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Representing Children and Youth

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Chapter 21 REPRESENTING CHILDREN AND YOUTH

Part 21A: The Role and Duties of the Child's Lawyer

by Donald N. Duquette¹ and Marvin Ventrell²

§ 21A.1 Introduction to the Representation of Children

Quality legal representation of all parties is essential to a high-functioning dependency court process.³ Quality legal representation of children in particular is essential in obtaining good outcomes for children. An adversarial court process that depends on competing independent advocacy to provide information will not produce good outcomes for litigants who lack competent advocates. Dependency court decisions are as good as the information on which the decisions are based. In order to promote the welfare of children in dependency court, therefore, children must be provided with competent independent legal representation.

The role of the child's attorney is unique in American jurisprudence and not yet sufficiently defined by law or tradition. Although there is a growing consensus that children in dependency cases should have lawyers, there continues to be confusion and debate over the role and duties of the lawyer. At the outset, we recognize that children are not simply small adults, and that extending the traditional role of an attorney in the adult context to the representation of children will not necessarily serve the child client well. A lawyer representing a child has a client who may or may not be competent, and who may be competent for some decisions but not for others. Modifications to the lawyering role must, therefore, be made. The primary modification concerns the client's direction to the lawyer where a child is incapable or incompetent to make such decisions. With these modifications in place, the lawyer then participates in formulating the client's position and reporting that position to the court in a manner inconsistent with traditional adult representation. Such modifications, some argue, create a hybrid lawyer role that can diminish independent zealous advocacy. Crafting rules that blend the benefits of client autonomy and child protection have proved to be difficult.

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³ ABA CENTER ON CHILDREN AND THE LAW, COURT IMPROVEMENT PROGRESS REPORT (1998).

Yet progress has been made. Children have been represented in the child welfare cases for a relatively short time. In the 1970s, children were infrequently represented by counsel, but today children are nearly always represented under some model of lawyering.⁴ Unlike delinquency law, which mandates independent legal counsel under *In re Gault*,⁵ there is no such federal or constitutional mandate in dependency court.⁶ Guidance comes primarily from the Federal Child Abuse Prevention and Treatment Act (CAPTA). As a condition for receiving Federal child abuse related funds, CAPTA requires that each state appoint a guardian ad litem for a child in every case involving an abused or neglected child that results in a judicial proceeding.⁷ CAPTA permits the guardian ad litem to be an attorney or a lay advocate, or both. It also requires the guardian ad litem to obtain, first-hand, a clear understanding of the situation and needs of the child and make recommendations to the court concerning the best interests of the child.

CAPTA is a reasonable starting place but it is not a comprehensive model. The result of implementing CAPTA in the states, therefore, has been the creation of numerous—and oftentimes inconsistent and unclear—models of representation. It can be argued that no two models of child representation among the various U.S. jurisdictions are alike. Further, within jurisdictions, there is often considerable disagreement as to which model is used and what the role of the representative is within the model. This confusion has undoubtedly contributed to the poor quality of representation children frequently receive in our system.⁸

So what precisely are the role and duties of the child's lawyer in dependency cases? The lawyer must first look to state law for controlling authority. The role of the child's lawyer may be set forth in state statutes, case law, court rules, state's ethics codes, or appointment orders and contracts. In Colorado, for example, state statute mandates the appointment of a guardian ad litem and further requires that the GAL be an attorney.⁹ The representation model is further defined by a body of case law, a supreme court directive, and the state ethics code.¹⁰ Taken together, these authorities form what is generally called the

⁴ For a discussion of the various models of child representation, see Appendix A-1, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES, § IV.

⁵ 387 U.S. 1 (1967).

⁶ A few states have improved on the problem by determining that a child has a constitutional right to legal representation in child welfare proceedings. See *In re Jamie TT*, 599 N.Y.S.2d 892 (N.Y. App. Div. 1993).

⁷ Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a(b)(A)(xiii).

