

# WHEN YOUR ATTORNEY IS YOUR ENEMY: PRELIMINARY THOUGHTS ON ENSURING EFFECTIVE REPRESENTATION FOR QUEER YOUTH

SARAH VALENTINE\*

Attorneys representing children too often become their enemies<sup>1</sup> rather than their advocates. This is especially true when the children are queer.<sup>2</sup> Queer youth caught in the judicial<sup>3</sup> system are often severely

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\* Director of Student Affairs and Associate Law Library Professor, City University of New York School of Law. This paper is based on the author's presentation at the *Columbia Journal of Gender and Law Symposium*, "Gender On the Frontiers: Confronting Intersectionalities," held on April 10, 2009. I wish to thank Shilpi Agarwal and the other students whose work made the symposium possible. This work would not have been possible without the encouragement and feedback of Ruthann Robson.

<sup>1</sup> Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 826 (2007) stating:

Children, at least those I have met, dislike hypocrisy most of all. They can comfortably accept not being permitted an attorney. But they deeply resent being assigned someone who calls herself an attorney and then behaves inconsistently with the core meaning of what attorneys are. It is important to agree that when someone chooses to seek an outcome that I have specifically repudiated and made clear I do not wish, it is not a misuse of language to regard that person as my enemy.

*Id.* (footnote omitted).

<sup>2</sup> Queer children are those who are, who may be, who are questioning whether or not they are, or who are targeted for being gay, lesbian, transgendered, bisexual or gender nonconforming. See Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 19 YALE J.L. & FEMINISM 449, 453 (2008). In addition, a child may be treated as queer or "potentially queer" by those who imbue harm in children being raised in a queer or "non-traditional" environment. See *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599 (Ohio. Ct. App. Mar. 23, 2007) (affirming change of custody from parent who supported gender nonconformity in child to parent who opposed child's gender nonconforming behavior); see also *infra* notes

harmed,<sup>4</sup> specifically because of where a court decides they will reside. Judges determine where children will reside through custody decisions, or by deciding whether they will be placed in foster care, group homes, or detention facilities in child welfare and delinquency proceedings.<sup>5</sup> Once in the justice system, most children are provided an attorney in part because courts have recognized that children have a liberty interest at stake in the proceedings,<sup>6</sup> including a right to “reasonably safe living conditions” and

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46–64 and accompanying text, discussing attorneys seeking to move foster children based solely on their placement in same-sex households.

<sup>3</sup> For purposes of this discussion the terms “family court,” “court,” or “justice system” denote any tribunal that affects in whose custody a queer child may be placed (i.e., custody matters, abuse and neglect proceedings, foster care extensions, adoptions, juvenile delinquency proceedings and PINS or CHINS proceedings). The phrases “juvenile justice system” or “juvenile proceeding” are used specifically for those proceedings in which the state is asserting control over the juvenile based on the juvenile’s own behavior, such as a delinquency or PINS proceeding.

<sup>4</sup> There are several cases which detail the harms faced by queer children in state care. See *R.G. v. Koller*, 415 F.Supp.2d 1129 (D. Haw. 2006) (detailing harmful effects of isolation on queer youth in Hawai’i detention facility); *In re Antoine D.*, 40 Cal.Rptr.3d 885 (Ct. App. 2006) (queer youth attacked with razor, forced into oral sex, and placed in 23-hour-per-day isolation because of sexual orientation); *Rodriguez v. Johnson*, No. 06 CV 00214, (S.D.N.Y. Nov. 9, 2006) (stipulated order of settlement) (settling a claim against the New York State Office of Children and Family Services for discriminatory treatment of transgender youth while in state custody, including staff disrupting prescription hormone therapy without medical advice). In addition, parents, guardians, and foster families also abuse queer youth. Sarah Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1076–83, 1091–97 (documenting parental and foster family reactions toward sexual difference in children including physical violence, forced reparative therapy, and ostracism).

<sup>5</sup> If the state feels that a child is a victim of abuse or neglect it can place a child in foster care, which may entail placing the child with another family or in a group home. If a child is found to be delinquent, or in some manner “out of control,” the state may place the child in a group home or in a state-sponsored detention facility.

<sup>6</sup> Valentine, *supra* note 4, at 1060. The courts have not yet found a liberty interest in custody determinations supporting a right to counsel for a child although many states provide attorneys for children in custody proceedings. See, e.g., N.Y. FAM. CT. ACT § 241 (McKinney 2008). The New York statute is “based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.” *Id.*

services necessary to ensure protection from harm.<sup>7</sup> Where a child will be placed is always an important issue in cases involving juveniles and thus a pivotal issue for the child's attorney. However, for queer children, questions of placement are critical, because they can have terrible, even life-threatening, consequences.<sup>8</sup>

Unfortunately, attorneys entrusted to represent queer youth are not immune from the heteronormativity<sup>9</sup> and homophobia<sup>10</sup> that pervade our culture. Even unintentional anti-queer bias can distort the relationship between a lawyer and a queer child client—further endangering an already at-risk population.<sup>11</sup> An attorney is generally viewed as someone fighting for her client's rights by giving voice to the client's wishes. However, the

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<sup>7</sup> Kenney A. *ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (holding children in state custody have a right to "reasonably safe living conditions" and services necessary to ensure protection from harm).

<sup>8</sup> See Valentine, *supra* note 4, at 1076–83, 1091–97 (discussing the dangers queer children face at home and in state custody).

<sup>9</sup> See Michael Warner, *Introduction* to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xxi (Michael Warner ed., 1993) (heterosexual culture has the exclusive ability to interpret itself as society, as the elemental form of human association, and as indivisible basis of community); see also Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?*, 33 LAW & SOC. INQUIRY 345, 360 (2008) (Heteronormativity is defined as "those localized practices and centralized institutions that legitimize and privilege heterosexuality and heterosexual relationships as fundamental and "natural" within a society.) (internal citations omitted).

<sup>10</sup> Homophobia is commonly used to express the full range of anti-LGBT thought and behavior. Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 617–18 (2001).

<sup>11</sup> Studies routinely indicate queer youth are a population at risk for homelessness and victimization. See, e.g., NICHOLAS RAY, NAT'L GAY & LESBIAN TASK FORCE POLICY INST. & NAT'L COALITION FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 16 (2006) [hereinafter AN EPIDEMIC OF HOMELESSNESS], available at [http://www.thetaskforce.org/reports\\_and\\_research/Homeless\\_Youth](http://www.thetaskforce.org/reports_and_research/Homeless_Youth) (a quarter of youth who "came out" to their family were told to leave home); GLSEN, EXECUTIVE SUMMARY 2007 NATIONAL SCHOOL CLIMATE SURVEY (2007), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1306-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1306-1.pdf) (finding almost 9 out of 10 LGBT youth harassed in school); COLLEEN SULLIVAN, ET AL., LAMBDA LEGAL DEFENSE & EDUC. FUND, YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER ADOLESCENTS IN FOSTER CARE (2005), available at [http://www.jimcaseyyouth.org/docs/youthinthemargins\\_2001.pdf](http://www.jimcaseyyouth.org/docs/youthinthemargins_2001.pdf) [hereinafter YOUTH IN THE MARGINS] (documenting mistreatment of queer children in foster care).

image of a zealous advocate does not hold true when the client is a child. Because they can disregard their clients' wishes, lawyers representing children too often become another liability the judicial system imposes on a child. When the client is a queer youth, the risk of harm created when an attorney fails to provide traditional advocacy is magnified.

Queer youth are endangered by both the judicial system and the child welfare system into which they may be placed. To protect these children, it is necessary to ensure that their attorneys represent their wishes by providing traditional advocacy as opposed to best interest representation.

Part I of this Article begins with a brief discussion of the bias and prejudice in the judicial and child welfare systems that affect queer youth. Then it provides an overview of the role continuum that allows attorneys representing children to provide *less* than traditional advocacy. The narratives in Part I.B illustrate the effect an attorney can have on a queer child. Part II of this Article addresses four mechanisms by which a queer child harmed by an attorney who provides less than traditional advocacy can seek redress. Part II.A explains how children can use claims of ineffective assistance of counsel, Part II.B discusses the possibility of bringing a legal malpractice suit, and Parts II.C & D. review ethical claims, both judicial and professional, that might prove useful to queer children injured by their attorneys.

## **I. BIAS AND PREJUDICE IN THE JUSTICE SYSTEM & INADEQUACIES IN THE LEGAL REPRESENTATION OF CHILDREN**

It is generally accepted that bias or prejudice against queers is both individualized and part of society at large.<sup>12</sup> Multiple studies indicate that individuals who work in the legal system—whether they are judges, attorneys, clerks, or other administrative personnel—are susceptible to these biases.<sup>13</sup> Sexual orientation bias may be explicitly evident as when a

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<sup>12</sup> See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 261 n.9 (2009) (using “‘homophobic’ to describe ‘irrational fears’ about gay men and lesbians and the term ‘heterosexist’ to describe the structural, institutional subordination of people who are not heterosexual”); Hirschfeld, *supra* note 10, at 617–18 (“Heterosexism is a broader term than homophobia in that it need not imply the fear and loathing the latter term suggests. Heterosexism can describe seemingly benign [but harmful] behavior based on the assumption that heterosexuality is the norm.”).

