸ For most families involved in the abuse and neglect system, unable to afford the services of expensive professionals, mental health services are provided by the state. These state social workers and other mental health professionals are often poorly trained, underpaid and lack a social work or other relevant degree.¹⁵⁹ Their caseloads are often unreasonably high, they lack the resources they need and the work is difficult. The combination of these factors leads to burnout and excessive turnover.¹⁶⁰

While one might assume that professionalization of the child abuse and neglect system would result in significant improvements, the nature of the practice makes it difficult to attract qualified social workers.¹⁶¹ In addition to the problems of low pay and high

¹⁵⁸ Marion Huxtable, *Child Protection: With Liberty and Justice for All*, 39 SOCIAL WORK 60, 64 (1994).

¹⁵⁹ LARRY LISTER, INTERDISCIPLINARY PERSPECTIVES IN CHILD ABUSE AND NEGLECT, 22 (1992), (*citing* A.W. SHYNE & A.G. SCHROEDER, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES (1978)). A 1977 study showed only 25% of social workers in child welfare had any formal social work training. *Id.*

¹⁶⁰ Howard A. Davidson, *Protecting America's Children: A Challenge*, 35 JAN TRIAL 23, 24 (1999).

¹⁶¹ For a general overview of the problems facing social workers in this field, *see* George Fryer, Jenny Pland, Daniel Brass & Richard Krugman, *The Child Protection Service*

caseloads, social workers often find this work unappealing because their services are often seen as intrusive and not welcome by clients, they become investigators rather than helpers, and the system is mired in bureaucracy, paper work, and constant changes in procedure.¹⁶² Because of the high rate of burnout, they are often required to pick up other cases when colleagues quit. Most significantly, they find themselves in situations where they are confronted with an inability to perform many of the functions that attracted them to social work in the first place.¹⁶³

In the past, child welfare practice was often concentrated on adoption, foster care and support services. Today, social workers must be investigators, expert witnesses, and crisis intervenors, roles that are often inconsistent with their desires to have a cooperative relationship with their clients.¹⁶⁴ When social workers are convinced to practice in this area, they are often frustrated and uncomfortable with the adversarial or advocacy role.¹⁶⁵

IV. Differences in Professional Training and Orientation that Create Collaborative Challenges

A. Linguistic Differences

Worker: A Profile of Needs, Attitudes, Utilization of Professional Resources, 12 CHILD ABUSE & NEGLECT 481 (1988).

¹⁶² Lister, *supra* note 159, at 23. See also William Brennan & Shanti Khinduka, *Role Expectations of Social Workers and Lawyers in the Juvenile Court*, 17 CRIME & DELINQUENCY 191 (1971) (for an early study on confusion of roles and responsibilities in the child protection system).

¹⁶³ Lister, *supra* note 159, at 23.

¹⁶⁴ *Id.* at 20. See also Paula Allen-Meares, *The Disciplinary Movement: Interdisciplinary Approach in Education*, 34 J. OF SOC. WORK ED. 1, 3 (1998) (“[C]lients do not always react well when social workers disclose a negative aspect of client behavior in court, and social workers themselves can feel conflicted about this.”).

Lawyers and social workers not only view the world in different ways but also speak of it differently. One of the most significant barriers to effective collaboration between lawyers and social workers is this difference in language.¹⁶⁶

One example of the differing orientations of the professions is evidenced in the language related to services. Social workers use a “helping” language, while lawyers’ language is one of “rights.” The language of social work stresses interdependence and relationship whereas the language of lawyers is focused on individualism and the vindication of individual positions.¹⁶⁷

The second and related problem is one of understanding what constitutes “evidence.”¹⁶⁸ Attorneys say, “Give me the facts.” Social workers respond by providing information that includes inferences based on their past experiences. They are hurt and offended when

¹⁶⁵ Weinstein, *supra* note 4, at 100.

¹⁶⁶ Madden, *supra* note 1. (The inability of social workers to participate fully in the legal system may be due to their discomfort with the aggressive style, authoritarian attitude and obtuse language and procedures used by the legal system).

¹⁶⁷ See JEAN M. BARTUNEK & ROBIN D. REID, *The Private Ordering of Professional Relations in* HIDDEN CONFLICT IN ORGANIZATIONS: UNCOVERING BEHIND-THE-SCENES DISPUTES (Deborah Kolb & Jean M. Bartunek Eds., 1992); DEBORAH KOLB, MAKING TALK WORK: PROFILES OF MEDIATORS (Jossey-Bass ed., 1994).

¹⁶⁸ See Weinstein, *supra* note 4, at 106 (stating “[s]ocial workers... are affected... because they receive little, if any training about the legal process. More often than not, they are unschooled in adversarial methods and uneasy with this approach. ... At the same time, lawyers may not understand the social worker’s dilemmas or approaches and may feel frustration at the social worker’s ‘emotionalism’ or lack of appreciation for the rules of the court situation.”).

attorneys discount these inferences because they consider it a discounting of their expertise.¹⁶⁹ They believe that the judge should value their opinions when they state, “I just know that child is not safe, the parent has hurt him before, and I am sure he is doing so now.”¹⁷⁰

A third example of the importance of language is the legal designation of a child who is not abused, but is in need of care. Most jurisdictions refer to this child simply as “neglected.”¹⁷¹ The most commonly used definition of “neglect” is a child who is “without proper care.”¹⁷² The term, however, implies fault on the part of the person who is responsible for providing that care. In most situations it is the parent. There are circumstances in which the parent is unable to care for the child through no fault of her

¹⁶⁹ Social workers believe that they have limited credibility and standing in legal circles. Michael Preston-Strout et al., *Social Work Law: From Interaction to Integration*, 20 J. OF SOC. WELFARE & FAM. LAW 1 (1998). This is reinforced by studies reporting that lawyers believe that they can perform the social work functions equally as well as the social workers. In one such study lawyers involved in a child protection system actually stated that social workers in the system “did nothing for clients but listen to their problems which anyone who had the time could do.” Marie Weil, *Research on Issues in Collaboration Between Social Workers and Lawyers*, 82 SOC. SERV. REV. 393, 396 (1982), (citing Audrey Smith, *The Social Workers in the Legal Aid Setting: A Study of Interprofessional Relationships*, 2 SOC. SERV. REV. 44 (1970)).

¹⁷⁰ Harris & Bernstein, *supra* note 157, at 471. Social workers have been cautioned about this in their own literature:

One approach to neglect cases that can be particularly helpful to the social worker is to evaluate neglect through the eyes of an attorney or judge. Weinberger and Smith’s study revealed that many of the variables in a neglect case thought to correlate with a judicial decision to remove a child from his home were not nearly so significant as testimony focused on legally admissible evidence. Psychodynamically based predictions and caseworker inferences had little impact. The conditions hazardous to the child’s well-being must be looked at closely and documented carefully as clear and present dangers to the child. Specific recording is essential because it is this descriptive material that will be examined in light of legal definitions of neglect.

