



*Making the Legal System Work for Children and Parents*

# Attributes of High-Quality Legal Representation for Children and Parents in Child Welfare Proceedings

This document describes fundamental attributes of quality legal representation for parents and children in child welfare proceedings, beyond presumed competency and knowledge of the law, rules of procedure, and negotiation and trial skills. This document builds on existing Standards of Practice<sup>1</sup> for attorneys representing children and parents in child welfare proceedings, and findings and recommendations from the U.S. Department of Health and Human Services, Children's Bureau, National Quality Improvement Center on the Representation of Children in the Child Welfare System<sup>2</sup> and Administration for Children and Families.<sup>3</sup>

## FUNDAMENTALS

### Right to Counsel

A well-functioning child welfare system must recognize that children and parents are parties to child welfare proceedings and are entitled to all the rights of parties, including the right to notice of the proceedings and the right to appear before the court and present arguments, evidence, and sworn testimony.<sup>4</sup> As parties to child welfare proceedings, children and parents must have a right, through either statute or case law, to independent legal counsel.<sup>5</sup> Unfortunately, children and parents throughout the country do not consistently have a right to counsel in child welfare proceedings.<sup>6</sup> This must change.

### Prioritize Quality

The attributes/elements of quality representation identified in this document should be in place as soon as possible. Systems should ensure attorneys for parents and children have supports to provide quality representation to clients.

## Be a Lawyer

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. The adversarial nature of the legal system presumes disagreements can be resolved by a neutral arbiter, after hearing facts and legal arguments presented by opposing parties within a formal framework of evidentiary and procedural rules. Child welfare proceedings, in contrast, are often characterized as more informal or collaborative. While there may be instances where clients' goals can be achieved through negotiation and cooperation, attorneys for parents and children must always remember their ethical duties are to their clients in an adversarial system, including their professional obligations of competency and diligence. Other system-actors, including judges and court administrators, also must not forget that children's and parents' attorneys have ethical duties to their clients, which are paramount to expediency or cost-savings and are a cornerstone of the legal system.

## Special Considerations for Children's Attorneys

Significant debate surrounds the appropriate role for children's attorneys in child welfare proceedings, primarily around whether children's attorneys should, consistent with rules of professional conduct, "abide by the client's decisions concerning the objectives of representation" and help clients achieve their objectives; or whether attorneys should substitute their judgement for that of their clients and advocate for what they believe is best for their clients. Academics, and many practitioners, favor client-directed representation as the most appropriate model of representation for verbal children who can express a point-of view.<sup>7</sup> However, most states do not have a client-directed model of children's representation, but rather follow a substituted judgement model.<sup>8</sup>

When children are nonverbal, or if children's attorneys are required by the appointing statute to substitute their judgement for that of their clients, attorneys are advised to frame their role in the context of advancing their child-clients' legal rights or legal interests (i.e., children have a legal right to live with their parents unless a court has found the parents unfit; children have a legal right to be placed with relatives, not in the most well-resourced home).<sup>9</sup> To do otherwise invites children's lawyers to take on the role of the judge and determine what they believe to be in their client's best interest based on factors which are not limited by the rules of evidence and procedure, and are not subject to review.<sup>10</sup> At the very least, any analysis of what is in a child's best interest must focus on the child-client's wishes and objectives and preserving the child's family environment and maintaining familial relationships.<sup>11</sup>

## Individual and System Responsibilities

This document divides attributes/elements into those that must be met by individual parents' and children's attorneys when representing their clients and those that must be addressed by the systems or structures governing legal representation for children and parents in child welfare proceedings.



# Individual Attorney Attributes

The fundamental attributes of quality representation for both children and parents that must be met by individual attorneys are those attributes that are already required of attorneys under their codes of professional conduct.<sup>12</sup> The fundamental attributes that must be met by systems or structures governing legal representation for children and parents in child welfare proceedings are those elements that must be in place to allow parents' and children's attorneys to meet their individual obligations to their clients.

