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Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases

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ATTORNEYS FOR CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS: IMPLICATIONS FOR PROFESSIONAL ETHICS AND PENDING CASES

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I. INTRODUCTION

Thousands of children are abused or neglected each year in New Mexico.[1] Some of these children end up in protective proceedings before the children's court.[2] Traditionally, these children have been represented before the court by a guardian ad litem.[3] In 2005, however, the New Mexico legislature amended the state's Abuse and Neglect Act,[4] requiring the appointment of a traditional lawyer, called a youth attorney, for children age fourteen years and older.[5] Guardians ad litem and youth attorneys serve very different roles: the former represent the best interests of the child as determined by counsel, while the latter represent the expressed wishes of the child as directed by the child.[6] The child advocacy community does not agree on which of these two methods—the advocate directed "best interests" model or the client directed "expressed wishes" model—best serves children, or even if either model is best in all situations.[7] Now that the New Mexico legislature has chosen its side in the debate, though, the state should focus not on which approach is best, but rather on ensuring that the chosen model meets the needs of the children.[8]

To that end, this Comment examines the impact of attorney representation on child protective proceedings, taking into account the effects of New Mexico statutes, court rules, and constitutional provisions. Each of the parties involved in these

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1. N.M. CHILD ABUSE & NEGLECT CITIZEN REV. BD., 2005 ANNUAL REPORT AND RECOMMENDATIONS 1 (2005) [hereinafter CRB, 2005 ANNUAL REPORT]. In 2003, the most recent year for which data is available, New Mexico reported that 6,238 children were substantiated victims of abuse, neglect, and other types of maltreatment. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2003, at 30 tbl.3-1 (2005), *available at* http://www.acf.dhhs.gov/programs/cb/publications/cm03/cm2003.pdf. From 1990 through 2003, the number of substantiated victims reported each year varied from a low of 3,730 in 1999 to a high of 8,845 in 1996, with a median of 6,288 victims annually. CHILD WELFARE LEAGUE OF AM., NATIONAL DATA ANALYSIS SYSTEM: DATA REPORTS, http://ndas.cwla. org/data_stats/access/predefined/Report.asp?ReportID =189 (last visited Oct. 7, 2005) (summarizing data from U.S. Department of Health and Human Services sources).

2. CRB, 2005 ANNUAL REPORT, *supra* note 1, at 1.

3. NMSA 1978, § 32A-4-10 (1993) (amended 2005); *see infra* Part II.C.1.

4. NMSA 1978, §§ 32A-4-1 to -33 (2005).

5. *Id.* § 32A-4-10; FISCAL IMPACT REPORT, LEGIS. FIN. COMM., S. 47-SB233, Reg. Sess. (N.M. 2005) [hereinafter FISCAL IMPACT REPORT] (listing amendments to the Children's Code); AGENCY BILL ANALYSIS, HEALTH POLICY COMM'N, S. 47-SB233.669, Reg. Sess. (N.M. 2005) (summarizing amendments to the Children's Code); *see infra* Part II.C.2.

6. NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 5 (2001), *available at* http://naccchildlaw.org/documents/naccrecommendations.pdf [hereinafter NACC RECOMMENDATIONS]; *see infra* Part II.B.

7. *See, e.g.*, NACC RECOMMENDATIONS, *supra* note 6, at 5; JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 31 (2d ed. 2001) ("Lawyers have represented children in child-protective proceedings for almost twenty-five years without a consensus in either the law, the ethical rules, or the scholarly literature about their role for children.").

8. *See* NACC RECOMMENDATIONS, *supra* note 6, at 5.

proceedings—children, attorneys, judges, social workers, and others—will be affected by the 2005 amendment.[9]

This Comment focuses on two issues. The first is an examination of the role of a child's attorney, as defined by the statutes and rules of professional conduct.[10] The Background section outlines the best interests (advocate-directed) and express wishes (client-directed) models of child representation,[11] as well as the relevant statutes and rules in New Mexico.[12] The Analysis section then examines the shortcomings in applying current laws to the youth attorney rule and provides recommendations for implementing the rule in practice.[13]

The second issue raised by this Comment concerns the so-called "pending cases" clause,[14] a constitutional provision unique to New Mexico[15] that could have the effect of blocking application of the youth attorney rule for some children.[16] The Background section reviews the case law related to this clause and suggests a single doctrine to resolve the inconsistencies in the law that have developed over time.[17] The Analysis section then shows how a careful interpretation of children's common law rights to representation avoids any conflict between the pending cases clause and the youth attorney rule.[18]

II. BACKGROUND

Until relatively recently in American history, children were only occasionally represented by legal counsel in court proceedings.[19] It was not until the 1960s that legal representation for children began to evolve into its own body of law.[20] In the 1967 case of *In re Gault*, the U.S. Supreme Court recognized a child's right to representation in delinquency proceedings.[21] *Gault* focused attention on children's rights in general and led the movement for representation in non-delinquency proceedings.[22]

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9. CRB, 2005 ANNUAL REPORT, *supra* note 1, at 1; *see* Univ. of N.M. Inst. of Pub. Law's Corinne Wolfe Children's Law Ctr., Training on the 2005 Changes to the Children's Code, Youth Attorney Session (June–July 2005) [hereinafter Training Presentation] (providing best practice recommendations for guardians ad litem, youth attorneys, the Children, Youth, and Families Department (CYFD), respondent counsel, judges, Citizen Review Boards (CRBs), and Court Appointed Special Advocates (CASAs)).

10. *See infra* Part III.A.

11. *See infra* Part II.B.

12. *See infra* Parts II.C–D.

13. *See infra* Part III.A.

14. "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. CONST. art. IV, § 34.

15. *See infra* note 105 and accompanying text.

16. *See infra* note 260 and accompanying text.

17. *See infra* Part II.E.

18. *See infra* Part III.B.

19. Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, 32 COLO. LAW. 65, 66 (2003). The history of legal representation for children can be traced back to Roman society, which appointed "special curators" for children under certain circumstances. Mary E. Hazlewood, Comment, *The New Texas Ad Litem Statute: Is It Really Protecting the Best Interests of Minor Children?*, 35 ST. MARY'S L.J. 1035, 1041 (2004). The "special curators" eventually evolved into the English doctrine of *parens patriae*, whereby the state has authority to protect children. *Id.*

20. Ventrell, *supra* note 19, at 66.

21. *In re* Gault, 387 U.S. 1 (1967) ; *see also* Ventrell, *supra* note 19, at 67.

22. *See, e.g.*, Hazlewood, *supra* note 19, at 1042 ("[*In re Gault*] highlighted the focus on children's

Today, the federal Child Abuse Prevention and Treatment Act (CAPTA)[23] requires representation by a guardian ad litem in dependency proceedings.[24] The CAPTA regulations do not define the role of the guardian ad litem, requiring only that "the State must insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child."[25] Despite decades of discussion following the enactment of CAPTA, scholars and legal organizations have been unable to reach a consensus on appropriate standards for the representation of children.[26] With the passage of the 2005 amendment to the Abuse and Neglect Act, New Mexico has chosen the standards it will use. The following sections of this Comment describe those standards.

A. Overview of Child Protection Proceedings in New Mexico

An outline of the typical abuse and neglect proceeding will help frame the discussion of representational standards.[27] The central purpose of the Children's Code is first to protect the best interests of the children covered by its provisions, and then to "preserve the unity of the family."[28] To achieve these goals, the Abuse and Neglect Act sets out the procedures and timelines that must be followed when

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attorneys...."); 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, 105 ("Ever since...*In re Gault*, states have expanded the role of attorneys in juvenile proceedings."); Bridget Kearns, Comment, *A Warm Heart but a Cool Head: Why a Dual Guardian Ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 WIS. L. REV. 699, 706 ("The nation-wide interest in children's rights generated both by the new research and by *Gault* also led the federal government to take action on behalf of abused and neglected children."); Melissa Maguire, Note, *Depriving Children of a Voice Is Not Harmless Error: An Argument for Improving Children's Representation in Massachusetts Through Statutory Reform*, 38 SUFFOLK U. L. REV. 661, 664–65 (2005) ("The advancement of children's law began with *In re Gault*....").

23. 42 U.S.C. §§ 5101–07 (2000).

24. *Id.* § 5106a(b)(2)(A)(xiii). Representation is required only to the extent that states cannot receive federal funding for certain improvements in child protective services if they do not meet the requirements of CAPTA. *Id.* § 5106a(a). As of 2003, only two states—Indiana and Pennsylvania—did not receive CAPTA funding. Howard Davidson, *New Federal CAPTA Changes: Tips for Advocates*, 7 CHILD L. PRAC. 133, 133 (2003). In 1999, California also did not receive CAPTA funding. 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, 2 n.3 (2000).

25. Child Abuse and Neglect Prevention and Treatment Program, 45 C.F.R. § 1340.14(g) (2005); *see also* Mandelbaum, *supra* note 24, at 2 n.6.

26. *E.g.*, Hazlewood, *supra* note 19, at 1043–44 ("In the last several decades, legal scholars...have focused much debate on the proper role of an attorney who represents a child in a custody case....[U]nresolved arguments still exist regarding exactly how attorneys or guardians should represent a child."); Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Rules to Improve Effectiveness*, 27 FAM. L.Q. 327, 328 (1993) ("[S]ince CAPTA, much has been written about...what representation of the child should entail. Debate, however, continues on these fundamental issues...."); Mandelbaum, *supra* note 24, at 3–4 ("[A] growing number of scholars have examined and debated the question of what is the appropriate role for the child's representative.... Despite these efforts, much confusion remains....").

27. The outline presented herein is brief, covering only enough of the procedure to provide a context for the discussion in the following sections. A detailed description of the proceedings can be found in NEW MEXICO CHILD WELFARE HANDBOOK: A LEGAL MANUAL ON CHILD ABUSE AND NEGLECT (2003) [hereinafter CHILD WELFARE HANDBOOK].

28. NMSA 1978, § 32A-1-3(A) (1999); State *ex rel.* Children, Youth & Families Dep't v. Maria C., 2004-NMCA-083, ¶ 23, 94 P.3d 796, 803; *see also* State *ex rel.* Children, Youth & Families Dep't v. George F., 1998-NMCA-119, ¶ 7, 964 P.2d 158, 161 (referring to appointment of a guardian ad litem as "furthering the central purpose of achieving the child's best interests").

a child enters the system.[29] The procedures also serve the express purpose of "assur[ing] that 'the parties [receive] a fair hearing and their constitutional and other legal rights are recognized and enforced.'"[30]

An abuse and neglect case begins when the Children, Youth, and Families Department (CYFD) files a petition alleging abuse or neglect.[31] The child's representative is appointed by the court upon the filing of the petition.[32] Within ten days of filing, the court holds a custody hearing.[33] If the court finds probable cause for abuse or neglect, it can either return the child to the parents or award legal custody to CYFD, pending the adjudicatory hearing.[34] The adjudicatory hearing, which must be held within sixty days of the service of the petition, is a full evidentiary hearing at which the state must prove the allegations of abuse or neglect by clear and convincing evidence.[35]

If the court finds abuse or neglect, it holds a dispositional hearing within thirty days where it hears evidence and determines the best interests of the child.[36] At the dispositional hearing, the court decides who should have custody of the child and orders the implementation of a treatment plan.[37] Within sixty days of the disposition, the court holds an initial judicial review hearing to determine the effectiveness of the treatment plan.[38]

Within six months of that hearing (or thirty days after a judicial determination that reasonable efforts toward reunification are not required), the court holds an initial permanency hearing to determine whether the child should be returned home or remain in CYFD custody.[39] If the child is returned home, the case can either be dismissed or the court can order continuing supervision.[40] If the case is not dismissed, a second permanency hearing will be held within three months.[41] If the court finds that reunification is still not possible at that point, it will initiate proceedings for a permanent guardianship or termination of parental rights (adoption).[42]

The procedures limit the time under which parents can rehabilitate themselves and reunite with their children.[43] Under federal guidelines, states must move quickly

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29. *Maria C.*, 2004-NMCA-083, ¶ 18, 94 P.3d at 802.

30. *Id.* ¶ 23, 94 P.3d at 803–04 (quoting NMSA 1978, § 32A-1-3(B) (1999)).

31. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-3. Although the case begins with the filing of the petition, the proceedings are set in motion a bit earlier. CYFD receives initial allegations of abuse or neglect and forwards them to local law enforcement for investigation. NMSA 1978, § 32A-4-3 (2005). CYFD next receives the report of the investigation, may conduct an additional investigation, and then decides whether to file a petition. *Id.* § 32A-4-4.

32. *Proposed Revisions to the Children's Court Rules*, 44 N.M. L. BULL. 22, 22 (2005) [hereinafter *Proposed Revisions*].

33. NMSA 1978, § 32A-4-18(A) (2005).

34. CHILD WELFARE HANDBOOK, *supra* note 27, at 13-5 (citing NMSA 1978, § 32A-4-18(D).

35. *Id.* at 1-4, 15-1; *see* NMSA 1978, §§ 32A-4-19, -21 (1997); *id.* § 32A-4-20 (2005).

36. *See* NMSA 1978, § 32A-4-22(A)–(C) (2005).

37. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-5. Custody can be awarded to the parent, with or without protective supervision, to the non-custodial parent, or to CYFD. *Id.*; *see* NMSA 1978, § 32A-4-22 (2005).

38. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-5; NMSA 1978, § 32A-4-25.

39. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-5, 19-1; NMSA 1978, § 32A-4-25.1.

40. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-5.

41. *Id.*; NMSA 1978, § 32A-4-25.1 (2005).

42. CHILD WELFARE HANDBOOK, *supra* note 27, at 1-6 to -7; *see* NMSA 1978, §§ 32A-4-31 to -32 (permanent guardianship); *id.* §§ 32A-4-28 to -29 (termination of parental rights).

43. State *ex rel.* Children, Youth & Families Dep't v. Maria C., 2004-NMCA-083, ¶ 21, 94 P.3d 796, 803.

to find permanent placement for children.[44] Normally, when a child has been in foster care for fifteen out of twenty-two months, proceedings to terminate parental rights must begin.[45] In some cases, however, proceedings can continue for many years.[46]

B. Models for Representation of Children

Today, almost all states require children to be represented throughout an abuse and neglect proceeding.[47] Because of the lack of consensus on representational standards, each jurisdiction has arguably developed its own model of representation.[48] Even within a given jurisdiction, experts disagree on which model is actually used and what role the child's representative plays.[49] Despite these differences, the main representational models in use can be broadly categorized as advocate directed and client directed.[50] Under the advocate-directed model, the child is represented by a guardian ad litem, who advocates for what he or she believes to be in the child's best interest.[51] Under the client-directed model, the child is represented by an attorney who advocates for what the child has expressed as his or her wishes.[52]

Under either model, jurisdictions have room to tailor the specific qualifications and role for each type of representative.[53] Most jurisdictions have adopted advocate-

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44. *Id.* (citing Adoption and Safe Families Act, 42 U.S.C. § 629(a)(7)(A) (2000)).

45. *Id.* ¶ 22, 94 P.3d at 803 (citing NMSA 1978, § 32A-4-29(A), (K) (2003) (current version at NMSA 1978, § 32A-4-29(A), (G) (2005))). The statute allows for specific exceptions to termination proceedings, such as when the parent is making substantial progress, a permanent placement plan that does not include termination of parental rights provides the most appropriate alternative, the child is not capable of functioning if placed in a family setting, or adoption is not appropriate for the child. NMSA 1978, § 32A-4-29(G)(1)–(8).

46. For example, George F. and his younger brother were taken into custody in December 1988 and were still in state custody in December 1996. State *ex rel.* Children, Youth & Families Dep't v. George F., 1998-NMCA-119, ¶ 2, 964 P.2d 158, 159; *see also infra* Part II.F.3 (discussing the facts of *George F.*).

47. *See supra* note 24 and accompanying text.

48. Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, *in* NACC CHILDREN'S LAW MANUAL SERIES 167, 169 (1999); *see* Mandelbaum, *supra* note 24, at 27 ("[E]ach state developed its own (and in many regards idiosyncratic) model of practice."). In summarizing her 1996 survey of U.S. jurisdictions, Jean Koh Peters wrote, "If our survey revealed one thing, it was *chaos*. We joked in our office that the 'fifty-plus state' survey revealed fifty-six state systems for representing children in child-protective proceedings." PETERS, *supra* note 7, at 32.

49. Ventrell, *supra* note 48, at 169; *see* Mandelbaum, *supra* note 24, at 27–28 ("[G]reat discrepancies between statutory mandates and what occurs in reality...may be due to differing interpretations of state mandates by counties, other localities, courts, or individual representatives, or by a combination of some or all of these factors.").

50. *E.g.*, NACC RECOMMENDATIONS, *supra* note 6, at 10–15; Emily Buss, *"You're My What?": The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700–01 (1996). Other possibilities include hybrid models, wherein the lawyer represents both positions to the court, or neutral fact finder, wherein the lawyer simply presents all relevant information to the court. *Id.* at 1702. Emily Buss, however, considers these alternatives to be variations of the best interests model. *Id.* Jean Koh Peters points out that focusing on "best interests" versus "wishes" has the effect of polarizing and distorting discussions on representational models. PETERS, *supra* note 7, at 49–50. Abandoning that dichotomy would facilitate discussions and promote the development of better representational models. *See id.* at 50.

51. NACC RECOMMENDATIONS, *supra* note 6, at 10.

52. *Id.* at 13.

53. *See id.* at 10–15 (describing the three most common representational roles under the advocate-directed and client-directed models).

directed representation through an attorney guardian ad litem.[54] Under this model, the court appoints an attorney to act as guardian ad litem,[55] who uses his or her judgment to determine the child's best interest. The judgment of the guardian ad litem takes precedence over the child's expressed wishes.[56] Some jurisdictions, like New Mexico, expand the guardian ad litem's responsibility to the child, beyond the pure best interests role.[57] Very few jurisdictions have adopted a client-directed model, in which a traditional attorney essentially treats the child client as an adult client, advocating for the expressed wishes of the child and being bound by the child's directives concerning the objectives of the representation.[58] States that follow some form of the client-directed model include Michigan,[59] Massachusetts,[60] Minnesota,[61] Connecticut,[62] and Maine.[63]

Uniform standards for client-directed representation have been proposed. The American Bar Association (ABA) has adopted standards for a "child's attorney" that provide for traditional representation but allow the attorney to request appointment of a separate guardian ad litem when the child cannot express his or her wishes, or when the attorney believes that the child's expressed wishes would be seriously

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54. As of 2001, approximately sixty percent of U.S. jurisdictions followed this model. *Id.* at 10.

55. *Id.*

56. *Id.*

57. In Michigan, for example, the guardian ad litem is called a lawyer-guardian ad litem. *Id.* at 12; MICH. COMP. LAWS § 712A.17d (2004). Attorney-client privilege applies to the relationship. *Id.* § 712A.17d(a). The lawyer-guardian ad litem must also determine the child's expressed wishes, tell the court of those wishes even if the lawyer-guardian ad litem advocates for a different view, and consider those wishes when making the best interests determination. *Id.* § 712A.17d(i). The expanded responsibility of the New Mexico guardian ad litem will be discussed in Part II.C, *infra*.

58. NACC RECOMMENDATIONS, *supra* note 6, at 13.

59. Michigan allows appointment of a traditional attorney when the lawyer-guardian ad litem and child disagree about the child's best interests. MICH. COMP. LAWS § 712A.17d(k)(2) (2004).

60. Massachusetts appoints a traditional attorney and may optionally appoint a guardian ad litem. PETERS, *supra* note 7, at 39 n.10. "Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy and competent representation to the child as is due an adult client, consistent with the Massachusetts Rules of Professional Conduct." COMM. FOR PUB. COUNSEL SERVS., COMMONWEALTH OF MASS., PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES ¶ 1.1(d) (2003), *available at* http://www.mass.gov/cpcs/manuals/pcmanual/B2aCAFL.pdf. The guardian ad litem, if appointed, serves only an investigatory role. MASS. GEN. LAWS ch. 215, § 56A (2005); *see also* Maguire, *supra* note 22, at 673 ("Massachusetts...uses the client-directed approach, appointing a traditional attorney to the child. Statutory law also grants the court discretion to appoint a [guardian ad litem], but solely in an investigative capacity.").

61. Minnesota establishes a right to effective assistance of counsel, MINN. STAT. § 260C.163(3)(a) (2005), requires appointment of an attorney for children ten years and older when the court feels it is appropriate, *id.* § 260C.163(3)(b), and requires appointment of a guardian ad litem in all cases, *id.* § 260C.163(5)(a). An attorney, when appointed, is specifically excluded from acting in the role of guardian ad litem. *Id.* § 260C.163(3)(d).

62. Connecticut requires appointment of counsel, and allows the court to appoint a guardian ad litem when appropriate:

> In any proceeding in which abuse or neglect...is alleged by the applicant, or reasonably suspected by the court, a minor shall be represented by counsel appointed by the court....In all cases in which the court deems appropriate, the court shall also appoint a person, other than the person appointed to represent the minor, as guardian ad litem for such minor to speak on behalf of the best interests of the minor....

CONN. GEN. STAT. § 45a-620 (2000).

63. Maine takes a somewhat different approach than the other states, requiring the guardian ad litem to make the wishes of the child known to the court and allowing either the guardian ad litem or the child to request appointment of legal counsel for the child. ME. REV. STAT. ANN. tit. 22, § 4005(1)(E)–(F) (2001).

injurious to the child.[64] The National Association for the Counsel of Children (NACC) has adopted a revised version of the ABA standards, allowing some best-interests representation in limited circumstances.[65] Although both sets of standards express a clear interest for representation by a traditional attorney,[66] each provides "so many points of discretion and...loopholes" that they significantly weaken the client-directed model.[67] No jurisdiction has adopted either the ABA standards or the NACC revised version.[68]

C. The Youth Attorney Rule Changed Representational Models Under the Abuse and Neglect Act

With the 2005 amendments to its Children's Code,[69] New Mexico has joined the limited number of states that provide client-directed representation to children. The changes were developed after several years of work by over 100 attorneys and child advocates working under the Court Improvement Project of the New Mexico Supreme Court.[70] A primary purpose of the bill was to provide client-directed representation for children age fourteen and older in abuse and neglect proceedings.[71] This change was made in order to give older children a stronger voice in decisions being made about their lives,[72] to help transition these children into adulthood,[73] to more closely meet the standards for representation adopted by the ABA and NACC,[74] and to conform to practices in other articles of the Children's Code.[75]

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64. NACC RECOMMENDATIONS, *supra* note 6, at 12.

65. Ventrell, *supra* note 48, at 172–73; *see* ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf [hereinafter STANDARDS OF PRACTICE].

66. Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441, 442–43 (2000).

67. *Id.* at 449–50.

68. NACC RECOMMENDATIONS, *supra* note 6, at 14–15.

69. NMSA 1978, ch. 32A (2005). The amendments were introduced in Senate Bill 233. S. 233, 47th Leg., Reg. Sess. (N.M. 2005).

70. FISCAL IMPACT REPORT, *supra* note 5, at 3; Training Presentation, *supra* note 9.

71. FISCAL IMPACT REPORT, *supra* note 5, at 3; Training Presentation, *supra* note 9.

72. FISCAL IMPACT REPORT, *supra* note 5, at 3; Training Presentation, *supra* note 9.

73. Training Presentation, *supra* note 9.

74. *Id.* The ABA expresses a "clear preference" for the appointment of a child's attorney rather than a guardian ad litem, regardless of age. STANDARDS OF PRACTICE, *supra* note 65, § A-2 cmt. In 1997, NACC adopted the ABA Standards but carved out an exception to client-directed representation when the child is not capable of directing his or her attorney in a traditional adult role. NACC RECOMMENDATIONS, *supra* note 6, at 14–15. While adoption of the ABA Standards might indicate a preference for client-directed representation over advocate-directed representation, NACC does not prescribe a specific model but instead suggests that state efforts focus on ensuring that whichever model the state chooses is implemented in a way that meets children's needs. *Id.* at 5; *see also supra* notes 64–65 and accompanying text.

75. Training Presentation, *supra* note 9. Under article 2 of the Children's Code, a youthful offender, defined as a delinquent child fourteen to eighteen years of age who has committed certain felony offenses, NMSA 1978, § 32A-2-3(I)(1)–(3) (2005), is subject to adult sentencing at the discretion of the court. *Id.* § 32A-2-20(A). Under article 6, a child fourteen years and older who is subject to mental health proceedings shall be represented by an attorney, *id.* § 32A-6-4 (1995), and can receive treatment on a voluntary residential basis. *Id.* § 32A-6-12 (1999). Only children under fourteen years can receive residential treatment without the child's consent. *See id.* § 32A-6-11.1.

1. Representation by a Guardian Ad Litem Before the 2005 Amendment

Before the 2005 amendment, the Abuse and Neglect Act required that the court appoint a guardian ad litem for all children.[76] The guardian ad litem was to be an attorney with the duty to zealously represent and protect the child's best interests before the court.[77] When reasonable and appropriate, the guardian ad litem could also present the child's declared position to the court.[78] The guardian ad litem was required "to advocate the child's expressed position only to the extent that the child's desires [were], in the guardian ad litem's professional opinion, in the child's best interests."[79] Thus, the best interests role was emphasized over the expressed wishes role.[80] This dual role meant that guardians ad litem did not "function in the same manner as traditional attorneys."[81] Under the best wishes role, the guardian ad litem acts as an extension of the court, assisting in investigation of the facts and reporting on placement and treatment.[82] This form of representation essentially follows the traditional attorney guardian ad litem model.[83]

2. Representation by a Guardian Ad Litem and Traditional Attorney After the 2005 Amendment

Following the 2005 amendment, the Abuse and Neglect Act maintains representation by guardian ad litem for children under fourteen years of age.[84] The requirement that the guardian be an attorney who zealously represents and protects the child's best interests remains essentially unchanged,[85] as does the guardian ad litem's role as an extension of the court.[86] One significant difference, though, is that the guardian ad litem is now *required* to present the child's expressed wishes to the

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76. NMSA 1978, § 32A-4-10(C) (1993) ("During an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child at the inception of the proceedings.").

77. *Id.* § 32A-4-10(E) ("The court shall assure that the child receives zealous representation by the child's guardian ad litem, pursuant to the provisions of Section 32A-1-7...."); *id.* § 32A-1-7(A) (1995) ("A guardian ad litem shall zealously represent the child's best interests with respect to matters arising pursuant to the provisions of the Children's Code."); *id.* § 32A-1-4(J) (2003) ("'[G]uardian ad litem' means an attorney appointed by the children's court to represent and protect the best interests of the child in a court proceeding....").