¹⁷¹ MO. REV. STAT. § 210.110 (2004).

own - for instance a mother with impaired judgment due to limited intellectual capacity. Some jurisdictions use an alternative designation for such a child who may be classified as “dependent.”¹⁷³ The dependency label does not carry with it the same stigma as the designation of “neglect.”¹⁷⁴ In those jurisdictions where neglect is the only designation, social workers may hesitate to bring the case to court for fear of offending the parent who they may have grown fond of. This is particularly true in a legal system that is built on the notion that cases are brought to court because somebody has done something wrong. This illustrates a more fundamental difference in perception that transcends language - the conceptualization of the abuse itself.¹⁷⁵ While social workers are more likely to view abusive or neglectful behavior as having its etiology in a psychosocial or medical/illness model, the legal conception focuses on abuse as a legal category of behavior emphasizing the issue of legal responsibility.¹⁷⁶

This underlying perception of the court as a forum for assigning blame is exacerbated by the attorney’s designation of his or her own role. In spite of the fact that the court is civil in nature and the focus is on helping the child as opposed to punishing the parents, attorneys for the juvenile officer or the state will sometimes refer to themselves as

¹⁷² *Id.*

¹⁷³ Most dependency matters involve allegations of child abuse or neglect--both purposeful and unintentional. In Arizona, dependency also encompasses other situations where there is no parent willing or able to care for a child, such as the imprisonment or death of a parent. Paul Bennett, *Secret Reflections: Some Thoughts About Secrets and Court Processes in Child Protection Matter*, 45 ARIZ. L. REV. 713, 714 (2003).

¹⁷⁴ This also has implications for parents’ willingness to “plea bargain” to a dependency charge as opposed to one that establishes neglect. Dailey & Cook, *supra* note 25, at 274.

¹⁷⁵ Lawyers and judges are concerned about the legal standards wherein several workers focus on helping the family. See John Ronnan & John Poertner, *Building Consensus Among Child Protection Professionals*, J. CONTEMP. SOC. WORK 428 (1989).

“prosecutors.” This is no doubt a result of their law school training as well as the fact that some of them may also act as attorneys for the state in delinquency matters where, because of due process protections extended to alleged delinquents, their role more closely resembles that of a prosecutor in the adult criminal justice system. Nevertheless, the use of that term in the processing of neglect cases sends a message to non-lawyers that this is really about blame.

A fourth complication arises concerning the idea of “protection” and the meaning of “risk of harm.” The law requires that a child should remain in the home unless he cannot be protected there.¹⁷⁷ Although all would agree that harm is difficult to predict,¹⁷⁸ the acceptable risk of harm clearly differs among the lawyers as well as between social workers and lawyers.¹⁷⁹ The most likely source of this difference in perception is a philosophical one based on a difference of opinion regarding the effect of alternative care. The idealists set the bar fairly low; if the parent has acted in a way that has harmed the child in the past and there is an indication that past behavior is re-occurring, the child should be removed. The focus is on avoiding any harm at the hands of a parent. At the other end of the spectrum are those who, while agreeing that the home may not be ideal, ask the question “as compared to what?”¹⁸⁰ They focus on what else is available to offer

¹⁷⁶ HOWARD IRVING, *FAMILY LAW: AN INTERDISCIPLINARY PERSPECTIVE* 130 (Irving ed., 1981).

¹⁷⁷ Hardin, *supra* note 98, at 111 (stating “the court must find that a child would be in serious danger if left unprotected in the home.”).

¹⁷⁸ See Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 81:1 *THE FUTURE OF CHILDREN*, 104 (1998) (describing reform efforts designed to better assess risk).

¹⁷⁹ See L. Dangleish & E. Drew, *The Relationship of Child Abuse Indicators to the Assessment of Perceived Risk and the Court’s Decision to Separate*, 13 *CHILD ABUSE & NEGLECT* 491 (1989).

¹⁸⁰ Robert Mnookin, *Foster Care*, 43 *HARV. EDU. R.* 599 (1973).

a child - safe foster homes or other types of alternative care? Even beyond that they question the emotional ramifications of taking a child from an environment that he has become accustomed to and may not perceive as dangerous. Another question is who will be to blame if a child remains in the home and suffers injury. In terms of exposure, it is far more likely that a judge's actions will be subject to scrutiny if he does not remove a child who is subsequently injured than if the child is harmed by a separation from a parent. For this reason, judges are more likely to err on the side of safety. Judges are risk adverse; they are more likely to take risks if they don't know the outcome. Taking a child from a family is safer, with the outcome unknown, than leaving the child who then may be killed and the judge blamed.¹⁸¹ Social workers, on the other hand, are more likely to appreciate the risk of an improper removal.¹⁸² While these questions go beyond simple language barriers, the words that are used - "risk of harm," "imminent danger" - are important in shaping the debate.

Finally, mental health professionals and attorneys view time differently as well. Lawyers are likely to view the situation presented as a "case" for which there needs to be a resolution. What attorneys know is a procedure whereby disputes are resolved by the application of objective criteria to a set of facts. From the attorney's point of view, the child abuse and neglect case is a time-limited representation of an individual client

¹⁸¹ Weinstein, *supra* note 4, at 114, (citing David Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children* 26 LOYOLA U. CHI. L. J. 183 (1995)).

¹⁸² "Judges cannot fail to take account of the risk of neglect or abuse in the ... home, but they may neglect to take account of the not-insignificant risk the child will suffer harm as a result of being in official care." Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 152 (1995).

resulting in a judicial resolution. For social workers, the “case” is more about process than resolution. The social worker recognizes that the judicial resolution in these cases is just one piece of the process of working with these families. It is neither the beginning nor the end. Because social workers tend to view these cases as long term, they are more likely to focus on long term versus short term goals. The attorney, on the other hand, is more likely to focus on vindicating the client’s rights, which usually results in a focus on short term as opposed to long-term goals.

Time is also a problem when the attorneys fail to recognize the effects of delay on the family. In their seminal work “Beyond the Best Interests of the Child,”¹⁸³ Goldstein, Freud and Solnit argue that decisions affecting children should be resolved in a manner that reflects a child’s sense of time.¹⁸⁴ Unfortunately, this rarely happens, and the effects of delay can be detrimental.¹⁸⁵

B. Ethical Dictates and Constraints

Another reflection of the differences between the professions is the ethical codes that govern their actions. Social workers are sometimes frustrated because they misunderstand the ethical constraints of attorneys.

¹⁸³ GOLDSTEIN, FREUD & SOLNIT, *supra* note 55.