<sup>13</sup> See Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141 (2007)

victim's sexual orientation is the reason behind a murderer's lenient sentencing,<sup>14</sup> a mother losing her child<sup>15</sup> or an eighteen-year-old disabled boy receiving a sentence thirteen times longer for having sex with an underage boy than he would have received if he had sex with an underage girl.<sup>16</sup>

Perhaps more insidious than overt prejudice is the assumption that everyone is, or should be, heterosexual. Such presumptions are the basis for decisions that harm queers, not because of hostility but because they are rendered invisible to the court or to the state.<sup>17</sup> The belief that children

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(citing and discussing several studies on sexual orientation bias in both specific court systems or conducted by state Bar Associations); *see also* Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 39 (2003) [hereinafter Brower, *Obstacle Courts*]; Amelia Craig Cramer, *Discovering and Addressing Sexual Orientation Bias In Arizona's Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 25 (2003). For further articles on this topic see Symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1 (2003).

<sup>14</sup> *See, e.g.*, Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U. J. GENDER SOC. POL'Y & L. 13, 13–14 (2003) (describing a judge who imposed a lenient sentence on defendant who murdered two gay men, specifically because the victims were gay).

<sup>15</sup> *See* Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 397, 404 (2004) (describing the now notorious case in which a court "disregarded the presumption in favor of a 'natural parent' to award custody of Ms. Bottoms' toddler to her mother, the child's maternal grandmother, because Ms. Bottoms" was a lesbian).

<sup>16</sup> Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198–199. (2009). Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1411–13 (2004) (discussing *Kansas v. Limon*, 539 U.S. 955 (2003)).

<sup>17</sup> *See, e.g.*, Anthony C. Infanti, *Deconstructing the Duty To the Tax System: Unfettering Zealous Advocacy On Behalf of Lesbian and Gay Taxpayers*, 61 TAX L. 407 (2008) (assumptions of heterosexuality harming queer tax payers); Jaime E. Hovey, *Nursing Wounds: Why LGBT Elders Need Protection From Discrimination and Abuse Based On Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95, 106–07 (2009) (arguing that heterosexist presumptions in law which encourage LGBT people to "come out" in order to make clear their identities endanger them); James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 681–85 (2004) (discussing how abstinence-until-marriage sex education erases queer youth); Lisa M. Pooley, *Heterosexism and Children's Best Interests: Conflicting Concepts In Nancy S. v. Michele G.*, 27 U.S.F. L. REV. 477 (1993) (discussing a California court's refusal to include a lesbian who had raised two children into the meaning of a custody statute).

cannot or should not be gay permeates our society and does violence to queer youth.<sup>18</sup> The violence is accentuated when the child is at the mercy of the state or a state-appointed attorney. These assumptions—*e.g.* believing a queer child is merely “confused,” assuming a child is too young to be sexual, or attempting to protect a child from societal discrimination—are dangerous even when an attorney is acting in good faith.<sup>19</sup>

Attorney bias and prejudice against “queerness” can be explicitly negative, founded on the belief that straying from the heterosexual norm in either action or appearance is wrong. However, bias may also be implicit in the decisions and determinations an attorney makes based on heterosexist notions that all children are (or should be) heterosexual or brought up in a “traditional” heterosexual home. Regardless of the reason behind the prejudice, the impact on a queer child will be the same.<sup>20</sup> If an attorney is allowed to provide anything but traditional advocacy for a queer child, it is likely the child will be harmed by either the attorney’s explicit hostility toward, or internalized erasures of, the child’s queer identity.

### A. Representing Children

Most children in the justice system are provided attorneys,<sup>21</sup> and courts have held that where a child possesses a right to counsel, she has a right to “effective assistance of counsel.”<sup>22</sup> While children may have a “right” to effective assistance of counsel, it is clear that the representation

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<sup>18</sup> Joseph J. Wardenski, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth* 95 J. CRIM. L. & CRIMINOLOGY 1363, 1372–73 (2005) (internal citations omitted); see also José Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 11–16 (2008) (describing both pre- and post-natal preferencing for heterosexual children).

<sup>19</sup> See Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 799–801 (2006) (noting harm in well-intentioned representation of queer youth if it reinforces negative concepts about queer identity).

<sup>20</sup> Cf. *State v. Davis*, 872 So. 2d 250, 253 (Fla. 2004) (court indicating that racial animus stated by defense counsel is equally repugnant whether real or said as trial tactic).

<sup>21</sup> Attorneys in juvenile proceedings are also called “guardians” or “guardians *ad litem*.” See Valentine, *supra* note 4, at 1060–65 (explaining different nomenclature for and roles adopted by attorneys appointed to represent children).

<sup>22</sup> See, *e.g.*, *In re Gault*, 387 U.S. 1 (1967); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353 (N.D. Ga. 2005); *In re Jamie T.T.*, 599 N.Y.S.2d 892 (App. Div. 1993).

they receive generally falls well below such a standard.<sup>23</sup> Worsening the problems children face from poorly trained, overwhelmed, or indifferent attorneys is the systemic support of “best interest” lawyering.<sup>24</sup> Unlike most attorney-client relationships, lawyers representing children have a role continuum that often allows them to select the kind of representation they will provide to a child.<sup>25</sup>

Attorneys for children may be allowed to, and are sometimes required to, provide traditional advocacy in which they are ethically required to advocate for the wishes of their clients.<sup>26</sup> However, most states encourage and may require that attorneys representing children be loyal to the court and not to their child clients.<sup>27</sup> In such states attorneys are appointed either as guardians *ad litem* (GALs) or as “best interest” attorneys. These roles require attorneys to advocate for what this Author suggests is their “best guess”<sup>28</sup> at what is in a child’s “best interest” by

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<sup>23</sup> See Susanne M. Bookser, *Making Gault Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 297, 305–06 (2004) (discussing studies indicating poor representation in juvenile justice proceedings); Hollis R. Peterson, *In Search of the Best Interest of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1084 (2006) (discussing studies on the effectiveness of guardians ad litem); Valentine, *supra* note 4, at 1055–56 (describing reasons for “less than robust representation” afforded child clients).

<sup>24</sup> With the encouragement of the judiciary, the vast majority of attorneys representing children in the United States persist in providing best interest representation. Valentine, *supra* note 4, at 1067–68.

<sup>25</sup> *Id.* at 1061–65 (discussing the roles adopted by attorneys representing children).

<sup>26</sup> The New York statute requiring counsel for children does not specifically articulate the type of advocacy counsel must provide, which has led to best interest lawyering being the most prevalent form of child representation in the state. See Valentine, *supra* note 4, at 1068–70. Some states require traditional advocacy for children of a certain age or when there is a conflict between the child’s wishes and what the attorney thinks is in the child’s best interests. See *id.* at 1111–12 nn.354–55 (citing New Mexico, Washington, and Michigan statutes).

<sup>27</sup> See, e.g., *Carrubba v. Moskowitz*, 840 A.2d 557, 564 (Conn. App. Ct. 2004) (explaining that an attorney for a child is more like a prosecutor than public defender); *Clark v. Alexander*, 953 P.2d 145, 152 (Wyo. 1998) (stating that in custody proceedings, a guardian ad litem functions as an “arm of the court”) (internal citations omitted).

<sup>28</sup> Because most attorneys have little or no training to prepare them to make these decisions, best interest generally becomes the attorney’s best guess at what is in the child’s best interest. See Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and*

substituting their judgment for that of their client.<sup>29</sup> This type of representation allows lawyers to ignore ethical rules concerning attorney-client privilege<sup>30</sup> and client autonomy<sup>31</sup> and also allows attorneys to directly undermine their clients before the court.<sup>32</sup>

The premise behind best interest lawyering is rooted in concepts of the state as *parens patriae*, responsible for the care of the child when the parents cannot or will not fulfill that role.<sup>33</sup> It is based in part on the belief

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*Custody Representation of Children*, 28 HAMLINE J. PUB. L. & POL'Y 177, 195–96 (2006) (even with training, attorneys cannot discern what is best for a given child, because they lack the time to completely understand all psycho-social factors affecting such a decision); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 206 (2004) (lack of training for best interest attorneys forces them to make decisions based on personal biases, experience, and intuition).

<sup>29</sup> The two roles are similar but not completely the same. Substitution of judgment should require an attorney who “substitutes” her judgment for that of a child client to attempt to advocate the position the child would adopt, were the child capable of making a decision. See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 303–06 (2005). The best interest attorney's role is to advocate what the attorney thinks would be in the child's best interest, regardless of the child's position. See *id.* at 269, 281–82, 284. However, as both types of representation cede authority to the attorney and remove it from the child client, “substituted judgment” representation is subject to the same arbitrariness and abuse as best interest lawyering. *Id.* at 305.

<sup>30</sup> See Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN'S L. REV. 601, 607–08 (2007) (discussing the scope of child client confidentiality when representing a child's best interest).

<sup>31</sup> Compare Robert E. Shepherd & Sharon S. England, *I Know the Child is My Client, But Who Am I?*, 64 FORDHAM L. REV. 1917, 1942 (1996) (arguing that GAL diminishes the child's autonomy by reducing the child's voice at the proceeding in favor of the lawyer's understanding of the child's best interest), with Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1675 (1996) (zealous advocacy on behalf of children is consistent with client autonomy).

<sup>32</sup> *In re Amika P.*, 684 N.Y.S.2d 761 (Fam. Ct. 1999) (refusing child's request to remove law guardian who refuses to advocate for the child's position); see Guggenheim, *supra* note 1, at 825–28 (describing cases in which courts have refused to allow him to substitute as the attorney for the child where children have objected to the position taken by their assigned counsel).

<sup>33</sup> Merrill Sobie, *The Child Client: Representing Children In Child Protective Proceedings*, 22 TOURO L. REV. 745, 750 (2006). See also Henning, *supra* note 29, at 249 –

that the court, which is ultimately responsible for determining the best interest of the child, requires someone else to act as either a neutral party or as a best interest advocate, to ensure that all pertinent information about a child is provided to the state.<sup>34</sup> Best interest lawyering persists although it has long been called into question by bar associations, academics, and many family law practitioners<sup>35</sup>—regrettably for reasons that have little or no connection to “the best interest” of the child.<sup>36</sup>

Best interest lawyering allows and encourages attorneys to substitute their own beliefs for those of their clients. This substitution of judgment occurs within an attorney-client relationship fraught with power

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55 (discussing role of paternalism in fostering best interest lawyering in delinquency proceedings).

<sup>34</sup> See, e.g., 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, 53–55 (2000) (discussing why family court judges cannot adequately protect children’s interests).

<sup>35</sup> See Haralambie, *supra* note 28, at 177.

<sup>36</sup> See Barbara Kaban et al, *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 682 (2006) stating:

The [Working] Group acknowledges that some attorneys are subject to statutory mandates or judicial expectations to serve as a best interests guardian ad litem that may conflict with the client-directed role. Other attorneys decline to use a traditional client-directed model and advocate for what is in the child’s best interests because: (a) it is a familiar role that emulates the normative parent/child relationship; (b) they believe their role is to “take care of” of the child, or they despair at the inability of the state protective system to perform its role adequately and, therefore conclude it is their responsibility to protect the child from harm by advocating for what they (or a social worker, therapist, or other third party) believe is in the child’s best interests; (c) attorneys like to win and best interests advocacy is perceived to be the least risky approach and the position that is most likely to please judges; d) ambivalence about the wisdom and efficacy of giving “voice” to young children or to youths with complex backgrounds, multiple and competing influences, and limited emotional or intellectual capacities; and/or e) attorneys have different awareness or perhaps lack understanding of developmental issues and the impact that race, ethnicity, class and culture may have on the child’s decision making.

*Id.* (footnote omitted).

differentials that allow attorneys relatively free reign to do as they please.<sup>37</sup> Within this environment of unchecked attorney autonomy, individual attorney biases and prejudice cannot help but infect the representation provided to children.<sup>38</sup> Any ideas attorneys may have as to what is in their queer child clients' best interests will be permeated with the attorneys' own homophobic and heterosexist biases.<sup>39</sup> Therefore, any best interest representation by biased attorneys endangers queer youth.

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<sup>37</sup> See Bruce A. Green & Bernadine Dohrn, *Ethical Issues in Representing Children*, 64 FORDHAM L. REV. 1281, 1290 (1996) (stating that "[t]he attorney-client relationship is a principal-agent relationship. It is difficult, however, to think of children as 'principals' in any meaningful sense, given their relative, if not utter, powerlessness to control or fire the lawyers who act in their name"); Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections On Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 595 (2008) (arguing that attorneys for children have essentially free reign and are subject to few accountability structures in the attorney-child client relationship).

<sup>38</sup> Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation In Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 469 (2007) ("Best-interests representation, however, silences the child's voice and amplifies the voice of the attorney, in most cases a stranger who knows little or nothing about the child and who stands to suffer no consequences himself in the proceedings. Given the disproportionate numbers of low-income children of color in the delinquency courts and the fact that many attorneys come from different communities, a troubling possibility exists that racist and classist biases—whether conscious or not—might influence the attorneys' decisions about what is best for their clients."); Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y. L. J., March 6, 2008, at 3 (arguing that attorneys representing children cannot help but have their decisions infected by their own personal biases); Guggenheim, *supra* note 1, at 797 ("The principal danger children's lawyers bring is that they will conclude what is best for their clients based on invisible factors that have more to tell us about the values and beliefs of the lawyers than about what is good for the children.").

<sup>39</sup> See Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 446 (2000), stating:

Because homophobia and heterosexism remain much more socially acceptable than other forms of bias (such as those based upon gender, race, or religion), many judges do not notice the bias that informs their reactions to and feelings about homosexuality. When such bias is brought to their attention, moreover, many judges lack the embarrassment or shame they might feel if confronted with their own gender or racial bias.

*Id.* (internal citations omitted). See also Hirschfeld, *supra* note 10, at 617 (arguing that most Americans refrain from outward expressions of overt racism and sexism but do not feel constrained to conceal anti-LGBT sentiments); Brower, *Obstacle Courts*, *supra* note 13,

## **B. The Good, the Bad, and the Ugly**

The representation of queer children occurs across a spectrum of attorney behavior. However, three general archetypes of representation might be described as the “good,” the “bad,” and the “ugly.” The “good” is what every child deserves. The “bad” is the casually disapproving yet still dangerous bias many attorneys exhibit toward queerness. The “ugly” is a menacing antagonism by an overtly prejudiced attorney who actively harms a queer child. The following case narratives illustrate these three archetypes.

The first case is an example of the “good” that is traditional advocacy and is from a reported New York case. It involves Lori M., a fifteen-year-old girl whose mother initiated a PINS<sup>40</sup> proceeding solely because her daughter was in a lesbian relationship.<sup>41</sup> According to the court, the mother filed the PINS petition “when Lori absconded from home in defiance of her mother’s directive that she have no contact or communication whatsoever with her older friend.”<sup>42</sup> Other than the lesbian relationship, there were no other disciplinary problems between the mother

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at 48 (citing annual nationwide juror polls that found jurors self-reporting that they were three times more likely to be unfair to lesbians and gay men than they are for African-Americans, Asians, Hispanics, or Whites).

<sup>40</sup> New York Family Court Act defines a “Person in need of supervision” as:

A person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child’s care, or other lawful authority, or who violates the provisions of section 221.05 of the penal law.

N.Y. FAM. CT. ACT. §712(A) (McKinney Supp. 2009).

<sup>41</sup> *In re Lori M.*, 496 N.Y.S.2d 940, 940 (Fam. Ct. 1985) (mother admitted to court that she would not have been upset if her daughter had been sexually involved with a male). Lest one think that times have changed, a mother in Miami recently argued, and a trial court agreed, that an eighteen-year-old female who had consensual sexual relations with her seventeen-year-old daughter committed sexual battery as a matter of law. *Acevedo v. Williams ex rel. Jaquita Wiggins*, No. 1D08-0370 (Fla. Dist. Ct. App. June 20, 2008), available at <http://opinions.1dca.org/written/opinions2008/06-30-08/>.

<sup>42</sup> *In re Lori M.*, 496 N.Y.S.2d at 940.

and daughter.<sup>43</sup> Under New York law, once a child is adjudicated a PINS, she can be removed from her home and placed in state custody.<sup>44</sup> Lori's Law Guardian argued that the child's sexual orientation and the choices she made in pursuit thereof were constitutionally protected.<sup>45</sup> After a discussion of children's constitutional rights to privacy, the court concluded that the mother could not invoke the power of the state to intervene in the child's relationship decisions and dismissed the petition.<sup>46</sup>

The second narrative illustrates the all too common "bad" representation provided queer children, or children who are seen as being at risk of becoming queer. It is illustrated by a case in West Virginia in which the attorney appointed to represent an infant petitioned to move the child because the foster parents were lesbians.<sup>47</sup> The couple, Kathryn Kutil and Cheryl Hess, had been approved by the West Virginia Department of Health and Human Resources (D.H.H.R.) as both foster and adoptive parents<sup>48</sup> and routinely had foster children placed in their home.<sup>49</sup> The attorney appointed as GAL to the infant sought to remove the child immediately upon determining the child had been placed in the home of a same-sex couple.<sup>50</sup> He sought removal even though his petition maintained that the home appeared "to be comfortable and physically safe for the infant respondent . . . [he nonetheless believed] that the best interest of the child is not to be raised, short term or long term, in a homosexual environment and that the same is detrimental to the child's overall welfare and well-being."<sup>51</sup> In addition to seeking to move the infant, he also sought a statewide injunction

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<sup>43</sup> *Id.*

<sup>44</sup> N.Y. FAM. CT. ACT § 728 (McKinney Supp. 2009).

<sup>45</sup> *In re Lori M.*, 496 N.Y.S.2d at 941.

<sup>46</sup> *Id.* at 942.