⁸ *America's Children at Risk: A National Agenda for Legal Action*, 1993 REPORT OF THE ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES.

⁹ COLO. REV. STAT. §§ 19-1-111(1), 19-1-103(59), 19-3-203(3).

¹⁰ See *In re J.E.B.*, 854 P.2d 1372 (1973); Supreme Court of Colorado Directive 04-06, "Court Appointments Through the Office of the Child's Representative" (2004); Colorado Rules of Professional Conduct.

Attorney/GAL model, which requires the attorney to represent the child's best interests. It is the predominant model of dependency court legal representation throughout the states. A survey by the National Council of Juvenile and Family Court Judges determined that 40 states appoint counsel for children in child abuse and neglect cases. In 30 states, an "attorney-guardian-ad-litem" is typically appointed who serves a dual function of representing both the best interests and the wishes of the child. In the 10 other states that appoint counsel for a child, a guardian ad litem is appointed in addition to the attorney, so that the attorneys perform the single role of representing the child (*i.e.*, the child's wishes). In 10 states, the NCJFCJ reported that an attorney is usually *not* appointed for the child, but in nine of those States a non-attorney guardian ad litem is appointed for the child.¹¹

Even with such guidance, the role of the child's lawyer presents unique difficulties. Moreover, some states offer very little guidance. Fortunately, there is a developing body of national authority to help guide the practitioner. By drawing on the authority of national ethics and practice standards, the dependency court child's attorney can fill in the gaps left by his or her state.

AUTHORITY FOR DEPENDENCY COURT LEGAL REPRESENTATION

- State Statute.
- Administrative Regulations.
- State Ethics Code.
- Case Law.
- State and Local Court Rule.
- Appointment Order.
- Appointment Contract with State Oversight Authority.
- State Standards of Practice or Guidelines.
- The Child Abuse Prevention and Treatment Act.
- NACC Recommendations for Representation of Children in Abuse and Neglect Cases.
- ABA Standards (and ABA NACC Revised Version) of Practice for Lawyers Who
- Represent Children in Abuse and Neglect Cases.
- Department of Health and Human Services Guidelines for Public Policy and State
- Legislation Governing Permanence for Children.
- Treatises and Literature.

¹¹ SHIRLEY DOBBIN ET AL., NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (1998).

§ 21A.2 Basic Lawyer Ethics: The Model Code and Model Rules

The starting place for the general rules of lawyer duties is the Model Code or Model Rules. Each state has adopted either the ABA Model Code of Professional Responsibility or Model Rules of Professional Conduct. The Model Code and Model Rules define the lawyer's basic responsibility of independent, competent, zealous advocacy.¹² These basic duties, including knowledge, skill, thoroughness, and preparation apply equally to lawyers representing children. No jurisdiction has created a blanket exception to the duty to abide by them for children's lawyers. Lawyers appointed to represent children, therefore, owe the same duties to the child client as he or she would to an adult client unless the state provides a specific exception, such as in the case of client confidentiality under some state's guardian ad litem provisions. Likewise, if one accepts that the duty to provide competent representation requires a lawyer to know his or her client, it would be a breach of the duty and a violation of the lawyer's ethics to fail to meet with your child client.

The American Bar Association's old Model Code of Professional Responsibility¹³ did not provide any direct guidance for the attorney representing a child. The newer Model Rules of Professional Conduct¹⁴ address the issue of dealing with a client under a disability. Rule 1.14(a) of the Model Rules provides: "When a client's ability to make adequately considered decisions is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The commentary to Rule 1.14 says: "Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings governing their custody." The default position, therefore, is for the child's lawyer to maintain as normal an attorney-client relationship as possible.

Rule 1.14(b) says: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot act in the client's own interest."

In August 2002, the American Bar Association adopted revised ethical rules with the "Ethics 2000" project.¹⁵ The new Rule 1.14(a) of the Model Rules, now

¹² See MODEL RULES OF PROF'L CONDUCT Preamble, R. 1.1; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1; 7-12, DR 6-101.