¹⁸⁴ *Id.*

¹⁸⁵ See Theresa Glennon & Robert G. Schwartz, *Looking Back, Looking Ahead: The Evolution of Children’s Rights*, 68 TEMP. L. REV. 1557 (1995) (discussing the ways that relationships were altered due to delay in legal process).

One of these constraints is in the identification of and loyalty to the client. For example, the attorneys who represent the child protection agency see themselves as corporate counsel. Their allegiance is to the agency, not to individual workers.¹⁸⁶ Consequently, when there is a conflict between what would be good for the agency from a policy perspective and the actions of individual workers, the attorneys must promote the agency. This leaves individual workers feeling further abandoned by their own attorneys and often results in their turning elsewhere (to the court's attorneys and sometimes the GALs) for legal advice. This is likely to occur when policies are changed and individual workers disagree or when the agency makes treatment availability decisions based on fiscal policy and the worker nevertheless believes that the judge will order the service to be provided.

Perhaps the most fundamental difference between social workers and attorneys is in how they view the "client" child or family. While attorneys may have some difficulty in defining their role in the system, they are usually pretty clear about the identity of their client.¹⁸⁷ The attorneys for the court represent the interests of the state in promoting the protection of children; the guardian ad litem is an officer of the court whose job it is to identify and advocate for the best interests of the child; attorneys for a state agency represent that agency's interests and attorneys for parents represent the parents' interests. All of these roles present the potential for a conflict of interest (the state's fiscal interest versus an individual child's need for expensive care; the guardian's recommendation

¹⁸⁶ Indeed this is the standard recommended by the Children's Division of the Department of Health and Human Services. *See DHSS, VII Standards for Legal Representation of Children, Parents and the Child Welfare Agency* <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm> (last visited Feb. 6, 2006).

versus what the child wants; the state agency versus an individual worker; mom's interest versus dad's). But lawyers are trained to look at the conflicts and resolve them in ways that most often lead to the advancement of a single client's interest.¹⁸⁸

Social workers, on the other hand, will often identify the "client" as the "family," an entity that may include individuals with clearly conflicting legal positions. This is intensified by the law's mandate that whenever possible, children should be with their families. This orientation suggests that the family is to be protected as a unit and that individuals within the system should advance this goal.

The difference between social workers' and lawyers' orientations ultimately stems from drastically different ethical perspectives. Systems thinking underlies contemporary social work; holism, interactionism and interdependence characterize the philosophy of social

¹⁸⁷ *But see* notes 121 – 154 and accompanying text, *supra*, explaining role confusion for Guardians Ad Litem.

¹⁸⁸ American Bar Association Model Rules of Professional Conduct, Rule 1.7 provides that attorneys may represent more than one client simultaneously, but only if the interests of those clients are not directly adverse or otherwise conflicting in such a way as to materially limit the ability of the attorney to fully represent each as individuals. ABA Model Rule 1.7 (2002). Where the rules do recognize group representation, it is in the case of formal organizations of individuals, such as corporations or other entities. ABA Model Rule 1.13 (2002). In the estate planning field, some authors have suggested that an "entity" model might be appropriate in representing the "family" but those suggestions have not been incorporated into the regulatory structure of any state's rules of professional conduct. *See, e.g.,* Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Russell G. Pearce, *Proceeding of the Conference on Ethical Issue[s] in Representing Older Client[s]: Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994) (proposing that family clients be allowed to choose an "entity" representation); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987). *But see* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).

work.¹⁸⁹ Social workers view a child abuse and neglect case from a systems perspective. They understand that the problem is not with an identified “client” but with the family as a system.¹⁹⁰ The law’s emphasis on individual rights and responsibilities is inherently inconsistent with the social worker’s family systems worldview.¹⁹¹ The law’s devotion to single-minded and zealous advocacy for the client¹⁹² stands in stark contrast to the social worker’s holistic view of acting in the best interests of the client broadly defined.¹⁹³

This dilemma of client identification is seen in law school clinics that use both social work students and law students.¹⁹⁴ In fact, social workers are often critical of lawyers for their failure to appreciate the effects of their advocacy on the family system.¹⁹⁵ Effective collaborations require that attorneys be able to understand and respect this systems

¹⁸⁹ Lister, *supra* note 159, at 17.

¹⁹⁰ Weil, *supra* note 169, at 394. “The best interest of parents may not be congruent with the best interests of children, yet the social worker has a professional and ethical responsibility to parents as well as children.”

¹⁹¹ Linda Katz, *Social Workers and Attorneys: Some Differences*, 1994 ADOPTALK 26 (Winter 1994). “Trained to use his/her intuitive and moral sense as well as to consider the need of *all* parties, the social worker can view legal advocacy as unethical and unconscionable. The attorney’s narrow focus violates social work principles and offends the worker’s moral concern for the child’s well-being. Out of this can come contempt for the attorney and disrespect for him/her as a colleague and a professional.”

¹⁹² Model Rules of Professional Conduct R. 1.3 cmt. [1] (2002):

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

But see Stephen Ellmann, *Critical Theories and Legal Ethics: The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2667 (1993) (suggesting that the code’s emphasis on rights minimizes a consideration of care).

¹⁹³ NASW, Code of Ethics, 1.01 (“Social workers’ primary responsibility is to promote the well-being of clients.”).

¹⁹⁴ Weimer, *supra* note 110, at 891-892.

perspective as well if they are going to be able to use the expertise of these professionals.¹⁹⁶

Another significant difference in ethical perspectives is the treatment of confidentiality.¹⁹⁷ Attorneys are restrained by ethical rules that require the protection of confidentiality in a context where the judge needs information to ascertain the best interests of the child.¹⁹⁸ The rules of evidence require a kind of strategizing and information hiding that would appear nonsensical outside of the adversarial context.¹⁹⁹ A social worker's ethical duty is to gather and share the broadest range of facts to promote a stable, healthy family.²⁰⁰

¹⁹⁵ Weinstein, *supra* note 4, at 106-107.

¹⁹⁶ Trubek, *supra* note 69, at 258.

¹⁹⁷ Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994).

¹⁹⁸ Weinstein, *supra* note 4, at 95.

¹⁹⁹ *Id.* at 85 (stating “[c]onfidentiality and privilege mean that some information may come to the attention of the attorney, but not to the attention of the finder of fact, regardless of how relevant or material the information is to the appropriate outcome of the case. In proceedings where the judge is supposed to assess all the facts and make a determination as to the best interest of the child, barriers to full disclosure are barriers to accomplish this end.”).