<sup>47</sup> *State ex rel. Kutil v. Blake*, 679 S.E.2d 310 (W. Va. 2009).

<sup>48</sup> *Id.* at 314 n.7.

<sup>49</sup> *Id.* Ms. Kutil's adopted daughter had initially been placed in the couple's home as a foster child and the Department continued to place children in the home after the GAL sought to remove the infant at issue. *Id.* at 316.

<sup>50</sup> According to newspaper reports the GAL visited the child once, for less than ten minutes at the couple's home, before moving to have the infant removed from the couple's care. Pamela Paul, *The Battle Over a Baby*, N.Y. TIMES MAG., July 26, 2009, at 38.

<sup>51</sup> *State ex rel. Kutil*, 679 S.E.2d at 314.

against the D.H.H.R. prohibiting the agency from placing any foster child in “homosexual homes.”<sup>52</sup> The trial court initially allowed the child to stay with the lesbian couple. However, after the biological mother’s parental rights were terminated and approximately eleven months after the initial placement, the matter was set for a permanency planning hearing and the GAL renewed his argument to remove the child.<sup>53</sup> The trial court agreed with the GAL, holding that although the “Kutil-Hess household may be the most appropriate adoptive placement home for the child, . . . it is unfair not to allow the child the option to be adopted by a traditional family.”<sup>54</sup>

The GAL’s insistence on—and the trial court’s agreement with—moving the child after almost a year in the foster family’s home is in direct contravention of the long recognized understanding that children in foster care need stability and should not be moved unnecessarily.<sup>55</sup> On appeal to the West Virginia high court, the issue of moving the child after she had bonded with the couple rose repeatedly. The Chief Justice pointedly questioned the GAL, who argued on behalf of the child on this issue.<sup>56</sup> She interrupted his argument to ask about the consequences of removing the infant “from the only real home she had ever known,”<sup>57</sup> saying, “Nothing could be worse than to rip a child out of a family that has bonded [with her] for two years.”<sup>58</sup> A different justice followed this line of questioning, stating, “I don’t have any real problem with the preference for two parents

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<sup>52</sup> *Id.* at 314 n.8. The trial court concluded it lacked jurisdiction to address the issue of the injunction. *Id.*

<sup>53</sup> *Id.* at 314.

<sup>54</sup> *Id.*

<sup>55</sup> “Researchers have extensively documented the emotional and psychological harm children suffer due to multiple foster care moves because they are deprived of stability and permanence.” Jennifer Rodriguez, *Case Spotlight: Braam v. State No. 98-2-01570-1*, 7 U.C. DAVIS J. JUV. L. & POL’Y 241, 241 (2003) (citing THOMAS P. McDONALD, ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (1993)). A Washington State foster care statute specifically acknowledges “[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support.” WASH. REV. CODE ANN. § 74.13.310 (West, 2009).

<sup>56</sup> *State ex rel. Kutil*, 679 S.E.2d at 312 (listing of counsel). See also Andrew Clevenger, *Same-Sex Couple’s Adoption Debated; State Court Hears Fayette County Case*, CHARLESTON GAZETTE, Mar. 12, 2009, at 1A.

<sup>57</sup> Clevenger, *supra* note 56 (description of oral argument).

<sup>58</sup> *Id.*

over one at the outset [of the placement process], but once the child has bonded [with a foster family], what about the child's rights?"<sup>59</sup> The GAL was adamant, arguing that the "trauma of being removed from a loving home early in life was outweighed by the benefit of having two adoptive parents over a lifetime" and that "logically a man and a woman would be the best choice to raise the child."<sup>60</sup> It must be noted that at this point in the proceeding the infant had already been moved twice.<sup>61</sup> The child had been taken from the lesbian foster parents and placed into the home of a heterosexual couple who initially planned to adopt her.<sup>62</sup> Within a week of the child's placement with them, the heterosexual couple indicated they would be unable to adopt, and the child was returned to the lesbian foster parents.<sup>63</sup> Thus, the GAL was actively arguing the child should be moved yet again in the chance that another heterosexual couple would come forward to adopt her. Unfortunately, this scenario, in which an attorney is appointed to represent a child and actively takes positions harmful<sup>64</sup> to the child because of the attorney's personal bias, is not unique and is likely repeated with less media attention in local proceedings nationwide.<sup>65</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *State ex rel. Kutil*, 679 S.E.2d at 317 n.13. The child was moved to the pre-adoptive home on November 22, 2008 and returned to the Kutil-Hess household on November 26, 2008.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See Braam ex rel. Braam v. State*, 81 P.3d 851, 854 n.1 (Wash. 2003) (noting that "[s]ome children in foster care are moved frequently, which may create or exacerbate existing psychological conditions, notably reactive attachment disorder").

<sup>65</sup> This case is eerily similar to one reported in Ohio, where the court-appointed guardian of two young boys who were placed into the home of lesbian foster parents sought to have the children moved. *See Boys Can Stay In Foster Home*, DAYTON DAILY NEWS, Oct. 18, 1996, at 4B. In a hearing initiated by the children's court-appointed guardian, the judge stated the boys were well taken care of and should not be removed from the home. The children's guardian challenged the placement claiming that his "religious beliefs are that homosexuality is immoral and that the children should not be subjected to an immoral lifestyle." *Id.* The children had been in the foster home for eight months and there was no suggestion that anything other than the sexuality of the foster parents was at issue. *Foster Child May Be Taken From Gay Couple*, COLUMBUS DISPATCH, July 5, 1996, at 2C.

The third and “ugly” story comes from a case described by Jody Marksamer and involves a sixteen-year-old transgendered girl who had been living as a female since she was thirteen.<sup>66</sup> According to Marksamer, Destiny presents as a female at school, with her family, and in the community.<sup>67</sup> When she was fifteen, the juvenile court placed Destiny in T-Max, the state’s highest-security juvenile facility for boys, because no other program would accept a transgendered youth.<sup>68</sup> Destiny’s therapist, who was fearful for the child’s safety, contacted Marksamer because the child’s court-appointed attorney completely refused to address her concerns. Destiny was assaulted shortly after being placed at the T-Max facility and the attacks continued during the next six months.<sup>69</sup> Because Destiny’s court-appointed attorney refused to assist his client, Marksamer was forced to file reports at the child’s placement review hearing documenting Destiny’s treatment inside T-Max. At the hearing Destiny testified that the report was true and further testified that she was being sexually assaulted, wanted to be moved to another facility, and was scared that the abuse would continue if she was returned to T-Max.<sup>70</sup>

Destiny’s court-appointed attorney appeared at the hearing at the direction of the court. However, not only did he not support her wish to leave T-Max, he warned the court against granting his client’s request, stating: “I think this young man has a lot of things—and I use the word man—to think about so I would just ask the court to be cautious in any decisions that it makes.”<sup>71</sup> This was not the first time the child’s attorney had exhibited hostility towards his own client. When Marksamer had initially contacted him about the case he “said with a chuckle and a hint of disgust, ‘and by the way, do you know he thinks he’s a girl.’”<sup>72</sup>

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<sup>66</sup> Jody Marksamer, *And By the Way, Do you Know He Thinks He’s a Girl? The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*, 5 SEXUALITY RES. & SOC. POLICY 72, 76 (2008).

<sup>67</sup> *Id.* at 76–77.

<sup>68</sup> Probation staff had recommended that Destiny be placed in an unlocked facility because she was considered low risk. *Id.* at 78.

<sup>69</sup> *Id.* at 77.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Marksamer, *supra* note 66, at 78.

The above narratives illustrate three phenomena. First, they point out the power “best interest” attorneys have over their child clients. Second, they demonstrate that the homophobic bias or heterosexism that pervades our society also, unsurprisingly, affects attorneys appointed to represent children. Finally, they suggest how this unchecked attorney power coupled with bias and prejudice can be potentially devastating for a queer child.

Queer children should not have to depend on the luck of the draw to receive an attorney like the one who represented Lori M.<sup>73</sup> Attorneys—such as Destiny’s counsel or the GAL in West Virginia—who allow bias to impair their representation of queer or transgendered youth are far too dangerous to be allowed to provide anything but traditional advocacy.<sup>74</sup> This Author has argued previously that best interest lawyering poses a serious threat to the health and safety of queer children caught in the judicial system.<sup>75</sup> However, best interest lawyering will likely persist unless and until attorneys are held accountable for the harm they cause. Holding individual attorneys liable for the harm they cause when they substitute their own judgment for that of their clients can serve to educate the legal community as a whole, resulting in better representation for queer youth.<sup>76</sup>

As a preliminary foray, this next Part considers four existing mechanisms that could be used to hold an attorney who fails to provide traditional advocacy for a queer youth accountable for his or her actions. An aggrieved party could bring a claim for ineffective assistance of counsel, file a legal malpractice claim, seek judicial sanctions, or file an ethics complaint. Each of these has its own advantages and disadvantages but each, if successful, could provide some redress for an injured child client

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<sup>73</sup> See *supra* notes 40–46 and accompanying text.

