

TWO DISTINCT ROLES/BRIGHT LINE TEST

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I. INTRODUCTION AND THESIS

It is a mistake to try to develop a single lawyer role for children in child welfare cases which tries to accommodate their developing capacities from infants to articulate teens. The older child needs a traditional attorney; the youngest child, incapable of directing counsel, needs a substitute to define and advocate for his or her best interests. We should adopt different standards for the different advocate roles. Trying to define a single lawyer role for children of all ages and all capacities is an impossible task.¹ A better approach towards recognizing and accommodating the child's developing cognitive abilities and judgment would be to adopt a bright line age test, say at seven. At age seven (or eight or ten) and above the youth would receive a client directed advocate, that is, a child's *attorney*, and below the bright-line age a child gets a best interests (or substituted judgment) advocate. The court should appoint either one or the other, or both, under certain circumstances as set out in law.² Both roles should be clearly established in law with duties that are aggressive and active.³

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¹ See Donald N. Duquette, *Legal Representation for Children In Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441 (2000).

² There is strong support among specialists in the field that there is an inherent conflict in asking a lawyer to assume the dual function of representing both the stated wishes and the best interests of a child. In a majority of states, however, lawyers are asked to serve as both attorney and guardian *ad litem*. Shirley A. Dobbin, Sophia I. Gatowski, & Krista R. Johns, *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, in TECHNICAL ASSISTANCE BULLETIN, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1998). Others have made the argument that these two roles are inconsistent and have urged legislators or state supreme courts to change this practice. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996).

³ Although there is controversy in our field as to how the lawyer for the child receives direction as to the goals of advocacy for the child, there is a strong consensus in the field that once the goals are established the advocate should be active and aggressive. Relaxed advocacy is NOT acceptable. ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, REVISED VERSION OF ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1999); ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, VII-21 (2002); Cf. Donald N. Duquette & Marvin Ventrell, *The Role and Duties of the Child's Lawyer*, in CHILD WELFARE

We are accustomed to drawing these clear bright age lines for the various rights and responsibilities of living in our society. At sixteen a youngster is able to drive, at eighteen a person can vote, at twenty-one one can purchase alcohol, and at thirty-five a citizen is eligible to serve as President. Similarly, we all know people who, at the appointed age, are not able to handle the responsibility well and others who are ready years before the fixed age. Yet we have chosen, in these other aspects of our social contract, to use age as a proxy for maturity and judgment. We have determined that a case-by-case assessment of an individual's ability to handle the responsibility would result in a process that is too cumbersome and a result that is too idiosyncratic and inconsistent to be fair. Similar reasoning applies to determining what sort of legal advocate a child should be assigned. The following sections will demonstrate that the limitations of the bright line age test are far fewer than the perils of either a one size fits all approach to legal representation or an ad hoc, case by case determination as to whether a child receives a client-directed or substitute judgment legal advocate.

Part II discusses why neither the client-directed nor the best interest model of legal representation is adequate for all children at all stages of development. Part III describes the role of the client-directed attorney for the older child and addresses the older but immature or mentally handicapped children not fully capable of directing counsel. Part IV describes the role of the substituted judgment or best interests advocate and considers the younger child whose level of maturity and capacity might warrant greater autonomy. Part V addresses the concern that the presumptive bright line might be set *too low* at seven because children and youth of all ages, even fourteen and sixteen years old, might need a best interests advocate. And Part VI addresses the concern that the presumptive bright line might be set *too high* because the interests of *all* children require that their rights be protected by a client-directed attorney.

II. NEITHER THE "CLIENT-DIRECTED" NOR THE "BEST INTERESTS" MODEL OF REPRESENTATION IS ADEQUATE FOR ALL CHILDREN AT ALL STAGES OF DEVELOPMENT

A. *Client-Directed Model Is Inadequate for Very Young Children*

The pure client-directed model requires that the attorney not substitute his or her judgment as to what is best for the child, but rather take direction from the child, if verbal, or from other objective information available in the environment, if the child is not verbal. There are three major difficulties with this approach.