²⁰⁰ Brigid Coleman, *Lawyers Who are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL’Y 131, 150-51 (2001), stating:

[Although]both lawyers and social workers are called upon by their professional codes to keep their client information confidential, the exceptions to those confidentiality rules differ greatly.... According to the Model Rules of Professional Conduct, attorneys are only allowed to disclose otherwise confidential information in the following situations: (1) when a client consents; (2) when the attorney believes it is reasonably necessary “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”; and (3) to establish or defend a claim related to the attorney’s relationship with the client. Disclosure at these times is discretionary, not mandatory. Social workers, however, are not only allowed to disclose otherwise confidential information for certain reasons (namely, if a client

C. Differences in Frame Of Reference

Knowledge development and knowledge utilization also drastically differ between law and social work practice even though they both function in the context of individual cases.²⁰¹ Beginning with their formal education, social workers begin “practice” while they are learning theoretical models, while law students generally start not with real clients but with an analysis of theoretical literature.²⁰² While both use case studies, there is a huge difference in the importance attached to these knowledge bases (cases are primary for lawyers, secondary for social workers) and the way they are used in practice. Education differs in that law students are taught to critically assess what factors limit or enhance the generalizability of legal outcomes in individual cases; social workers rarely rely on case studies to derive knowledge or information.²⁰³ Instead social work education is highly reliant on providing actual clients services. Throughout their training, they have to examine their own world views and see themselves in relation to their clients and the “bigger picture.” By contrast “the law student is taught to be a dispassionate evaluator of

consents or if it “is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person”), but they are in fact encouraged to disclose the information in situations of potential harm. Besides following the NASW Code, social workers are often mandated by law to disclose otherwise confidential information in certain situations, such as abuse of children or the elderly. (footnotes ommitted).

See also Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 212 (1999).

²⁰¹ Karen M. Staller, *Knowledge Utilization in Social Work and Legal Practice*, 3 *J. SOC. & SOC. WELFARE* 91 (1998).

²⁰² *Id.* at 95.

²⁰³ *Id.* at 99-103.

both the client's case and the law governing it."²⁰⁴ This difference in orientation informs a much more limited "worldview."²⁰⁵

For lawyers, individual cases have the benefit of providing resolution to individual litigants as well as contributing to overall development of the law. For social work, the structure of individual case knowledge and the processes for its development are largely ill defined.²⁰⁶

²⁰⁴ Aiken & Wizner, *supra* note 66, at 73.

²⁰⁵ This point was brought home to me most vividly by a recent conversation with a law student in a class I was teaching with a social work professor. The course, an introduction to disability studies, is an interdisciplinary one taught by both law professors and mental health professionals. Before class began, one of the law students expressed a concern that he wasn't sure how he was doing in the class because he had not received feedback on a reaction paper assigned by one of the other professors. He stated that he didn't know if he had "gotten it right." A non-law student suggested that because it was a reaction paper there was no "right answer" because the assignment was to reflect on his subjective reaction to which no objective assessment was possible. He countered by saying, "It doesn't matter what I think, the court doesn't care what I think." His legal education had effectively narrowed his vision of relevancy to that which can be obtained by an application of "objective" legal rules to a given situation. Fortunately, time and the structure of the class afforded me the opportunity to continue the discourse, once more affirming the value of interdisciplinary education.

²⁰⁶ Staller, *supra* note 201, at 101-102:

[While] the knowledge base of social work is a comprehensive topic which encompasses the facts and theories, skills and attitudes, necessary for effective, efficient practice. . . . Social work has not produced a systematic body of knowledge. . . . One way of understanding this paradox is that there is a lack of structure guiding the acquisition and building of social work knowledge: Social work knowledge comes from practice wisdom, the social sciences, governmental policy and guidelines, scholars who produce theory and research findings. These sources do not contribute evenly to all areas of social work, nor are there established rules for determining what knowledge should be incorporated into the profession and what is excluded. For example, on what grounds or through what processes should social work incorporate into its knowledge the concepts of the underclass, co-dependence, or the battered child syndrome?

In practice, lawyers use the analogous reasoning skills they developed to learn the law as a tool to make assessments (predictions) about their clients' cases. Social workers do not have case literature to scan for the outcomes of similar cases.²⁰⁷ Institutional structures require the attorney to link a current case with a verifiable external body of knowledge; this is not true for social workers.²⁰⁸ Lawyers have ready access to this knowledge base.²⁰⁹ This access is not present in social work, where knowledge is fragmented and without systematic organization and structure. Lawyers are used to a system whereby their actions are subject to public judgment (outcome of case) while the outcome of a social work intervention is rarely made public. This may also help to account for the social worker's discomfort in court proceedings where their actions are subject to scrutiny.²¹⁰

Lawyers and social workers also see their responsibility to their clients in different ways. Lawyers have an obligation to advance their client's interests.²¹¹ As long as those interests are within the limits of the law, the potential negative effect of those actions on the greater goals of society do not preclude the representation.²¹² On the other hand, the social workers Code of Ethics provides that while their primary responsibility is to

²⁰⁷ *Id.* at 104.

²⁰⁸ I think this is what leads lawyers to see social work as "fuzzy" and not as rigorous.

²⁰⁹ The legal research industry thrives on the attorney's demand for efficient and thorough access to information.

²¹⁰ *See van Wormer, supra* note 54, at 117.

²¹¹ Model Rules of Prof'l Conduct R. 1.3 (2002).

²¹² Some models of lawyering would suggest that the attorney has a further responsibility to counsel against such a course of action. *See e.g.*, WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

promote the well being of the client, a social worker's responsibility to the larger society may supersede the loyalty owed to clients.²¹³

More particularly, in terms of frames of reference, social workers and lawyers view conflict differently. Social workers most often engage in counseling, not conflict. "Counseling" has different connotations in law and social work.²¹⁴ Although social workers recognize that conflict may be inevitable, they use strategies to avoid conflict. Adversarial actions are reserved for extreme situations.²¹⁵ Lawyers, on the other hand, are much more comfortable with conflict, and are less likely to see it as a negative. Some commentators have suggested that those drawn to the law are left-brained, whereas those drawn to social work possess a right-brained tendency.²¹⁶

V. Resolving the Dilemma

The challenges facing interdisciplinary practice have been identified. Addressing them requires recognizing the different perspectives of each profession, being willing to make the effort to work collaboratively while continuing to meet the challenges posed by recent changes in juvenile court practice. This article suggests three general approaches to improving collaborative efforts. The first set of recommendations relate to structural reforms, including a move towards unified family courts, adoption of family group conferencing and the expanded use of mediation. The second approach urges curricular

²¹³ NASW, Code of Ethics, Section 1.1 Ethical Principles (1996), *available at* <http://www.socialworkers.org/pubs/code/code.asp> (last visited Feb. 3, 2006).

²¹⁴ Judith Alphonso Lau, *Lawyers vs. Social Workers: Is Cerebral Hemisphericity the Culprit?*, 1 CHILD WELFARE 21, 23 (JAN/FEB 1983).