¹³ MODEL CODE OF PROF'L RESPONSIBILITY (American Bar Association 1969).

¹⁴ MODEL RULES OF PROF'L CONDUCT (American Bar Association 1983).

¹⁵ MODEL RULES OF PROF'L CONDUCT (2002).

referring to a client with *diminished capacity*, provides: “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

Rule 1.14(b) provides: “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” The new Rule 1.14(b) gives the child’s attorney broader guidance on what “other protective action” might be appropriate, including allowing consultation with other persons or entities. Further, the new Rule 1.14(b) provides more guidance regarding the previous trigger for acting (“only when the lawyer reasonably believes that the client cannot act in the client’s own interest”) to include situations in which the client “is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.” This change reflects the Ethics 2000 loosening of the confidentiality rules under some circumstances.

The Comment to the new Rule 1.14 provides much greater guidance to the child’s attorney wishing to take protective action on behalf of the child client:

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.

[6] In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness

of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

The new Comment 4 to Rule 1.14, modifying Comment 3 to Model Rule 1.14, provides that in "matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor." In the child welfare context, it is likely that the child's attorney would not be looking to the parents for direction on the central questions of custody, although the parents could be helpful on collateral questions such as placement, education and health care.

§ 21A.3 The Best Interests vs. Expressed Wishes Conundrum

Although the new Model Rule 1.14 provides better guidance than before, neither the Model Code nor Model Rules were drafted specifically with child representation in mind. It has long been thought that the field would benefit from a comprehensive set of national standards specifically designed for the child's attorney. Producing those standards has proved difficult, largely because of the debate over the role of the child's attorney. Policy makers have differed in their views of whether the attorney should represent the best interests or expressed wishes of the child. The debate has received more than enough attention in the literature, yet it is necessary to understand the nature of the debate in order to move past it.

Should the lawyer for the child be guided by the child's expressed wishes or by the lawyer's determination of what is in the best interests of the child? The competition between the two principle models has been called the dilemma of

child advocacy.¹⁶ The dilemma paradigm asks whether children's attorneys should advocate the expressed wishes (the client-directed model) or the best interests (the advocate-directed model) of the child.

Both the interests and wishes models are criticized. Proponents of traditional client-directed lawyering argue that children and youth benefit from the sense of empowerment that comes from a lawyer who works exclusively for the child rather than society's view of what is best for the child. Another objection is that best interests is a substituted judgment model that inappropriately substitutes the view a lawyer for that of the child while at the same time usurping the role of the court to make such determinations. With an infant or young child, the pure best interests approach fails to set out principles to guide the advocate's discretion in identifying the child's best interests.¹⁷ The model has also resulted in what has come to be known as "relaxed advocacy," where attorneys feel free to ignore their traditional duties (such as seeing their client or filing motions) because they are appointed as a guardian ad litem.

Many critics of the best interests model have advocated for the traditional attorney model only to be criticized for endangering children's welfare by allowing children to determine their fate. The pure wishes or client-directed model is criticized where a child of limited capacity and poor judgment sets immature and even harmful goals for the outcome of the case. For example, the younger abused child commonly wants to return to the custody of the parent—even if it was that parent who caused the injuries. Child advocate lawyers say they do not wish to use their advocacy skills to put a child in continued danger.

Many also point out that "children are under tremendous pressure to misidentify and/or misarticulate their own interests because of pressure from their families, from the court process, and from the circumstances leading to the court process."¹⁸ Haralambie notes that children's "wishes may be based on threats, bribes, and other questionable bases."¹⁹ Buss interprets Perry as "suggesting that children's communications with their lawyers are hampered by, among other things, their difficulty in dealing with the emotional and social pressures connected with the proceeding, their feelings of guilt, their difficulty understanding and framing responses to lawyers' questions, and their lack of understanding of the court process."²⁰ Melton notes that "the necessity of making choices can be anxiety provoking for children."²¹

¹⁶ ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (American Bar Association 1993).

¹⁷ See Donald N. Duquette, *Legal Representation for Children In Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 *FAM. L.Q.* 441 (Fall 2000).

¹⁸ Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1702-1703 (1996) (citations omitted).

¹⁹ *Id.* at 1703 n.9 (citations omitted).

²⁰ *Id.* (citations omitted).

²¹ *Id.* at n.10 (citations omitted).

The pure client-directed model has another major flaw in that it does not give sufficient direction for the representation of the very young clients who may be nonverbal or lack the developmental capacity to make reasoned decisions and give guidance to the attorney.²²

This wishes/best interests conundrum has tied the field in knots for over two decades, but experience and analysis are breaking the impasse.

§ 21A.4 The “Child’s Attorney” Response

One response to the dilemma has been the creation of the “child’s attorney” model of representation, which tends toward a client-directed approach. While state and federal statutes currently weigh in favor of a best interests approach, national policy advocates tend to favor a client-directed approach.²³ The model moves away from the substituted judgment, paternal guardian ad litem model and toward a more autonomous traditional attorney model that includes safeguards to protect autonomy, which may harm a child. This “child’s attorney” model is found in each of the following events and literature:

- The December 1995 Fordham University School of Law Conference on Ethical Issues in the Legal Representation of Children, which resulted in a special law review issue by the same name.²⁴
- The adoption in February 1996 of the *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*.²⁵
- The publication of *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* by Yale Clinical Law Professor Jean Koh Peters in 1997.²⁶
- The Adoption in 1999 of the ABA (NACC Revised) *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*.

²² Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955, 1957.

²³ The representation of children in the dependency court has also evolved from the 1970’s paternal model to the current tendency toward an independent child’s attorney. See, e.g., Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 *CAL. W. L. REV.* 16 (1976); Ann M. Haralambie, *Current Trends in Children’s Legal Representation*, 2 *CHILD MALTREATMENT* 193 (1997); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259 (1995).

²⁴ Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1279 (1996).

²⁵ The ABA STANDARDS were adopted by the ABA February 5, 1996, and by the NACC (with reservation) on October 13, 1996. They are adapted and published with the permission of the ABA in the *NACC DESKBOOK & DIRECTORY* (3d ed. 1998).

²⁶ JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (Charlottesville, VA: LEXIS Law Publishing 1997).

Each of these sources rejects the notion that one must either represent the expressed wishes or best interests of the child.

§ 21A.4.1 The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases

The ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases provide:

[t]he term “child’s attorney” means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. 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 preferences and follow the child’s direction throughout the course of litigation. To the extent that a child cannot express a preference, the child’s attorney shall make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a guardian ad litem. To the extent that a child does not or will not express a preference about particular issues, the child’s attorney should determine and advocate the child’s legal interests. If the child’s attorney determines that the child’s expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer’s opinion of what would be in the child’s interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child’s expressed preference, unless the child’s position is prohibited by law or without any factual foundation.

§ 21A.4.2 The ABA (NACC Revised) Standards of Practice

The *ABA Standards* were adopted in 1996. The following year, the NACC adopted the standards with reservation as to Standard B-4. Standard B-4 is the client direction language of the standards, and some members of the NACC Board of Directors believed the *ABA Standards* gave too much autonomy to the child client and was unrealistic where young children were concerned. Subsequently, the NACC adopted its own revised version of the *ABA Standards* in the NACC’s attempt to achieve a better balance of beneficence and autonomy within Standard B-4. The “Child’s Attorney” model of the *ABA (NACC Revised) Standards of Practice* draws on the work of the Fordham Conference and Professor Peters. In essence, this child’s attorney model places the attorney in the traditional role of zealous advocate but provides for an infusion of “protection” through the application of an objective best interests evaluation in limited situations. The model requires that the attorney assume the traditional role of zealous advocate and not GAL to avoid any propensity toward relaxed advocacy. At the same time, it recognizes that some children are not capable of

