

Fundamentals of quality legal representation for both children and parents in child welfare proceedings.

This document is intended to describe 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 Practice¹ for attorneys representing both 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 System² and Administration for Children and Families January 17, 2017, Information Memorandum regarding High Quality Legal Representation for All Parties in Child Welfare Proceedings.³

Necessary and Ideal. Attributes/elements of quality representation are labeled as “Ideal” or “Necessary.” Elements labeled “Necessary” are those attributes which **must be achieved** as soon as possible in order to provide quality legal representation to children and/or parents in child welfare proceedings. Some attributes are labeled “Ideal” recognizing that they may currently be aspirational for many jurisdictions because of funding or other limitations. Nonetheless, all attributes/elements of quality representation identified in this document should be in place as soon as possible and systems should work to ensure that attorneys for parents and children have the supports needed 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 as members of the legal profession have ethical duties to their clients and to the administration of justice in an adversarial system. The adversarial nature of the legal system presumes that 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 proceedings. While there may be instances where clients’ goals can be achieved through negotiation and cooperation, attorneys for parents and children must always be vigilant to 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 be cautious to 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.

¹ American Bar Association, Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases; ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases; National Association of Counsel for Children, Recommendations for Representation of Children in Abuse and Neglect Cases.

² Duquette, Donald N., Children’s Justice: How to Improve Legal Representation for Children in the Child Welfare System (American Bar Association, 2016).

³ U.S. Dept. of Health and Human Services, Administration for Children and Families, Information Memorandum: High Quality Legal Representation for All Parties in Child Welfare Proceedings (ACYF-CB-IM-17-02) January 17, 2017.

Special Considerations for Children’s Attorneys. There has been significant debate about 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.⁴ However, most states do not have a client-directed model of children’s representation, but rather follow a substituted judgement model.⁵

When children are non-verbal, or if children’s attorneys are required by the appointing statute to substitute their judgement for that of their clients, attorneys are well-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 to be unfit; children have a legal right to be placed with relatives, not in the most well-resourced home).⁶ 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 any number of factors which are not limited by the rules of evidence and procedure, and are not subject to review.⁷ At the very least, any analysis of what is in a child’s best interest must include a focus on both the child-client’s wishes and objectives and the preservation of the child’s family environment and maintaining familial relationships.⁸

Individual and System Responsibilities. This document divides attributes/elements into those that must be met by individual parents’ and children’s attorneys in the representation of their clients and those that must be addressed by the systems or structures that govern legal representation for children and parents in child welfare proceedings.

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.⁹ The fundamental attributes that must be met by systems or

⁴ Duquette, Donald N., Children’s Justice: How to Improve Legal Representation for Children in the Child Welfare System, p. 21-25 (American Bar Association, 2016); *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, 592 (2006).

⁵ *See e.g.*, *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* (3rd ed. 2012), available at: [http://www.caichildlaw.org/Misc/3rd Ed Childs Right to Counsel.pdf](http://www.caichildlaw.org/Misc/3rd%20Ed%20Childs%20Right%20to%20Counsel.pdf)

⁶ *See e.g.*, Guggenheim, Martin, *A Paradigm for Determining the Role of Counsel for Children*, *Fordham Law Review* (Vol. 64, Issue 4) (1996); *see also* Kelly, Lisa & Levezu, Alicia, *Until the Client Speaks: Reviving the Legal Interest Model for Preverbal Children*, 50 *Fam.L.Qtly* 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.)

⁷ *See* Guggenheim, Martin, *supra*, at 1431.

⁸ *See e.g.* Duquette, Donald, *Children’s Justice* (2016); *see also* United Nations Committee on the Rights of the Child, General Comment No. 14, §§ 48-79 (2013).

⁹ *See e.g.*, American Bar Association, Model Rules of Professional Conduct.

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.