78. *Id.* § 32A-1-7(D)(2) (1995) ("When a child's circumstances render the following duties and responsibilities reasonable and appropriate, the guardian ad litem shall...present the child's declared position to the court....").

79. State *ex rel.* Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, ¶ 36, 955 P.2d 204, 213.

80. *Id.* ¶ 36, 955 P.2d at 212–13.

81. State *ex rel.* Children, Youth & Families Dep't v. George F., 1998-NMCA-119, ¶ 11, 964 P.2d 158, 161.

82. *Id.* ¶¶ 11–12, 964 P.2d at 161–62; *see* Collins *ex rel.* Collins v. Tabet, 111 N.M. 391, 398–99, 806 P.2d 40, 47–48 (1991).

83. *See supra* notes 54–56 and accompanying text.

84. NMSA 1978, § 32A-4-10(C) (2005) ("At the inception of an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child under fourteen years of age.").

85. *Id.* § 32A-4-10(F) ("The court shall assure that the child's guardian ad litem zealously represents the child's best interest...."); *id.* § 32A-1-7(A) ("A guardian ad litem shall zealously represent the child's best interests in the proceeding for which the guardian ad litem has been appointed and in any subsequent appeals."); *id.* § 32A-1-4(I) ("'[G]uardian ad litem' means an attorney appointed by the children's court to represent and protect the best interests of the child in a court proceeding....").

86. The powers and duties of the guardian ad litem still include such judicial functions as assessing CYFD's permanency and treatment plans and reporting to the court on compliance with the plans and the child's adjustment to them. *Id.* § 32A-1-7(E)(1)–(8).

court,[87] rather than merely being allowed to present them when reasonable and appropriate.[88] The new requirement to present the child's expressed wishes to the court makes New Mexico's guardian ad litem very similar to Michigan's lawyer-guardian ad litem.[89]

For children fourteen and older, the New Mexico Abuse and Neglect Act now requires appointment of a traditional attorney.[90] If a child is already in the system when he or she turns fourteen, then under most circumstances the child's guardian ad litem will continue representing the child as an attorney.[91] The role of the attorney is to zealously represent the child,[92] in the same manner as the attorney would represent an adult client.[93] Unlike the guardian ad litem, the statute does not place any additional duties on the child's attorney, such as communicating with professionals involved in the child's care, attending substitute care review board hearings, or reporting to the court on the child's adjustment to placement and CYFD's compliance with the treatment plan.[94] The youth attorney rule is, by definition, a traditional attorney model of representation.[95]

D. Rules of Professional Conduct

In addition to the Children's Code, the rules of professional conduct also govern the conduct of the youth attorney. Among the ABA Model Rules of Professional Conduct, only Rule 1.14 applies specifically to children.[96] New Mexico's version of Rule 1.14 states that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority*, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[97] The New Mexico rule also allows "[a] lawyer [to] seek the appointment of a guardian or conservator or take other protective action with respect to a client, only

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87. *Id.* § 32A-1-7(D) ("After consultation with the child, a guardian ad litem *shall* convey the child's declared position to the court at every hearing.") (emphasis added).

88. *See supra* note 78 and accompanying text.

89. *See supra* note 57 and accompanying text.

90. NMSA 1978, § 32A-4-10(C) (2005) ("At the inception of the abuse and neglect proceeding,...[i]f the child is fourteen years of age or older, the court shall appoint an attorney for the child.").

91. *Id.* § 32A-4-10(E). Exceptions are when the child requests a different attorney, the guardian ad litem requests to be removed, or the court determines that the appointment of a different attorney is appropriate. *Id.* § 32A-4-10(E)(1)–(3).

92. *Id.* § 32A-4-10(F) ("The court shall assure that...the child's attorney zealously represents the child.").

93. *Id.* § 32A-1-7.1(A) ("The attorney shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct."); *see also id.* § 32A-4-10(A) ("A child subject to the provisions of the Children's Code is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code."); *id.* § 32A-1-16(A) (1993) (providing for the same).

94. *Compare id.* § 32A-1-7.1 (2005) (requiring the attorney to represent the child as an adult client), *with id.* § 32A-1-7(E)(1)–(8) (defining additional duties of the guardian ad litem), *and supra* note 82 and accompanying text (describing the guardian ad litem as an extension of the court).

95. *See supra* note 58 and accompanying text.

96. PETERS, *supra* note 7, at 42.

97. Rule 16-114(A) NMRA (emphasis added). Rule 16-114(A) is substantially the same as the ABA version, changing only "the representation" to "a representation" and substituting "diminished" for "impaired." *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(A) (2002).

when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[98]

The Model Rules are more explicit in describing the protective action that may be taken:

> 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 interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[99]

In contrast to the New Mexico rule, the ABA rule emphasizes that the lawyer may act to prevent harm to the client and specifically allows for consultation with others and for appointment of a guardian ad litem.[100] The ABA rule also allows for the lawyer to reveal confidential information, otherwise protected under Rule 1.6, to the extent reasonably necessary to protect the interests of a client with diminished capacity.[101] The New Mexico rule does not mention confidentiality in particular, but the commentary notes that the lawyer can be put in an "unavoidably difficult" position and "may seek guidance from an appropriate diagnostician."[102]

E. The Pending Cases Clause of the New Mexico State Constitution

While statutes and court rules govern the role and conduct of youth attorneys, the pending cases clause of the New Mexico Constitution[103] affects the *implementation* of the youth attorney rule. This clause states that "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."[104] This provision is unique to New Mexico, as no other state has a similar provision in its constitution.[105] Proceedings that began prior to the effective date of the amendment might be affected by the clause.

The original purpose of the pending cases clause was to insure that cases were won on their merits, not through political influence.[106] In territorial days, when the New Mexico Constitution was being drafted, parties to a case often influenced the legislature to change the rules of evidence or procedure to their benefit.[107] Today, the pending cases clause applies broadly to state regulatory agencies, the courts' own rule-making authority,[108] and other governmental entities.[109] In determining

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98. Rule 16-114(B) NMRA.
99. MODEL RULES OF PROF'L CONDUCT R. 1.14(B).
100. *Compare* Rule 16-114(B) NMRA, *with* MODEL RULES OF PROF'L CONDUCT R. 1.14(B).
101. MODEL RULES OF PROF'L CONDUCT R. 1.14(C) (referring to Rule 1.6).
102. Rule 16-114 cmt. NMRA.
103. N.M. CONST. art. IV, § 34.
104. *Id.*
105. Aaron Kugler, *Rights and Remedies: An Analysis of Article IV, § 34 of the New Mexico Constitution*, 35 N.M. TRIAL LAW. 61, 77 (2005).
106. *Id.*
107. *Id.* (citing Stockard v. Hamilton, 25 N.M. 240, 245, 180 P. 294, 295 (1919)).
108. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, ¶ 7, 110 P.3d 526, 528 (citing Marquez v. Wylie, 78 N.M. 544, 546, 434 P.2d 69, 71 (1967)).
109. Kugler, *supra* note 105, at 79.

whether to apply the provision, the courts focus on the meaning of "pending"[110] and have carved out only a few limited exceptions.[111] The remainder of this section lays the foundation for analyzing the effect of the pending cases clause on the youth attorney rule.[112] The following examination of decisions involving the pending cases clause shows that the courts have adopted sometimes confusing constructions of the provision, but the case law can be unified by focusing on the functional effects of legislation rather than on its formal language.

1. "Pending Case" Defined by the Effect on a Right or Remedy

In most situations, the courts apply the pending cases clause when a right has been affected, whether that right is substantive or procedural.[113] In *City of Roswell v. Holmes*, the court considered the impact of the clause on a statute that created a right to enter a motion to dismiss on cases pending when the statute became effective.[114] The court found that, as far as the pending cases clause was concerned, it did not matter if the statute was procedural or substantive.[115] In either case, the court said, the statute "undoubtedly" affected a right.[116]

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110. *Id.* at 82.

111. *Id.* at 85. The exceptions to section 34 are constitutional amendments, a party who chooses to follow the new legislation, and legislation not intended to influence a pending case. *Id.* at 86. The former two are true exceptions; the latter is better understood as an application of the statute under the functional definition of "pending case." *See infra* note 120.

112. *See infra* Part III.B.

113. City of Roswell v. Holmes, 44 N.M. 1, 5, 96 P.2d 701, 703 (1939).

114. *Id.* at 2, 96 P.2d at 701.

115. *Id.* at 4–5, 96 P.2d at 702–03. The New Mexico Supreme Court has never explicitly held that the pending cases clause applies to legislation affecting substantive rights. The holding with respect to substantive rights in *Holmes* is arguably dicta because the court first found that the statute was procedural, not substantive. *Id.* at 4, 96 P.2d at 702. This lack of a clear holding may be responsible for later confusion. For example, in *Gray v. Armijo*, 70 N.M. 245, 252–53, 372 P.2d 821, 827 (1962), the plaintiffs argued that application of a statute, if procedural rather than substantive, was barred by article IV, section 34. The court based its decision on the meaning of "pending," rather than the procedural or substantive nature of the statute. *Id.* In *Heron v. Gaylor*, 53 N.M. 44, 49, 201 P.2d 366, 369 (1948), the plaintiff argued that a new rule could not affect a substantial right. Without addressing the substantial nature of the right, the court held that the rule was not a change in procedure contemplated by the constitution. *Id.* at 49, 201 P.2d at 370. The court of appeals approached the substantive rights issue in *Mott v. Sun Country Garden Products, Inc.*, 120 N.M. 261, 264, 901 P.2d 192, 195 (Ct. App. 1995), where the plaintiff argued that a statute barring a defense was substantive rather than procedural, and thus was valid even though it was passed after the plaintiff initiated the action. In finding for the plaintiff, the New Mexico Court of Appeals relied on a New Mexico federal district court case, which held that the defense had never existed, so a statute prohibiting the defense could not affect the substantive rights of defendants or plaintiffs. *Id.* at 265, 901 P.2d at 196 (citing Armijo v. Atchison, Topeka & Santa Fe Ry., 754 F. Supp. 1526, 1535 (D.N.M. 1990)); *see also infra* notes 320–324 and accompanying text. Because the statute did not affect a right, it was valid under the pending cases clause. *Id.* at 265, 901 P.2d at 196. It was not until a later case that the court of appeals explicitly held that the clause applies to substantive rights and remedies. State v. Stanford, 2004-NMCA-071, ¶ 5, 94 P.3d 14, 16 (citing Hillelson v. Republic Ins. Co., 96 N.M. 36, 37–38, 627 P.2d 878, 879–80 (1981)). *Hillelson*, the case cited for the holding in *Stanford*, dealt with whether a change in a statutory interest rate would be prohibited under the pending cases clause. *Hillelson*, 96 N.M. at 37–38, 627 P.2d at 879–80. The court in *Hillelson*, however, found only that either a right or a remedy was affected, without stating whether the right or remedy was substantive or procedural. *Id.* at 38, 627 P.2d at 880. That finding, in turn, relied on two U.S. Supreme Court cases, one that was similarly equivocal, and one that held that statutory interest is a remedy rather than a right. Funkhouser v. J.B. Preston Co., 290 U.S. 163, 167 (1933) ("The statute in question concerns a remedy."); Morley v. Lake Shore & M.S. Ry., 146 U.S. 162, 170–71 (1892) (declining to distinguish between remedies and substantial rights, but holding that neither could have been affected).

116. *Holmes*, 44 N.M. at 5, 96 P.2d at 703.

This emphasis on the effects of a statute leads to a functional definition of "pending case." A statute that creates a new procedure does not automatically invoke the pending cases clause.[117] Rather, the court determines whether a case is "pending" under its construction of the particular statute.[118] The court is guided in this construction by the intention of the clause, which is "'to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation.'"[119] If a change in procedure serves a neutral purpose and is not enacted to decide the merits of a case, then the case is not pending within the meaning of the clause.[120]

Ultimately, the courts determine neutrality by whether the statute affects a party's ability to achieve a particular result.[121] Basing the analysis on the effects of the statute makes the difference between right and remedy, and between procedure and substance, irrelevant.[122] For example, a statute that changes the procedure for appealing an agency decision without affecting access to judicial review does not invoke the pending cases clause.[123] Similarly, a procedure that sets a specific day for hearing motions, thereby changing the custom of hearing them upon notice, does not invoke the clause.[124] In contrast, a statute that changes a remedial interest rate,[125] or one that changes the maximum sentence available in a criminal case,[126] affects the outcome of the case and thus does invoke the clause.

2. "Pending Case" Defined by the Formal Language of Article IV, Section 34

Despite the functional, effects-based definition of "pending," the courts sometimes refer to a formal literal definition.[127] The formal definition states that a

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117. *In re* Held Orders of U.S. West Commc'ns, Inc., 1999-NMSC-024, ¶ 12, 981 P.2d 789, 793.

118. *Id.* ¶ 13, 981 P.2d at 793 (citing Stockard v. Hamilton, 25 N.M. 240, 245, 180 P. 294, 295 (1919)).

119. *Id.* ¶ 14, 981 P.2d at 793 (quoting *Stockard*, 25 N.M. at 244–45, 180 P. at 295).