directing their litigation, and that a degree of substituted judgment is unavoidable. In essence, where the ABA remained consistent with the client-directed attorney throughout, the NACC carved out a significant exception where the client cannot meaningfully participate in the formulation of his or her position. In such cases, the NACC's version calls for a GAL type substitution of judgment, but using objective criteria. Additionally, the NACC's version requires the attorney to request the appointment of a separate GAL, after unsuccessful attempts at counseling the child, when the child's wishes are considered to be potentially seriously injurious to the child.

§ 21A.5 The "Two Distinct Roles" Response

Another response calls for the creation of two distinct lawyer roles. This model suggests that it is a mistake to try to develop a single lawyer role for children in protection cases that attempts to accommodate developing capacities from infants to articulate teens. "We should adopt different standards for the different lawyer roles."²⁷ This model creates a bright line at age 12 or 14, and the court appoints a best interest lawyer for all the children younger than that age and a traditional attorney for the children over the strict age test. This avoids ad hoc, discretionary decision making, and makes it more likely that similarly situated children would receive the same level of advocacy for their stated preferences.²⁸ The state of Michigan has adopted this model.²⁹

§ 21A.6 The "Duties" Response

No matter how the goals of the advocacy are determined, whether as directed by the child-client or as determined by a best interest of the child judgment of the lawyer, there is widespread agreement that the lawyer for the child should be an active and aggressive advocate. Few continue to argue that a lawyer representing a child client is absolved from the fundamental duties of thorough communication with the client or case investigation and preparation. While recognizing the difficulty of determining the goals of litigation in the face of a client of limited capacity, there is agreement that certain duties are fundamental.

§ 21A.6.1 NACC Recommendation for Representation of Children in Abuse and Neglect Cases

In an attempt to get past the best interests and expressed wishes debate, the NACC adopted the *NACC Recommendations for Representation of Children in*

²⁷ Donald N. Duquette, *Legal Representation of Children: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441, 441 (Fall 2000).

²⁸ *Id.*

²⁹ *Id.* at 444.

Abuse and Neglect Cases in 2001.³⁰ The Recommendations encourage jurisdictions to avoid the wishes/interests debate and instead focus on providing fundamental services to child clients through a child's needs assessment. The NACC believes that, regardless of the role designation, attorneys should be able to provide competent independent legal representation by focusing on the following systemic safeguards, advocacy duties, and special advocacy issues.

A. Systemic Safeguards

- 1. Children need competent, independent, and zealous attorneys. The system of representation must require the appointment of competent, independent, zealous attorneys for every child at every stage of the proceedings. The same attorney should represent the child for as long as the child is subject to the court's jurisdiction.
- 2. Children need attorneys with adequate time and resources. The system of representation must include reasonable caseload limits and at the same time provide adequate compensation for attorneys representing children.
- 3. Children need attorneys who understand their role and duties. The system of representation of children must be well defined by statute, bar standards, administrative guidelines, supreme court directive or other documents such that every attorney appointed for a child can understand his/her precise role and duties, and such that an attorney can be held accountable for performance of those duties.
- 4. Children need an opportunity to present their positions to the court through counsel. The system of representation must provide the child with an opportunity for his/her needs and wishes to be expressed to the court.
- 5. Children need confidential communication with their attorneys. The attorney has a duty to explain the extent of confidentiality in developmentally appropriate language.
- 6. Children need to be involved as litigants in the entire litigation process, including any post disposition, termination of parental rights, and adoption proceedings. The system of representation must recognize the child as a party to the litigation and must include the child in all phases of the litigation, including the opportunity to participate in arguments and jury selection where applicable, offer exhibits, call witnesses, examine and cross examine witnesses and

³⁰ For full text, see Appendix A-1, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES.

engage in motions and discovery processes. The child must also be given notice of all proceedings and copies of all pleadings.