First, the model gives little guidance in the case of the non-verbal child, the infant. The proponents say in such a situation the lawyer could merely take no position at all, but simply be sure that the court is fully informed on the important issues. This seems of limited use to the court and overlooks the fact that in nearly all cases parties come to court with agreements on various issues. The position-less child advocate will have little to contribute to a negotiated

settlement if he or she takes no position in the litigation. Some commentators recognize the difficulty of a lawyer representing someone who cannot instruct them and simply argue that very young children should not be represented by counsel in these proceedings at all.⁴ Supporters of the client-directed position also recommend that the lawyer for the non-verbal child avoid imposing their own subjective judgments by representing only the “legal interests” of the child.⁵ The *Fordham Conference* recommended advocating for the young child’s legal interests⁶ but that approach provides, at best, an illusion of objectivity. The legal interests of a child may be unclear or in conflict and thus give no direction to the advocate. Legal interests may be unclear because courts do not always apply constitutional doctrine consistently to children’s rights or arguable constitutional protections may be inconsistent with existing statutes or rules. Which authority is the advocate to follow? Legal interests of the child are often in conflict. For example, a child has a right to be a part of his or her family of origin, but also has an interest in being protected from abusive or neglectful parents. The child has a “legal interest” in permanency, but the question is whether that interest is best served by reunification with the biological parents, by adoption with an extended family member, by permanent guardianship, or by adoption outside the extended family? Resort to “legal interests” does not provide the needed guidance and direction for the advocate of a non-verbal child.

A second major difficulty with applying the client-directed model to very young children is the classic case of the four-year-old seriously abused child who is asked, “where do you want to live?” The child inevitably says, with my Mom or with my Dad even though that is the very person who has inflicted the abuse. Is there any argument that a four year old is capable of making such a judgment on his or her own behalf? Is the lawyer to use his or her considerable skills of advocacy to advocate for a position that could expose the child client to serious harm? In fact, the advocates for the pure client-directed approach have recognized the serious limitation of applying this approach to very young children, but their modification of the client-directed model to remedy this quandary results in another major difficulty with applying this approach to very young children.

The third major difficulty with applying the client-directed approach to very young children is that the attempts to remedy the deficiencies, some of which are mentioned above, have created points of unrestrained and unreviewed lawyer discretion which actually defeat the major rationale for a client-directed approach in the first place. A premise for the client-directed model is that lawyers lack sufficient training and expertise to make some of the decisions required in children’s cases and the best interests model merely imposes the lawyer’s values on their young clients—in a way unguided by law. The point is valid, but the existing recommendations of the ABA Standards, the

⁴ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996).

⁵ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 2, at B-5.

⁶ See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 2.

NACC modification of those standards and the *Fordham Conference Recommendations* all contain within themselves opportunity for lawyer discretion about what position to take on behalf of the child that is unreviewed by anyone else, not guided by principled criteria, and potentially idiosyncratic. These recommendations water down the client-directed approach so that similarly situated children run a considerable risk of receiving different forms of advocacy and different levels of participation in the decision-making depending upon the personality and values of the lawyer assigned to the case.⁷

For example, the NACC Version of ABA Standards require the attorney to represent the child's expressed preferences and follow the child's direction throughout the litigation, "except as specifically provided herein."⁸ The NACC Version goes on to say, "Client directed representation does not include 'robotic allegiance' to each directive of the client"⁹ The NACC further waters down and confuses the attorney's duty when it says, "there will be occasions when the client directed model cannot serve the client and exceptions must be made."¹⁰ So what are those exceptions? How is a lawyer to know? What is to prevent one lawyer from invoking the exception in situations in which ninety-nine of one hundred lawyers would defer to the child's judgment?

The ABA Standards contain similar points of unreviewed lawyer discretion when, for example, it requires the child's attorney to determine whether the child is "under a disability" (and thus unable to direct counsel on one aspect or another of the case);¹¹ whether the stated position of the child would be "seriously injurious to the child" (justifying a request for a guardian-ad-litem); and providing that the child's attorney "may request appointment of a guardian ad litem" (a person who would presumably argue against the child's stated wishes, but without further guidance as to the circumstances justifying the request).¹²

Thus, proponents promise a client-directed relationship with the child, but include huge exceptions that effectively swallow the rule, exceptions that can be invoked, despite admonishments to the contrary, whenever the lawyer becomes uncomfortable. These exceptions are exercised by the lawyer in a manner that is unreviewed and without guiding criteria. This results in a watering down of the classical adult attorney-client relationship to which the model aspires. One of the worst consequences of trying to make the client-directed model fit the very young and even nonverbal child is that these exceptions swallow up the rule even when applied to the older and mature child of twelve, fourteen, or sixteen years of age.

B. *The Best Interests Model Is Inadequate for Older Children*

Even the most paternalistic among us can imagine an older youth whose voice, perspective and wishes should not only be presented to the court, but also vigorously advocated by counsel as directed by the youth. "It is a lonely

⁷ Duquette, *supra* note 1.