## Legal Advocacy

- Diligently pursue clients' case goals and, as needed and when consistent with client's interests and objectives, proactively drive the case forward:
  1. Develop a case theory and legal strategy for adjudication, and advance other client objectives and issues that support reunification (e.g., litigation to increase visitation).
  2. Engage in proactive case planning, develop and propose a case plan, identify service providers, and set a visitation schedule (if family maintenance or immediate family reunification is not possible).
  3. Litigate issues and use experts, as needed, to achieve clients' case goals, including through active motion practice throughout proceedings, not only at statutorily set periodic review dates.
  4. Explain to clients their right to attend court hearings and advocate for clients who want to attend court proceedings to attend in person.

## Out-of-Court Advocacy

- Engage with and know the clients.
- Understand trauma and client's specific trauma history, including:
  1. How client's trauma history impacts client's experience with the child welfare system and ability to engage in child welfare services; and
  2. How trauma impacts the attorney/client relationship.
- Meet and communicate regularly with client and well before any and all court hearings.
- Counsel clients about all legal matters related to the case, including the allegations related to dependency, the proposed service plan, and the client's rights in the pending proceedings.
- Approach cases with a sense of urgency with an immediate focus<sup>13</sup> on:
  1. Placement arrangements that support child's connection to family, siblings, education, language and culture (including in-home placement, with relatives, neighbors and fictive kin/close family friends);
  2. Visiting arrangements that, consistent with child safety, are: unsupervised whenever possible in child friendly places conducive to parent/child interaction and engagement, as frequent and long as possible, organized around activities that reflect the routine activities of the family, and progress through reduced supervision and increased frequency; and
  3. Services that appropriately address client's strengths and needs.
- Conduct a thorough and independent investigation at every stage of the proceeding, before and after the jurisdictional/dispositional phase of the proceedings. This should include obtaining and reviewing on

an ongoing basis and to the extent allowable under state law (including via subpoena, discovery, or court order), child welfare agency records, service provider records, and all other relevant records for parents and children, including medical and education records.

- Research applicable legal issues and legal arguments.
- Engage in case planning and advocate for appropriate services and visitation, on an ongoing basis, including after the jurisdictional/dispositional phase of the proceedings.

### Cultural Humility

- Understand how racial, cultural, social, and economic differences may impact the attorney/client relationship, avoid imposing personal values upon clients, and take these factors into account when working with clients to achieve their case goals, including identifying and accessing services.
- Understand and recognize the impact of personal and system bias stemming from race, gender identity, sexual orientation and expression, ethnicity, culture, country-of-origin, disability, and socioeconomic status, and develop strategies, including legal strategies, to mitigate the negative impact of personal and systems bias on clients' case goals.
- Identify and use to clients' advantage their individual, familial, cultural, and community strengths.

### Scope of Representation

- Identify potential ancillary legal issues that could impact client's dependency case and refer client to legal resources to address issues, or handle if competent to do so.
- Cooperate and communicate regularly with client's other legal service providers to ensure dependency proceedings and other legal proceedings benefit client.



## System Attributes

### Caseloads and Compensation

- Ensure parents' and children's attorneys' compensation rates are adequate for the attorneys' practice, accounting for overhead and other costs borne by private professionals. At a minimum, parents' attorneys' and children's attorneys' compensation should be equal to county or child welfare agency attorneys' compensation, and consistent with other publicly-funded attorneys' compensation, including criminal defense attorneys.
- Ensure attorneys have a reasonable caseload of no more than 60 clients at a time for a full-time attorney, assuming a caseload that includes clients at various stages of the case. Generally, caseloads with over 60 clients will not be manageable for attorneys who lack supports of an interdisciplinary practice model, including access to social workers, investigators, and/or paralegals.<sup>14</sup> Note, a caseload of 60 clients should be considered full-time work, and attorney compensation should support a full-time practice at this caseload level.

