

FEATURE, REPRESENTING THE CHILD IN ABUSE & NEGLECT CASES

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Reporter

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Text

[*28] Legal representation of children in juvenile court proceedings is a relatively recent development in American jurisprudence.

The first juvenile court was created in Chicago in 1899. Within 20 years, almost all states had their own juvenile courts. However, those courts operated under the *parens patriae* doctrine, acting as a substitute parent for poor children and children who were out of parental control. Lawyers had no role in those courts. Although some early juvenile courts appointed a guardian ad litem (GAL) to make recommendations concerning the child's best interests, the GAL was usually not an attorney and was not expected or permitted to provide legal representation for the child.

- Due process for children

It was not until 1967 that the U.S. Supreme Court recognized in [In re Gault, 387 U.S. 1 \(1967\)](#), that the child in delinquency proceedings is entitled to basic due process protections, including the right to counsel. In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) Pub. L. 93-273; [42 U.S.C. § 5101 et seq.](#) This legislation included a provision that required states in every case involving an abused or neglected child to appoint a guardian ad litem to "obtain firsthand, a clear understanding of the situation and needs of the child" and to "make recommendations to the court concerning the best interest of the child." [42 U.S.C. § 5106a](#), subd. (b)(2)(A)(xiii).

As child welfare law continued to develop, in a few states, courts began appointing counsel for the child in some cases. Generally, court-appointed counsel were expected to fulfill the GAL role. However, as more attorneys became involved in child welfare proceedings, some became concerned that, in light of their ethical duty to zealously advocate the client's position, acting as the child's GAL was not their proper role. These concerns gave rise to a debate that continues today as to the proper role of an attorney appointed to represent a child in abuse and neglect proceedings.

In December 1995, a national conference of experienced children's attorneys joined legal ethics experts for a "Conference on Ethical Issues in the Legal Representation of Children" held at Fordham University School of Law, [64 Fordham L. Rev. 1279](#) et seq. (1996). That conference was sponsored by, among others, the American Bar Association (ABA), the National Association of Counsel for Children (NACC), and the National Council of Juvenile and Family Law Judges. [Id. at p. 1299](#). Conference participants produced a series of consensus recommendations that begin with this declaration:

A lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer. The lawyer should assume the obligations of a lawyer regardless of how the lawyer's role is labelled [sic], be it as guardian ad litem, attorney ad litem, law guardian, or other. The lawyer should not serve as the child's guardian ad litem or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child.

[Id. at p. 1301.](#)

On the heels of the Fordham Conference, in 1996 the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (www.abanet.org/child/repstandwhole.pdf). The ABA Abuse and Neglect Standards call for client-directed advocacy based on the attorney's traditional ethical duty to zealously advocate the client's interests. They require the attorney to represent the child's expressed preference. ABA Abuse and Neglect Standard B-4.

Although the ABA recognized that lawyers in many jurisdictions are appointed as the child's GAL to advocate for the child's best interests without regard for the child's expressed preferences, the ABA's position is that the ethical rules apply because the appointed attorney is also expected to perform legal functions. If the lawyer concludes that he or she has a conflict of interest caused by performing both as the child's lawyer and as the child's GAL, the lawyer is expected to perform as the child's attorney ("expressed preference"), withdraw as the child's GAL ("best interests"), and seek appointment of a separate GAL. ABA Abuse and Neglect Standards A-2, B-2.

In 1999, the NACC adopted the ABA Abuse and Neglect [*29] Standards with reservations about Standard B-4 (www.naccchildlaw.org/?page=PracticeStandards). The NACC concluded that none of the existing models of child representation achieved the necessary balance of "beneficence" (best interests) and "autonomy" (client-direction) necessary for the effective representation of children. Ventrell, "Legal Representation of Children in Dependency Court: Toward a Better Model--The ABA (NACC Revised) Standards of Practice" 1999 *Children's Law Manual* 167, 174 (www.naccchildlaw.org/?page=PracticeStandards). In the NACC's view, "robotic" allegiance to either beneficence or autonomy could be harmful to the child client. *Id.* at p. 171. The NACC therefore adopted a "hybrid" model of child representation that places the attorney in the traditional role of zealous advocate but provides for "best interests" advocacy in limited situations.

The ABA/NACC Revised Standards require the attorney to use the client-directed model in representing a child except in cases "when the client directed model cannot serve the client." ABA/NACC Revised Standard B.4.(1). The first recognized exception is "where the child cannot meaningfully participate in the formulation of the client's position." In that case, the attorney must use an objective, substituted judgment model to determine a position that serves the child's interests. ABA/NACC Revised Standard B-4(2). The second recognized exception is when "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 best interests)." In those cases, the attorney must first exercise a client-counseling function to try to persuade the child to abandon the dangerous position. If the child cannot be persuaded, the attorney must ask the court to appoint a separate GAL for the child and continue to represent the child's expressed preference. ABA/NACC Revised Standard B-4(4).

- Addressing competing models

The ABA Standards and the ABA/NACC Revised Standards did little to quell the debate over the proper role of the child's attorney. Recognizing that many children's attorneys are unable to comply with the ABA Abuse and Neglect Standards because state law requires them to assume the GAL role, the NACC sought to find a better way to define the proper role of the child's attorney in abuse and neglect proceedings. Its solution was to focus on the tasks the child's lawyer should perform to achieve the best outcome for the child in light of the objectives of child protection proceedings, without regard to the representation model imposed upon the lawyer by state law or local practice.

In 2001, the NACC issued "NACC Recommendations for Representation of Children in Abuse and Neglect Cases" (www.naccchildlaw.org/?page=PracticeStandards). These NACC Recommendations detail the child's attorney's

advocacy duties, regardless of how the child's attorney's role is characterized, and set forth the basic needs and rights of the child that should be the focus of every child's attorney's advocacy efforts.

In 2003, the ABA adopted Standards of Practice for Lawyers Representing Children in Custody Cases. ABA Custody Standards. These standards differ from the ABA's Abuse and Neglect Standards in that they specifically recognize that the lawyer in custody proceedings may be appointed as the "Child's Attorney" or as a "Best Interests Attorney." ABA Custody Standard II.B. The Child's Attorney provides traditional, zealous, client-directed advocacy. ABA Custody Standard II.B.1. The Best Interests Attorney provides legal services for the purpose of protecting the child's best interests without being bound by the child's directives or objectives. ABA Custody Standard II.B.2. The ABA Custody Standards also set forth a list of duties for all children's lawyers in custody matters, regardless of whether the lawyer is appointed as the Child's Attorney or as a Best Interests Attorney. ABA Custody Standard III. The duties prescribed in the ABA Custody Standards closely parallel the advocacy duties contained in the NACC Recommendations.

The ABA Custody Standards are significant in the child welfare context because they were the impetus for the National Conference of Commissioners on Uniform State Laws (NCCUSL) to begin work on a uniform law to implement standards for representing children in custody proceedings. The NCCUSL drafting committee felt a need for more defined attorney roles in abuse and neglect proceedings and also undertook to define the child's lawyer's role in those proceedings in the resulting uniform act. Although committee members recognized that the issues, law, and litigation dynamics in abuse and neglect cases are usually quite different from those in custody proceedings, they concluded that the standards for representing children in both kinds of cases should be the same. Atwood, "The [*30] Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism," *42 Fam. L. Q.* 63, 68 (2008).

The Uniform Act, issued in 2007, is highly controversial and is opposed by many experts on the representation of children in abuse and neglect proceedings. Federle, "Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act," *42 Fam. L.Q.* 103, 113-14 (2008). It does not provide for a uniform model of representation in all cases. Instead, taking its cue from the ABA Custody Standards, it calls for at least two different models of representation depending on the case and the predilections and perceptions of the appointing court. Atwood, *supra*, *42 Fam. L. Q.* at p. 88; Federle, *supra*, *42 Fam. L.Q.* at p. 107. The Uniform Act uses the ABA Custody Standards' "Child's Attorney" and "Best Interests Attorney" concepts and terminology and calls for the appointment of one or the other in abuse and neglect proceedings. Atwood, *supra*, *42 Fam. L.Q.* at pp. 80, 85. Rejecting the hybrid attorney/GAL model used in many jurisdictions, it also provides for the appointment of a separate "best interests advocate" in some cases. *Id.* at pp. 80, 87.

The Uniform Act, like the NACC Recommendations and the ABA Custody Standards, includes specific "core functions" that attorneys appointed to represent a child should perform in each case, regardless of the role assigned. Atwood, *supra*, *42 Fam. L.Q.* at pp. 81-82. This approach does not resolve the ethics issues that arise when an attorney is appointed as the child's GAL or "best interests attorney" in abuse and neglect proceedings. However, it does help to ensure that whatever model of representation is used meets the child's needs within the context of the abuse or neglect proceedings. Focusing on the legal tasks the attorney should perform emphasizes that the attorney is expected to employ his or her legal skills to advance and protect the child's interests--whether those interests are defined as the child's best interests or the child's stated interests. Drawing on the collective wisdom of the NACC, the ABA, and the thousands of attorneys who represent children in abuse and neglect proceedings, it is possible to delineate the essential duties of attorneys appointed to represent children in abuse and neglect proceedings

- Elements of competent representation

Training and education. The child's attorney is obligated to provide competent, independent, and zealous representation. Since Congress enacted CAPTA in 1974, child welfare law has developed exponentially and has become a specialized area of legal practice. Some states now recognize child welfare law as a specialized practice

area in which attorneys may be certified as legal specialists through the NACC (www.naccchildlaw.org/?page=Certification).

An attorney who accepts an appointment to represent a child in abuse and neglect proceedings need not be a certified specialist to provide competent representation. However, the competent child's attorney must be familiar with a wide body of law and social science, very little of which is taught in law schools. Therefore, attorneys who accept appointments to represent a child in an abuse and neglect case should not do so unless they have received training in the relevant law and social science. At a minimum, the competent attorney will be familiar with the applicable state statutes, regulations, and case law and have some knowledge of the various federal laws and regulations that apply in abuse and neglect cases. In addition, the competent attorney will have some training and education in basic child development, bonding and attachment theory, child abuse and neglect, domestic violence, substance abuse, mental health, developmental disabilities, services for children with special [*31] needs--including special education law, and family preservation and reunification requirements and services. The competent attorney will also possess basic trial skills, including skill in presenting and examining lay and expert witnesses and knowledge of the rules of evidence.

Independent investigation of the facts. The competent child's attorney conducts an independent investigation to gather all relevant facts. Review the court's file and all other appropriate records. These may include records maintained by the child protection agency, police reports, school records, and medical and mental health records. Contact the assigned social worker and other collateral sources of information, including potential witnesses. These may include former social workers, police officers, relatives, foster parents, teachers, health care professionals, and the child's Court Appointed Special Advocate (CASA).

Communication with the client. The child's attorney cannot effectively represent the interests of a child without knowing the child. The competent child's attorney meets with the child as soon as possible after appointment and as often as necessary throughout the case to establish and maintain the attorney--client relationship. Even if the child is preverbal, visiting the child in his or her placement is essential to understanding the child's needs. Explain the proceedings to the child in language that is developmentally appropriate, as well as the attorney's role, what the child may expect from the attorney, and any limitations there may be on the confidentiality of the child's communications with the attorney and other professionals involved in the case.

Determining the child's wishes and legal interests. An essential element of the attorney--client relationship is determining the child's wishes in light of the issues before the court. Before the attorney can meaningfully talk with the child about the child's wishes, he or she must determine what the child's legal interests are at each hearing.

The child's legal interests include having the child's needs met by the child welfare system. The NACC Recommendations characterize these legal interests as "Advocacy Issues," *i.e.*, interests for which the child's attorney should advocate, regardless of the attorney's assigned role. They include the child's need to have appropriate food, clothing, shelter, and safety, and to have any medical, dental, mental health, and educational needs met. They also include preservation of family relationships, where doing so will not jeopardize the child's physical or emotional safety; timely resolution of the child's case in a manner that will provide the child with permanence and stability; and protection from unnecessary harm that can result from the legal proceedings themselves. State law may call for additional protections or services for the child. The child may also have other needs or interests outside of the child welfare system that need advocacy or protection. To frame the issues, identify the child's needs, identify appropriate family and professional resources to meet those needs, and focus advocacy efforts on ensuring that the child welfare system is meeting those needs.