⁸ NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *supra* note 3, at B-4.

⁹ *Id.*

¹⁰ *Id.* at B-4(1).

¹¹ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 3, at B-3.

¹² *Id.* at B-4(3). *Cf.* Duquette, *supra*, note 1.

voice in this debate that urges that such an older unimpaired child does not warrant the same zealous representation of his or her wishes as would an adult."¹³ A second flaw in the pure "best interests" approach is that it allows the lawyer for the child unfettered discretion in determining the goals of the litigation without the discipline of an active client and thus allows the lawyer to substitute his own values for those of the child client. Nonetheless, many of us in the field have seen cases in which the wishes of a mature youth were overridden by his or her lawyer who argued that another result was in the client's best interests. These are the injustices that fuel the client-directed movement—and properly so.

It has become good practice in many jurisdictions using a "best interests of the child model" for lawyers to defer to the older and mature child even where they disagree with the result sought. But a good practice does not have the same force as law. Individual lawyers need the focus, discipline and protection that a best interests approach for the older child does not bring. A client-directed approach should be legally mandated for the older child.

III. CLIENT-DIRECTED ATTORNEY FOR THE CHILD

As a drafting matter, defining pure client-directed attorney standards for older children is pretty easy and has already been done. The ABA/NACC Standards define "child attorney" as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."¹⁴ That is it. Nothing further need be said. The child's attorney assumes the traditional advocacy role and duties under law. No exceptions. No qualifiers.¹⁵

There will be cases, as happens with adult clients, in which the child's ability to direct counsel is in question. But there are legal rules to guide the attorney in this situation—and the same rules apply to children as to adults. Importantly, the client-directed approach recognizes that the attorney for the child is an *attorney* with the same duties and responsibilities owed to an adult. These duties and responsibilities also govern the attorney's relationship to a client with a disability.

If an *attorney* is representing a child whose capacity is in question, the 1983 ABA Model Rules of Professional Responsibility, adopted by most states, provide guidance. Rule 1.14 provides, "When a client's ability to make adequately considered decisions is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall as far as reasonable possible, maintain a normal client-lawyer relationship with the client."¹⁶ The commentary states, "Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or

¹³ Duquette, *supra* note 1, at 447.

¹⁴ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 3, at A-1.

¹⁵ The word *attorney* is used throughout to designate the lawyer serving in this traditional role. *Lawyer* means a person licensed to practice law, but who is not necessarily serving as an *attorney*.

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.14 (1983).

six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings governing their custody."¹⁷ Thus, while the lawyer is required to maintain as normal an attorney-client relationship as possible, Rule 1.14(b) states, "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot act in the client's own interests."¹⁸

Although the 1983 version of the Model Rules provides guidance to the child's attorney, the 2002 amendments to the ABA Model Rules of Professional Responsibility are a considerable improvement and speak directly to the child's attorney in this situation. The 2002 amendments to section 1.14 substitute the term *diminished*, for *impaired*, a term that better reflects our clients' "intermediate degrees of competence".¹⁹ Amended Rule 1.14(b) has both more specific guidance as to protective measures, and a lower trigger for invoking these measures:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interests, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.²⁰

This ethical guidance from the Model Rules should ease the concern that a child of seven or eight or a child of limited capacity could be exposed to harm if allowed to instruct counsel. The rules guide counsel, provide protection for a client at risk of physical or other harm, but still limit the ability of counsel to override a child's stated wishes.²¹

The skills of the lawyer are critically important to implementing a client-directed approach at the youngest ages. In her 1993 book, Ann Haralambie, a pioneer in child advocacy, urges that children's attorneys advocate the child's wishes unless potentially harmful, at which point the attorney should request appointment of a guardian *ad litem*.²² She emphasizes, however, that ethical dilemmas can be minimized or eliminated if the child's attorney spends significant time building a relationship with the client and advising the client.²³ If the child's position seems unreasonable, Haralambie recommends that the lawyer explain the situation to the child and counsel him or her about the alterna-

¹⁷ *Id.* at cmt. 1.

¹⁸ *Id.* at R. 1.14(b).

¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002) ("When a client's ability to make adequately considered decisions is *diminished*, whether because of minority, mental disability or for some other reason, the lawyer shall as far as reasonable possible, maintain a normal client-lawyer relationship with the client.") (emphasis added).

²⁰ *Id.* at 1.14(b).

²¹ *Id.* at cmt. 5 ("In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.").

²² ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993).

