



BEST PRACTICES AND ETHICAL CONSIDERATIONS IN THE REPRESENTATION OF CHILDREN: THE PERSPECTIVE FROM U.S. LAW AND PRACTICE



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¹ Note that the information and opinions reflected in this memo are not representative of the opinions or position of the University of Pennsylvania which is named for affiliation purposes only.



This memorandum summarizes the foundational principles and best practices underlying the system of representation for children in the United States. Based on conversations with the team of attorneys and advocates from PHR, the memorandum focuses on the following areas: (1) the principles underlying the ethical representation of children; (2) ethical standards mandated when representing children and (3) best practices in implanting a system of child representation and participation in court proceedings. The memorandum also includes a discussion of defining and determining best interests in cases involving children, and a literature review including an overview of law school clinical programs focused on the representation of children. The materials are intended to provide initial resources that could be helpful in training not only attorneys for children but also Judges, prosecutors, and other stakeholders involved in any legal case involving children as parties or witnesses. While many of the cited works and addendums relate to the specific practice of representing children in child welfare, abuse and neglect or juvenile delinquency proceedings in the United States, the takeaways and themes are relevant to the implementation of the principles espoused in Georgia’s Code on the Rights of the Child.

I. Principles Underlying the Ethical Representation of Children

The importance of quality representation for children cannot be understated and is at the core of the ethical guidelines and best practices for attorneys for children in the United States. It is widely recognized that children require zealous legal representation in a variety of matters including abuse and neglect proceedings, custody cases, delinquency issues and instances where a child is the complaining witness or required to testify. For decades, United States law has reflected that young people deserve legal representation at every stage of a proceeding where their rights are at issue. In a landmark case in 1967, the U.S. Supreme Court decided that all juveniles were entitled to same procedural safeguards and due process of law in a delinquency proceeding. See *In Re Gault*, 387 U.S. 1 (1967). Over the past decades, states have followed suit in abuse and neglect proceedings providing attorneys for children who are placed in foster care.

Currently attorneys for children appear in a variety of U.S. court settings, both criminal and civil. In criminal matters, an attorney may be appointed to a child who is the complaining witness or a victim in a criminal matter. Children who are charged with delinquency offenses are provided with attorneys in a juvenile delinquency matter in Family Court. In custody matters, children who are the subject of the custody proceeding are sometime assigned attorneys or guardians ad litem who represent their best interest to the court in making custodial decisions. Finally, children who are the subject of abuse and neglect (also referred to as dependency) proceedings are provided with attorneys in most jurisdictions regardless of whether the child is placed in foster care (also referred to as substitute care) or the court orders supervision of the family’s home. In both juvenile delinquency and dependency matters, the Family Court is often working with service providers and professionals from other disciplines including mental health professionals, drug treatment providers, and social workers from the government child welfare

agency or the local juvenile justice agency. In some cases, the other professionals are part of the court system—such as a mental health evaluation and referral system that is based in the court system—or are part of the petitioning or prosecuting agency—such as the child protective caseworkers who work for the local child welfare agency and are charged with investigating allegations of child neglect and abuse and ultimately testifying as part of the child welfare proceeding.

The unique nature of representing children requires attorneys and courts handling these matters to have specialized skills and knowledge in order to best serve the children and families before them. Ultimately, attorneys for children bear the immense responsibility of helping children and youth navigate complicated legal cases, understand their legal rights and responsibilities, and advocate for the best outcome for their clients in the individualized context of their life and particular stage of development. However, as the Family Justice Initiative, a project of the American Bar Association and other children’s and parents’ advocacy organizations, recommended “first and foremost, children’s attorneys and parents’ attorneys in child welfare proceedings are lawyers who have ethical duties to their clients and to the administration of justice in an adversarial system.”²

While the statutory guidelines for representing children in child maltreatment proceedings and custody cases differ from state to state, there are common tenets underlying the provision, content and scope of representation for children. State statutes determine when and how children are appointed counsel in proceedings such as abuse and neglect cases and delinquency proceeding. As an overview there are thirty-two other states that guarantee children an attorney in an abuse or neglect proceeding and the remainder that provide discretion to the Court as to the timing and need for representation. For example, New York requires children who are the subject of abuse and neglect proceedings to be represented by counsel “of their own choosing or by assigned counsel.”³ The Court bears the responsibility to appoint an attorney for the child⁴ and that attorney advocates for the child’s position.⁵ The responsibility to represent the child’s position is also codified in the law regarding juveniles in delinquency cases requiring “the attorney for the child must zealously defend the child. In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.” N.Y. Ct. Rules § 7.2(c), (d). In contrast, California law states that the Court must appoint counsel for the child in any proceeding “unless it determines there would be no benefit to doing so.” Cal. Welf. & Inst. Code § 317(c)

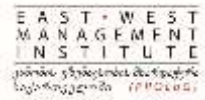
As a general matter, this memorandum will reference national standards with some specific examples from state statutes and programs to provide further explication and guidance in implementing standard of practice. The national standards, set by highly regarded organizations

² Family Justice Initiative, “Attributes of High-Quality Legal Representation for Children and Parents in Child Welfare Proceedings” *available at* <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-attributes-2019.pdf>.

³ N.Y. Family Court Act Sec. 241.

⁴ *Id.* at Sex. 249 (a).

⁵ N.Y. Court Rules Sec 7.2(c) and (d).



including the American Bar Association, National Association of Counsel for Children and National Council of Juvenile and Family Court Judges, provide a helpful resource for discussing the ethical considerations and basic obligations of attorneys for children.