²¹⁵ Staller, *supra* note 201, at 109.

reforms in the formal professional education of both social workers and lawyers; and finally, more extensive use of cross training.

A. Structural Changes

1. Unified Family Courts

While there is no universally accepted definition of “family court,”²¹⁷ a unified family court has been described as “a single court system with comprehensive jurisdiction over all cases involving children and relating to the family.”²¹⁸ These courts originated at about the same time as the juvenile court began.²¹⁹ Eventually in 1959, a working group produced the Standard Family Court Act, the purpose of which was to:

protect and safeguard family life in general, and family units in particular, by affording to family members all possible help in resolving their justiciable problems and conflicts arising from their inter-personal relationships, in a single court with one specially-qualified staff, under one leadership, with a common philosophy and purpose, working as a unit, with one set of family records all in one place, under the discretion of one or more specially-qualified judges.²²⁰

The purpose of the unified system is essentially twofold: to resolve family conflicts in a more conciliatory manner, therefore reducing the potential for further damage to the relationships at stake, and to have one judge with a specialized expertise resolve all disputes affecting the family in a more comprehensive and coordinated fashion.

²¹⁶ Lau, *supra* note 214, at 26-27.

²¹⁷ Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. J. 1, 7 (1993).

²¹⁸ Babb, *supra* note 34, at 31 (quoting Ann L. Milne, *Family Law From a Family System Perspective – the Binary Equation*, 21 Pac. L.J. 933, 934 (1990)).

²¹⁹ *Id.* at 36 (quoting Committee on the Standard Family Court Act of the National Probation and Parole Association, *Standard Family Court Act – Text and Commentary*, 5 NAT’L PROBATION & PAROLE ASS’N J. 99, 104 (1959)).

Based on its study of the unmet legal needs of children and their families, the American Bar Association recommended the establishment of unified family courts in all jurisdictions.²²¹ The process for responding to issues facing the families who come before the court requires a team approach incorporating the best of what lawyers and social workers have to offer.²²² A survey conducted by the ABA's Coordinating Council on Unified Family Courts in cooperation with the Center for Children, Families and the Courts notes that no state that has created a unified family court would consider returning to the more traditional fragmented approach to family dispute resolution.²²³ Those advocating for the creation of unified family courts suggest that such courts have the greatest potential to enhance family law decisionmaking, thereby enhancing the quality of people's lives.²²⁴ Another effort to improve the delivery of court services to children and

²²⁰ *Id.* (citing H. TED RUBIN & VICTOR FLANGO, COURT COORDINATION OF FAMILY CASES 7 (1992)).

²²¹ Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL'Y 1, 3 (1999).

²²² *Id.*, at 20.

²²³ Andrew Schepard, *Editorial Notes*, 42 FAMILY CT. REV. 5 (2004). For further positive commentary on the value of model family courts, see Jane M. Spinak, *Lawyering for a New Democracy: Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331 (2002); see also Michael Town, *Court as Convener and Provider of Therapeutic Justice*, 67 REV. JUR. U.P.R. 671 (1998).

²²⁴ Babb, *supra* note 116, at 527:

Fashioning an effective system within which to resolve contemporary family legal issues requires a paradigmatic shift in conceptualizing the nature of the family and its functioning. "A family must be viewed as a 'natural social system, with properties all its own.'" A theoretical social science perspective, the ecology of human development, provides a mechanism for comprehending the true nature and breadth of a family's functioning and its legal problems, as well as a framework around which to design or to redesign a more effective family adjudicatory system. Once a more responsive court structure exists, this institution can aim to

families is the court improvement program. This federally funded grant program provides money to the states to improve the system.²²⁵

A complementary reform movement involves the use of alternative dispute resolution mechanisms for resolving what are, in essence, relationship breakdowns. These methods, primarily mediation, are seen as valuable for several reasons. They are seen as providing greater opportunities for more closely tailored resolutions for family disputes,²²⁶ further empowering families to take responsibility for shaping the resolution with the hope that members will be more likely to comply with agreements that they fashioned themselves.²²⁷ Mediation is seen as a process that will encourage future relationships by attempting to build consensus among all the interested parties.²²⁸ It is also a process that may be able to incorporate the best of the skills that lawyers (assisting clients in negotiation) and social workers (communication, collaboration and identifying shared interest) bring to the table.

dispense therapeutic justice with the goal of improving the lives of individuals and families in the disposition of family legal disputes.

²²⁵ For a description of these programs and their success, see Mark Hardin, *Court Improvement for Child Abuse and Neglect Litigation: What Next*, 22:6 CHILD LAW PROTECTION 85 (2003).

²²⁶ Leonard Edwards, *The Future of the Juvenile Court: Promising New Directions*, 6 JUV. CT. 131, 134 (1996).

²²⁷ See Marie Galante & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1334 (1994).

²²⁸ This would include foster parents, service providers and others who are often essential to the successful completion of a service plan, but who are often left out of the formal proceeding because they are not "parties." See Steve Baron, *Dependency Court Mediation: The Roles of Participants*, 35 FAM. & CONCILIATION CTS. REV. 149 (1997). See also Marilou T. Giovannucci, *Understanding the Role of the Mediator in Child Protection Proceedings*, 35 FAM. & CONCILIATION CTS. REV. 143 (1997).

These programs, now in their early stages, show promise for the future.²²⁹ Lawyers will be asked to represent parents who are participants in the mediations either by attending with their clients or advising them outside the actual session. Either way, this presents attorneys with yet another role that requires a perspective that is different from the traditional adversarial arena to which they are accustomed.²³⁰ Social workers will need to learn the skills necessary to conduct mediations as well as how to participate effectively in the process. Most importantly, both lawyers and social workers will have to come to an understanding of the role of the law in this setting.²³¹

Not surprisingly, however, resistance has arisen in the legal community to the use of mediation in these cases.²³² Concerns have been raised about power imbalances between parents and the state and the ways in which parents (clients) will be disadvantaged by

²²⁹ Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 463 (2002):

Research on mediation programs in California and Florida child dependency cases report high settlement rates (75% in California and 86% in Florida). The research suggests that as compared to nonmediated cases, agreements in dependency mediations tend to be more detailed, are more likely to include provisions for services to children and family members, and are more likely to make use of relative foster care. Furthermore, the study found that both parents and the professional participants (after initial suspicions were overcome) prefer mediation to court hearings, feeling that mediation gives them more opportunity to voice their points of view and personal respect.

See also Claire Sandt, *Mediation in Bexar County Texas: A Judge's View*, 22 CHILD LAW PRACT. 130 (2003).

²³⁰ Julius Kibow, *The Need for Standardization and Expansion of Nonadversary Proceedings in Juvenile Dependency Court with Special Emphasis on Mediation and Role of Counsel*, 44 JUV. & FAM. CT. J. 223 (1993).