Except in cases where the child is too young to make a meaningful decision, involve the child in making decisions about how legal issues should be resolved. Even if the attorney is acting as a GAL, he or she must know the child's wishes to evaluate what resolution is in the child's best interests. In cases where the child is too young or too incapacitated to make a meaningful decision, develop the child's position based on objective criteria rather than on the attorney's life experience, instinct, or personal beliefs. Objective criteria may include the child's circumstances; the child's physical and emotional health; the possible resolutions available in light of the law and the facts; and the opinions of medical, mental health, educational, social work, and other experts.

The child's attorney also has a duty to counsel the child client. Sometimes the child expresses a wish that is completely unrealistic--the most common being a wish to return to an abusive or violent parent, even though doing so clearly would not be safe for the child. In these situations, counsel the child as to why the court is unlikely to order what the child wants, explain what alternatives might be possible, and encourage the child to make a more realistic decision about how the issue might be resolved.

Avoiding conflicts of interest. The child's attorney must avoid potential conflicts of interest. This issue often arises when the court appoints one attorney to represent siblings. If the interests of all siblings are not the same, a potential conflict may arise in representing them.

Advocacy for the child in the courtroom. The child's attorney must actively advocate for the child's interests in the courtroom. To that end, notify other counsel and parties of the appointment and request service of all court documents and prior notice of all events affecting the child, such as case conferences, placement changes, new abuse reports, and other changes of circumstances. Also review all pleadings; request discovery; and file responses, motions, and other appropriate pleadings, as necessary to protect the child's interests.

Counsel should develop a theory and strategy of the case to implement throughout the life of the case. If there are contested matters, participate in mediation, settlement conferences, and other ADR proceedings. If the matter goes to trial, present evidence, cross-examine witnesses, make objections, file trial briefs, and preserve issues for appeal. If the child will testify, prepare the child for that testimony and request that the child's testimony be taken in chambers or seek other protective measures, if necessary to protect the child's emotional health. This includes ensuring that the child is questioned in a developmentally appropriate manner. Monitor other parties' compliance with court orders affecting the child and bring any failures to comply to the court's attention.

[*32] Counsel also must bring to the court's attention any interests the child may have in other contexts, such as child support, educational issues, personal injury, public benefits, and delinquency proceedings. If counsel is unable to represent the child with respect to these issues, he or she should request that the court appoint another attorney to pursue these issues on the child's behalf or appoint a GAL or other representative to protect the child's interests in these arenas.

Protecting the child's interests in appellate proceedings. If the proceedings result in a decision that may be harmful to the child, the attorney should consider whether there are grounds for an appeal or other means of obtaining review in a higher court. Prepare and file any documents required to obtain appellate review. If other parties seek review in a higher court, ensure that the child's interests are protected in those proceedings. Ideally, the attorney will continue to represent the child's interests in the higher court. However, if unable to do so, counsel should seek appointment of appellate counsel to represent the child and cooperate with appellate counsel in bringing the child's interests to the appellate court's attention.

Keeping the parties and the court focused on the needs of the child. Even though the child is the subject of child welfare proceedings, sometimes the child's interests get obscured in the contest between the parents and the state. The child's attorney's primary duty is to keep the proceedings focused on the interests of the child. To that end, ensure that the court has all relevant facts and law bearing on the child's interests, that the other parties--including the child welfare agency--are fulfilling their obligations to the child, that the court considers the child's wishes, and that the proceedings themselves do not cause further harm to the child. Conscientious performance of the duties out-lined above will help ensure that the focus remains on the child. More importantly, keeping the focus on the child will increase the likelihood that the resolution of the case will not only meet the child's needs and protect the child's legal interests but also will be in the child's best interests.

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