Defining a Lawyer for the Child

The American Bar Association as part of its “Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases” defines a child’s attorney as “a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client.”⁶ The commentary for the standard goes further to delineate that “the standard explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position.”⁷ In contrast the “guardian ad litem” is defined as “an officer of the court appointed to protect the child’s interests without being bound by the child’s expressed preferences.”⁸ The two standards differ in whether the attorney is representing the legal interests or the best interests of the child in a particular proceeding, but they are consistent in the ethical obligations and scope of work that attach when representing children. There has been considerable debate in the legal profession and academy about whether an attorney for a verbal child should be client-directed in their representation, consistent with the ethical and professional obligations for attorneys representing adults, or whether an attorney for a child should substitute judgment to represent the child’s best interest as determined by the attorney.

Attorneys for children are subject to all of the same ethical rules and constraints as attorneys for adults. It is critical to remember that the legal ethics are not limited or waived simply because the attorney is representing a child under the age of 18. While the format and type of representation for a child may differ depending on the case posture and the child’s age and competency, the ethical obligations remain consistent throughout that the attorney must abide by the same legal ethics including a duty of confidentiality and zealous representation of their client. In other words, whether you are representing a child who is the victim required to testify in a criminal matter, a teenager accused of a delinquent act or a child who is removed from the care of her parents, the ethical obligations that guide all attorneys such as confidentiality, zealous representation, avoiding conflict of interests, and independent legal counsel apply to that attorney and child client relationship,

The attorney for the child must follow the ethical guidelines prohibiting ex parte communications with the Court and disclosure of any client confidences or privileged work product that would not be permissible for an adult client. For example, an attorney for the child would not be able to have an individual conversation with a Judge about a child client’s current situation or stated preference outside of the presence of all other parties in the proceeding.

⁶ American Bar Association, Standard of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, Part 1, A-1.

⁷ Id. at A-1 Commentary.

⁸ Id. at A-2.

Additionally, an attorney for a child should not disclose client confidences without express permission from a child who is able to provide verbal consent.

Furthermore, the attorney for the child maintains an independent obligation to identify both actual and potential conflict of interests which would impede the ethical and zealous representation of their client. Conflicts of interest can arise between siblings in a case where one child may present a different position than another child, or there was a prior legal relationship with a parent or guardian in the family that would preclude the attorney from being able to represent the child’s interest in a new matter. In those cases where the siblings interest differs, it would not be ethically appropriate for a child’s attorney to continue representation of the sibling group, but rather separate counsel so should be assigned for each sibling. This ensures that each child is zealously represented, and their position is accounted for by their attorney. A failure to appoint separate counsel or attempt to internally reconcile the divergent interests of the children would undermine the child’s right to full independent legal representation in the case.

Duties of Attorneys Representing Children

The obligation to zealously represent your child client is sacrosanct to the effective and ethical representation of children. Even though the client is under the age of majority, the integrity of any court process requires that the child client is represented with the same level of care, attention and diligence as an adult client. Indeed, the benchmarks for a high-quality attorney for children are not far afield from the benchmarks for any attorney. The professional ethics and responsibility to zealous lawyering are shared regardless of the client’s age and are the foundation of a high-quality practice. In the specific context of the cases which involve children, however, there are some additional characteristics, as elaborated by the ABA Center on Children in the Law as “Quality Hallmarks” of the child’s attorney:

- Understand the child’s wishes in the case.
- Understand the child’s strengths, needs, and resources.
 - Ensure the child has an opportunity to attend and participate in court hearings.
 - Advocate for the child to maintain contact with parents, siblings, and kin through visitation, placement and permanency planning.
 - Work with collateral contacts— teachers, foster parents, service providers.
 - Collaborate with a multidisciplinary team.
 - Promote tailored, specific case plans and services.
- Advocate for the child’s access to education and community⁹

While these hallmarks may appear commonsensical, it is important to detail what practical efforts are required to ensure that an attorney is zealously representing their child client. In

⁹ ABA Center on Children and the Law, *Legal Representation in Child Welfare Proceedings* (attached as addendum).

other words, what are the specific tasks and duties of an attorney for the child that should be followed in every case? What does it mean to zealously represent your client when your client is an infant, child or adolescent? How does an attorney for a child understand a child's wishes or collaborate with collateral contacts and a multidisciplinary team on behalf of the child?

The immediate answer to those questions is through lawyering with many of the same fundamental skills that all lawyers use regardless of the age of their client or even the particular legal subject matter. To provide further clarity though, the ABA standards lay out the basic obligations for a children's attorney including as follows (emphasis added):

- (1) **Obtain copies** of all pleadings and relevant actions.
- (2) **Participate** in depositions, negotiations, discovery, pretrial conferences and hearings.
- (3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conference, changes of placements and other changes of circumstances affecting the child and the child's family;
- (4) Attempt to reduce case delays and ensure that the court recognized the need to speedily promote permanency for the child;
- (5) **Counsel the child** concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;
- (6) **Develop a theory and strategy of the case** to implement at hearings, including factual and legal issues, and;
- (7) Identify appropriate family and professional resources for the child.¹⁰

As an example from state practice, Pennsylvania appoints attorneys to children who are the subject of a dependency proceeding alleging abuse, neglect or maltreatment by a parent or custodian. Pursuant to Pennsylvania law, attorneys for children are representing their best interests in court proceedings meaning that they are not bound by the child client's legal interest or stated preference, particularly if it conflicts with the attorney's determination of what is in the child's best interest. Even so, the state statute clearly delineates all of the tasks that are expected from a child advocate attorney referred to here as the guardian ad litem and sets a uniform standard for the practice and representation of children (emphasis added):

“A guardian *ad litem* shall:

- 1) **Meet with the child** as soon as possible following assignment pursuant to Rule 1151 and **on a regular basis** thereafter in a manner appropriate to the child's age and maturity;
- 2) **On a timely basis, be given access to relevant court and county agency records**, reports of examination of the guardians or the child, and medical, psychological, and school records;

¹⁰ Id. at B-1 (including commentary that the “child's attorney should not be merely a fact-finder, but rather should zealously advocate a position on behalf of the child.”)

- 3) **Participate in all proceedings**, including hearings before juvenile court hearing officers, and administrative hearings and reviews to the degree necessary to adequately represent the child;
- 4) **Conduct such further investigation** necessary to ascertain the facts;
- 5) **Interview potential witnesses**, including the child’s guardians, caretakers, and foster parents, examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child;
- 6) At the earliest possible date, be advised by the county agency having legal custody of the child of:
 - a) any plan to relocate the child or modify custody or visitation arrangements, including the reasons, prior to the relocation or change in custody or visitation; and
 - b) any proceeding, investigation, or hearing under the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.* or the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, directly affecting the child;
- 7) **Make any specific recommendations to the court relating to the appropriateness and safety of the child’s placement and services** necessary to address the child’s needs and safety, including the child’s educational, health care, and disability needs;
- 8) **Explain the proceedings to the child** to the extent appropriate given the child’s age, mental condition, and emotional condition; and
- 9) **Advise the court of the child’s wishes** to the extent that they can be ascertained and present to the court whatever evidence exists to support the child’s wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court¹¹”

Similarly, in juvenile delinquency matters, the Pennsylvania laws require that an attorney representing a youth in a delinquency matter adheres to the following guidelines (emphasis added):

- “A. Role of Counsel. Attorneys who represent juveniles in proceedings commenced pursuant to these Rules and the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.* shall:
1. 1) **zealously and competently represent** the juvenile at every stage of the proceedings;
 2. 2) **advise and communicate** with the juvenile in a developmentally appropriate manner;
 3. 3) if applicable, review and complete the admission colloquy mandated by Rule 407 with the juvenile; and
 4. 4) **litigate the juvenile’s case** when an admission is inappropriate and protect the record for appeal.

¹¹ Pennsylvania Rules of Juvenile Court Procedure Rule 1154

B. Ethical obligations. The attorney has an ethical and professional obligation to the juvenile, rather than the juvenile’s guardian.”¹²

The common themes which emerge from a review of the ABA national standards and the specific state examples are the robust and detailed nature of ethical and competent representation for children. Indeed, it is evident that representing children reflects almost all of the same principles and requirements of representing adult clients in being competent, diligent, and thorough throughout the case. The particular challenges and specialized skills required of attorneys representing children are *in addition* to the basic tenets of effective and ethical legal representation and not a replacement for them.

While the prior statutes and standards explicate specific activities and efforts that should be undertaken by the attorney for the child, there has also been work on identifying the core competencies that guide child representation. These core competencies are helpful constructs in expanding our understanding not only of the role of the children’s attorney but also the importance of having centralized offices or other agencies to train and ensure accountability. The following graphic developed as part of a Quality Improvement Center with the National Association of Counsel for Children, University of Michigan and U.S. Children’s Bureau provides a helpful overview of core competencies in child representation, and the six core skills listed below:



1. *Enter the Child's World*: Engage with the child, learn their needs, guide them, counsel them and advocate for their needs while accommodating their stated interests consistent with state law.
2. *Assess child safety* and protect the child but without *over-reacting*. “Remove the danger, not the child”, whenever that can be done consistent with child safety. Distinguish between case plan and safety plan.

¹² Pennsylvania Rules of Juvenile Court Procedure Rule 153 “Role of Counsel”.

3. *Actively Evaluate Needs*: Facilitate an appropriate assessment of the needs of the child and his/her family. Diagnose the problem.
4. *Advance Case Planning*: Facilitate development of an appropriate case plan.
5. *Develop Case Theory*: Develop an active and forward-looking theory of the case. What is going on here? Adopt, and maybe rule-out, alternative and tentative theories of the case. Provides force and direction to the advocacy. (Drive the bus.).
6. *Advocate Effectively*: Use advocacy corollaries in meeting a child's needs that stress problem-solving and non-adversarial approaches - but which include traditional adversarial modes when appropriate.¹³

While the standards and core competencies present a clear path for ethically and effectively representing children, the importance of having institutional support for these practices cannot be understated. The standards and ethical obligations need to be reinforced by the courts and other judicial stakeholders so that there is uniformity in the practice and ultimately consensus about the proper methods for representing children. Additionally, attorneys for children need support and resources in order to be able to do their work as envisioned by the standards and core competencies. In the United States, there is a general consensus that centralized legal offices for children achieve better outcomes for children and youth and promote high quality legal representation in the system.¹⁴ The centralized office includes a variety of models but at its core is defined by a group of attorneys working alongside professionals including social workers, investigators and paralegals with a shared infrastructure and system of professional support in their legal practice. While the funding source for the centralized office may differ—and indeed many offices across the United States are funded by the state, local county or private foundation—the centralized office provides a core of services to support the attorney’s work and ultimately provide increased training, consistency in practice, and greater oversight of the work.

A centralized office can be helpful as well in determining the appropriate caseload for attorneys so that they can maintain the quality of representation and meeting their ethical obligations. For example, it would not be realistic for a children’s attorney to be handling over a hundred cases which would preclude them from being able to meet individually with each of their clients on a regular basis, gather independent information and review all of the relevant records while

¹³ National Association of Counsel for Children QIC-Child Rep, Best Practice Model Six Core Skills, available at <http://www.improvechildrep.org/QICModelSixCoreSkills/SixCoreSkills.aspx>

¹⁴ Mimi Laver and Cathy Krebs, The Case for a Centralized Office for Legal Representation in Child Welfare Cases (December 2, 2020) (available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2020/the-case-for-a-centralized-office-for-legal-representation-in-ch/) (detailing the reasons supporting a centralized legal office for children and providing specific state examples of models)

advocating for the child both in and out of court. The goals listed below from the American Bar Association, identify the benefits of a centralized legal office for children as follows:

- Clearly define roles and expectations,
- Set reasonable caseloads,
- Offer fair compensation and benefits,
- Follow standards of practice,
- Provide specialized child welfare law training,
- Ensure effective supervision,
- Seek client feedback on representation,
- Give attorneys access to an interdisciplinary model of representation.¹⁵

In conclusion, the standards for ethical representation of children make clear first and foremost that the attorney for a child is practicing as an independent attorney and subject to the same legal obligations and constraints. Any standards or procedures established for attorneys for children must support that primary foundational premise that attorneys for children are lawyers, and while they may require additional specialized training to represent children, that is to support their lawyering and representation not to supplant it.

II. The Child as a Witness

In many situations, the child will be the victim and/or witness in a legal proceeding which is a different posture than when the child is the subject of the proceeding such as in custody matters or a party to the proceeding as in abuse and neglect matters. As an example, a criminal case could include a child victim who would be asked to testify to the defendant's actions. If a defendant was criminally charged with sexually and physically abusing a ten-year-old child, one can imagine that the prosecuting attorney would need to include testimony from that child about the defendant's conduct. In that case, the child witness would be subject to the same rigors of cross examination as any witness in a criminal proceeding pursuant to the U.S. Constitution's Sixth Amendment right to confront any witnesses brought against the defendant. In this sense, the child victim and witness would be subject to the rigors of cross examination by the defendant's attorney, which would potentially attempt to undermine the child's story, credibility and memory.

Recognizing that children as victims and witnesses are different, all fifty states and federal law have specific laws which deal with the competency of the child witness and their corresponding ability to testify in an ongoing trial. The federal law states that all individuals are presumed competent to testify and age as the sole factor is not a reason to prohibit a child from testifying.¹⁶ However, both state laws and federal law make provisions for *how* that testimony will be

¹⁵ American Bar Association Center on Children and the Law, *Legal Representation in Child Welfare Proceedings* (available at

https://www.americanbar.org/content/dam/aba/administrative/child_law/cwrepinfographic.pdf)

¹⁶ 18. U.S.C. Sec. 3509 (WHICH SUBSECTOIN)

provided in court recognizing the unique issues surrounding a child testifying in Court and the likelihood of increasing trauma for the child victim or child witness absent such additional considerations. As an example of these considerations, it is helpful to consider the following federal law which provides for alternatives to the child providing live in-court testimony. One of the alternatives permitted under the law is testimony by closed circuit television:

(1) Child’s live testimony by 2-way closed circuit television.—

(A) In a proceeding involving an alleged offense against a [child](#), the attorney for the Government, the [child](#)’s attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the [child](#)’s testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the [child](#) be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the [child](#) is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i)** The [child](#) is unable to testify because of fear.
- (ii)** There is a substantial likelihood, established by expert testimony, that the [child](#) would suffer emotional trauma from testifying.
- (iii)** The [child](#) suffers a mental or other infirmity.
- (iv)** Conduct by defendant or defense counsel causes the [child](#) to be unable to continue testifying.¹⁷

In addition to permitting a child witness to testify by television in order to protect their emotional well-being, the federal law prescribes who can be in the room with the child when they are testifying including an “adult attendant” whose purpose throughout the proceeding is to provide emotional support.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the [child](#) and the [child](#) shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the [child](#) during the [child](#)’s testimony are—

- (i)** the [child](#)’s attorney or guardian ad litem appointed under subsection (h);
- (ii)** persons necessary to operate the closed-circuit television equipment;
- (iii)** a judicial officer, appointed by the court; and
- (iv)** other persons whose presence is determined by the court to be necessary to the welfare and well-being of the [child](#), including an [adult attendant](#).

¹⁷ 18 U.S.C. Sec. 3509 (federal law detailing child victim’s and child witnesses’ rights)

The federal law also envisions situations where the child will not be able to testify live in court, either in the same room with the other parties or through closed circuit television. In those situations, the law provides an alternative means of testimony for the child through a videotaped deposition.

(2)Videotaped deposition of child.—

(A) In a proceeding involving an alleged offense against a [child](#), the attorney for the Government, the [child](#)'s attorney, the [child](#)'s parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the [child](#)'s testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the [child](#) is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

- (I) The [child](#) will be unable to testify because of fear.
- (II) There is a substantial likelihood, established by expert testimony, that the [child](#) would suffer emotional trauma from testifying in open court.
- (III) The [child](#) suffers a mental or other infirmity.
- (IV) Conduct by defendant or defense counsel causes the [child](#) to be unable to continue testifying.