<sup>74</sup> Traditional advocacy representation insulates children from the bias and prejudice of their attorneys for a number of reasons, not the least of which is because the child’s wishes guide the representation. The arguments for traditional advocacy for queer youth are more fully detailed in Valentine, *supra* note 4, at 1100–06.

<sup>75</sup> *Id.* at 1097–1100.

<sup>76</sup> Compare Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 857 (arguing that successful lawsuits against school officials who failed to protect queer youth resulted in schools nationwide developing anti-bullying policies), and Inga Laurent, “*This One’s for the Children*”: *The Time Has Come To Hold Guardians Ad Litem Responsible for Negligent Injury and Death To Their Charges*, 52 CLEV. ST. L. REV. 655 (2005) (arguing that the absolute immunity protection often extended to court appointed guardians fails to ensure competent representation of children).

and potentially begin to act as a catalyst for changing how attorneys represent queer children. The following sections will analyze these mechanisms using the actions of Destiny's attorney as illustration.

## II. HOLDING ATTORNEYS ACCOUNTABLE

### A. Ineffective Assistance of Counsel Claims

The general standard for ineffective assistance of counsel is whether the trial counsel's performance "fell below an objective standard of reasonableness,"<sup>77</sup> and that "but for" the deficient performance there is a reasonable probability that the outcome would be different.<sup>78</sup> Ineffective assistance of counsel claims are available to children in the juvenile justice system<sup>79</sup> as well as to those in abuse and neglect<sup>80</sup> and custody<sup>81</sup> proceedings.

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<sup>77</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also* *State v. Davis*, 872 So. 2d 250, 253 (Fla. 2004) ("[A] defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards.") (internal citation omitted).

<sup>78</sup> *Strickland*, 466 U.S. at 694; *accord* *Davis*, 872 So. 2d at 253 ("[T]he deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined.") (internal citation omitted). *See also* John H. Blume & Stacey D. Neumann, "It's Like Déjà vu All Over Again": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach To the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>79</sup> *See, e.g., In re S.E.*, 2008 WL 2404039, at \*4 (Ohio Ct. App. June 13, 2008) (holding that attorney's failure to move to suppress juvenile's written statement constituted ineffective assistance of counsel); *In re Michael DD*, 823 N.Y.S.2d 284, 286 (App. Div. 2006) (rejecting contention that failure of juvenile's attorney to cross examine witness constitutes ineffective assistance of counsel).

<sup>80</sup> *See, e.g., In re Colleen C.C.*, 648 N.Y.S.2d 754 (App. Div. 1996) (law guardian's failure to take an active role in proceeding constituted ineffective assistance of counsel); *In re Clifton B.*, 96 Cal. Rptr.2d 778 (Ct. App. 2000) (joint representation of children in termination of parental rights proceeding constituted ineffective assistance of counsel). *See also* *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353, 1363 (N.D. Ga. 2005) (in class action brought on behalf of children in state custody, court found that there was a triable issue of fact as to whether or not the children were receiving ineffective assistance of counsel).

<sup>81</sup> *Pratt v. Wood*, 620 N.Y.S.2d 551, 553 (App. Div. 1994) (besides evidentiary errors, reversal required because of passive role taken by child's attorney in custody matter).

There are no reported cases in which a juvenile claimed ineffective assistance of counsel in whole or in part due to the biases of her attorney. However, there are cases where adults have successfully used the racial or ethnic animus of their attorneys as a basis for ineffective assistance of counsel claims or as an explanation of the attorney's actions when pursuing such a claim.<sup>82</sup> In *State v. Davis*, the defense counsel during voir dire said, "There is something about myself that I'd like to tell you, and then I'd like to ask you a question. *Sometimes I just don't like black people. Sometimes black people make me mad just because they're black.*"<sup>83</sup> In finding that trial counsel's racist statements constituted ineffective assistance of counsel, the court framed the issue by stating, "We strongly reaffirm the principle that racial prejudice has no acceptable place in our justice system."<sup>84</sup> The court also determined that it did not matter whether or not "counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated."<sup>85</sup>

Ineffective assistance of counsel claims have also been successful based in part on trial counsel's animosity towards an adult client's sexuality. In *Fisher v. Gibson*, the Tenth Circuit upheld an ineffective assistance of counsel claim in part because of the trial counsel's hostility toward his client's sexual orientation.<sup>86</sup> During the habeas proceeding, the petitioner's trial counsel admitted that he often clashed with his client and that during the period of time he was representing him, he "thought homosexuals were the among the worst people in the world and I did not like that aspect of this case. I believe my personal feelings toward the defendant affected my representation of him."<sup>87</sup> The court in *Fisher* noted that the attorney's animosity towards his client affected his representation<sup>88</sup>

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<sup>82</sup> See, e.g., *Frazer v. U.S.*, 18 F.3d 778 (9th Cir. 1994) (finding a defense counsel's calling his client "a stupid nigger son of a bitch" irreconcilable with the duty of loyalty and the 6th Amendments right to counsel); *Davis*, 872 So.2d at 253 (holding "We cannot agree with the trial court's conclusion that an explicit expression of racial prejudice can be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated.").

<sup>83</sup> *Davis*, 872 So.2d at 252 (emphasis in original).

<sup>84</sup> *Id.* at 253.

<sup>85</sup> *Id.*

<sup>86</sup> *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002).

<sup>87</sup> *Id.* at 1298.

<sup>88</sup> *Id.*

and found that the defense counsel's hostility toward the petitioner pointed to a "blatant and fundamental violation of Mr. Porter's duty of loyalty to his client."<sup>89</sup>

Echoes of the biases exhibited by the attorneys in *Davis* and *Fisher* permeate Destiny's case. Her attorney's sneering "and by the way do you know he thinks he's a girl"<sup>90</sup> statement illustrates the same kinds of dismissive and dangerous prejudice found in *Davis* and *Fisher*. In addition, after hearing Destiny testify that she was being sexually assaulted at T-Max, her attorney specifically warned the judge against moving her, saying, "I think this young man has a lot of things—and I use the word man—to think about."<sup>91</sup> Destiny's attorney was hostile to her because she was transgender and his hostility led him to sabotage her attempt to seek safety, a fundamental breach of the duty of loyalty every attorney owes all clients regardless of age or sexual identity.

The second prong of the ineffective assistance of counsel standard requires that a defendant show "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>92</sup> In *Davis*, the court found "there is also evidence in this record to suggest that counsel's expressions of racial bias during voir dire affected his performance in both the guilt and penalty phases of Davis's trial, creating an unacceptable risk that prejudice clouded counsel's judgment and diminished the force of his advocacy."<sup>93</sup> In *Fisher*, the court found the defendant's credibility was key to the case<sup>94</sup> and held that trial counsel undermined his client in part by treating him in an abusive and hostile manner while the client was on the stand.<sup>95</sup>

The article that describes Destiny and her attorney does not provide a record of either the initial trial or the dispositional hearing, although it does note that probation recommended a non-secure placement for

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<sup>89</sup> *Id.*

<sup>90</sup> Marksamer, *supra* note 66, at 78.

<sup>91</sup> *Id.* at 77.

<sup>92</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

<sup>93</sup> *State v. Davis*, 872 So.2d 250, 256 (Fla. 2004).

<sup>94</sup> *Fisher v. Gibson*, 282 F.3d 1283, 1309 (10th Cir. 2002).

<sup>95</sup> *Id.* at 1308.

Destiny.<sup>96</sup> Marksamer suggests that Destiny's attorney failed to provide zealous representation during the dispositional hearing and indicates that it was because the attorney himself thought it was in Destiny's best interest to stop acting like a girl and obtain treatment for her "so-called sexual problem."<sup>97</sup> Given the statements the attorney made at the review hearing, the statements he made to Marksamer prior to the hearing, his refusal to assist his client, and his direct undermining of her testimony when she was on the stand, it seems clear that his bias affected his performance and clouded his judgment. Because courts often privilege the judgments and statements of best interest attorneys over those of other counsel and of their own clients,<sup>98</sup> it is likely that Destiny's lawyer severely prejudiced the outcome of the placement review hearing against his client.

As in *Davis* and *Fisher*, the homophobic bias that Destiny's attorney harbored should support a claim for ineffective assistance of counsel. As with racial bias, there is no place in our judicial system for sexual orientation or gender identity bias. A successful appeal based on ineffective assistance of counsel would remand the proceedings for a new trial with new counsel and possibly a new judge. If Destiny were to successfully appeal her initial placement in T-Max, it would provide legal support for other queer children to attack their fact-finding or dispositional proceedings and thus begin to educate the children's bench and bar. However, a much more effective (though much harder to achieve) method of educating attorneys would be for Destiny to successfully sue her attorney for legal malpractice.

## B. Legal Malpractice Claims

A second tactic available for a queer child injured by an attorney's actions is to bring a legal malpractice suit. Such suits can be the impetus for changing how attorneys treat their queer child clients,<sup>99</sup> in the same way Jamie Nabozny's successful litigation against a local school board helped

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<sup>96</sup> *Supra* note 68 and accompanying text.

<sup>97</sup> Marksamer, *supra* note 66, at 78.