- 7. Children need judicial review of adverse decisions. The system of representation must provide an opportunity to appeal an adverse ruling.
- 8. Children need to be able to hold their attorneys accountable. The system of representation must provide recourse for ineffective assistance of counsel.
- 9. Children need an attorney with a fair opportunity to be effective in the court system. The system of representation must include a court system that devotes adequate time and resources to cases.

B. Advocacy Duties

- 1. Children need attorneys who fully understand their cases. The attorney must perform a full and independent case investigation.
- 2. Children need meaningful communication with their attorneys. The attorney must observe the child, and dependent upon the child's age and capabilities, interview the child. The attorney must engage in regular and meaningful communication with the child. Children need to participate in making decisions that affect their cases. The attorney has a duty to involve the child client in the process, whether under a client directed model or advocate directed model. The attorney has a duty to explain his/her role to the child in developmentally appropriate language.
- 3. Children need loyal attorneys. The child's attorney is prohibited from representation that would constitute a conflict of interest.
- 4. Children need the full benefit of legal counsel. The attorney must provide competent, independent and zealous representation for each client. The attorney must have adequate time and resources to devote to the child's case, and to understanding his/her role and duties, insuring confidentiality, and full active participation in all stages of the child's case.

C. Advocacy Issues

- 1. Children need permanence. The attorney must advocate for timely resolution and permanent resolution (absent compelling reasons to the contrary) of the case.
- 2. Children need their immediate and basic needs met. The attorney must advocate for food, shelter, clothing, and safety, including a safe temporary placement where necessary and for educational, medical, mental health, and dental needs.

- 3. Children need family relationships. The attorney must advocate for continuation of appropriate familial relationships and family preservation services where appropriate.
- 4. Children need to be protected from unnecessary harm that can result from legal proceedings. The attorney must advocate for the utilization of court processes that minimize harm to the child, and make certain that the child is properly prepared and emotionally supported where the child is a witness.

§ 21A.6.2 The ABA Standards and NACC Revised ABA Standards Focus on Duties

Beyond the “child’s attorney” role designation of the ABA Standards, the focus of the document is the basic obligations and required actions of the lawyer for the child that most policy makers support, regardless of their view of the dilemma. These obligations also appear in the NACC revised version of the standards and are consistent with the *NACC Recommendations* in Section 21A.6.1 above. They are also affirmed by the federal government in *Guidelines for Public Policy and State Legislation Governing Permanence for Children*.³¹ The duties of the child’s attorney, from the *ABA Standards*,³² include:

...

B. GENERAL AUTHORITY AND DUTIES

B-1. Basic Obligations. The child’s attorney should:

1. Obtain copies of all pleadings and relevant notices;
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 conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family;
4. Attempt to reduce case delays and ensure that the court recognizes 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;

³¹ ADOPTION 2002: THE PRESIDENT’S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

³² ABA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES (1996) (commentary omitted).

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.

...

C. ACTIONS TO BE TAKEN

C-1. **Meet With Child.** Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

C-2. **Investigate.** To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

1. Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;
2. Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;
3. Contacting lawyers for other parties and non-lawyer guardians ad litem or court-appointed special advocates (CASA) for background information;
4. Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;
5. Obtaining necessary authorizations for the release of information
6. Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.
7. Reviewing relevant photographs, video or audio tapes and other evidence; and
8. Attending treatment, placement, administrative hearings, and other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

C-3. **File Pleadings.** The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

1. A mental or physical examination of a party or the child;
2. A parenting, custody or visitation evaluation;
3. An increase, decrease, or termination of contact or visitation;
4. Restraining or enjoining a change of placement;
5. Contempt for non-compliance with a court order;
6. Termination of the parent-child relationship;
7. Child support;
8. A protective order concerning the child's privileged communications or tangible or intangible property;
9. Requesting services for child or family; and
10. Dismissal of petitions or motions.