### Interdisciplinary Model

- Ensure attorneys have access to work in an integrated manner with interpreters, experts, social workers, and investigators, as needed.

- Ensure attorneys have access to work in an integrated manner with parent allies/ peer parent mentors and youth ambassadors, as needed.<sup>15</sup>

## Diversity/Cultural Humility

- Ensure system provides attorney training around bias and cultural humility, including how racial, cultural, social, and economic differences may impact the attorney/client relationship, how personal and system bias may influence child welfare system decision making, and how attorneys can mitigate the negative impact of personal and system bias on clients' case goals.
- Ensure attorney supervision and oversight includes an opportunity for attorneys to reflect on bias and cultural humility and to evaluate impact of attorneys' personal bias on representation.
- Develop and implement a strategy to ensure a diverse attorney and staff workforce that mirrors the cultural, racial, and socioeconomic background of clients and communities served and which includes meaningful professional advancement and leadership opportunities.<sup>16</sup>

## Timing of Appointment

- Ensure attorneys are appointed and have the opportunity to have a meaningful meeting with the client, before any court appearance, regarding any allegations of abuse or neglect, the attorney/client relationship, and the child welfare legal system process. The meeting should be held at the earliest to occur of: (1) the emergency removal of a child from his or her home; (2) an application for an order of removal, prior to the filing of a petition alleging abuse or neglect; or (3) the filing of a petition alleging abuse or neglect.<sup>17</sup>

## Support and Oversight

- Define clear roles and expectations for attorneys and all members of the multidisciplinary team.
- Provide training and education opportunities.
- Provide oversight and performance evaluation.
- Provide the opportunity for clients to provide feedback on representation.

## Accountability/Use of Data

- Use a continuous quality improvement process to measure qualitative and quantitative outcomes.<sup>18</sup>

### Endnotes

1. ABA STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (American Bar Association, 2006); ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (American Bar Association, 1996); NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (National Association of Counsel for Children, 2001).
2. DONALD N. DUQUETTE, CHILDREN'S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION FOR CHILDREN IN THE CHILD WELFARE SYSTEM (American Bar Association, 2016).
3. U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAM., INFORMATION MEMORANDUM: HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS, ACYF-CB-IM-17-02 (January 17, 2017).
4. Ibid.
5. In child welfare proceedings, often siblings' interests are aligned and they may be represented as a group by counsel. However, there are instances when siblings' interests are not aligned. In such cases, attorneys will not be able to represent the sibling group without resolving any conflicts of interest. When conflicts cannot be resolved, children should be appointed separate counsel. Similarly, because the potential for a conflict of interest is so high among parents in child welfare proceedings, in most cases parents should be appointed separate counsel as a matter of course.
6. See e.g., A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children (2d ed.

2009); National Civil Right to Counsel Status Map, available at: <http://civilrighttocounsel.org/map>

7. DUQUETTE, *supra* note 2; *See also Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006).

8. *See e.g.*, CHILDREN'S ADVOCACY INSTITUTE & FIRST STAR, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN (3d ed. 2012), at [http://www.caichildlaw.org/Mis-c/3rd\\_Ed\\_Childs\\_Right\\_to\\_Counsel.pdf](http://www.caichildlaw.org/Mis-c/3rd_Ed_Childs_Right_to_Counsel.pdf)

9. *See e.g.*, Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM LAW REVIEW 1399 (1996); *see also* Lisa Kelly & Alicia Levezu, *Until the Client Speaks: Reviving the Legal Interest Model for Preverbal Children*, 50 FAM L.Q. 3 (Fall 2016) (noting that when children's legal rights conflict, the child's attorney should present information on both options to the judicial officer without taking a position).

10. *See* Guggenheim, *supra* note 6, at 1431.