These are some examples of alternative means of ensuring both that the testimony of the child is included in the criminal proceedings, but also that the well-being of the child is protected to the extent feasible. Attorneys for children, prosecutors and Courts should carefully consider the range of alternative options for facilitating testimony from child victims and witnesses while maintaining due process for a defendant. When considering potential alternatives, it is particularly helpful to reference the emerging research of the impact of trauma, including witnessing violence and the impact that testifying and engaging with a criminal proceeding can have on a child. As a reference for this inquiry, the American Academy of Pediatrics statement on child witnesses in the court is a helpful source summarizing existing research and including policy recommendations for courts and pediatricians to support children and minimize the negative aspects of children testifying.¹⁸

III. Best Practices in Determining the Best Interests of the Child

One of the most important and also challenging aspects of representing children is determining as the child's attorney what is in their best interests. While the concept of best interests is common throughout child welfare, juvenile delinquency and custody matters, there is no standard or universally accepted definition of best interests. Rather state laws tend to lay out the factors, considerations or issues that a Court should consider when determining what is in a child's best interest. Certainly, the child's safety is generally seen as the paramount

¹⁸ Robert H. Pantrell, MD, FAAP and Committee on Psychosocial Aspects of Child and Family Health, The Child Witness in the Courtroom, *Pediatrics* 2017 , 139(3) e20164008.

consideration in determining best interests. As one report on best interests statutes in the U.S. noted, “[b]est interests’ determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern.”¹⁹ To generalize, some of the factors considered in state laws include the following: the parent’s ability to provide a safe and stable home including the bare minimums of housing, food, and clothing, attachment between the child and the parents or other family members including siblings, the individualized medical and behavioral health of the parent and the child, and the child’s stated wishes or preference.

An example of a state statutory definition of best interests is Maryland’s law about developing a permanency plan for a child placed in foster care:

“The local Department of Social Services shall consider the following factors in determining the permanency plan that is in the best interests of the child:

- The child's ability to be safe and healthy in the home of the child's parent
- The child's attachment and emotional ties to the child's natural parents and siblings
- The child's emotional attachment to the child's current caregiver and the caregiver's family
- The length of time the child has resided with the current caregiver
- The potential emotional, developmental, and educational harm to the child if moved from the child's current placement
- The potential harm to the child by remaining in State custody for an excessive period of time”²⁰

It is evident from the definition of the best interest in Maryland that the attorney has to consider a range of factors in determining what is in a client’s best interest and that determination should be factually based and individualized to the particular child client. As discussed in the prior section about ethical obligations, the attorney would be responsible for speaking with the child to uncover how she is doing in the home and school, and to gain a better sense of the child’s emotional attachment to family members including siblings. Additionally, the attorney should be reaching out to other stakeholders in the matter including substitute caregivers, teachers, social workers and medical providers to gather information about the child’s current situation and well-being.

¹⁹ Child Welfare Information Gateway. (2020). *Determining the best interests of the child*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

²⁰ Maryland Family Law § 5-525(f)(1).

As the previous section demonstrates, it is critical that the determination of best interests is in line with the attorney’s ethical duties to zealously advocate for their child client and to conduct a rigorous and independent examination of their client’s case. This is especially critical so that attorneys for children are not making determinations of best interests based solely on their own personal experiences, instinct, assumptions or in a worst-case scenario biases or stereotypes. For example, it would not be ethical to ask what would an attorney for a child want for their own child in determining their client’s best interests, but rather to ask what is best for this child given their individual needs, history, family and community. Best practices have developed in the United States to determine best interests through a detailed and methodical process so that there is not variability among practitioners and there is a common basis for assessing the child’s needs and ultimately determining best interests.

As Professor Jean Koh Peters noted when discussing how to determine the best interests of a child “[an] extreme form of best interests representation omits several of the most fundamental characteristics of lawyering. The lawyer-client partnership and dialogue is reduced to a one-person monologue wholly unchecked by the client. The client becomes an object, rather than the subject of the representation. The lawyer, usually agent, acts as the principal in the relationship.”²¹ With this principle in mind, it is clear that the attorney for the child is not meant to be a surrogate parent or caregiver or simply mouthpiece for the child. Instead, the attorney for the child is responsible for creating a professional relationship with the child where there is a reciprocity and partnership in the representation.

In light of this, one of the most important aspects of the lawyer-client relationship for children’s attorneys is communication. Communicating with youth clients is critical if the lawyer is going to be successful in interviewing, counseling and advocating for their child client. Elements of effective communication with children include active listening, non-directive questioning focused on open ended questions, rapport building, and cultural humility to understand the client’s culture, community and context for considering legal options and making decisions. Of course, the most basic method of ensuring communication with your child client is to meet regularly with the child both so that you can maintain updated information about the child and her wishes, but also so that you can build rapport with the child so that they will discuss sensitive matters with the attorney and there is a meaningful attorney-client relationship even though the client is a child.