C-4. Request Services. [Consistent with the child's wishes**], the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

1. Family preservation-related prevention or reunification services;
2. Sibling and family visitation;
3. Child support;
4. Domestic violence prevention, intervention, and treatment;
5. Medical and mental health care;
6. Drug and alcohol treatment;
7. Parenting education;
8. Semi-independent and independent living services;
9. Long-term foster care;
10. Termination of parental rights action;
11. Adoption services;
12. Education;
13. Recreation or social services; and
14. Housing.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

1. Special education and related services;
2. Supplemental security income (SSI) to help support needed services;
3. Therapeutic foster or group home care; and
4. Residential/in-patient and out-patient psychiatric treatment.

C-6. **Negotiate Settlements.** The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

D. HEARINGS

D-1. **Court Appearances.** The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. **Client Explanation.** The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. **Motions and Objections.** The child's attorney should make appropriate motions, including motions in limine and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. **Presentation of Evidence.** The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

D-5. **Child at Hearing.** In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

D-6. **Whether Child Should Testify.** The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

D-7. **Child Witness.** The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

D-8. **Questioning the Child.** The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

D-9. **Challenges to Child's Testimony/Statements.** The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

D-10. **Jury Selection.** In those states in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. **Conclusion of Hearing.** If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

D-12. **Expanded Scope of Representation.** The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

1. Child support;
2. Delinquency or status offender matters;
3. SSI and other public benefits;
4. Custody;
5. Guardianship;
6. Paternity;
7. Personal injury;
8. School/education issues, especially for a child with disabilities;
9. Mental health proceedings;
10. Termination of parental rights; and
11. Adoption.

D-13. **Obligations After Disposition.** The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

E. POST HEARING

E-1. **Review of Court's Order.** The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. **Communicate Order to Child.** The child's attorney should discuss the order and its consequences with the child.

E-3. **Implementation.** The child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

F. APPEAL

F-1. **Decision to Appeal.** The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

F-2. **Withdrawal.** If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. **Participation in Appeal.** The child's attorney should participate in an appeal filed by another party unless discharged.

F-4. **Conclusion of Appeal.** When the decision is received, the child's attorney should explain the outcome of the case to the child.

F-5. **Cessation of Representation.** The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

Whether the lawyer takes his or her direction from the child or makes a best interest judgment as to what the goals of the litigation should be, the above list of activities is what is expected of the lawyer in implementing the goals, once they are determined.

§ 21A.7 The Child's Wishes Are Always Relevant

The national authorities that have addressed the child preferences reflect a consensus on this issue, too.³³ Regardless of whether or not a child is competent to direct the attorney, and even if the role of the attorney is defined as other than purely client-directed, the wishes and preferences of the child are always relevant and should be communicated to the court unless limited by privilege. No matter what weight is given to the child's preferences in determining the goals of advocacy, the attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should communicate the child's wishes and preferences to the court. The lawyer also has a duty to explain to the child in a developmentally appropriate way information that will help the child have maximum input in the determination of the particular position at issue. According to the child's ability to understand, the lawyer should inform the child of the relevant facts, the applicable laws, and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings.

State law may provide authoritative guidance on how the stated wishes and preferences of the child are to be presented to the court, if at all. Maine provides an example:

The guardian ad litem shall make the wishes of the child known to the court if the child has expressed his wishes, regardless of the recommendation of the guardian ad litem.³⁴

Florida requires the guardian ad litem to file a written report that must include "a statement of the wishes of the child."³⁵

In any event, the child's wishes are to be elicited and taken seriously. The lawyer is expected to play a counseling role, advising the child client of the risks and benefits of various options and, particularly, the likely consequences of the client's expressed choices. This discussion and counseling will, in many cases, produce agreement between client and lawyer about what they perceive to be in the client's best interests.