²³¹ See generally, Gregory Firestone, *Dependency Mediation: Where Do We Go from Here?*, 35 FAM. & CONCILIATION CTS. REV. 223 (1997).

²³² Sinden, *supra* note 100.

these processes.²³³ Many of these criticisms are indicative of the different ways in which lawyers and social workers view the appropriate resolution of these issues.²³⁴

Another promising reform recently adopted in some jurisdictions is called Family Group Conferencing. The concept originated with the Maori people of New Zealand who sought to incorporate their tribal custom of extended family involvement in response to state intervention relating to their children.²³⁵ Consistent with their cultural values, it seeks to enlist the aid of extended family to avoid the necessity of removing children from their homes.²³⁶

Four key principles inform the process: “(a) the process is family centered and moves away from the negative perceptions and blame-placing approach to a strength-based model, (b) respect and value is placed on cultural ideals and practices, (c) families and community involvement is encouraged, and (d) the community is seen as a family support resource.²³⁷

²³³ *Id.* at 386 (stating “[i]n the child welfare context, the vast disparity in power between the parties distorts this process. Too often informality results in the weaker party--the parent--simply capitulating to the agency rather than pushing the agency to find the creative third way. The "win-win" solution so frequently touted by the proponents of informality requires a creative tension between the parties that tends to arise only when the parties are roughly equally matched in power.”).

²³⁴ Hon. Karen Burstein, *Article 10: A Primer for Social Work Practitioners*, 169 PLI/CRIM. 437, 442. (“For all its imperfections, the adversary system, with its strict rules of evidence, with its measured pace, permits a real airing of all views, a reliable testing of all positions so that when a determination is reached, it is, and can be seen to be, even-handed.”).

²³⁵ MARK HARDIN, *FAMILY GROUP CONFERENCES: LEARNING FROM THE EXPERIENCES OF NEW ZEALAND* (ABA 1996).

²³⁶ *Id.*

The model is based on building collaborations between the courts (lawyers) and child protective agencies (social workers). It is designed to build on the strengths of families and improve the quality of care for children by involving family and community members as active participants in protecting children.²³⁷ A plan for the family is arrived at through participant consensus rather than mandated by the court or the child protection agency.

In 2003, more than 150 communities in 35 states and more than 20 countries were expected to implement some form of family group decision-making.²³⁸ Much more research needs to be conducted before these programs can be termed a success. However, two pilot projects have been evaluated with the findings that “clearly demonstrate the family conferencing model (FLM) can be an effective process for empowering families to take control of their futures.”²⁴⁰

Professor Janet Weinstein has recommended a hybrid process which incorporates the important contributions of the professionals involved while ensuring fairness.²⁴¹ Her

²³⁷ Chandler & Marilous, *supra* note 67, at 216, 219.

²³⁸ Lisa Merkel-Holguin, *Putting Families Back into the Child Protection Partnership: Family Group Decisionmaking*, 12 PROTECTING CHILDREN 4 (1998). See also Dana E. Prescott, *Child Protection: Kinship and Family Group Conferencing*, 19 ME. B. J. 140 (2004).

²³⁹ Chandler, *supra* note 67, at 216 (citing LISA MERKEL-HOLGUIN, *Practice Diversions and Philosophical Departures in the Implementation of Family Group Conferencing*, in FAMILY GROUP CONFERENCING (Gale Burford & Joe Hudson eds. 2003)).

²⁴⁰ *Id.* at 218 (citing C. Wheeler & S. Johnson, *Evaluating Family Group Decision Making: The Santa Clara Example*, 18:5 PROTECTING CHILDREN 65-68 (2003)). (The FLM can claim considerable success in achieving its goals including preventing child mistreatment, maintaining children within the family network and reducing court involvement).

²⁴¹ Weinstein, *supra* note 4, at 143.

model includes an internal referral to an interdisciplinary team with a facilitator that could include many interested partners.²⁴² The purpose of the meeting would be to gather information, determine what additional information is needed, and to ensure the safety of the child.²⁴³ This would be followed by regular meetings of clerks and professionals in different groups depending on the needs of the child and family.²⁴⁴ Essential components of the process include a problem solving approach and a focus on relationships.

B. Legal and Social Work Education

Ideally, the collaboration between social workers and lawyers in this area could begin before the start of their professional careers.²⁴⁵ In designing curricula for both law students and social work students, an interdisciplinary approach should be considered.²⁴⁶ Courses taught at the law school could include not only cases and relevant statutes but also regulations that govern social worker's conduct. Professionals who deal on a daily basis with abuse and neglect victims, such as physicians, can be used to educate the students about the medical and psychological implications of abuse and neglect. More importantly, dialogue between law students and social work students could increase an understanding of the different and difficult roles performed by each. Use of a hypothetical case for a mock hearing involving both law students and social work students could be used.

²⁴² *Id.* at 145.

²⁴³ *Id.*

²⁴⁴ *Id.* at 146-147.

²⁴⁵ See Allen-Meares, *supra* note 164, at 2.

²⁴⁶ See Jane E. Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practices*, 74 WASH. L. REV. 319 (1999).

Beyond these curricular changes orienting law students to the potential for law as an instrument of social change is recommended.²⁴⁷ Lawyers who intend to practice in the public interest field should develop an understanding of their roles as change agents²⁴⁸ and as having a responsibility to contribute “to efforts to provide access to equal justice for the poor and powerless.”²⁴⁹

Another opportunity for collaboration between law and social work students can occur in a clinic setting. Law students who work in a child advocacy clinic often need the assistance of social workers to provide information regarding their cases. The social work students could obtain and distill the necessary information from agency social workers, thereby speeding up the process while gaining valuable insights into agency work. The social work students could also be asked to gather information independently, similar to the type of work preformed by CASA and other volunteers. Social work students could then accompany the law student and their professor to court, which would allow them to gain a better understanding of courtroom procedure and how to testify.²⁵⁰

Social Work educators have long recognized the value of infusing law into the

²⁴⁷ Aiken & Wizner, *supra* note 66.

²⁴⁸ *Id.* at 73. (“We believe that teaching law students about the role of lawyers in challenging injustice and working for social change is an appropriate—indeed, obligatory—concern of legal education. Social justice education has the potential for inspiring students of law to engage in committed social work on behalf of the disadvantaged and powerless.”).

²⁴⁹ *See Id.* (Aiken and Wizner make a compelling argument for instilling in law students the values held by the social work profession).