11. *See e.g.*, DUQUETTE, *supra* note 2; *see also* U.N. Committee on the Rights of the Child, Convention on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), §§ 48-79, May 29, 2013.

12. *See e.g.*, MODEL RULES OF PROF'L CONDUCT (2016).

13. Jillian Cohen & Michele Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 28 ABA CHILD LAW PRACTICE 33, 38-44 (May 2009).

14. Throughout the country, caseloads for parents and children's attorneys vary significantly, and in many jurisdictions caseloads exceed 100 or even 150 open cases. Research has indicated that when parents have high-quality legal representation (and attorneys have lower caseloads) children achieve permanency faster. *See e.g.*, MARK E. COURTNEY, JENNIFER L. HOOK, & MATT ORME, EVALUATION OF THE IMPACT OF ENHANCED PARENTAL LEGAL REPRESENTATION ON THE TIMING OF PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE (Partners for Our Children, Feb. 2011). Managers of parent representation programs indicate that attorneys are unable to consistently meet their obligations to their clients when caseloads exceed 60 clients, and in some jurisdictions caseloads are capped at 40 clients again as program managers have found that attorneys cannot meet their individual obligations to their clients with more cases. Researchers have found that children's attorneys with more than sixty cases spent less time on investigation, document review, and legal case preparation. *See* DUQUETTE, *supra* note 2. Additionally, a comprehensive caseload analysis in Pennsylvania found that attorneys for parents and children could not meet their statutory obligations to clients with cases exceeding 61 clients for parent attorneys and 71 clients for children's attorneys. *See* 2015 PENNSYLVANIA STATE ROUNDTABLE REPORT, LEGAL REPRESENTATION: A CALL TO ACTION (2015), at [http://www.ocfpcacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3\(1\).pdf](http://www.ocfpcacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3(1).pdf)

15. This attribute is considered "ideal" and may be aspirational for many jurisdictions because of funding or other limitations.

16. *Id.*

17. Some jurisdictions have piloted appointing parents' attorneys prior to removing a child from the home, or filing of a petition seeking removal or court oversight. Pre-petition/pre-removal appointment of parents' attorneys has had promising results keeping families intact and preventing the unnecessary removal of children into foster care.

18. Continuous quality improvement generally means collecting data and using it to "identify, inform, monitor and improve progress toward outcomes in an ongoing fashion." U.S. DEPT OF HEALTH & HUM. SERVS., ADMIN. FOR CHILDREN & FAM., PROGRAM INSTRUCTION FOR STATE COURTS APPLYING FOR COURT IMPROVEMENT PROGRAM (CIP) FUNDS FOR FISCAL YEARS (FYS) 2012-2016, ACYF-CB-PI-12-02, 6 (Jan. 11, 2012). Collecting data is key to measuring and tracking the progress of legal representation, monitoring how well interventions and activities are working, and making any needed adjustments to meet your goals. *See e.g.*, Andrew Davies & Angela Olivia Burton, *Why Gather Data on Parent Representation? The Pros, Cons, Promise and Pitfalls*, 34 ABA CHILD LAW PRACTICE 49, 54-57 (April 2015). Tools available to help with continuous quality improvement of legal representation for children's and parents' attorneys are available, as well as technical assistance regarding the same. *See e.g.*, ABA CENTER ON CHILDREN AND THE LAW, INDICATORS OF SUCCESS FOR PARENT REPRESENTATION, (2015), at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-of-Success.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf)



The Family Justice Initiative (FJI) is a collaboration of the ABA Center on Children and the Law, the Children's Law Center of California (CLC), the Center for Family Representation (CFR), and Casey Family Programs (CFP).

The FJI unites professionals from around the country to ensure every child and every parent has high-quality legal representation when child welfare courts make life-changing decisions about their families. Through the FJI's work, child welfare lawyers, researchers, judges, social workers, policymakers, families impacted by abuse and neglect, and others are reenvisioning how to best protect children, strengthen families and support communities.