120. *Id.* ¶ 16, 981 P.2d at 794. In effect, the court ties the definition of pending to the intent of the statute. Although a case may be pending under a formal definition of the term, *see infra* Part II.E.2, it may not be functionally pending when considered in the context of the statute. It has been argued that the holding in *In re U.S. West* is dicta because the court decided the issue based on the formal definition of pending. Kugler, *supra* note 205, at 86, 88 n.122; *see infra* note 127. As argued in this Comment, however, the formal definition is merely a specific application of the functional definition. *See infra* note 132 and accompanying text. Therefore, the conclusion based on the formal definition is not necessary after the court's initial conclusion based on the functional definition. The holding based on the formal definition, then, is the dicta.

121. State v. Stanford, 2004-NMCA-071, ¶ 5, 94 P.3d 14, 16 (citing Hillelson v. Republic Ins. Co., 96 N.M. 36, 37–38, 627 P.2d 878, 879–880 (1981)).

122. *Id.*; *see supra* notes 115–116 and accompanying text.

123. *In re U.S. West*, 1999-NMSC-375, ¶ 16, 981 P.2d at 794 (holding that legislation that serves "a neutral purpose of providing an orderly procedure for the transfer of [functions from one agency to another] without impairing an aggrieved party's right to meaningful judicial review" is consistent with "'the spirit and beneficial purpose'" of article IV, section 34 (quoting State *ex rel.* State Tax Comm'n v. Faircloth, 34 N.M. 61, 64, 277 P. 30, 31 (1929))).

124. Heron v. Gaylor, 53 N.M. 44, 49, 201 P.2d 366, 369–70 (1948).

125. *Hillelson*, 96 N.M. at 38, 627 P.2d at 880 (holding that "a change in [statutory] interest affects either the rights or remedies of the parties").

126. *Stanford*, 2004-NMCA-071, ¶ 7, 94 P.3d at 17 (holding that an amendment to the habitual offender statute that removes enhancement of the defendant's sentence was not a "neutral legislative act in that...it can benefit a defendant and affect a right or remedy of the State").

127. *In re U.S. West*, 1999-NMSC-024, ¶ 17, 981 P.2d at 794 (finding that, at least for this case, a "more literal reading of the 'pending case' requirement" results in the same conclusion as the functional analysis).

case becomes pending when it is "filed on the docket of some court"[128] and is no longer pending after a final judgment is entered.[129] The courts have recognized exceptions to this "final judgment" rule, such as when a judgment remains under control of the issuing court[130] or when "subsequent district court proceedings can be traced to appellate remand instructions or an opinion that directs a party to a new cause of action."[131] These exceptions, however, are simply situations when legislation can affect the outcome of a case despite the entry of a final judgment. Viewed in this manner, the combination of the formal definition and its exceptions can be seen as equivalent to the functional definition.[132]

F. Illustrative Cases

The challenges presented by the youth attorney amendment to the Abuse and Neglect Act are best understood in the context of actual cases.[133] Four New Mexico cases, described in this section, show some of the problems that can arise when a guardian ad litem provides representation. The amended statute, by appointing an attorney, solves some problems while at the same time creating new ones.

1. *State ex rel. Children, Youth & Families Department v. Esperanza M.*

Problems can arise when a guardian ad litem finds that the child's best interests conflict with the child's expressed wishes. Esperanza M. was thirteen years old[134] when she told a school counselor that she had been sexually abused by her adoptive

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128. *Id.* ¶ 13, 981 P.2d at 793 (quoting Romero v. N.M. Health & Env't Dep't, 107 N.M. 516, 519, 760 P.2d 1282, 1285 (1988)).

129. *Id.*

130. *Id.* (citing Marquez v. Wylie, 78 N.M. 544, 546, 434 P.2d 69, 71 (1967)).

131. *Id.* (quoting Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 115 N.M. 229, 237, 849 P.2d 372, 380 (Ct. App. 1993)).

132. Courts trace the functional definition of pending back to *Stockard*. *See, e.g.*, *In re U.S. West*, 1999-NMSC-024, ¶ 14, 981 P.2d at 793; Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, ¶ 7, 110 P.3d 526, 528; State v. Stanford, 2004-NMCA-071, ¶ 5, 94 P.3d 14, 16. *Stockard*, though, combined the functional and formal definitions by noting that "[t]he evident intention of the Constitution is to prevent legislative interference...in cases that are in the process or course of litigation...and which have not been concluded, finished, or determined by a final judgment." Stockard v. Hamilton, 25 N.M. 240, 245, 180 P. 294, 295 (1919). Immediately thereafter, the court stated that "[s]uch a provision...does not apply to a case like the present one, where a final judgment was obtained long prior to the enactment of the law...." *Id.* In other words, once a final judgment has been rendered, legislation cannot affect the outcome of a case, and there is no reason to apply the pending cases clause. This is the functional definition of "pending case." The so-called exceptions to the "final judgment" rule, *see supra* notes 130–131 and accompanying text, are instances where legislation can still affect the outcome of a case despite the entry of a final judgment and thus are merely applications of the functional definition. These situations must be distinguished from the true exceptions noted at *supra* note 111, which are situations when, despite the effect of legislation on a pending case, the courts do not apply the pending cases clause.

133. *See, e.g.*, Jennifer Paige Hanft, *Attorney for Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, but Is It a Formula for Malpractice?*, 34 LAND & WATER L. REV. 381, 383 (1999) (using *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998), to exemplify the difficulties that arise from failing to define the duties and roles of a guardian ad litem under Wyoming law). Other authors use hypothetical situations, which have the advantage of including more issues within a single fact pattern. *See, e.g.*, Mandelbaum, *supra* note 24, at 9; Michael D. Drews & Pamela J. Halprin, Note, *Determining the Effective Representation of a Child in Our Legal System: Do Current Standards Accomplish the Goal?*, 40 FAM. CT. REV. 383, 384 (2002).

134. State *ex rel.* Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, ¶ 3, 955 P.2d 204, 206.

father.[135] During a psychiatric examination, however, Esperanza said that she felt extreme pressure to protect her family and wanted to testify so that "she could lie and convince the judge that the abuse never occurred."[136] Esperanza was not allowed to testify because the psychiatrist thought it would be psychologically damaging.[137]

The children's court found that Esperanza had been neglected and abused.[138] Esperanza's parents appealed.[139] Esperanza would have been at least fourteen years old when the appeal was heard.[140] Before the appeal, but after the conclusion of the original proceedings, the children's court allowed Esperanza's original guardian ad litem to withdraw and appointed a new guardian ad litem to represent Esperanza incident to the appeal.[141]

Upon appeal, Esperanza's parents sought to strike the new guardian ad litem's answer brief.[142] The guardian ad litem thought that it was in Esperanza's best interests to represent that Esperanza had been abused, despite her denial.[143] The parents argued that such a contradictory position was contrary to the role of the guardian ad litem, or at least required the appointment of separate counsel for Esperanza.[144] The guardian ad litem's brief, however, had also noted Esperanza's disagreement.[145] The court held that this approach properly balanced the guardian ad litem's dual duties of representing Esperanza's best interests and advocating her expressed position.[146]

2. *State ex rel. Children, Youth & Families Department v. Candice Y.*

In another case illustrating the possible conflicts between representing a child's best interests and advocating for a child's expressed wishes, Candice Y. reported that her stepfather had sexually abused her, but later recanted her story.[147] Unlike in Esperanza's case, the court allowed Candice to testify at her preliminary hearing.[148] Candice stated that she did not remember what she had said earlier and that she had made up the abuse so that her stepfather would get marriage counseling.[149] The children's court concluded that Candice had been neglected or abused.[150]

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135. *Id.* ¶ 2, 955 P.2d at 206.
136. *Id.* ¶ 5, 955 P.2d at 207.
137. *Id.*
138. *Id.* ¶ 1, 955 P.2d at 206.
139. *Id.*
140. Esperanza was born on July 8, 1982, *id.* ¶ 3, 955 P.2d at 206, and the case was decided in 1998.
141. *Id.* ¶ 35, 955 P.2d at 212. Although the appellate court did not say why the children's court allowed the original guardian ad litem to withdraw, it later noted that the original guardian ad litem's representation was "materially deficient" and failed to meet the standards of the Children's Code. *Id.* ¶ 40, 955 P.2d at 213.
142. *Id.* ¶ 35, 955 P.2d at 212.
143. *See id.* ¶ 38, 955 P.2d at 213.
144. *Id.* ¶ 35, 955 P.2d at 212.
145. *Id.* ¶ 38, 955 P.2d at 213.
146. *Id.* ¶ 39, 955 P.2d at 213.
147. State *ex rel.* Children, Youth & Families Dep't v. Candice Y., 2000-NMCA-035, ¶¶ 3–4, 999 P.2d 1045, 1049.
148. *See id.* ¶ 9, 999 P.2d at 1049.
149. *Id.*
150. *Id.* ¶ 5, 999 P.2d at 1049.

Like in *Esperanza M.*, the guardian ad litem told the children's court that Candice had lied in her testimony at the preliminary hearing.[151] Candice had become extremely hostile toward her guardian ad litem and clearly stated that she did not want the proceedings to continue.[152] The guardian ad litem decided to proceed with the case and the investigation without Candice's cooperation.[153] The children's court denied the requests of Candice and her parents to remove the guardian ad litem.[154] The court of appeals upheld that decision, noting that, as in *Esperanza M.*, the guardian ad litem's duty is to zealously represent the child's best interests, even when that means contradicting the child's story.[155]

3. *State ex rel. Children, Youth & Families Department v. George F.*

The rules of professional conduct can affect the interaction of the child's counsel with CYFD, not just with their clients. George F. and his younger brother, Frank F., were taken into state custody in December, 1988 after they had been physically and sexually abused.[156] In addition to the emotional problems caused by the abuse, George was also deaf, legally blind, and communicated only by sign language.[157] Eight years later, in December 1996, both children had endured multiple foster placements and were still in the custody of the state.[158]

In May 1996, the children's court ordered CYFD to secure long-term placement for George.[159] Concerned about the lack of staff who had experience dealing with George's problems at the proposed institutional placement, George's guardian ad litem attempted to communicate ex parte with CYFD social workers.[160] CYFD prohibited the social workers assigned to the case from communicating with the guardian ad litem.[161] CYFD's attorney considered the social workers to be his clients and the guardian ad litem to be an adversarial party.[162] Communications with the social workers would thus violate "the ethical rule prohibiting attorneys from communicating with a party they know to be represented by counsel about the subject of the representation."[163] The children's court allowed the communications on the grounds that social workers are not clients of CYFD,[164] and the ruling was upheld on appeal.[165]

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151. *Id.* ¶ 29, 999 P.2d at 1053.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* ¶ 31, 999 P.2d at 1054. The court may even have backed off the requirement in *Esperanza M.* to also advocate the child's expressed position, *see supra* note 147 and accompanying text, by arguing that "[t]he guardian ad litem had no duty, however, to advance Candice's recantation or revisionist story, if she did not believe it." *Candice Y.*, 2000-NMCA-035, ¶ 31, 999 P.2d at 1054.
156. State *ex rel.* Children, Youth & Families Dep't v. George F., 1998-NMCA-119, ¶ 2, 964 P.2d 158, 159.
157. *Id.*
158. *Id.*
159. *Id.* ¶ 3, 964 P.2d at 159.
160. *Id.*
161. *Id.* ¶ 4, 964 P.2d at 159.
162. *Id.*
163. *Id.* (citing Rule 16-402 NMRA).
164. *Id.* ¶ 5, 964 P.2d at 160.
165. *Id.* ¶ 16, 964 P.2d at 163.

4. *State ex rel. Children, Youth & Families Department v. Joanna V.*

This final case illustrates the conflicts that can arise when a guardian ad litem changes roles to that of an advocate. Joanna V. was fourteen years old when CYFD initiated abuse and neglect proceedings against her mother.[166] Following a fight at school, and while still in state custody, Joanna entered into delinquency proceedings.[167] The guardian ad litem who represented Joanna in the abuse and neglect proceedings also represented her as an attorney in the delinquency proceedings.[168] Joanna pled guilty to one of the charges[169] and then attempted to withdraw her plea on the grounds that the dual role of her attorney/guardian ad litem created a conflict of interest.[170] The state supreme court recognized the "gravity of the potential conflict" when one attorney represents a child in different roles in the two proceedings,[171] but nevertheless found no actual conflict.[172] The court also recognized that, in most cases, the child is unlikely to understand the subtle differences between an advocate and a guardian ad litem and will be confused when one attorney acts in both roles.[173]

III. ANALYSIS

The youth attorney rule faces threats from two fronts: statutory ambiguities leading to the erosion of children's new rights and constitutional impediments to application of the rule. As the preceding sections have shown, the intent of the youth attorney rule is to provide traditional adult representation to children fourteen and older.[174] The limited guidance provided by the Children's Code and the rules of professional conduct allows children with "traditional adult representation" to be treated differently than adults.[175] Youth attorneys could even act as a guardian ad litem,[176] perhaps out of fear that a child would be left unprotected.[177] Youth attorneys and the courts together, however, provide at least as much protection as the current system.[178] Furthermore, guardians ad litem who transition into youth attorneys have a unique opportunity to help their clients avoid the confusion that can sometimes accompany client-directed representation.[179]

In addition to the uncertainty over the role of the youth attorney, the pending cases clause of the state constitution, on its face, blocks the application of the youth attorney rule altogether for certain children.[180] The youth attorney rule does not