²⁵⁰ *See* Weinstein, *supra* note 246, at 354.

curriculum.²⁵¹ A survey conducted in the 1990's indicated that although courses in law and social work were offered at the majority of institutions that responded to the survey, they were virtually never required.²⁵² The author concluded that this left many students without adequate knowledge of legal issues. She proposed that in lieu of separate courses, legal content be infused into existing courses to increase the student's exposure. The content areas identified for inclusion include: Definition and Regulation of Practice, Client Issues, Laws and Regulations, Privacy, Advocacy, Conflict/Liability and Case Law Precedents that Influence Social Work Practice.²⁵³ Other specific pedagogical models include focus on particular legal topics facing social workers (such as child maltreatment), on the laws related to the issues (reporting laws), the social workers response to these issues (the requirement of mandated reporting), and the relevant legal context (child protection agencies/court).²⁵⁴ An acknowledgment of the lack of training

²⁵¹ See Sandra Kopels, *Infusing Legal Issues into the Social Work Curriculum*, 32 J. OF SOC. WORK EDUC. 115, 116 (1996):

During the 1920s, an abundance of books and articles appeared that described various legal-social work relationships. In the 1960s the civil rights movement, the war against poverty, and court decisions that gave rights to children and families affected the practice of social work. As a result, numerous articles were written in both legal and social journals about the need for lawyers and social workers to understand and collaborate with one another to more effectively help their clients. During the 1970s the first textbook pertaining to social work and the law was published. Since then, a proliferation of texts has addressed the interplay between law and social work in general terms, and more specifically, the legal issues of social work practice with children and worker liability. In these texts, and in many related articles, authorities suggest that the best way to achieve effective communication and collaboration is for the social worker to learn more about the law.

²⁵² *Id.* at 116.

²⁵³ *Id.* at 122.

²⁵⁴ Ellen Bogolub, *Infusing Content About Discharging Legal Responsibilities into Social Work Practice Classes: The Example of Mandated Maltreatment Reporting*, 17 J. OF TEACHING IN SOC. WORK 185 (1998).

social workers receive on the legal aspects of child abuse and neglect,²⁵⁵ as well as other areas is evident in the professional literature.²⁵⁶

Yet another proposal recommends that the core of justice related content be taught to all social work students, with additional content for practitioners who are likely to come into regular contact with the court system. Finally, specialized courses and field instruction for those whose specific training is as “judicial social workers”²⁵⁷ could be taught.

C. Cross training

Social workers and lawyers must begin by recognizing the different ways in which they view the world. Cross training can be helpful.²⁵⁸ The most successful programs appear to be those that begin with the orientation of new staff. Too often, both social work training and new attorney training are designed and conducted internally with little input from the other group. Each profession assumes that it can capture the roles of the other players and convey them in an objective manner. As we have seen, however, these roles

²⁵⁵ Phyllis Howing & John Wodarski, *Legal Requisites for Social Workers in Child Abuse and Neglect Situations*, 37:4 SOCIAL WORK 330 (1992). (“There is considerable confusion and concern among social workers regarding the work of child protective services (CPS) and the legal systems that deal with child abuse and neglect.” “To make responsible and effective decisions, social workers must understand the written and unwritten laws and procedures followed in child maltreatment cases.”).

²⁵⁶ Madden, *supra* note 1, at 335 (“Despite more than 70 years of periodic attention, the reality is that most social workers possess insufficient knowledge and skills to be effective participants in the legal systems that are part of the practice environment in every social work setting.”).

²⁵⁷ Rufus Lynch & Edward Brawley, *Social Workers and the Judicial System: Looking for a Better Fit*, 10 J. OF TEACHING IN SOC. WORK 65, 66 (1994).

²⁵⁸ See Paul Johnson and Katharine Cahn, *Improving Child Welfare Practice Through Improvements In Attorney-Social Worker Relationships*, 54 U. PITT. L. REV. 229 (1992) (describing a cross-training program).

are often the subject of misperception.²⁵⁹ When differing perspectives are reflected in such subtle ways as the very language we use, there is little substitute for face-to-face exchange in coming to appreciate other professional outlooks. Involving individuals from different disciplines in the training and on-going education for all players in the system will also enhance the likelihood of collaboration.²⁶⁰

²⁵⁹ Weinstein, *supra* note 4, at 158 (quoting Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Juvenile Co-Parents*, 54 MD. L. REV. 377, 410 (1995) (“The effectiveness of participation by persons of different disciplines in the child placement process depends on their learning from one another. A workable child placement process will provide for a conscious, restrained, open and reviewable use by professional participants of knowledge acquired from a discipline not their own. That art of collaboration grows out of a recognition that borders do exist, even if they cannot always be sharply defined, and that under certain circumstances they may be crossed.”)).

²⁶⁰ *Id.*, at n. 264 (quoting David Herring, *The Michigan Agency Attorney*, in KATHERINE CAHN & PAUL JOHNSON, *CHILDREN CAN’T WAIT*, 992-993 (1993):

“The importance of this interdisciplinary training cannot be overemphasized. The agency attorney must have a background in child welfare to be able to provide the counseling, support, and zealous advocacy required by the private model of legal representation. The attorney must speak the language of the social worker and must have the knowledge required to assist in developing and assessing the social worker’s case plan. The attorney must know what services are effective and available in the particular community to help reunify a dysfunctional family. Only with this knowledge can the attorney identify cases where the social worker should currently be reaching a permanency decision, and then help her or him to make a timely decision.

This interdisciplinary training is necessary even to understand child abuse and neglect legislation ... To fully know understand and implement this law in individual cases, the agency attorney must know why it is important for children to have a permanent home and when they need such a home. The attorney also must be aware of the damage that can be done to children by disrupting their previously permanent parental home, even if that home presents some risk to a child. Training is also essential for the agency attorney to participate effectively in periodic social worker cases conferences, which may include professionals from other relevant disciplines such as psychiatry, psychology, and medicine. The attorney must be able to operate beyond the role of a legal mechanic to get the social workers and other professionals to come to concrete case plan

A review of the literature suggests that training for social workers and lawyers in the other's profession "has improved communication, reduced conflict and led to collaborative relationships between the two professions."²⁶¹ Most of these efforts consisted of presenting common information to different professional groups as opposed to a multidisciplinary approach to both curriculum development and participation.²⁶²

A statewide initiative to implement multidisciplinary training to reform child protective services was undertaken in 1996 in Kentucky.²⁶³ Building on a successful model employed in the Pacific Northwest,²⁶⁴ the trainers identified nine criteria for developing the training. They included an agreement upon each professional's decision

recommendations and to address the permanency planning issues from the very beginning of the case. The training enables the agency attorney to realize that attendance and full participation at social work and multidisciplinary case conferences are vital."

²⁶¹ Paul Knepper & Shannon Barton, *Statewide Cross-Training as a Means of Court Reform in Child Protection Proceedings*, 36 BRANDEIS J. FAM. L. 511, 521 (1997-98).

²⁶² *Id.* at 523.