<sup>98</sup> Valentine, *supra* note 4, at 1062.

<sup>99</sup> Manual R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TULANE L. REV. 2583, 2590 (1996) (suggesting that as product liability and medical malpractice litigation forced manufactures and doctors to change, so legal malpractice litigation would force lawyers to reform).

change how schools treat queer youth.<sup>100</sup> Civil legal malpractice<sup>101</sup> claims require that an attorney-client relationship give rise to a duty of care by the attorney, that the attorney breach that duty resulting in damages to the client, and that the breach was the proximate or legal cause of the client's injury.<sup>102</sup> Recent cases have opened the door for attorneys to be liable for negligent infliction of emotional distress as well as more tangible injuries.<sup>103</sup>

It is clear that Destiny's attorney breached his duty of competence<sup>104</sup> and loyalty,<sup>105</sup> even given the probability that he was representing her as a "best interest" attorney.<sup>106</sup> It must be remembered that

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<sup>100</sup> Jamie Nabozny sued both the school board and individual school administrators for their failure to intervene in years of well documented anti-gay attacks on him by other students. See Bedell, *supra* note 76, at 855–57.

<sup>101</sup> Based on public policy concerns, many jurisdictions impose a higher standard in criminal malpractice actions. See *Belk v. Cheshire*, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003). However, even juvenile delinquency proceedings are considered civil in nature, *McKiver v. Pennsylvania*, 403 U.S. 528, 541 (1971), and thus it is not necessary to address the stricter criminal legal malpractice standards in this Article.

<sup>102</sup> Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609, 612 (1993).

<sup>103</sup> See Joseph J. Kelleher, *An Attorney's Liability for the Negligent Infliction of Emotional Distress*, 58 FORDHAM L. REV. 1309, 1320–21 (1990).

<sup>104</sup> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill thoroughness, and preparation reasonably necessary for the representation. ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) [hereinafter MODEL RULES OF PROF'L CONDUCT]. According to Marksamer, Destiny's attorney completely failed in any attempt to understand her transgender identity, her risk of abuse in placement, or her treatment needs. Marksamer, *supra* note 66, at 78.

<sup>105</sup> *Model Rules of Prof'l Conduct* Rule 1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT R., *supra* note 104, at R. 1.2. While Rule 1.14(b) allows an attorney to take "reasonably necessary protective action" if she "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken" and "cannot act in her own interest," the Model Rules also require that "as far as reasonably possible [an attorney] maintain a normal client-lawyer relationship with the client." *Id.* at R. 1.14.

<sup>106</sup> See *id.* at R. 1.14, R. 1.2. Rule 1.14 requires that an attorney attempt to maintain a normal attorney client relationship with a client with "diminished capacity" and only substitute judgment when the client "is at risk of substantial physical, financial, or other harm. Even if appointed as a best interest attorney, it should be remembered that the lawyer he choose to substitute his own judgment for that of a sixteen- year- old client, not a small

Destiny was sixteen years old, that she had been living as a female for three years, was seeking to be moved because she was being assaulted in placement, and had active support from her therapist with regard to moving her to a safer placement.<sup>107</sup> Her attorney refused to acknowledge her chosen identity or call her by her chosen name. He questioned Destiny's gender identity disorder diagnosis, undermined her testimony on the stand, and encouraged the court to disregard her petition to be moved from her current placement.<sup>108</sup>

As for damages, it is likely, though impossible to know, that Destiny was physically assaulted once she was returned to T-Max since she testified that she had been assaulted on more than one occasion. Even if she was not physically assaulted, for a transgender youth to be returned to a place like T-Max is damaging, in and of itself.<sup>109</sup> It is also arguable that Destiny's attorney was the proximate cause for both her initial placement at and her return to T-Max. Marksamer makes clear that at the initial disposition hearing, Destiny's attorney failed to argue for a different disposition—even when a probation staff suggested that Destiny should not be in a secure facility.<sup>110</sup> While the judge is the final arbiter, juvenile and family court judges routinely reference and rely on the recommendations of children's attorneys when making decisions.<sup>111</sup> By failing to argue for less restrictive and less dangerous placements as suggested by Destiny's "low risk designation,"<sup>112</sup> and by failing to make specific recommendations for placements with programs that would support her gender identity,<sup>113</sup> Destiny's attorney completely acquiesced in and supported her inappropriate placement at T-Max.

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child, and Destiny was attempting to be moved away from a setting in which she was being harmed.

<sup>107</sup> *Supra* notes 66–68 and accompanying text.

<sup>108</sup> Marksamer, *supra* note 66, at 81–82.

<sup>109</sup> Children placed in secure facilities solely because gender identity issues caused other programs to reject them face multiple consequences including "vulnerability to assault, lack of socialization and programming, loss of community and connection to family, and an increased likelihood the he or she will be pulled deeper into the system." *Id.* at 79.

<sup>110</sup> *Id.*

<sup>111</sup> Guggenheim, *supra* note 1, 817–818 nn.133–140 and accompanying text.

<sup>112</sup> Marksamer, *supra* note 66, at 79.

<sup>113</sup> *Id.*

Unfortunately, most, though not all, states provide attorneys who represent children with some form of immunity.<sup>114</sup> The immunity granted may be absolute, protecting them from liability “no matter how erroneous the act, how injurious its consequences, or how malicious the motive.”<sup>115</sup> This immunity, also called quasi-judicial immunity, is extended to attorneys who represent children either by state law<sup>116</sup> or by courts applying a functionality test that examines the duties of the individual attorney and “whether they are closely aligned with the judicial process.”<sup>117</sup> Using the functionality test, several courts have granted absolute immunity to those attorneys who function as an adjunct to the court (most guardians ad litem) but not to those who function as advocates for children.<sup>118</sup>

If Destiny’s attorney were granted absolute immunity it would be difficult, if not impossible, to succeed in a malpractice action even if it could be proven that his actions were driven by actual malice towards his client. However, if Destiny’s attorney only received qualified immunity, he would be shielded from liability unless his conduct was considered grossly

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<sup>114</sup> See Laurent, *supra* note 76. The Maryland Supreme Court recently refused to grant immunity to a guardian appointed to represent a child. Fox v. Willis, 890 A.2d 726 (Md. 2006). See also Planned Parenthood Ass’n of Atlanta Area, Inc. v. Miller, 934 F.2d 1462 (11th Cir. 1991) (suggesting that a guardian ad litem would be liable if he caused damages to his minor client).

<sup>115</sup> Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (both judge and attorney representing child as guardian ad litem were sued).

<sup>116</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-522(H) (2008).

<sup>117</sup> Cok, 876 F.2d at 3.

<sup>118</sup> See, e.g., Collins *ex rel.* Collins v. Tabet, 806 P.2d 40 (N.M. 1991), stating:

We hold that a guardian ad litem, appointed in connection with court approval of a settlement involving a minor, is absolutely immune from liability for his or her actions taken pursuant to the appointment, provided that the appointment contemplates investigation on behalf of the court into the fairness and reasonableness of the settlement in its effect on the minor. We also hold, however, that if the guardian’s appointment does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court and instead assumes the role of a private advocate for the child’s position, then the guardian is not immune and may be held liable under ordinary principles of malpractice.

*Id.* at 44.

negligent or it was determined that he failed to act in good faith in exercising his discretion.<sup>119</sup> Both the National Conference of Commissioners of Uniform State Laws<sup>120</sup> and the American Bar Association<sup>121</sup> suggest that attorneys who represent children, especially those who do so as “best interest” attorneys, should have qualified, not absolute, immunity. Attorneys representing children have been granted qualified immunity by both case law<sup>122</sup> and statute.<sup>123</sup> It is also possible that Destiny’s attorney would not receive any immunity and thus be held liable under ordinary standards of malpractice.<sup>124</sup>

While qualified immunity provides significant protection for attorneys it is not an impermeable shield. Courts have denied qualified immunity to school officials and law enforcement personnel who failed to respond to pleas for assistance because of the victim’s sexual orientation.<sup>125</sup>

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<sup>119</sup> See Nat’l Conference of Comm’rs of Unif. State Laws, Comment, *Uniform Representation of Children In Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 1, 57 (2008). “In other states, guardians ad litem enjoy a qualified immunity and can be held liable only for acts that exceed ordinary negligence. The terminology varies, ranging from gross negligence to intentional misconduct and bad faith. The qualified immunity provided in this section gives best interests advocates adequate protection from suit while still holding them accountable for egregious misconduct.” *Id.*

<sup>120</sup> NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS, UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT, Section 18 (2007) (provides that only the child has a right of action for money damages against the child’s attorney and limits liability unless the actions or inactions of the attorney constitute willful misconduct or gross negligence).

<sup>121</sup> See, e.g., *ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 160 (2003) (limits liability to cases where attorney’s actions were “willfully wrongful,” “done with conscious indifference or reckless disregard,” “done in bad faith,” with malice or were “grossly negligent”).