166. State *ex rel.* Children, Youth & Families Dep't v. Joanna V., 2004-NMSC-024, ¶ 2, 94 P.3d 783, 784.
167. *Id.* ¶ 3, 94 P.3d at 784–85.
168. *Id.*
169. *Id.*
170. *Id.* ¶ 8, 94 P.3d at 786. Joanna merely asserted a conflict; she described neither the nature of the conflict nor its consequences. *Id.*
171. *Id.* ¶ 10, 94 P.3d at 786.
172. *Id.* ¶ 17, 94 P.3d at 787.
173. *Id.* ¶ 16, 94 P.3d at 787.
174. *See supra* Part II.C.
175. *See infra* Part III.A.1.
176. *See infra* note 221 and accompanying text.
177. *See infra* notes 226–230 and accompanying text.
178. *See infra* notes 226–230 and accompanying text
179. *See infra* Part III.A.3.
180. *See infra* Part III.B.

change the *possible* outcomes of child protective proceedings, so such proceedings are not "pending cases" under the formal definition of "pending."[181] Functionally, though, the rule can change the actual outcome of the proceeding, which should make the proceedings "pending cases."[182] Under the common law, however, children have a right to representation of their choice, so the youth attorney rule does nothing more than codify an existing right.[183] This takes the proceedings out of the functional definition of "pending cases," avoiding the constitutional prohibition and allowing the appointment of youth attorneys for all children.[184]

A. Defining the Role of the Child's Attorney in New Mexico

Determining the role of the child's attorney can be difficult.[185] The confusion noted about the role of children's representatives in the different states extends to the role of representatives within a single state.[186] Often, the role of the representative is not well-defined and can only be determined through an "exhaustive search of statut[es], judicial rule[s], ethical rules, [and] case law."[187] Such searches may not be easy when the relevant sections are scattered throughout different parts of the state code.[188] In New Mexico, the role of the guardian ad litem is defined in three different sections of the Children's Code located in two different articles[189] and is further refined in case law.[190] Ultimately, the statutes and rules may not show how children are represented in practice, so new representatives must talk to actual practitioners.[191] This ambiguity leads many lawyers to make their own decision regarding their proper role, leading to confusion among all people involved in child protective proceedings and a reduction in the quality of legal representation.[192] To avoid confusion, states should clearly articulate the standards governing the role of the child's representative[193] and use precise language in their statutes.[194]

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181. *See infra* Part III.B.1.

182. *See infra* Part III.B.2.

183. *See infra* Part III.B.3.

184. *See infra* Part III.B.3.

185. Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857, 1858 (1996) ("The fundamental responsibilities of the child's attorney have historically been difficult to pin down.").

186. *See supra* notes 48–49 and accompanying text.

187. PETERS, *supra* note 7, at 41 (footnote omitted).

188. Peters uses Connecticut as an example where, before 1996, child protective proceedings were defined in the family law title of the state statutes, but the role of the guardian ad litem was defined in the social and human services and resources title—without a cross-reference between the sections. *Id.* at 41 n.12. A number of "extremely careful" studies had missed the statutory provision. *Id.*

189. *See supra* notes 84–86.

190. *See, e.g.*, *supra* notes 79–82 and accompanying text.

191. PETERS, *supra* note 7, at 41–42.

192. DONALD N. DUQUETTE ET AL., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, ch. VII (1999), *available at* http://web.archive.org/web/20041009213315/http://www.acf.hhs.gov/programs/cb/publications/adopt02/02final.htm.

193. *Id.*

194. *See* PETERS, *supra* note 7, at 39 n.10 (noting that "[w]ords like 'represent' and 'advocate' suggest traditional legal counsel, but are compromised by association with words like 'protect' and 'best interests'").

1. The Role of the Youth Attorney as Defined by Statute and the Rules of Professional Conduct

The 2005 amendment to the New Mexico Children's Code created a new statutory right to representation by a traditional attorney for children fourteen years of age and older.[195] The statute clearly requires the youth attorney to represent the child as an adult and to follow the standard rules of professional conduct.[196] Interpreting these rights requires not just reference to the statutory language itself, but also to "the legislative purposes expressed in the [Children's] Code."[197] Comparing the current version of the statute with the pre-amendment version can indicate the legislature's intent.[198] More specifically, the adoption of language that "children are to be treated the same as adults unless the Children's Code specifies otherwise" indicates that the legislature intended for legal issues related to children to be governed by the same standards that apply to adults.[199]

Governing children under the same standards as adults does not mean that children will always be treated in exactly the same way as adults.[200] The rules of professional conduct provide some limited guidance for lawyers who represent children.[201] Under the New Mexico rules, an attorney must maintain a normal relationship with a minority client "as far as reasonably possible."[202] While it may be possible for an attorney to have a lawyer-client relationship with an older child that is "substantially similar" to the attorney's relationship with an adult, the rules provide no guidance as to "where and how the relationships are to differ."[203] The rules simply require the lawyer to evaluate the child client for an impairment based on minority, in the same way the lawyer evaluates the adult client for an impairment based on "mental disability or...some other reason."[204] The rule is the same for child and adult, and thus the representation is consistent with the statutory mandate for the youth attorney to provide children with "the same manner of legal representation and be bound by the same duties to the child as [to] an adult client."[205] The difference, of course, is that the child client can be considered impaired based solely on age and thus can be treated differently than an adult who is unimpaired.[206]

2. Interpreting the Role of the Youth Attorney Through New Mexico Case Law

Rule 16-114 in practice provides "remarkably little guidance" regarding when an attorney should seek the appointment of a guardian or what the protective action

195. *See supra* note 90 and accompanying text.
196. *See supra* note 93.
197. Doe v. State, 100 N.M. 579, 581, 673 P.2d 1312, 1314 (1984) (citing *In re* Doe, 88 N.M. 481, 482, 542 P.2d 61, 62 (Ct. App. 1975)).
198. *Id.* at 582–83, 673 P.2d at 1315–16.
199. *Id.* at 583, 673 P.2d at 1316.
200. *See infra* notes 201–206 and accompanying text.
201. PETERS, *supra* note 7, at 42.
202. Rule 16-114(A) NMRA; *see also supra* Part II.D.
203. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1401 (1996).
204. Rule 16-114(A) NMRA.
205. NMSA 1978, § 32A-1-7.1 (2005).
206. Rule 16-114(A) NMRA.

might comprise.[207] Likewise, New Mexico case law provides little additional help. Only three appellate opinions reference rule 16-114.[208] Interestingly, all three cases involved children's court cases that fell under the Abuse and Neglect Act: two involved the appointment of a guardian ad litem for the mother in termination of parental rights proceedings,[209] and one involved the appointment of a guardian ad litem for the child in a protective proceeding.[210] In the case of *Stella P.*, the mother's attorney recognized the mother's mental illness and asked the court to appoint a guardian ad litem to represent the child's best interests.[211] Although the appointment was based on mental illness, not minority, the case shows that the courts interpret Rule 16-114 to allow the appointment of a guardian ad litem.[212]

In *Esperanza M.*, the case most relevant to the youth attorney rule, the court determined that a guardian ad litem can both represent a child's best interests and present the child's expressed wishes to the court, even when those interests and wishes conflict.[213] Although the court based its decision on the dual role defined in section 32A-1-7 of the Children's Code,[214] it also noted that the dual role is consistent with the rules of professional conduct.[215] The court observed that Rule 16-102(A) requires a lawyer to "abide by a client's decisions concerning the objectives of representation."[216] In this case, the child's objective was to protect her family by testifying that she had never been abused.[217] The guardian ad litem's position in contradiction of this objective was consistent with Rule 16-102(A) because, under Rule 16-114(A), the representative's relationship with the client is to be informed by any impairments to the "client's ability to make adequately considered decisions in connection with the representation."[218] Although the court's reasoning was dicta, it relied only on the rules of professional conduct, and not on the representative's statutory role as a guardian ad litem.[219] The rules of professional conduct, however,

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207. *See* PETERS, *supra* note 7, at 44. Peters analyzed a version of ABA Model Rule 1.14 that was identical, in both the text of the statute and the commentary, to the current New Mexico Rule 16-114. Citing to the literature, Peters quotes various descriptions of Model Rule 1.14, including "unhelpful[]," "inadequate," "confusing," "incoherent," "ambiguous," and "provid[ing] only superficial guidance." *Id.* at 44 n.14.

208. The three cases are *State ex rel. Children, Youth & Familes Department v. Stella P.*, 1999-NMCA-100, 986 P.2d 495, *State ex rel. Children, Youth & Families Department v. Esperanza M.*, 1998-NMCA-039, 955 P.2d 204, and *State ex rel. Children, Youth & Families Department v. Lilli L.*, 121 N.M. 376, 911 P.2d 884 (Ct. App. 1995).

209. *Stella P.*, 1999-NMCA-100, 986 P.2d 495; *Lilli L.*, 121 N.M. 376, 911 P.2d 884. *Lilli L.* involved the appointment of an attorney or guardian ad litem for a minor parent in a termination of parental rights proceeding under Rule 1-017(C) NMRA. *Lilli L.*, 121 N.M. at 378, 911 P.2d at 886. The case is not important for this discussion because, although the court quoted Rule 16-114, it did not explain how—or if—that rule affected the decision. *Id.* at 378–79, 911 P.2d at 886–87.

210. *Esperanza M.*, 1998-NMCA-039, 955 P.2d 204. For a discussion of *Esperanza M.*, see *supra* Part II.F.1.

211. *Stella P.*, 1999-NMCA-100, ¶ 4, 986 P.2d at 497. The guardian ad litem was appointed in addition to the attorney, not instead of the attorney. *See id.* ¶ 9, 986 P.2d at 499 (referring to the presence of both an attorney and a guardian ad litem at hearing).

212. The rule only mentions the appointment of a guardian or conservator, but it also allows for "other protective action." Rule 16-114 NMRA; *see also supra* note 98 and accompanying text.

213. *See supra* Part II.F.1.

214. *Esperanza M.*, 1998-NMCA-039, ¶ 38, 955 P.2d at 213.

215. *Id.* ¶ 37, 955 P.2d at 213.

216. *Id.*

217. *See supra* note 137 and accompanying text.

218. *Esperanza M.*, 1998-NMCA-039, ¶ 37, 955 P.2d at 213.

219. *See id.* The court in *Esperanza M.* reasoned that the dual role of the guardian ad litem "conforms to the

do not support the court's conclusion: advocating a position determined by the representative and not the client violates the duties not to "assert personal knowledge of facts not in issue" and not to "state a personal opinion...not supported by the evidence as to the justness of a cause."[220]

Youth attorneys must be careful not to use the reasoning from *Esperanza M.* to justify acting in the role of a guardian ad litem.[221] By providing a traditional attorney for children fourteen and older, the legislature has implicitly adopted the rule that "counsel for unimpaired children are obliged by the canons of their profession to vigorously seek to achieve the outcomes dictated by their clients."[222] If the youth attorney determines that the child is impaired by minority, then the attorney should determine the extent to which the child can set the objectives of the representation, consistent with the intent behind the youth attorney rule.[223] Any move away from client-directed representation goes contrary to the intent of the youth attorney rule.[224] When the child is impaired by minority, however, allowing the child to have as

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Rules of Professional Conduct." Taking a position before the court contrary to the client's objectives directly violates the duty to abide by a client's decisions. Rule 16-102(A) NMRA; *see Esperanza M.*, 1998-NMCA-039, ¶ 37, 955 P.2d at 213. If taking such a position is to be consistent with that duty, then there must be a provision elsewhere in the rules that allows the attorney to take such a contrary stance. *See* Guggenheim, *supra* note 203, at 1411 (noting that there can be no justification for taking a position contrary to that of a client-child considered "unimpaired" under the Model Rules because "the law unambiguously authorizes the child[] to set the objectives for the case"). *Esperanza M.* construed Rule 16-102(A) in conjunction with Rule 16-114(A), the latter of which allows the normal lawyer-client relationship to be limited by the client's minority or other impairment. Rule 16-114(A) NMRA; *see Esperanza M.*, 1998-NMCA-039, ¶ 37, 955 P.2d at 213. When the lawyer-client relationship is so limited, the lawyer can take "other protective action" in order to protect the "client's own interest." Rule 16-114(B) NMRA. In *Esperanza M.*, the court apparently believed that the role of a guardian ad litem falls under "other protective action."

220. Rule 16-304(E) NMRA. The New Mexico rule is substantially the same as Model Rule 3.4(e). Requiring the representative to advocate his or her own conception of the child's best interests requires the representative to advocate a personal view in contravention of Rule 16-304(E). Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 356 (1993); *see also* Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 101 (1984) ("[R]equiring the lawyer to advocate the position he thinks most appropriate...apparently contravenes the traditional prohibition against lawyers expressing their personal views to the factfinder."). This problem only arises because the court in *Esperanza M.* attempted to reconcile the role of the guardian ad litem with the rules of professional conduct. By relying instead solely on the statutory role of the guardian ad litem, any question of interpreting the rules to allow a traditional attorney to act as a guardian ad litem can be avoided. The better approach is to recognize that certain statutory or customary tasks of the guardian ad litem are not the function of a traditional attorney. *See* STANDARDS OF PRACTICE, *supra* note 65, § A-2 cmt.