If an attorney is representing a child in substitute care, communication is critical to ensuring that the attorney is upholding the highest standards of their representation. Indeed, the lawyer for the child will not be able to be directed by their client if there is no communication with the client and an understanding of the lawyer’s role as a legal advocate in their case. For example, consider the appropriate type and frequency of communication that an attorney should have when representing siblings in foster care who are seven, ten and thirteen years old. From the onset of the representation and before the first hearing, the attorney should speak with all three child clients with the goal of gaining information, ascertaining their preferences, determining

²¹ Jean Koh Peters, *The Roles and Content of Best Interests in Client Directed Lawyering for Children in Child Protection Proceedings*, 64 Fordham L. Rev. 1505, 1526 (1996).

whether there is a potential conflict among the siblings, and explaining their role as the child’s attorney and the court proceeding in age-appropriate language which will differ for the youngest and oldest child. After the initial meeting, the attorney should maintain regular and frequent contact especially in advance of any court hearings or significant changes in the case such as a change in the children’s placement or services. It is critical that the attorney is in contact with the children to ensure that they have updated information and also that the child feels comfortable to speak with the attorney and reach out if needed. While an attorney might be inclined to speak only with the oldest sibling, the attorney needs to establish independent relationships with each child regardless of age.

Identifying the child’s preference is a significant aspect of the role of the child’s attorney and one that requires a high level of practice and specialized training. It is widely accepted that the “child’s attorney should elicit the child’s preferences in a developmentally appropriate manner, advise the child and provide guidance. The child’s attorney should represent the child’s expressed preference and follow the child’s direction through the course of litigation.”²² The standards make clear that the child’s attorney “has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue.”²³ Clearly then the attorney for the child has the independent obligation to understand their professional role and to communicate that to the client in order to assist the client in understanding how they should act in the relationship.

It is helpful to distinguish between cases where the child is clearly too young to provide the attorney with a preference or position, and cases where the child is capable of providing the attorney with their stated preference or a position as to the ultimate outcome of the legal case. In cases where the age of the child precludes the attorney from being able to elicit a preference, it is clear that the child’s attorney must proceed with an independent assessment of what would be in the child’s best interest based on a similar review of the case facts as listed below. It is generally agreed that pre-verbal infants and children and young toddlers fall into this category of cases where the attorney would be able to bypass determining the child’s preference or position. However, it should be noted that even if the age of the child precludes them from having a clearly stated preference, the attorney for that child must still make an independent decision as to what is in the child’s best interest. In other words, the attorney for a newborn or young toddler cannot delegate the best interests determination to an expert or outside reviewer such as a social worker or psychologist, even if those professionals are being utilized to bring additional information to the case. While experts can provide helpful counsel and guidance in evaluating the best interest of the child, their information must be placed in the appropriate context to ensure that the attorney for the child is not overly preferencing any particular expert or report but rather considering and evaluating the totality of the child’s environment, needs,

²² See ABA, *supra* note 1 at B-4. (ABA Standards on Client Preferences) (further clarifying that the child’s attorney should “inform the child of the relevant facts and applicable law and the ramifications of taking various positions which may include the impact of such decisions on other family members or on future legal proceedings.”)

²³ *Id.* at B-4 Commentary.

individual context and the specific legal concern at issue. Some scholars suggest that the appropriate construct is to frame the determination of best interests in terms of the child’s legal rights which avoids an analysis of what might be better for a child as opposed to what is their legal right.²⁴

Given the range of issues that children’s attorneys are facing and the potential for overreaching in their advocacy, it is not uncommon for children’s attorneys to confront confusion about their role or the process of determining what is in their client’s best interests. Prof. Peters provides a helpful construct of seven questions for children’s attorneys to consider as a way of checking the potentially far-reaching power of the lawyer to make determinations of what is in a child’s best interest:

1. In making decisions about the representation, am I making the best effort to assess the case, from my clients subjective point of view, rather than from an adult’s point of view?
2. Does the child understand as much as I can explain about what is happening in the case?
3. If my client were an adult, would I be taking the same action, making the same decisions and treating her in the same way?
4. If I decide to treat my client differently from the way that I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?
5. Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for that of my client?
6. Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
7. Does the representation seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?²⁵

It is critical for attorneys for children and organizations that represent children to discuss the process and practice of determining what is in the best interests of the child and to determine general guidelines for practitioners that will protect against individual or systemic biases from entering into the analysis.

Ethical Challenges in Determining Best Interests

²⁴ Family Justice Initiative, *supra note 2* at 2.

²⁵ Jean Koh Peters, *Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions* 65-69 (1997).

Children’s attorneys face a number of unique circumstances which can raise ethical and practical challenges during the course of the representation. For example, children’s attorneys are tasked with speaking with children about sensitive topics including abuse, maltreatment, family dynamics and trauma. Furthermore, it can often be difficult for children’s attorneys absent clear guidelines to maintain their role as an attorney for the child and not assume a role outside of their scope of expertise such as therapist, psychologist, educator, social worker or caregiver. The particular facts of cases in this area are often extremely compelling and tragic, so it is understandable that attorneys would want to do as much possible to advocate for and remedy the presenting issues for the client. However, stepping outside of the professional role as the attorney is both an ethical violation since the attorney is not trained in that role and ultimately diminishes the importance and unique nature of representing the child.

Therefore, it is important to recognize and create systems to identify these particular challenges since a failure to identify these issues can lead to children’s attorneys acting outside of their ethical guidelines or professional training, and potentially impacting the well-being and welfare of the child client. Best practice mandates that attorneys for children and organizations tasked with representing children in any capacity follow the basic ethical guidelines. For example, these guidelines include the prohibition against ex parte communication. Given the child’s age and status, it can be tempting to discuss issues outside of the court hearing, off the record or individually with the Judge. Ex parte communication is not permitted even in circumstances where the case involves a child or the exchange of information is considered to be helpful to the child’s case. In order to protect the due process of all parties and the integrity of the judicial process, this communication should be avoided not only with Judges but also with court staff including judicial staff such as law clerks.