<sup>122</sup> See *Marquez v. Presbyterian Hospital*, 608 N.Y.S.2d 1012 (Sup. Ct. 1994) (holding that law guardian is entitled to qualified immunity when functioning primarily as child’s guardian ad litem but would be liable for ordinary negligence when functioning as child’s attorney).

<sup>123</sup> TEX. FAM. CODE ANN. § 107.009 (2008).

<sup>124</sup> See, e.g., *Collins ex rel. Collins v. Tabet*, 806 P.2d 40 (11th Cir. 1991); *Fox v. Willis*, 890 A.2d 726 (Md. 2006).

<sup>125</sup> See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003) (denying school administrators’ claim of qualified immunity in suit brought by queer students alleging equal protection claim for officials’ failure to protect students from anti-gay attacks); *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008) (denying qualified

After the Supreme Court's decision in *Romer*,<sup>126</sup> it is possible that actions driven by homophobic or transphobic bias and prejudice will not to be found entitled to immunity in the context of a § 1983 action.<sup>127</sup> Thus, given both his animus toward his client's sexuality and his actions in keeping her at T-Max, if only qualified immunity were available to Destiny's attorney, Destiny might succeed in bringing a legal malpractice claim.

### C. Judicial Sanctions

A queer youth like Destiny could also use the Model Code of Judicial Conduct<sup>128</sup> to stop her attorney from substituting his own judgment for hers. Canon Two, Rule 2.3 provides that a "judge shall not in the performance of judicial duties, by words or conduct manifest bias, prejudice, or harassment based on . . . sexual orientation, . . . and shall not permit court staff, court officials, or others subject to the judge's discretion and control to do so."<sup>129</sup> This rule also mandates that judges require "lawyers in proceedings before the court to refrain from manifesting bias or prejudice" based on sexual orientation.<sup>130</sup> A majority of states have adopted judicial codes that include language forbidding sexual orientation discrimination by the court.<sup>131</sup>

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immunity to deputy who provided less protection to lesbian domestic violence victim than to heterosexual domestic violence victims).

<sup>126</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>127</sup> See *Emblem v. Port Auth. of N.Y./N.J.*, No. 00 Civ. 8877(AGS), 2002 WL 498634, at \*11 (S.D.N.Y. March 29, 2002) ("The Supreme Court established in *Romer v. Evans* that, in the context of sexual orientation, '[i]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' (citations and emphasis omitted). *But cf* *Milligan-Hitt v. Bd. of Trustees of Sheridan County Sch. Dist. No. 2*, 523 F.3d 1219, 1234 (10th Cir. 2008) (finding that *Romer's* impact on prior precedent not clear enough to defeat claim of qualified immunity).

<sup>128</sup> ABA MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter MODEL CODE OF JUDICIAL CONDUCT].

<sup>129</sup> *Id.* at R. 2.3(b).

<sup>130</sup> *Id.* at R. 2.3(c).

<sup>131</sup> Jennifer Gerarda Brown, *Sweeping Reform From Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363 (2000). The Model Code of Judicial Conduct was amended in 2007 and the Canon that forbids sexual

Assuming the prohibitions of Canon Two were read so as to proscribe bias on the basis of sexual or gender identity as well as sexual orientation,<sup>132</sup> there are two ways they could be used to protect queer youth from the actions of their attorneys. First, a motion could be made to disqualify a judge who allowed an attorney to take a position that was harmful to his child client based on personal bias and prejudice. There are several cases where decisions have been vacated<sup>133</sup> and judges disqualified<sup>134</sup> based on judicial sexual orientation bias. Given that Canon Two has specific rules that require a Judge to ensure that attorneys appearing before them do not discriminate based on sexual orientation,<sup>135</sup> it is possible that a litigant, especially one who objects to his attorney's action and is ignored by the court, could succeed in vacating his sentence. It is also possible that in cases like Destiny's where there is clear evidence of the attorney's bias, if a child objected and was ignored by the court, the court's placement decisions could also be challenged.

While challenging the actions of a judge pursuant to the Judicial Code of Conduct does not directly affect the attorney, a successful challenge will educate the judiciary and cannot help but filter down to the attorneys who appear before them. Canon Two could also support a minor's request for new counsel during the pendency of a proceeding if the request

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orientation bias was renumbered from Canon Three to Canon Two. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 687 (2008).

<sup>132</sup> The Canon states that the prohibited manifestations of bias include but are not limited to those specified. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 128, at R. 2.3(b). In addition, comment 2 of Rule 2.3 indicates that negative stereotyping is an example of "manifestations of bias or prejudice." *Id.* cmt. 2.

<sup>133</sup> See, e.g., *State v. Patto*, 579 N.W.2d 503 (Neb. 1998) (vacating sentence because judge interjected own anti-gay religious beliefs at sentencing).

<sup>134</sup> See, e.g., *Rucks v. State*, 692 So.2d 976 (Fla. Dist. Ct. App. 1997) (motion to disqualify judge based on judge's reaction to petitioner's homosexuality was successful); *In re C.M.A. a/k/a C.M.W. & L.A.W.*, 715 N.E.2d 674 (Ill. App. Ct. 1999) (upholding removal of judge whose actions were based on personal beliefs about homosexuality).

<sup>135</sup> Rule 2.3(c) specifically requires judges to ensure that attorneys appearing before them refrain from discrimination. Rule 2.3(b) forbids a judge from allowing "others subject to the judge's discretion and control" from acting in a discriminatory fashion. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 128, at R. 2.3(b), 2.3(c). Given that most attorneys for children are appointed by judges, they are clearly within the control of the court. See Merril Sobie, *A Law Guardian by the Same Name: A Response to Professor Guggenheim's Matrimonial Commission Critique*, 27 PACE L. REV. 831 (2007) (discussing the impact on judicial appointment of law guardians).

was based on the bias of the minors appointed counsel.<sup>136</sup> Several states specifically mandate that attorneys provide the court with the child's stated position if it is counter to that of the attorney.<sup>137</sup> In those states the child's attorney would himself be the conduit for a child to make her objections known to the court.

Further, if, as in *Destiny's* case, another attorney is assisting the child, that attorney could request that the judge prohibit the child's attorney from acting in a discriminatory and biased manner. Even unsuccessful motions may foreground the issue of bias and prejudice and encourage the court to evaluate the performance of the child's attorney.<sup>138</sup> Forcing the judge to confront the ramifications of Canon Two may remind everyone involved that prejudice and discrimination based on sexual orientation are prohibited by the Model Code of Judicial Conduct as well as by the Model Rules of Professional Conduct.

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<sup>136</sup> Some courts have allowed minors to replace counsel or retain their own attorneys during a proceeding. *See, e.g.,* *Wagstaff v. Superior Court*, 535 P.2d 1220 (Ak. 1975) (upholding fourteen-year-old's right to retain own counsel); *Akkiko M. v. Superior Court*, 163 Cal.App.3d 525 (Ct. App. 1985) (trial court must honor ten-year-old child's counsel of choice if child is found to be competent to choose counsel); *Anonymous v. Anonymous*, N.Y.L.J., Sept. 8, 1995, at 27, col. 3 (Sup. Ct. 1995) (court appoints attorney selected by children); Arnold H. Lubasch, *Boy in Divorce Suit Wins Right to Choose His Lawyer*, N.Y. TIMES, Nov. 10, 1992, at B6 (discussing the case *P. v. P.* in which a New York Supreme Court judge granted an eleven-year-old child's request to "fire" his court appointed counsel because he did not get along with him. The court held that "under the right circumstances, a child can ask a court to replace a court-appointed attorney with an attorney of the child's choosing." *Id.*). Thus, by requiring judges to ensure lawyers also refrain from manifesting sexual orientation bias, Canon Two should require a court to grant a motion of a youth seeking to replace her counsel on the basis of bias.

<sup>137</sup> *See, e.g.,* CAL. WELF. & INST. CODE § 317(E) (Deering 2008); *see also* ME. REV. STAT. ANN. tit. 22, § 4005 (2008) (requires guardian to make child's wishes known to court regardless of recommendation of guardian).

<sup>138</sup> *See In re J.V. & C.W.*, 464 N.W.2d 887, 892 (Iowa Ct. App. 1990) (stating that, while not convinced there was either standing or ineffective assistance of counsel, "in the interest of justice and because the children are by definition legally unable to help themselves, it is our responsibility to evaluate the performance of the guardian ad litem, sua sponte if necessary").

#### D. Ethical Violations

Attorney ethics are governed by state laws, most of which are based on the *ABA Model Rules of Professional Conduct*.<sup>139</sup> Law is a self-regulating profession, and model rules were adopted to guide attorney behavior and provide a method for disciplining attorneys whose behavior is considered improper.<sup>140</sup> The American Bar Association's *Standards for Imposing Lawyer Sanctions* presume that the most important ethical duties are those an attorney owes to her client.<sup>141</sup> These include the duty of loyalty (encompassing the duty to avoid conflicts of interest) and the duties of diligence, competence, and candor.<sup>142</sup> Best interest attorneys often claim that they do not have to comply with the professional duty of loyalty because they are required to advocate what is in a child's best interest, not what the child wishes.