Assuming that the child's stated preferences are determined and elicited by the lawyer and communicated to the court, how much weight should the lawyer for the child attach to those stated preferences in determining the goals of the litigation? The vast majority of legal scholars and authorities who have

³³ These include the ABA STANDARDS; NACC STANDARDS OF PRACTICE; THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN; and the FORDHAM CONFERENCE ON ETHICAL ISSUES IN THE LEGAL REPRESENTATION OF CHILDREN.

³⁴ ME. REV. STAT. tit. 22, §4005(1)(e).

³⁵ FLA. STAT. § 39.465(2)(b).

addressed this issue recommend that a lawyer should take direction from his or her child client if the child is determined to have developed the cognitive capacity to engage in reasoned decision making. The national trend is in the direction of a more traditional lawyer role, giving more deference to the child's wishes and preferences, and turning to a more objective process for determining the child's position when that is required. Determining the decision-making capacity of any particular child and the weight to be given to that child's preferences remains a difficult and elusive question, however. The ABA Model Rules of Professional Responsibility, discussed above, especially the 2002 amendments, will provide some guidance. In the case of the very young child or the older child, the question of competence to instruct counsel may not be so difficult. If the client is an infant and cannot speak, the client cannot instruct counsel. If a client is a normally developed 15- or 16-year-old, however, he or she is quite likely to have clear and reasonable views as to the proper decisions to be made affecting his or her life that should be aggressively argued to the court. But determining capacity for the middle-years child, from 8 to 12 for instance, and the weight to be given to that child's preferences is perhaps the most difficult question in child advocacy today, and it does not yet have a clear answer.

The weight given to a child's stated wishes and preferences generally depend on the child's capacity, on his or her mental competence and maturity. But how should that capacity be assessed? Especially for the middle-years child, capacity is not an either-or proposition. Children mature at different rates and may be capable for some judgments and not for others. Professor Jean Koh Peters creates the image of a sliding scale or "dimmer switch" in which the child's capability is not an "on or off" phenomenon where a child is either capable of directing the lawyer or not.³⁶ "Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it."³⁷ A child's capacity, then, is a broader spectrum where children may be able to contribute various amounts to guide the representation if the lawyer properly incorporates the child's unique individuality.

State law and practice may incorporate the "dimmer switch" concept in authoritative directions to the lawyer. If the lawyer is appointed to represent the "best interests of the child," for instance, the statute may recognize the child's growing capacity. In Michigan, for example, the duties of the lawyer/GAL include:

- (h) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. *The*

³⁶ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 53-54 (1997).

³⁷ *Id.*

child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences. (emphasis added)

Under Michigan law, the lawyer, when formulating a best interest goal, is to give increasing weight to the preferences of the child according to the child's age and maturity. At some point the best interests and wishes of the child merge, and the lawyer/GAL ends up representing the stated wishes of the child. If, however, a conflict remains between the child and the lawyer/GAL regarding the child's best interests, the lawyer/GAL should bring the matter to the court, which may appoint an attorney for the child who serves in addition to the lawyer/GAL.³⁸

§ 21A.8 Conclusion

A child welfare legal system that serves and protects children must include independent legal counsel for all parties, including children. The practice of law for children has evolved over a relatively short period of time from a cottage age industry to a sophisticated legal specialty. That specialty includes new guidelines and standards of practice that guide the practitioner toward providing children with the full benefit of legal counsel. Despite some disagreement over the nuances of practice, there is widespread consensus on the primary duties of the child's lawyer. A national model of practice that serves the special needs of child clients has emerged.

³⁸ MICH. COMP. LAWS § 712A.17d(1)(h). Where there is a disagreement between the lawyer-guardian ad litem and the child as to the child's best interests, the lawyer is to bring the question before the court, and the court may appoint an attorney for the child who has the same duty of zealous representation as for an adult and serves in addition to the lawyer-guardian ad litem. MICH. COMP. LAWS § 712A.17d(2).