Attorneys for children should also abide by the rules governing confidentiality of a client’s information and the importance of soliciting the approval and consent of the client when seeking confidential information or making disclosures of otherwise confidential client information. This is especially important when considering the breadth and sensitive nature of information that children’s attorney are charged with gathering as part of their representation. For example, attorneys for children may be obtaining and reviewing medical records, psychological records, school reports, disciplinary reports and other sensitive documents which should be treated with the same degree of care and respect as an attorney would be obligated to provide to the records of an adult client whether they are medical, psychological or financial in nature. As part of the previously discussed obligation to counsel the child client and provide them with ongoing information about their legal case, the child’s attorney should discuss in an age-appropriate manner the reason for obtaining the records, the need to disclose information from the confidential as part of the legal case and the implications of disclosing or not disclosing the information. These are critical conversations for attorneys to have with their child client as part of the counseling relationship so that the child understands the legal processes, claims and potential outcomes of the case.

Additionally, the child’s attorney should be mindful not to disclose any statements or comments from the child client without their permission as well. It can be tempting to share client statements with less discretion when speaking with other parties or stakeholders in a case. The child’s attorney should follow the same guidelines for disclosure with maintaining the client’s confidences as the primary objective and seeking informed consent with asking about particular disclosures of information.

IV. Literature Review for Attorneys Representing Children

Specialized training should be required for all attorneys working with children and for any Judges, judicial staff and other court stakeholders. The specialized training ensures that attorneys for children are up to date on the current best practices in child and adolescent issues and informed about the range of collateral issues that arise in these cases.

In most jurisdictions in the United States, attorneys for children are encouraged or mandated to receive yearly continuing legal education training on a range of issues impacting their representation of children including the following: applicable laws and regulations, ethical considerations in representing children; basic theories of childhood and adolescent development and their impact on the child’s representation and the role of the attorney; interviewing and counseling techniques for children and adolescents; social issues impacting children and families including mental health issues, substance abuse disorders, domestic violence, child abuse and neglect; working with and incorporating interdisciplinary experts into the child’s representation; and the impact and role of trauma in representation for children and adolescents.

Understanding trauma and its manifestations is critical both in the representation of children and in the practices of any courts that interact with children as victims, witnesses or parties. Trauma is defined as an individual’s emotional response to a terrible or violent event and can impact for an individual’s life in both the long and short term. Recent studies on the prevalence and effect of trauma in children and adolescents demonstrate that childhood trauma and exposure to violence can impact overall health and well-being far into adulthood.

The National Council of Juvenile and Family Court Judges advised that courts and Judges “should appropriately engage the court system to first do no harm, recognizing that all persons appearing before the court do so with experience and concepts of self, family, community, culture and history.”²⁶ Training on the definition, manifestation and impact of trauma for all court staff including Judges and repeat stakeholders is one way of insuring that the work of attorneys for children in addressing the trauma for their clients is not unknowingly undermined by the Court. Trauma assessments specific to the court can also be utilized to help guide practice and policy decisions in court that regularly interact with children and youth in any capacity.

²⁶ See NCJFC Trauma Informed Courts, available at <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/>

The following articles and reports are provided for deeper exploration of the topics discussed in this memorandum and potential use in any training programs for attorneys for children, Judges, judicial stakeholders, and other counsel in cases involving children.

Best Practices in Representing Children

[Best Practice Model of Child Representation](#), QIC (collaboration between the University of Michigan and U.S. Children’s Bureau)

[QIC Child Rep Training Materials](#), QIC-Child Rep Best Practice Model (compilation of trainings, power point slides, and other materials on all aspects of representing children including interviewing and counseling children, child safety decision making, effective advocacy in and out of court, and monitoring child well-being)

[Questions that Every Judge and Lawyer Should Ask About Infants and Children in the Child Welfare System](#), National Council of Juvenile and Family Court Judges (3/22/17)

[Five Tips for Successfully Interviewing Your Child Client](#), Cathy Krebs, American Bar Association (9/5/18)

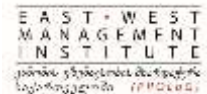
[Legal Representation in Child Welfare Proceedings](#), ABA Center on Children and the Law.

[Attributes of High Quality Legal Representation for Parents and Children in Child Welfare Proceedings](#), Family Justice Initiative (laying out the principles and components of quality legal representation for children and parents in abuse and neglect proceedings and recommending that “first and foremost, children’s attorneys and parents’ attorneys in child welfare proceedings are lawyers who have ethical duties to their clients and to the administration of justice in an adversarial system”)

Orlebeke, B., Zhou, X., Skyles, A., & Zinn, A. (2016). [Evaluation of the QIC-ChildRep Best Practices Model Training for Attorneys Representing Children in the Child Welfare System](#). Chicago, IL: Chapin Hall at the University of Chicago (evaluating the impact of a training program for child attorneys in abuse and neglect cases)

Jean Koh Peters and Susan Bryant, [The Five Habits of Cross-Cultural Lawyering and More](#) (website detailing the five habits of cultural competent lawyers and also providing materials for clinical law teachers and practitioners to train and to learn about cultural competence and based off of the seminal 2001 article by Susan Bryant, [The Five Habits: Building Cross Cultural Competence in Lawyers](#)).