²³ *Id.*

tives.²⁴ A policy emphasizing a client-directed approach will not succeed without the skills and aptitude of the well-trained lawyer.

IV. BEST INTERESTS/SUBSTITUTED JUDGMENT ROLE

The best interests advocate could be a lawyer or a lawyer working with a guardian *ad litem* or a CASA²⁵. The best interests advocate should be charged with representing the best interests of the child, as determined by the advocate and the role should be aggressive, ambitious, professional, and include the duties recommended in the ABA Standards. The significant difference between the best interests advocate and the client-directed attorney lies in how and by whom the goals and objectives of the advocacy are determined. However the goals are established, the action steps of the advocate in pursuit of those goals are quite similar.²⁶

The *two distinct roles/bright line test* focuses our attention on the unique challenge in representing the youngest children—how to determine the best interests of a child. This is among the least developed part of our jurisprudence and should be a central focus of our discussion as a field. We should be discussing how the substituted judgment for the child is to be made and by whom. We can draw from other parts of the law, medicine and philosophy. Legal principles and best practices guidelines should be developed to guide the lawyer's best interests determination for preverbal and impaired children. Such guidelines should be consistent with the principles ratified by this conference regarding preverbal and impaired children.²⁷

Who should fulfill the best interests advocate role for the child? A lawyer is essential to give the child an adequate voice because of the complexity of the legal process and the need to be able to make the process work for the child. An alternative to a best interests lawyer would be a true guardian *ad litem*, who is then represented by counsel, which is the system in several states and in England.

Perhaps children below the bright line age cut-off, who cannot instruct counsel, should not have lawyers at all as Professor Guggenheim has argued.²⁸ The better view is that children indeed need advocates in this complex and often-chaotic process. Children caught up in any complex, even well meaning, bureaucracy, such as a hospital, school or the court process, still need someone with power to look out for them. Parents, ordinarily the first choice, cannot be depended on in child welfare cases because the parents' ability to care for the child is the very issue before the court.

Just as there will be children over the bright line age whose ability to make decisions is questionable, there will be children below the bright line age whose capacity warrants more autonomy and a stronger voice in guiding their legal

²⁴ *Id.*

²⁵ Court Appointed Special Advocate ("CASA").

²⁶ Ventrell & Duquette, *supra* note 3.

²⁷ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 2, at 1308-12; *See Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623 (2006).

²⁸ Guggenheim, *supra* note 5.

representative. How are the interests of the younger, but competent, child to be addressed? Certainly, the best interests advocate should be statutorily directed to give some voice to the child by reporting the child's wishes and desires (consistent with the attorney-client privilege). But further, the advocate, in determining the best interests of the child, could be charged with giving weight to the child's stated preferences according to the child's age and maturity. Michigan's statute is an example:

The child's wishes are relevant to the lawyer-guardian ad litem's [i.e. the best interests advocate's] determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity.²⁹

The Michigan statute attempts to codify the idea that a child's wishes should be given greater weight according to his or her age and competence, and that a child may be competent for some decisions but not for others. This reflects the influence of Professor Peter's metaphor of the "dimmer switch."³⁰ "Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it."³¹ The law governing the best interests advocate should recognize that competence is not an "on or off" phenomenon where a child is either capable of directing the lawyer or not. Rather competence is a broader spectrum where children may be able to contribute various amounts to guide the representation if the lawyer properly incorporates the child's unique individuality. In this way the interests of the child who is young but competent for at least some decisions, may be accommodated in the bright line test.

V. IS THE BRIGHT LINE AGE TOO LOW AT SEVEN?

The age at which a child receives a best interest or client-directed advocate comes down to a value choice made in a political process. Some will argue that age seven is too low for a child to be given a client-directed attorney, even with the safeguards of the Model Rules as articulated above, because a child this young, or all children, need a best interests advocate. In response, consider that the child's direction will merely give instructions to the lawyer. The child's views do not necessarily prevail. The process should be looked upon as a whole. The agency and its attorney will presumably make arguments it thinks are in the best interests of the child. The mother and father of the child, and other caretakers, if permitted standing, will argue what they consider to be the best interests of the child. Ultimately the judge will make a determination that incorporates the best interests considerations.

The court's ultimate decision will generally be a better one if all points of view are fully presented to the court—including the views of the person most affected, the child. A best interests advocate is in many ways a redundant or irrelevant player if he or she is merely going to echo what the agency or the court is already charged with doing. The uniqueness and importance of the

²⁹ MICH. COMP. LAWS ANN. § 712A.17d(1)(h) (West 2005).