²⁶³ *Id.* at 512.

²⁶⁴ The Children Can't Wait project designed to reduce delays in termination of parental rights cases was begun by the Northwest Resource Center for Children, Youth and Families in 1988. Over a two year period, the trainers conducted interdisciplinary seminars in nine counties. A description of the project can be found in KATHARINE CAHN & PAUL JOHNSON, CHILDREN CAN'T WAIT: REDUCING DELAYS FOR CHILDREN IN FOSTER CARE (1993). In their assessment the authors noted:

It has been our experience that these seminars can facilitate improvements in child welfare outcomes by fostering relationships between social workers and attorneys in two ways. First, training (particularly cross-training or multidisciplinary training) can promote role clarification and improve each profession's understanding and acceptance of the other's area of expertise. Second, collaborative work can promote improvements in the legal and administrative structure of the systems, including the structures of relationships and working arrangements between the two professions. JOHNSON & CAHN, *supra* note 244, at 231.

making role,²⁶⁵ including guidelines developed by the judiciary that specify the roles of each actor.²⁶⁶ The training should occur before actors enter the system,²⁶⁷ should include the attorneys for all the parties²⁶⁸ and should be held locally as opposed to at a statewide conference.²⁶⁹ Content of the training should include the rationale for the relevant laws²⁷⁰ as well as gaps in knowledge related to the implementation of the law.²⁷¹ Finally, the training should include a discussion of how participants view successful outcomes and the expectations of other professionals in achieving them,²⁷² as well as communication and team building skills.²⁷³

After presenting our findings to the stakeholders that had participated in the initial set of meetings, we began a discussion in the context of three interdisciplinary groups concerning the development of training designed to overcome the barriers to collaboration we had identified.²⁷⁴ The participants generated a consistent list of needed training across the three groups. This list included further education about court

²⁶⁵ Knepper & Barton, *supra* note 261, at 526 (citing Russell, *supra* note 83, at 213).

²⁶⁶ *Id.* at 526 (citing C. Bradley Doss & Lynda Idelman, *The County Child Abuse Protocol System in Georgia: An Interagency Cooperation Approach to a Complex Issue*, 73 CHILD WELFARE 675, 677-78 (1994)).

²⁶⁷ *Id.*, (citing Russell, *supra* note 83, at 213-214).

²⁶⁸ *Id.*, (citing Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 11-12 (1994)).

²⁶⁹ *Id.*

²⁷⁰ *Id.*, at 527.

²⁷¹ *Id.* (citing KATHARINE CAHN & PAUL JOHNSON, CHILDREN CAN'T WAIT: REDUCING DELAYS FOR CHILDREN IN FOSTER CARE 137 (1993)).

²⁷² *Id.*, (citing KATHARINE CAHN & PAUL JOHNSON, CHILDREN CAN'T WAIT: REDUCING DELAYS FOR CHILDREN IN FOSTER CARE 137, 338 (1993)).

²⁷³ *Id.* at 527 (citing Doss & Idelman, *supra* note 251, at 686).

²⁷⁴ *See Part I supra.*

procedures,²⁷⁵ any recent legislation that might affect their work, discussions concerning an increased role for families in the decision-making process²⁷⁶ and further clarification about “strengths-based practice.”²⁷⁷ In addition, the groups asked for further discussion on the question of how to accommodate both a movement from an adversarial to a collaborative model while at the same time allowing for the "checks and balances" that are built into the system.

While some of these goals could be met simply through traditional training programs, the core training designed to help professionals communicate from their different perspectives require more than mere knowledge-transfer. Accordingly, while training programs to convey information were planned, a separate set of cross-trainings designed to focus on understanding professional perspectives were also held. In these meetings, we created a case vignette and had each group review the fact situation and then discuss them in terms of areas of concern and next steps. It was fascinating to see how some groups emphasized some areas and had one recommendation (e.g., “pick up all the kids”) while other groups emphasized different aspects of the case and had different recommendations. These recommendations reflected different beliefs and values as well as pragmatic attention to whether or not there was enough evidence for a protective custody order.

²⁷⁵ Specifically concerning a case management system that had recently been implemented for abuse & neglect cases.

²⁷⁶ Some of the participants wished to include parent representatives in the cross-training. They also expressed a desire to increase parental and family involvement in the resolution of the case similar to the family group conferencing model discussed at notes 230-235 and accompanying text, *supra*.

These discussions, founded upon specific fact situations but having the goal of highlighting language, perspectives, and ethical constraints for each of the participants, were extremely valuable in furthering the understanding and appreciation of each professional's role in the system. The use of role play was also discussed and it appeared this method of training would have significant advantages as well. Needless to say, these cross training sessions cannot be a one-time meeting if ongoing collaboration is to be fostered. Scheduling of regular opportunities for discussion of case scenarios, preferably co-facilitated by professionals well-versed in both professions, is necessary to the success of these programs.

VI. Conclusion:

Beyond Training: The Need for Conversations between Lawyers and Social Workers.

Juvenile court systems around the country continue to struggle to find a coherent paradigm by which to guide themselves. The struggle between a rehabilitative, systems perspective from social work and a right's based, adversarial perspective from law continues. No matter how the courts continue to try to strike the right balance between rehabilitation and rights, and experiment with new options for resolving child abuse and neglect actions, the problems brought before these courts simply cannot be solved without the cooperation of both attorneys and social workers. This article has suggested

²⁷⁷ See WALTER KISTHARDT, *The Strengths Model of Case Management: Principles and Helping Functions in THE STRENGTHS PERSPECTIVE IN SOCIAL WORK PRACTICE*. (D. Saleebey, ed. 1997)

that the increased use of mediative mechanisms can create a system that would support rather than undermine that cooperation. It has outlined a system of cross-training that will further understanding and appreciation of the various professional roles in any system. Finally, this article has suggested that educational institutions should meet the challenge of fostering cross-disciplinary work through increased programs in which law students and students in other disciplines study and work side-by-side.

Ultimately, of course, the collaborative challenge cannot be met with laws, programs, or procedures, as it requires the willingness of each set of professionals to be open to the other's language, ethical perspectives and worldviews. While training is important, it will not get at the heart of the difficulty of misunderstandings and misperceptions resulting from different world views. The key to success lies beyond one-time training programs to on-going conversation. Attorneys and social workers must talk and, more importantly, listen to each other. A discussion about appropriate roles and a clarification of responsibilities is just the beginning. Use of case studies similar to those used by ethics committees would give everyone the opportunity to comment on how a case was or should have been resolved. Such discussions allow the myriad issues to surface along with an opportunity for a better understanding of how others view the issues and view their part in resolving them. These discussions must occur on a regular basis and not as part of a "training session." These conversations are the only way to build relationships among those responsible for providing services to families involved in the abuse and neglect system.