Trauma Resources



[What Can Juvenile and Family Courts do to Respond to Trauma?](#) National Council of Juvenile and Family Court Judges (4/25/17)

[NCTSN Trauma Bench card for the Trauma Informed Judge](#), National Child Traumatic Stress Network (7/30/13)

[Trauma Informed Legal Advocacy: A Resource for Juvenile Defense Attorneys](#), National Child Traumatic Stress Network, Justice Consortium Attorney Workgroup Subcommittee (2018)

Ryan Matlow and Victor Carrion, [Trauma Informed Techniques for Interviewing Immigrant Children: Guidelines and Recommendations for Attorneys and Other Professionals](#), Stanford Medicine and University of Texas, Rio Grande Valley School of Medicine (2019).

Brennen, J., Guarino, K., Axelrod, J., & Gonsoulin, S. (2019). [Building a multi-system trauma-informed collaborative: A guide for adopting a cross-system, trauma-informed approach among child-serving agencies and their partners](#). Chicago, IL: Chapin Hall at the University of Chicago & Washington, DC: American Institutes for Research.

[Trauma Informed Interviewing Techniques](#): A Toolkit for Attorneys and Other Professionals Working with Immigrant Children, Stanford Medicine and University of Texas, Rio Grande Valley School of Medicine (video training series and toolkit) (focused on immigrant children but provides an excellent overview of interviewing techniques when working with children who have been victims of trauma)

[Conducting A Quick Screen for Trauma: Child Interview](#), Center for Addiction and Mental Health

Child as a Witness

Robert H. Pantrell and Committee on Psychosocial Aspects of Child and Family Health, [The Child Witness in the Courtroom](#), Pediatrics, March 2017, 139 (e)

Michael E. Lamb et al., [Children and the Law](#), in Handbook of Child Psychology and Developmental Science, 12, 1-48 (Richard M. Lerner. Ed., 2015)

Patrick A. Curtis & Gina Alexander (Eds). (2012). *What works in Child Welfare*. New York: Child Welfare League of America, *see especially* Chapter II.4 “What Works in Protecting Child Witnesses” by Kathleen Coubon Faller and Frank Vandervort.

Law Review Articles on Representing Children

Amy Harfeld, [“Twenty Years of Progress in Advocating for A Child’s Right to Counsel”](#) American Bar Association (March 22, 2019)

Suparna Malempati, *Ethics, Advocacy, and the Child Client*, 12 Cardozo Pub. L. Pol'y & Ethics J. 633 (discussing the role of attorneys for children and the ethical constraints)

Barry Feld and Perry Moriearty, *Race, Rights and the Representation of Children*, 69 Am. U. L. Rev. 743 (2020) (detailing the shortcomings of *In Re Gault* and proposing reforms to the system for juvenile delinquent clients and the system)

Legal Education & Training for Attorneys for Children

The American Bar Association published a comprehensive list of all organizations and clinics nationally that serve children and adolescents under the “[Children’s Law Centers](#)” document. Additionally, the ABA compiled a list of the law school clinical programs in the United States focusing on child advocacy issues [here](#). The following list represents a sample of the law school clinics that focus on training students to represent children and adolescents in legal matters.

[Children’s Rights Clinic](#), Drake Law School (Iowa) (clinic where law students represent children and youth in abuse and neglect proceedings as their guardian ad litem and attorneys for the children in addition to representing youth in juvenile delinquency proceedings)

[Children’s Advocacy Clinic](#), Dickinson Law School (Pennsylvania) (clinic where law students represent children in abuse and neglect proceedings)

[East Bay Community Law Program](#), Berkeley Law School (California) (including the Youth Defender Clinic and Education Advocacy Clinic)

[Child and Family Advocacy Clinic](#), Rutgers Law School (New Jersey) (clinic where law students represent children in abuse and neglect proceedings and other administrative matters)

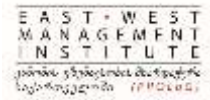
[Children and Youth Law Clinic](#), University of Miami Law School (clinic where law students represent youth in abuse and neglect proceedings and former foster youth in civil legal matters)

[University of Michigan Law School Child Advocacy Law Clinic](#), (Michigan) (oldest child welfare clinic in the country where students represent children, parents and other parties in child welfare proceedings)

[New York University Juvenile Defender Clinic](#) (New York) (yearlong clinic where students represent children accused of crimes in delinquency court)

[Harvard Law School Child Advocacy Clinic](#) (Massachusetts) (clinic where students represent children in abuse and neglect proceedings, juvenile delinquency cases, and education matters)

[University of Pennsylvania Law School Interdisciplinary Child Advocacy Clinic](#) (Pennsylvania) (semester long course where law students and social work students collaborate



on cases representing youth in abuse and neglect proceedings, unaccompanied minors, and former foster youth)

(See article on describing the interdisciplinary nature of the the program training law and graduate social work students at <https://www.caseinpoint.org/live/news/10254-interdisciplinary-child-advocacy-clinic-focuses-on>)

[University of Virginia Child Advocacy Clinic](#) (Virginia) (yearlong course where law students represent children in administrative hearings)

[Youth and Education Law Project](#), Stanford Law School (California) (clinic where law students tackle education cases on behalf of children including direct representation of children in education matters)