³⁰ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 53 (1997).

³¹ *Id.* at 53-54.

child's voice and perspective militates towards moving the age range as far down the age ladder as possible. Other research has identified seven as an age by which children are capable of participating in such decisions.³²

VI. IS THE BRIGHT LINE AGE TOO HIGH BECAUSE ALL CHILDREN NEED A CLIENT-DIRECTED ADVOCATE?

Many hold the position that the attorney must follow the child's expressed preferences, no matter the child's age, and if the child is incapable of expressing a viewpoint, the lawyer must attempt to discern the child's wishes or legal interests from objective criteria.³³ Many have strong opinions that lawyers have no special training or standing to be substituting their judgments for those of the child. These substituted judgments reflect the lawyer's own personal values and even class biases and serve as a substitute for spending significant time with their clients and their cases. Children will not receive adequate advocacy unless children's lawyers are put under the discipline of being client directed, so the argument goes.

There is a great deal of value in these positions. Lawyers representing children are in need of guidance, structure and discipline. But the client-directed model will not function when the client lacks the ability to speak to give that direction, and the client directed model will not function when the client lacks basic cognitive and judgment skills to make decisions about the advocacy.

A blanket requirement of client-directed approach is also inconsistent with international norms. The UN Convention on the Rights of the Child, Article 12, reflects a position consistent with the one advocated here:

State Parties shall assure to the child *who is capable of forming his or her own views* the right to express those views freely in all matters affecting the child, the views of the child being given weight in accordance with the age and maturity of the child.³⁴

The American adversarial system is but a means to an end. Perhaps the purists among the client-directed advocates place too much value on the adversarial approach itself and do not fully appreciate problem solving and dispute resolution as an element of the overall legal process. Child welfare proceedings are a good example of "therapeutic jurisprudence" where the goal is justice for the welfare of the child and family involved.

Some advocates of the pure client-directed approach may see children as an oppressed and disenfranchised minority who require liberation and "a voice". These purists seem to get inspiration from the women's movement, the U.S. civil rights movement and other liberation struggles. But the analogy does not fit children. Unlike women, racial minorities and other oppressed groups, the youngest children are not fully capable human beings. They do indeed suffer from a disability and require daily caregivers. An exclusive children's

³² Sarah H. Ramsey, *Representation of the Child in Protective Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L. Q. 287, 311 (1983).

³³ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, *supra* note 3.

³⁴ U.N. Convention on the Rights of the Child art. 12, *opened for signature* November 20, 1990, 1577 U.N.T.S. 3 (emphasis added).

rights focus does necessarily translate into justice for children. As Guggenheim has ably argued, “[I]t is time to ‘candidly appraise’ whether children’s rights serve children’s interests.”³⁵

Ten years after adoption of the ABA Standards and publication of the *Fordham Conference Recommendations*, no state has adopted the pure client-directed model. Perhaps this is because trying to impose a client-directed advocacy model on all children, from the age of sixteen hours to the age of sixteen years, defies commonsense and is inconsistent with the experience of legislators and other policy-makers. Grouping together the interests of the older child with that of the nonverbal infant seriously detracts from the older child’s case. One advantage of the *two distinct roles/bright line test* is that it makes it politically more feasible to realize a right to client-directed counsel for older children in protection cases. This framing not only reflects the developmental reality of childhood, but also has the added benefit of increasing the political likelihood that a larger number of children could have the advantages of an enhanced voice in these decisions and directing the goals of their litigation.³⁶

VII. CONCLUSION

The essential point is this: since two distinct roles for the lawyer representing the child are necessary to accommodate the developing capacities of childhood, the shortcomings and disadvantages of a bright line age test are considerably less than the shortcomings and disadvantages of a case by case decision as to the duties a lawyer should assume on behalf of his or her young client. The *two distinct roles/bright line test* not only reflects commonsense and scientifically recognized differences in children as they grow and mature, but it is also the most likely to achieve the objective of assuring client-directed representation for more children. Legislators and other policy makers will find this approach more reflective of their own experiences with children. The *two distinct roles/bright line test* moves us toward consensus on a few more issues, is politically attractive, and focuses our attention on the next fundamental and challenging child advocacy question—what should be the means and process for making substituted judgment decisions for the youngest child.

³⁵ MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS?* (2005).

³⁶ New Mexico recently adopted a two distinct roles statute but set the bright line test, at age fourteen, a bit too high in my opinion. See N.M. STAT. § 32A-4-10 (2005).