While courts have excused strict adherence to some of the rules of professional conduct for "best interest" attorneys, they have often done so in a limited fashion. Courts have allowed best interest attorneys to ignore rules governing the allocation of authority between client and lawyer<sup>143</sup> and confidentiality.<sup>144</sup> However, even when allowing an attorney to ignore these rules by substituting judgment, courts often require an explicit explanation of the child's position.<sup>145</sup> In addition, some states require that best interest attorneys abide by all the rules of professional conduct when representing

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<sup>139</sup> See MODEL RULES OF PROF'L CONDUCT, *supra* note 104; GILLERS & SIMON, *supra* note 131, at 3 (2008) (forty-seven states and the District of Columbia have adopted much of the language of the Model Rules).

<sup>140</sup> Douglas L. Christian & Michael Christian, *Twice Bitten: Violations of Ethical Rules as Evidence of Legal Malpractice*, 28 BRIEF 62, 62 (1999).

<sup>141</sup> ABA JOINT COMM. ON PROF'L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS 9 (1992), available at [http://www.abanet.org/cpr/regulation/standards\\_sanctions.pdf](http://www.abanet.org/cpr/regulation/standards_sanctions.pdf).

<sup>142</sup> *Id.* at 9–10 (summarizing obligations required in the Model Rules of Professional Conduct).

<sup>143</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 104, at R. 1.2.

<sup>144</sup> *Id.* at R. 1.6. See also *Clark v. Alexander*, 953 P.2d 145, 153–154 (Wyo. 1998) (allowing modification of duty of confidentiality for attorney in hybrid model of "attorney/guardian").

<sup>145</sup> See *Clark*, 953 P.2d at 154.

their clients<sup>146</sup> and bar ethics opinions suggest that attorneys representing children are bound by ethical duties to a client even if they are acting as a best interest attorney.<sup>147</sup> Similarly, courts have required that best interest attorneys abide by those parts of the Rules that do not govern substitution of judgment.<sup>148</sup>

Thus, while a best interest attorney may breach some aspects of the duty of loyalty and confidentiality, it is clear that being appointed to represent a child does not provide carte blanche for attorneys to ignore the entirety of the Code of Professional Conduct. Actions such as those by Destiny's attorney, which are based on prejudice, are clearly unethical.<sup>149</sup> Many states have adopted rules prohibiting sexual orientation bias by attorneys<sup>150</sup> and others have rules that also prohibit prejudice on the basis of a client's gender identity.<sup>151</sup>

If the rules proscribing sexual orientation bias either included or were read so as to encompass proscriptions against discrimination based on sexual orientation or gender identity, Destiny could succeed in bringing an

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<sup>146</sup> See MICH. COMP. LAWS § 712A.17d (2008).

<sup>147</sup> See, e.g., *An Attorney's Duty to Follow a Client's Explicit Instruction Not to Disclose Confidential Information in the Context of a Minor Client's Disclosure of Ongoing Sexual Abuse in Dependency Proceedings*, 23 L.A. LAW 40 (2001); Mass. Bar Assoc., Ethics Opinion No. 93-6 (1993), available at <http://www.massbar.org/for-attorneys/publications/ethics-opinions/1990-1999/1993/opinion-no-93-6> (lawyer for minor must follow the minor client's direction unless child is incapable of making a considered judgment; even where lawyer finds child incompetent, he must make decisions on basis of what the child would desire if she were competent to understand her options and express her wishes).

<sup>148</sup> See, e.g., *Clark*, 953 P. 2d at 154 (trial court erred in allowing child's attorney to testify); *de Montigny v. de Montigny*, 233 N.W.2d 463 (Wis. 1975) (guardians ad litem must perform duties in accordance with rules of professional conduct and nominal representation fails to meet that standard); *State v. Joanna V.*, 94 P.3d 783 (N.M. 2004) (court discusses gravity of potential conflict when one attorney serves dual roles for child); *In re Georgette*, 785 N.E.2d 356 (Mass. 2003) (while finding no conflict based on evidence at bar, court discusses rules of professional responsibility and children's attorneys at length).

<sup>149</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 104, at R. 8.4 cmt 3.

<sup>150</sup> William C. Duncan, *Sexual Orientation Bias: The Substantive Limits of Ethics Rules*, 11 AM. U. J. GENDER SOC. POL'Y & L. 85, 87 (2002) ("As of 2001 sixteen states had some prohibition of sexual orientation bias in their professional responsibility codes.").

<sup>151</sup> See, e.g., ARIZ. RULES OF PROF'L CONDUCT R. 8.4 (2007) (misconduct for a lawyer to knowingly manifest, by words or conduct, bias or prejudice based upon sexual orientation or gender identity).

ethics complaint. She could either argue that her attorney should have refused to take her case because of his personal biases or argue that once he had accepted the appointment he allowed his personal prejudice to interfere with his ability to impartially represent her. The treatment Destiny received was clearly based on the attorney's prejudice towards her gender identity, and the attorney's actions violated several of the duties an attorney owes to a client.

Moreover, other rules in addition to those specifically prohibiting bias based on sexual orientation or gender identity are applicable. Rule 8.4 states that it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice.<sup>152</sup> Comment three of this rule states that a lawyer who in the course of representing a client knowingly manifests bias or prejudice, based on, among other things, sexual orientation, violates this rule.<sup>153</sup> In addition, because legal mistakes are "not easily rectified, the ethical norms of the profession correctly discourage and arguably prohibit a lawyer from taking a case where their representation may be impaired."<sup>154</sup> Rule 1.16 states that a lawyer shall withdraw from representation if the representation will result in a violation of the rules of professional conduct or the lawyer has a mental condition that impairs his ability to represent his client.<sup>155</sup> The comments to this section state that a lawyer should not accept representation in a matter unless it can be performed competently.<sup>156</sup> An attorney who views a queer youth such as Destiny with prejudice will be unable to craft the legal arguments necessary to protect her and unable to represent her in a competent manner.<sup>157</sup>

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<sup>152</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 104, at R. 8.4.

<sup>153</sup> *Id.* cmt. 3.

<sup>154</sup> Gabriel J. Chin, *Do You Really Want A Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 16 (1998).

<sup>155</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 104, at R. 1.16(a) (1)–(2).

<sup>156</sup> *Id.* at cmt 1.

<sup>157</sup> See Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005). Kruse examines fundamental moral disagreements between attorney and client using the fictional case of an attorney representing a lesbian couple wishing to adopt a child. She argues that the attorney's own moral framework which views homosexuality as deviant would color his legal analysis and cause him to adopt a narrow "interpretation of the law that would delegitimize" his client's goals and minimize the chance of success. *Id.* at 432–33.

Because the Rules of Professional Conduct are expressly implicated by an attorney actively taking a position antithetical to a child client based in some part on bias and prejudice, a bar association should seriously consider the child's ethical complaint. To do otherwise would be condoning misconduct based on an attorney's perception of the child's sexuality or gender identity. Courts have found race- and gender-based misconduct by attorneys punishable under Rule 8.4 even when a state professional responsibility investigation held otherwise.<sup>158</sup> Similarly, an attorney who objected to the presence of a disabled clerk in the courtroom was found to "engage in conduct that is prejudicial to the administration of justice."<sup>159</sup> If an ethics violation was filed against Destiny's attorney, he would have to attempt to argue that his actions were not guided by personal bias and prejudice—a difficult argument given the statements he made. If he failed, some sort of sanctions would be justifiable given that his actions directly contravene the rules of professional conduct.

### III. CONCLUSION

Children in the judicial system are at the mercy of their appointed counsel. Attorneys, like everyone in the court system, have their own personal biases and prejudices. The best interest standard allows attorneys to ignore a child-client's wishes. This, when combined with the unchecked power attorneys have over children in general, increases the likelihood that attorneys who represent queer youth will take actions that either intentionally or thoughtlessly conflict with the sexual or gender identity of their clients. Only by requiring traditional advocacy for queer youth can these children be assured that their lawyers will not become their enemies.

The dangers awaiting queer youth in the justice and child welfare systems are both pervasive and severe. Queer youth must have reliable attorneys who provide traditional advocacy, not best interest attorneys who

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<sup>158</sup> *In Re Charges of Unprofessional Conduct Contained In Panel File 98–26*, 597 N.W.2d 563 (Minn. 1999); cf. *In Re Thomas C. Monaghan, a Suspended Attorney, Respondent, Grievance Committee for the Second and Eleventh Judicial Districts*, 743 N.Y.S.2d 519, 521 (App. Div. 2002) (crude and offensive conduct and language toward opposing counsel, more likely to have been gender-related rather than race-related, held punishable).

<sup>159</sup> *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*, 653 N.W.2d 452, 455 (Minn. 2002) (upholding a finding that the objection to the disabled clerk's presence in the courtroom was improper and violated Minn. R. Prof. Conduct 3.1 and 8.4(d)).

endanger them by substituting judgment. To protect these children, it is necessary to hold attorneys who fail to provide traditional advocacy for queer youth accountable. Only then will the bench and bar recognize that representation based on bias and prejudice is unacceptable, inherently dangerous, and something which cannot be tolerated.