221. Aside from the reasoning in *Esperanza M.*, Rule 16-114 provides sufficient latitude for the youth attorney to act in almost any role. The rule "fails to explain how to determine when not to treat a minor as a normal client or how the child-client should then be treated." Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 689 (1987). This ambiguity allows attorneys to make subjective decisions about their role in the case and to advocate their own view of what is "right," even if contrary to the child's expressed wishes. *Id.* As the Massachusetts Supreme Court noted, "Even where it is undisputed that a child and her attorney disagree, the law is unclear as to whether the attorney is always bound by her minor client's decision when the attorney feels that the child's decision is not in her own best interest." Adoption of Erica, 686 N.E.2d 967, 973 n.9 (Mass. 1997). This line of arguments parallels Duquette's criticism of the ABA and NACC Standards. *See supra* notes 64–67 and accompanying text. When the lawyer's "individual decision about a child's impairment...is not reviewed by any court and is not based on objective and reviewable criteria...[then] unfettered lawyer discretion enters into the lawyer-child client relationship." Duquette, *supra* note 66, at 453.

222. Guggenheim, *supra* note 203, at 1412.

223. *See id.*

224. *See supra* notes 71, 93 and accompanying text.

much say as possible in the objectives of representation meets the legislative intent of providing a "transition" period into adulthood.[225]

Giving a child who is partially impaired by minority some role in setting objectives—if not a significant role—does not mean that the child will be left unprotected. Children will be competent to make some decisions, depending upon the nature of the issue and the extent of their impairment.[226] The judge, however, has the ultimate duty to determine the child's best interests, which allows the youth attorney to more freely advance the child's expressed wishes.[227] In fact, an attorney who determines the child's best interests necessarily relies on his or her own values and biases, with the result that the advocated position may not represent the child's best interests as they would be viewed by the child, the parents, or the community.[228] Furthermore, children's lawyers acting as traditional attorneys find that children have "considerable wisdom," often making decisions about their own best interests that "prove[] at least as sound as that of the adults who have substituted their own best judgment."[229] Finally, when attorneys act against the child's wishes, the child can often effectively block the implementation of any decision.[230]

3. Managing the Transition from Guardian Ad Litem to Youth Attorney

The discussion of impairment resulting from a child's minority must consider not just the child's understanding of the proceedings, but also the child's understanding of the role of counsel.[231] The role of the traditional attorney easily confuses children. Young clients react to attorneys by asking "you're my what?"[232] One children's lawyer describes the common scenario:

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225. *See supra* note 73 and accompanying text.

226. Lyon, *supra* note 221, at 699. A child may be able to express a reasoned preference on some issues but not others, meaning that capacity does not have to be an "all-or-nothing" decision. Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 310 (1983). The ABA Standards for a Child's Attorney recognize that the children may be able to determine some positions in their own case but not others, "depending upon the particular position and the circumstances prevailing at the time the position must be determined." STANDARDS OF PRACTICE, *supra* note 65, § B-3 cmt.

227. Buss, *supra* note 50, at 1703; Wilber, *supra* note 220, at 354 ("If the child advocates an obviously unwise course of action, presumably the judge will not adopt it."). Lyon proposes that Model Rule 1.14 be amended to require the judge to determine, in all cases, whether the minor client is competent to direct his or her attorney. Lyon, *supra* note 221, at 694–95. The only way that a child can be harmed by the youth attorney advocating the child's expressed wishes rather than the child's best interests is if the attorney "somehow fool[s] everyone else in the courtroom, with the result that the court will enter an order...antithetical to the child's best interests. This defies reality." Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 809–10 (2001). One risk, though, is that the other parties in the proceeding will not be adequately represented, and the judge will not hear all points of view. Ramsey, *supra* note 226, at 323.

228. Dale, *supra* note 227, at 810 (referring to the works of Jean Koh Peters, Martin Guggenheim, and Randi Mandelbaum).

229. Buss, *supra* note 50, at 1704; Wilber, *supra* note 220, at 354 ("The ability of children to reach 'considered judgments' may be underestimated. Many children, particularly adolescents, are as capable of rational decision making as adult litigants."); *see also* Guggenheim, *supra* note 220, at 99 ("[I]t is unlikely that the attorney will be able to resolve effectively the often complex and value-laden issue of what is best for the child.").

230. Buss, *supra* note 50, at 1704.

231. *Id.* at 1706. "The child client must be informed about the responsibilities and obligations of the representative, as well as the ability and requirements of the representative to accomplish these things." Ventrell, *supra* note 48, at 9.

232. Buss, *supra* note 50, at 1699.

> In my practice, I have assumed the expressed interest, or "traditional attorney" role, and have sought to take direction from my clients about which objectives to pursue. In soliciting their direction, I repeatedly explain to my clients that they are in charge, that I will fight for what they want, as long as they tell me what to fight for.
>
> What I have found, however, is that, for many of my clients, even the teenagers among them, the message does not sink in. They continue to assume that I will take whatever action I think is right, and that I stand united with the public child welfare agency in controlling their fate. For many of my clients, despite my frequent protestations to the contrary, I am a part of the all-powerful "you all" that gives and takes away placements, visits, and services as we see fit.[233]

Older children, in fact, are unlikely to believe that an adult will cede control to a child.[234]

New Mexico's youth attorney rule has the potential to compound this problem by changing the role of the lawyer from guardian ad litem to traditional attorney in the middle of a proceeding.[235] The child, who will likely be confused by the role of a traditional lawyer, must also be able to understand that the guardian ad litem he or she has come to rely upon can no longer act in the same manner.[236] As the court noted in *Joanna V.*, "We are dealing, after all, with children,...who we cannot expect to appreciate the subtle shades and nuances of our law that surface when an attorney changes roles."[237] Joanna V. at least had the benefit of distinct proceedings —first child protective proceedings, then delinquency proceedings—to help separate her lawyer's roles.[238]

Misunderstandings about the attorney's role can result in ineffective representation.[239] Without understanding, the child is unlikely to participate in the consultations necessary for good decision making or to seek confidential advice from the attorney.[240] The adult burdens of decision making and lawyer direction can also have the effect of "re-victimizing" the child who is unprepared to deal with them.[241] The mere context of the abuse and neglect proceeding can make it more difficult for the child to understand what is happening.[242] Pressures from families, the court process,

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233. *Id.*

234. *Id.* at 1709.

235. NMSA 1978, § 32A-4-10(E) (2005). By default, when a child who enters the system before the age of fourteen turns fourteen, the child's guardian ad litem will continue representing the child as an attorney. *See supra* note 91 and accompanying text.

236. *See* State *ex rel.* Children, Youth & Families Dep't v. Joanna V., 2004-NMSC-024, ¶ 15, 94 P.3d 783, 787 ("[The guardian ad litem] may be the professional with the longest term, on-going involvement with the child over time....").

237. *Id.* ¶ 16, 94 P.3d at 787.

238. *See supra* Part II.F.4.

239. Buss, *supra* note 50, at 1712.

240. *Id.*

241. Duquette, *supra* note 66, at 448. The original victimization refers to the abuse inflicted on the child. *Id.* "Re-victimization" refers to the harms that may be caused when a child faces pressure to misidentify or misarticulate his or her own interests because of pressure from family and the court process. *Id.*

242. Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 929 (1999). Specific factors affecting the child's understanding include infrequent contact between the attorney and the child as well as the introduction of many other adults (such as doctors and teachers) and legal professionals (such as the judge, the other party's attorneys, and other court personnel) at one time. *Id.*

and the abuse or neglect itself can lead children to misidentify or misarticulate their own interests.[243] Much of the confusion arises simply because children normally have little if any exposure to lawyers (except through television) and because the lawyer-client relationship differs from most other childhood relationships.[244] In short, the child is being forced to "form and sustain a relationship of the most peculiar sort."[245]

By avoiding abrupt transitions, however, many of the above problems can be alleviated or avoided. "If lawyers approach their representation of child clients with the expectation that the children will be prepared to assume control of representation as soon as that role is explained, lawyers likely will fail, and fail most abysmally...."[246] Children's law expert Emily Buss suggests that a teaching approach, wherein the lawyer gradually exposes the child to decision making and control, may result in modest success.[247] Under this approach, the attorney would only take a position in court as directed by the child.[248] If the attorney notices that the child is resisting the decision-making role, then the attorney would not take any position in court.[249] This approach is consistent with the attorney's professional obligation to "educate her client about what to expect in the course of representation and to clear up any confusion that the lawyer detects."[250] When the attorney is unable to take a position, he or she would still participate in the proceedings, asking about the factual and legal bases for the other parties' actions and ensuring that the state's actions comply with the law.[251]

Approached gradually in this way, the transition required by the New Mexico statute[252] can be used to prepare the child for the guardian ad litem's new role as a traditional attorney. Under the 2005 amendment, the guardian ad litem is now required to present the child's expressed wishes to the court.[253] While the guardian ad litem does not have the option to take no position, as recommended under the teaching approach, he or she can use the opportunity to explain how the presenting of expressed wishes will be similar to the client-directed model the lawyer will eventually follow as a traditional attorney. By calling the child's attention to the process, the lawyer can help the child understand the child's own influence over the

243. Duquette, *supra* note 66, at 448.

244. Buss, *supra* note 50, at 1706–07.

245. Buss, *supra* note 242, at 926. Children are likely to show considerable deference to their attorney because they "have spent much of their young lives learning the appropriate ways to behave around adults, and they have suffered the consequences at the hands of these authority-bearing adults when they failed to learn fast enough." *Id.* at 932.

246. *Id.* at 956.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 957. Buss refers to the preamble of the Model Rules of Professional Conduct, which states that "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 2 (2002). Education of the client is also consistent with the lawyer's duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 16-104(B) NMRA.

251. Buss, *supra* note 242, at 959.

252. *See supra* note 235.

253. *See supra* note 87 and accompanying text.

process[254] and let the child learn about that "most peculiar" relationship.[255] Once the lawyer transitions to the role of traditional attorney, he or she can follow the teaching approach more closely. While the child who enters the system at age fourteen or older will not have the advantage of a transition period, he or she can still benefit from the teaching approach to representation.

B. Application of the Youth Attorney Rule to Pending Cases

The intent of the 2005 amendment is to provide attorney representation in abuse and neglect proceedings for all children fourteen and older.[256] Children in the child protection system at the time of the amendment were originally covered by the pre-2005 statute, which allowed only for representation by a guardian ad litem.[257] If representation by an attorney could change the outcome of the proceeding, then the pending cases clause of the state constitution could prohibit the appointment of an attorney.[258]

Children in the system at the effective date of the amendment can be affected in one of two ways, depending on their age at that date. For children who were under fourteen years of age, the statute requires the appointment of a youth attorney when the child turns fourteen.[259] For older children, the statute requires the appointment of a youth attorney at the child's next appearance before the court.[260] In either case, the pending cases clause can be invoked if appointment of a youth attorney affects the "right" of a party or changes a "rule[]...of procedure," and if the child protection proceeding is a "pending case."[261]

1. The Youth Attorney Rule Puts Protective Proceedings Outside the Formal Definition of "Pending Case"

In applying the pending cases clause, the courts primarily look to the meaning of the phrase "pending case."[262] A case becomes pending when it is filed on the docket

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254. Buss, *supra* note 242, at 959.

255. *See supra* note 245 and accompanying text.

256. *See supra* note 71 and accompanying text.

257. *See supra* Part II.C.1.

258. *See infra* note 261 and accompanying text.

259. NMSA 1978, § 32A-4-10(E) (2005). The Abuse and Neglect Act provides for the "child's guardian ad litem [to] continue as the child's attorney" when the "child reaches fourteen years of age." *Id.* Alternatively, the court can appoint a different attorney if appropriate. *Id.* § 32A-4-10(E)(1)–(3).

260. Under section 32A-4-10, any child fourteen or older, who entered the system after the 2005 amendment went into effect, will be represented by an attorney. *Id.* § 32A-4-10(C). A strict construction of the statute, however, might exempt these children from attorney representation. An attorney is appointed only at the inception of an abuse and neglect proceeding, *id.*, or when a child turns fourteen, *id.* § 32A-4-10(E). An older child already in the system when the amendment became effective was past the point of inception and had already turned fourteen. Thus, neither of the triggering events for appointing an attorney will ever occur. The proposed revision to the children's court rules, however, calls for appointment of an attorney at the child's first appearance after his or her fourteenth birthday. *Proposed Revisions*, *supra* note 32, at 22. (The proposed rule number is 10-305.1, *id.*, but that number is already in use. *See* Rule 10-305.1 NMRA ("Joinder of Parties; Severance; Abuse and Neglect Proceedings.")) When a statute prescribing a rule of practice or procedure conflicts with a court rule, as here, the court rule prevails. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 311, 551 P.2d 1354, 1358 (1976).

261. N.M. CONST. art. IV, § 34.

262. *See supra* note 110 and accompanying text.

of some court[263] and remains pending while an act of the legislature can affect its outcome.[264] The word "case" has been broadly construed to apply not just to litigation but also to actions by state regulatory agencies and even the courts themselves when they exercise rule-making authority.[265]

Two cases show that the pending cases clause applies to children's court proceedings in general, and to abuse and neglect proceedings in particular. In the first case, *State v. Doe*, the defendant challenged a compelled psychological examination in a delinquency proceeding.[266] The court noted that article IV, section 34 of the New Mexico Constitution required the case to be decided as the Children's Code provided before June 19, 1981, the effective date of amendment, because "all events occurred before that date."[267] In the second case, *Ashley B.G. v. Fastle*, Ashley B.G.'s mother challenged the grant of a permanent guardianship on the grounds that she had not received notice of the hearing.[268] Although the court made no mention that Ashley B.G. had been abused or neglected, the permanent guardianship was probably awarded based on a finding of abandonment.[269] The court set aside the permanent guardianship and remanded the case to the children's court for a determination of the best interests of the child.[270] Upon remand, the pending cases clause required the guardianship to be decided under the statutory procedure in effect when the original proceeding was initiated.[271]

Abuse and neglect proceedings, which were not addressed by *Doe* or *Ashley B.G.*, have the potential to remain pending for a much longer time than delinquency or permanent guardianship proceedings.[272] The action begins when CYFD files a petition with the children's court.[273] The children's court resolves all issues of law and fact to the fullest extent possible in the adjudicatory hearing.[274] An abuse and

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263. *See supra* note 128 and accompanying text.

264. *See supra* Part II.E.1.

265. *See supra* note 109 and accompanying text.

266. State v. Doe, 97 N.M. 263, 639 P.2d 72 (1981). The specific section of the Children's Code at question was NMSA 1978, § 32-1-32(B) (current version at § 32A-2-17(B) (2005)). *Doe*, 97 N.M. at 265, 639 P.2d at 74. The court did not cite the date of the code edition, but instead referred to the code as it existed "before the effective date of [the 1981] amendment." *Id.*

267. *Doe*, 97 N.M. at 265, 639 P.2d at 74. By "events," the court most likely meant the filing of the petition on February 13, 1981, and the motion to transfer, made on March 17, 1981. *Id.* Filing of the petition would make the case "filed on the docket of some court," which makes the case pending for purposes of article IV, section 34. *See supra* note 128 and accompanying text.

268. Ashley B.G. v. Fastle, 1998-NMCA-003, 952 P.2d 463. Although permanent guardianship proceedings fall under the Abuse and Neglect Act, they can be held independently of an abuse and neglect proceeding. Ronald A. v. State *ex rel.* Human Servs. Dep't, 110 N.M. 454, 455, 797 P.2d 243, 244 (1990).

269. The effective statute in *Ashley B.G.* provided that the court can establish a permanent guardianship when "the child has been abandoned by his parents." NMSA 1978, § 32-1-58(C)(1) (1987). The current version of the statute allows the court to establish a permanent guardianship when "the child has been adjudicated as an abused or neglected child." *Id.* § 32A-4-31(C)(1) (2005). The current statute encompasses abandonment, however, because a neglected child includes a child "who has been abandoned." *Id.* § 32A-4-2(E)(1) (1999).

270. *Ashley B.G.*, 1998-NMCA-003, ¶ 14, 952 P.2d at 467.

271. *Id.* ¶ 14, 952 P.2d at 467. The original petition was filed under NMSA 1978, § 32-1-59 (1987). *Ashley B.G.*, 1998-NMCA-003, ¶ 2, 952 P.2d at 465. At the time of the appeal, the statute had been superseded by NMSA 1978, § 32A-4-32 (1993). *Ashley B.G.*, 1998-NMCA-003, ¶ 2, 952 P.2d at 465.

272. *See supra* Part II.A.

273. State *ex rel.* Children, Youth & Families Dep't v. Frank G., 2005-NMCA-026, ¶ 41, 108 P.3d 543, 557; *see also supra* note 31 and accompanying text.

274. *Frank G.*, 2005-NMCA-026, ¶ 41, 108 P.3d at 557; *see also supra* notes 34–35 and accompanying text.

neglect adjudication is immediately appealable to the court of appeals,[275] but the children's court retains jurisdiction during the appeal so that it can take further action in the case.[276] These further hearings are essential to protect the rights of both the parents and the child.[277] This entire set of hearings is a continuum of proceedings that does not end until the dismissal or termination of parental rights,[278] or when the child reaches eighteen years of age.[279] Because the children's court retains control during this entire time, the case remains pending.[280]

Although legislation that modifies the Children's Code can implicate the pending cases clause, modification by itself is insufficient. In order to invoke article IV, section 34, the legislation must also have the potential to affect the outcome of the case.[281] Legislation can directly impact the outcome by affecting a party's ability to achieve a particular result,[282] such as by changing the remedial interest rate available to a party[283] or by changing the maximum sentence available in a criminal case.[284] Clearly, the youth attorney rule does not have a similar direct impact; it merely provides certain children with client-directed representation.[285] Representation by a youth attorney rather than a guardian ad litem does not change the possible outcomes of a protective proceeding, such as permitting the child to remain with his or her parents subject to prescribed conditions,[286] placing the child under protective supervision of CYFD,[287] or terminating parental rights.[288] Under this formal test, then, abuse and neglect proceedings are not pending under article IV, section 34 for purposes of applying the youth attorney rule.

2. The Youth Attorney Rule Brings Protective Proceedings Under the Functional Definition of "Pending Case"

Legislation can also indirectly impact the outcome of a case by merely affecting a right or procedure in a pending case.[289] Representation of the child in an abuse and neglect proceeding is, by statutory definition, a right.[290] Although the statutory right is given to the child, the child's representation protects the parents' procedural

275. *Frank G.*, 2005-NMCA-026, ¶ 41, 108 P.3d at 558.

276. *Id.* ¶ 42, 108 P.3d at 558.

277. *Id.*

278. State *ex rel.* Children, Youth & Families Dep't v. Maria C., 2004-NMCA-083, ¶ 25, 94 P.3d 796, 804. The court later emphasized the unitary nature of the proceedings, noting that "the process due at each stage should be evaluated in light of the process received throughout the proceedings." *Id.* ¶ 35, 94 P.3d at 807.

279. NMSA 1978, § 32A-4-24(F) (1993) ("When a child reaches eighteen years of age, all neglect and abuse orders affecting the child then in force automatically terminate.").

280. *See supra* note 130 and accompanying text.

281. *See supra* Part II.E.1.

282. *See supra* note 121 and accompanying text.

283. *See supra* note 125 and accompanying text.

284. *See supra* note 126 and accompanying text.

285. *See supra* note 71 and accompanying text.

286. NMSA 1978, § 32A-4-22(B)(1) (2005).

287. *Id.* § 32A-4-22(B)(2).

288. *Id.* § 32A-4-28.

289. *See supra* notes 119–120 and accompanying text.

290. The youth attorney rule is set out in the section of the Children's Code entitled "Basic rights." NMSA 1978, § 32A-4-10 (2005).

rights.[291] Thus, anything that affects the child's right to representation also affects the parents' rights. More directly, under the 2005 amendment, parents lost the right to petition the court to remove the child's representative under certain conditions.[292]

By its plain language, article IV, section 34 can be implicated whether the affected right is substantive or procedural,[293] though some confusion exists as to whether the clause is implicated when the rights are substantive.[294] The distinction between substantive and procedural rights is often unclear.[295] Generally, substantive law creates, defines, or regulates rights, whereas procedural law sets out the means for enforcing those rights.[296] Procedural provisions cannot abridge, enlarge, or modify substantive rights.[297]

In the context of an abuse and neglect proceeding, the children's substantive rights can be defined either as the right to live with their parents unless a court finds the parents unfit or, alternatively, as the right to be separated from their parents whenever their parents are actually unfit.[298] The right to counsel does not appear to fall under either definition of substantive rights, and, in fact, it is traditionally considered a procedural due process right.[299] On the other hand, the youth attorney rule creates a right, and creation of a right is substantive.[300] How a right is implemented—that is, the rules for appointing the youth attorney—is procedural.[301]

This discussion illustrates the confusion surrounding the substance-procedure dichotomy, both in classifying the youth attorney rule and in implicating the

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291. *Frank G.* involved the appeal of a children's court adjudication of abuse and neglect. State *ex rel.* Children, Youth & Families Dep't v. Frank G., 2005-NMCA-026, ¶ 1, 108 P.3d 543, 545. The court held that "[p]arents' rights to procedural due process were not violated" because, in part, "a guardian ad litem had been appointed for the Child." *Id.* ¶ 37, 108 P.3d at 556; *see also* State *ex rel.* Children, Youth & Families Dep't v. Candice Y., 2000-NMCA-035, 999 P.2d 1045. In *Frank G.*, the court stated: "[Parents] fail to point to any evidence that shows that they were prejudiced by the conduct of the [child's] guardian ad litem or that their interests were adversely affected to a degree that would cause [the court] to be concerned about the fairness or propriety of the determination of abuse and neglect." *Id.* ¶ 33, 999 P.2d at 1054.

292. The statute allows that "[a]ny party may petition the court for an order to remove a guardian ad litem on the grounds that the guardian ad litem has a conflict of interest or is unwilling or unable to zealously represent the child's best interests." NMSA 1978, § 32A-1-7(C) (2005). In contrast, the section defining the powers and duties of the child's attorney makes no mention of a similar right. *See id.* § 32A-1-7.1.

293. The constitutional provision merely says that "[n]o act of the legislature shall affect the right or remedy of either party." N.M. CONST. art. IV, § 34. The adjectives "substantive" and "procedural" do not appear in front of the word "right." *See id.*

294. *See supra* notes 113–116 and accompanying text.

295. *See, e.g.*, State *ex rel.* Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984) (recognizing the difficulty of distinguishing substance from procedure and noting that NMSA 1978, § 38-3-9 had been characterized by the New Mexico Supreme Court at various times as both substantive and procedural); Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976) ("[T]he line between substance and procedure is often elusive...."); *In re* Daniel H., 2003-NMCA-063, ¶ 18, 68 P.3d 176, 180 ("The distinction between a procedural and a substantive provision is frequently difficult to draw.").

296. *Gesswein*, 100 N.M. at 770, 676 P.2d at 1335; *see also In re Daniel H.*, 2003-NMCA-063, ¶ 18, 68 P.3d at 180.

297. *In re Daniel H.*, 2003-NMCA-063, ¶ 18, 68 P.3d at 180 (citing Johnson v. Terry, 48 N.M. 253, 256, 149 P.2d 795, 796 (1944)).

298. Guggenheim, *supra* note 203, at 1429–30.

299. State *ex rel.* Children, Youth & Families Dep't v. Ruth Anne E., 1999-NMCA-035, ¶ 26, 974 P.2d 164, 171 (citing L.V. v. W.V., 482 N.W.2d 250, 257 (Neb. 1992)); *accord In re* A.W., 618 N.E.2d 729, 732 (Ill. App. Ct. 1993).

300. *See supra* note 296 and accompanying text.

301. *Id.* Similarly, the "creation of a right to appeal is substantive, [whereas] restrictions on the time and place of exercising this right are procedural." State v. Garcia, 101 N.M. 232, 234, 680 P.2d 613, 615 (Ct. App. 1984).

pending cases clause. The functional definition of "pending case," however, clears up the confusion. The functional definition states that if legislation can affect the outcome of a case, then it is prohibited by the pending cases clause.[302] The youth attorney rule changes the lawyer's role from a best-interests model to a client-directed model.[303] The legal standards governing the conduct of a lawyer can greatly influence a case.[304] The revised role will help the attorney act more effectively, thereby improving the fact-finding ability of the court.[305] The change in role from guardian ad litem to traditional attorney thus can affect the outcome of the proceeding.[306]

The youth attorney role could also negatively affect the outcome of the proceeding. If the child becomes confused by the attorney's role, effective representation may become more difficult than with a guardian ad litem.[307] New Mexico recognized this confusion in *Joanna V.* when one lawyer represented a child as a guardian ad litem in an abuse and neglect proceeding and as a traditional attorney in a delinquency proceeding.[308] Similarly, the court's understanding of the case may be hampered if the attorney is unable to reveal confidential information.[309] For example, in the cases of *Esperanza M.*[310] and *Candice Y.*,[311] the respective guardians ad litem told the court that their clients were lying when they said that they were not abused. Under the youth attorney rule, however, a traditional attorney may not have been able to reveal such information.[312]

Functionally, then, the youth attorney rule can affect a pending case by changing the outcome of an abuse and neglect proceeding. The effect can be positive, by

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302. *See supra* Part II.E.1.

303. *See supra* Part II.C.

304. DUQUETTE ET AL., *supra* note 192, ch. VII. For example, a traditional attorney can have a "mediating effect" by expediting the resolution of disputes, helping minimize contentiousness between adult parties, and facilitating the settlement of contested issues. Mandelbaum, *supra* note 24, at 62.

305. *See In re* Jamie TT, 599 N.Y.S.2d 892, 894 (App. Div. 1993) ("The appearance of a lawyer to protect [the child's] interests seems clearly necessary to avoid an erroneous outcome unfavorable to [the child] in the proceeding."); Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485, 501 (2003) ("Unlike a guardian ad litem, an attorney will represent the voice of the child, which will provide the court with more information and improve its fact-finding ability, allowing the court to make a more informed decision.").

306. Buss, *supra* note 242, at 926 ("The lawyer's advocacy might change the outcome of the case (the best evidence of influence)."); Ramsey, *supra* note 226, at 297 ("[D]ecisions might be more accurate, not necessarily because the child's view was correct, but because another point of view would be presented."). More generally, any kind of adult advocate can directly affect the outcome of the case. Guggenheim, *supra* note 203, at 1414.

307. *See supra* note 239 and accompanying text. "When the child lacks [understanding of the client-lawyer relationship], the lawyer's representation is incoherent." Buss, *supra* note 50, at 1724.

308. State *ex rel.* Children, Youth & Families Dep't v. Joanna V., 2004-NMSC-024, 94 P.3d 783; *see supra* Part II.F.4 (discussing the facts of *Joanna V.*). The Abuse and Neglect Act now specifically prohibits such representation. NMSA 1978, § 32A-1-7(I) (2005) ("A guardian ad litem shall not serve concurrently as both the child's delinquency attorney and guardian ad litem.").

309. Hazlewood, *supra* note 19, at 1066. The Texas Family Code provides an exception for information relating to abuse and neglect. *Id.*

310. State *ex rel.* Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, 955 P.2d 204; *see supra* Part II.F.1 (discussing the facts of *Esperanza M.*).

311. State *ex rel.* Children, Youth & Families Dep't v. Candice Y., 2000-NMCA-035, 999 P.2d 1045; *see supra* Part II.F.2 (discussing the facts of *Candice Y.*).

312. New Mexico prohibits a lawyer from "reveal[ing] information relat[ed] to representation of a client unless the client consents after consultation." Rule 16-106 NMRA. Although the rule impliedly allows disclosures when appropriate to the representation, that authorization is limited by the client's instructions. *Id.* cmt.

improving the child's representation and thereby aiding the court.[313] The effect can also be negative by confusing the child and keeping important information confidential.[314] The language of the constitutional provision does not discriminate between positive and negative effects, however, so any effect on the outcome would make abuse and neglect proceedings pending under article IV, section 34.[315]

3. The Right to Attorney Representation Existed Before the Youth Attorney Rule

Even if appointment of a youth attorney can affect the outcome of an abuse and neglect proceeding, the pending cases clause will not be implicated if the right existed before the legislation went into effect.[316] Functionally, if the child could have been represented by a client-directed attorney before the effective date of the amendment, then such representation after the effective date will have no *new* effect on the outcome.[317]

In the simplest situation, a procedural modification that merely changes the method for implementing or enforcing an existing right without changing the underlying right does not implicate the pending cases clause.[318] Thus, under article IV, section 34, the process for appealing a judgment or the specified date for filing motions can be modified so long as the appeal or motion are still available.[319]

More important to the youth attorney rule, codifying an existing common-law right does not affect that right. In *Armijo v. Atchison, Topeka & Santa Fe Railway*, the defendant's train struck the plaintiff's car, killing the driver.[320] A New Mexico statute prevented the defendant from introducing a "seat belt defense."[321] The defendant argued that the statute violated equal protection by taking away the right to argue the seat belt defense.[322] The court, however, held that the common law had not created a seat belt defense, so a statute prohibiting the defense could not affect the substantive rights of either the defendant or the plaintiff.[323] In the words of the court, "there never was a 'seat belt defense' and there still is not a 'seat belt defense.'"[324]

The New Mexico Court of Appeals was soon faced with a challenge to the same statute, this time based on article IV, section 34.[325] In *Mott*, the section of the statute

313. *See supra* notes 304–305 and accompanying text.

314. *See supra* notes 307–312 and accompanying text.

315. *See supra* Part II.E.1.

316. *See infra* note 353 and accompanying text.

317. *See infra* note 350 and accompanying text.

318. *See supra* notes 123–124 and accompanying text.

319. *See supra* notes 123–124 and accompanying text. The two examples noted in the text are from *In re Held Orders of U.S. West Commc'ns, Inc.*, 1999-NMSC-024, ¶ 16, 981 P.2d 789, 794, and *Heron v. Gaylor*, 53 N.M. 44, 49, 201 P.2d 366, 369–70 (1948), respectively.

320. 754 F. Supp. 1526, 1528 (D.N.M. 1990), *rev'd in part on other grounds*, 19 F.3d 547 (10th Cir. 1994), *rev'd in part on other grounds*, 27 F.3d 481 (10th Cir. 1994).

321. *Id.* at 1534 (citing NMSA 1978, 66-7-373(B) (1989)). Under a seat belt defense, the failure to wear a seat belt would constitute negligence or negligence per se on the part of the plaintiff and could be used to limit or apportion damages. *Id.*

322. *Id.* at 1535.

323. *Id.*

324. *Id.*

325. Mott v. Sun Country Garden Prods., Inc., 120 N.M. 261, 264, 901 P.2d 192, 195 (Ct. App. 1995).

prohibiting the seat belt defense had been deleted before the plaintiff brought the action but was reinserted while the case was pending.[326] The court adopted the reasoning of *Armijo* in finding that no substantive rights were affected, and, thus, the reinserted statute did not violate the pending cases clause.[327]

The same analysis holds when an existing right is later codified. In *State ex rel. Hannah v. Armijo*,[328] an action was brought to disqualify a district judge.[329] The statute allowing for the disqualification procedure had been passed before the case was pending but did not become effective until after the case was pending.[330] The court held that the right to disqualify judges had always been present in the state constitution, so the statute merely "vitalized" that right—it did not change a rule of procedure.[331] Before the statute was enacted, parties were free to adopt an appropriate procedure for disqualification; after it was enacted, they were merely required to follow the procedure in the statute.[332] Because no right was affected, and because a change in presiding judge could have occurred for other reasons before the statute was passed, the application of the statute was not prohibited by the pending cases clause.[333]

Similar to *Hannah*, the youth attorney rule codifies an existing right. Illinois has interpreted its own abuse and neglect statutes as providing children the right to representation by a client-directed attorney of their choice.[334] Under the Illinois Juvenile Court Act, minors subject to a juvenile proceeding have "'the right to be represented by counsel.'"[335] In an abuse and neglect proceeding, this right is specified as representation by a guardian ad litem.[336] In the abuse and neglect proceeding of *In re A.W.*, the child A.W., a thirteen-year-old minor, asked the court to replace her guardian ad litem with an attorney of her choice.[337] The court noted that the child's right to counsel is "almost coextensive to that afforded to adults"[338] because, under the Act, children have "'the rights of adults, unless specifically

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326. *Id.* at 264, 901 P.2d at 195. Section 66-7-373(B) of the New Mexico Statutes was deleted in 1991, the plaintiff brought the action in 1992, and the seat belt provision was reinserted at section 66-7-373(A) in 1993. *Id.* at 264, 901 P.2d at 195.

327. *Id.* at 266, 901 P.2d at 196.

328. 38 N.M. 73, 28 P.2d 511 (1933).

329. *Id.* at 74, 28 P.2d at 511.

330. *Id.* at 82, 28 P.2d at 516.

331. *Id.* at 83, 28 P.2d at 516.

332. This is almost identical to the situation in *Heron* where motions had customarily been heard upon notice, but during a pending case a new procedure set a specific day of the month. Heron v. Gaylor, 53 N.M. 44, 49, 201 P.2d 366, 369–70 (1948); *see supra* note 124 and accompanying text.

333. *Hannah*, 38 N.M. at 83, 28 P.2d at 516. *Gesswein* cited *Hannah* for its finding that no right was affected by the statute. State *ex rel.* Gesswein v. Galvan, 100 N.M. 769, 771, 676 P.2d 1334, 1336 (1984). *Gesswein*, however, found that changing the rules of disqualification would affect a pending case as defined by article IV, section 34. *Id.* at 773, 676 P.2d at 1338.

334. *In re* A.W., 618 N.E.2d 729, 733 (Ill. App. Ct. 1993).

335. *Id.* at 732 (quoting ILL. COMP. STAT. ANN. ch. 37, ¶ 801-5(1) (West 1991) (current version at 705 ILL. COMP. STAT. 405/1-5(1) (2003))).

336. ILL. COMP. STAT. ANN. ch. 37, ¶ 802-17(1) (West 1991) (current version at 705 ILL. COMP. STAT. 405/2-17(1) (1998)) ("Immediately upon the filing of a petition...the court shall appoint a guardian ad litem for the minor if: (a) such petition alleges that the minor is an abused or neglected child.").

337. *In re A.W.*, 618 N.E.2d at 730. A.W. had located a private firm that was willing to act as her attorney in a pro bono representation. *Id.*

338. *Id.* at 732.

precluded by laws which enhance the protection of such minors.'"[339] Starting with the extent of the child's rights, and comparing to other jurisdictions that recognize a child's right to choice of counsel, the court held that the Illinois statutes give children the right to substitute counsel of their choice.[340] This right is not absolute, however, but subject to the discretion of the court based on whether the child was manipulated or coerced into substituting private counsel.[341]

The pre-2005 New Mexico statutes were very similar to Illinois' and thus should afford children a similar right to choose counsel. Under the pre-2005 statute, children had a right to be represented by a guardian ad litem.[342] Although the New Mexico statute did not explicitly state a "right to be represented by counsel" as in Illinois, the guardian ad litem acted as counsel for the child.[343] Furthermore, as in Illinois, the rights of the child were to be "the same basic rights as an adult, except as otherwise provided in the Children's Code."[344] New Mexico recognizes that a party has a right to be represented by counsel of his or her own choosing,[345] subject to rejection by the court only for a compelling reason.[346] If New Mexico children are to have the same rights as adults, then like in Illinois that should include the right to substitute counsel of their choice.[347]

Thus, children had a right to client-directed representation before the 2005 amendment was enacted, even though that right may never have been exercised.[348] To paraphrase the court in *Armijo*, there always was a "right to an attorney" and there still is a "right to an attorney."[349] As in *Hannah*, the right existed without a procedure, and the 2005 amendment "vitalized" that right by providing a procedure for its implementation.[350] Furthermore, the amendment does not take away any right,

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339. *Id.* (quoting ILL. COMP. STAT. ANN. ch. 37, ¶ 801-2(3)(a) (West 1991) (current version at 705 ILL. COMP. STAT. 405/1-2(3)(a) (1998))).

340. *Id.* at 732–33.

341. *Id.* at 733.

342. NMSA 1978, § 32A-4-10(C) (1993) ("During an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child at the inception of the proceeding."). In New Mexico, guardians ad litem must also be attorneys, although they do not act in the role of a traditional attorney. NMSA 1978, § 32A-1-4(I) (2005). This was also the case before the 2005 amendments. *Id.* § 32A-1-4(J) (2003).

343. *See* State *ex rel.* Children, Youth & Families Dep't v. Esperanza M., 1998-NMCA-039, ¶ 39, 955 P.2d 204, 213 ("We do not believe that a conflict...necessarily requires that the guardian ad litem withdraw *as counsel* for the child.") (emphasis added). If guardians ad litem truly are counsel for children, then the youth attorney rule merely changes how children exercise that right to counsel.

344. NMSA 1978, § 32A-4-10(A) (1993). The language remains unchanged in the current statute. *Id.* § 32A-4-10(A) (1995).

345. Sanders v. Rosenberg, 1997-NMSC-002, ¶ 9, 930 P.2d 1144, 1146 (citing Chappell v. Cosgrove, 1996-NMSC-020, ¶ 7, 916 P.2d 836, 838).

346. *Id.* (citing *Chappell*, 1996-NMSC-020, ¶ 7, 916 P.2d at 838).

347. This position would also be consistent with the recommended ABA standards for the child's attorney, which state that "[t]he court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer." STANDARDS OF PRACTICE, *supra* note 65, § H-5.

348. A search of New Mexico case law turns up no instances of children requesting substitute counsel in an abuse and neglect proceeding.

349. Armijo v. Atchison, Topeka & Santa Fe Ry., 754 F. Supp. 1526, 1535 (D.N.M. 1990).

350. *See supra* notes 331–332 and accompanying text. Alternatively, the 2005 amendment can be seen as merely modifying the way in which the existing right to counsel is exercised. *See supra* note 343 and accompanying text.

as argued unsuccessfully in *Armijo*:[351] the court can still appoint a guardian ad litem when circumstances warrant.[352] Because children could have been represented by an attorney before the amendment was passed, the pending cases clause does not prohibit appointment of an attorney for all children fourteen and older, regardless of when they entered the protective system.[353]

IV. CONCLUSION

New Mexico significantly changed its Children's Code by requiring that all children fourteen years and older in abuse and neglect proceedings be represented by a traditional attorney. The new rule intends for such children to be treated like adults, at least by their legal representatives. By relying on the existing rules of professional conduct to define that role, however, the youth attorney rule leaves open the possibility that older children may not get the full voice that the legislature intended. Past decisions that held that the role of the guardian ad litem is consistent with the rules of professional conduct create the additional risk that youth attorneys could act in the same role as a guardian ad litem. Only by paying careful attention to the lawyer-client relationship and by educating the child about the nature of legal representation can the youth attorney remain true to the intent of the statute and at the same time improve the outcome of the proceedings for the child.

For children who were in the system and under fourteen years old when the amendment became effective, a technicality presents a potential roadblock to appointment of a youth attorney. The pending cases clause of the state constitution prevents application of legislation to ongoing cases. The courts' interpretation of this clause has sometimes been inconsistent, but an extensive review of the case law shows that the decisions can be reconciled by viewing the functional effect of legislation on the results of pending cases rather than the formal language of the clause. While the youth attorney rule can affect the outcome of the case, thereby invoking the clause, the common law right to counsel of choice shows that the youth attorney rule "vitalizes" an existing right and thus avoids the effect of the pending cases clause.

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351. *See supra* notes 322–323 and accompanying text.

352. Rule 16-114(B) NMRA ("A lawyer may seek the appointment of a guardian or conservator or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."). The court can also disqualify counsel if necessary to protect the interests of the child. *See* Sanders v. Rosenberg, 1997-NMSC-002, ¶ 10, 930 P.2d 1144, 1146–47 (holding that, to protect the interests of children, the court has broad equitable power to disqualify counsel for reasons other than violation of an ethical or court rule). This provides a limitation similar to that of Illinois', which allows the court to intervene if the child was manipulated or coerced. *See supra* note 341 and accompanying text.

353. *See supra* note 333 and accompanying text.