Individual Attorney Attributes

- **Legal Advocacy:** The following attributes are “Necessary”
 - 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, as well as to 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, service providers, and visitation schedule (if immediate family reunification is not possible).
 3. Litigate issues and utilize experts, as needed, to achieve clients’ case goals, including through active motion practice throughout proceedings and not limited by statutorily set periodic review dates.
 4. Explain to clients their right to attend court hearings and advocate that clients who want to attend court proceedings are able to be present in-person.
- **Out-of-Court Advocacy:** The following attributes are “Necessary”
 - Engage with and know the clients.
 - Understand trauma and clients’ 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 focus¹⁰ 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, are as frequent and long as possible, are organized around activities that reflect the routine activities of the family, and progress in terms of reduced supervision and increased frequency; and
 3. Services that appropriately address clients’ strengths and needs.
 - Conduct a thorough and independent investigation at every stage of the proceeding, including after the jurisdictional/dispositional phase of the proceedings. This should

¹⁰ Cohen, Jillian & Cortese, Michele, Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families, ABA Child Law Practice, Vol. 28, No.3 (May 2009).

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 both 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:** The following attributes are “Necessary”
 - Understand how racial, cultural, social, and economic differences may impact the attorney/client relationship, maintain vigilance against imposing personal values upon clients, and take these factors into account when working with clients to achieve their case goals, including identifying and accessing appropriate services.
 - Understand and recognize the impact of personal and system bias stemming from race, gender identity, sexual orientation, 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:** The following attributes are “Necessary”
 - 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 clients’ other legal service providers to ensure dependency proceedings and other legal proceedings have beneficial results for clients.

System Attributes

- **Caseloads and Compensation:** The following attributes are “Necessary”
 - Ensure parents’ and children’s attorneys’ compensation rates are adequate for the attorneys’ practice, taking into account the 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 do not have supports that may come with an interdisciplinary practice model, which includes access to social workers, investigators, and/or paralegals.¹¹ Note, a caseload of 60 clients

¹¹ 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.*, Courtney, Mark E., Hook, Jennifer L., & Orme,

should be considered full-time work, and attorney compensation should support a full-time practice at this caseload level.

- **Interdisciplinary Model:** The following attributes are “Necessary” unless otherwise noted
 - 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. [Ideal]
- **Diversity/Cultural Humility:** The following attributes are “Necessary” unless otherwise noted
 - 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 that 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. [Ideal]
- **Timing of Appointment:** The following attributes are “Necessary”
 - Ensure attorneys are appointed and have the opportunity to have a meaningful meeting with the client, prior to any court appearance, regarding any allegations of abuse or neglect, the attorney/client relationship, and the child welfare legal system process, at the earliest to occur of the following: (1) the emergency removal of a child from his or her

Matt, 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, and in some jurisdictions caseloads are capped at 40 cases again as program managers have found that attorneys cannot meet their 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, Donald N., *Children’s Justice: How to Improve Legal Representation of Children in the Child Welfare System* (2016.) 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. 2015 Pennsylvania State Roundtable Report, Legal Representation: A Call to Action (2015), available at: [http://www.ocfcpacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3\(1\).pdf](http://www.ocfcpacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3(1).pdf)

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.¹²

- **Support and Oversight:** The following attributes are “Necessary”
 - Define clear roles and expectations for attorneys.
 - Provide training and education opportunities.
 - Provide oversight and performance evaluation.
 - Provide the opportunity for clients to provide feedback on representation.
- **Accountability/Use of Data:** The following attribute is “Necessary”
 - Utilize a continuous quality improvement process to measure qualitative and quantitative outcomes.¹³

¹² 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.

¹³ 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. Department of Health and Human Services, Administration for Children and Families, Program Instruction, ACYF-CB-PI-12-02 (01/11/2012), 6. 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.*, Davies, Andrew & Burton, Angela Olivia, *Why Gather Data on Parent Representation? The Pros, Cons, Promise and Pitfalls*, ABA Child Law Practice, vol.34, No.4 (April 2015). Tools available to help with continuous quality improvement of legal representation for children’s and parents’ attorney are available, as well as technical assistance regarding the same. *See e.g.*, Indicators of Success for Parent Representation, ABA Center on Children and the Law (2015), available at: https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf.