Center for **Children**'s Advocacy

Who will speak for me?

Video and Resource Materials
For Attorneys Representing Children in the Legal System.

Dear Viewer,

The video and literature in this package present you with an opportunity to listen closely to the young people whom you represent. These materials can help you establish solid relationships with your clients and allow you to develop and hone the skills necessary to ensure that your clients' voices are heard as they journey through the legal and child welfare systems.

In the poignant video "Who Will Speak for Me,?" children and adolescents draw on their own experiences to explain what they want, what they need, and all too often what they fail to receive from their attorneys. We, as their advocates, must hear their voices to be able to represent them effectively.

The enclosed resource materials, written by experts in the field of child-client representation, elaborate on the issues raised in the video. Also included, at the beginning of the package, is a list of suggested readings that offers additional guidance.

Understanding children's perspectives allows us, as attorneys, to see how our relationships with our child clients affect their basic sense of security. Whether you are an experienced attorney who has been representing other clients for years, or an attorney who is just embarking on a career in lawyering for children, this video and the accompanying written materials are sure to inspire and instruct you.

Thank you for caring enough about your clients to take this step towards improving the quality of legal representation for children.

Sincerely,

Martha Stone

Martha Stone, Esq.
Executive Director

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Center for **Children**'s Advocacy

Who will speak for me?

Video and Resource Materials
For Attorneys Representing Children in the Legal System

Complete List of Suggested Resources
(Items marked by * are contained in this package)

Video

***Who Will Speak For Me?**

An important video produced by the Center for Children's Advocacy, featuring children whose lives are affected by the Connecticut legal system. Children who have been abused or neglected speak out and tell their stories, describing what they want and need to create successful, productive relationships with their attorneys.

Resource Materials
Trauma

Feierman, Jessica and Fine, Lauren, *Trauma and Resilience: A New Look at Legal Advocacy for Youth in the Juvenile Justice and Child Welfare Systems,* Juvenile Law Center, April 2014
http://www.jlc.org/resources/publications/trauma-and-resilience

Trauma-Informed Care Practice Guide, Connecticut Department of Children and Families, 2012.
http://www.ct.gov/dcf/lib/dcf/trauma-informed_care/pdf/trauma-informed_care_-_practice_guide_september_2012.pdf

Reducing Trauma for Children Involved in Dependency and Criminal Court, American Bar Association Child Law Practice, Vol. 27, No. 1, March 2008.

*Pilnik, Lisa and Kendall, Jessica, *Victimization and Trauma Experienced by Children and Youth: Implications for Legal Advocates,* Moving from Evidence to Action, The Safe Start Center Series on Children Exposed to Violence, American Bar Association Center on Children and the Law, Issue Brief #7, September 2012.

Child Development

Buss, Emily, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell Law Review 895 (1999).

Maze, Candice L., *Advocating for Very Young Children in Dependency Proceedings*, American Bar Association Center on Children and the Law, 2010. Available on CCA Website:
http://www.kidscounsel.org/representingveryyoungchildren.pdf

Interviewing Children

Interviewing the Child Client: Approaches and Techniques for a Successful Interview, ABA Children's Rights Litigation Committee, 2008 (38 minutes) (available at CCA office).

*Adams, Lauren Girard, and Paxton, Maisley, *Counseling Children and Youth in Times of Crisis: Understanding Child Development and Building Rapport*, American Bar Association Child Law Practice, Vol. 30 No. 4, June, 2011.

Gutierrez, Ron and Trillin, Abigail, *Interviewing the Child Client,* Legal Services for Children, Inc., California. Available on the CCA Website
http://www.kidscounsel.org/interviewing%20child%20client.pdf

Reitman, Karen A., *Attorneys for Children Guide to Interviewing Clients: Integrating Trauma Informed Care and Solution Focused Strategies,* 2011.
http://www.courts.state.ny.us/ip/cwcip/Publications/attorneyGuide.pdf

*Sandt, Claire, *Conducting Developmentally-Appropriate Child Interviews: A Conversation with Dr. Karen Saywitz,* What I Wish I'd Learned in Law School: Social Science Research for Children's Attorneys, American Bar Association Center on Children and the Law, 1997.

* Walker, Anne Graffam, *Children in the Courts: When Language Gets in the Way*, Trial Journal of the Association of Trial Lawyers of America, January, 1999.

* Walker, Anne Graffam, *Handbook on Questioning Children: A Linguistic Perspective*, American Bar Association Center on Children and the Law, 1999. Introduction; Appendix A: Checklist for Interviewing/Questioning Children; Appendix B: A Few Suggestions for Questioning Children; Appendix C: Some Basic Sentence-Building Principles for Talking to Children.

Quality of Legal Representation

Brooks, S., *Representing Children in Families,* 6 UNLV 724 (2006).

Duquette, Donald N., with Darwall, Julian, *Child Representation in America: Progress Report from the National Quality Improvement Center,* Family Law Quarterly, Vol. 46, No. 1, Spring 2012.

Laver, Mimi and Khoury, Andrea, *Opening Doors for LGBTQ Youth in Foster Care: A Guide for Judges and Lawyers,* American Bar Association 2008

Peters, Jean Koh, *Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions*, 2007.

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

*Peters, Jean Koh, *Seven Questions to Keep Us Honest, Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions,* 2007, pp. 138-142.

*Pitchal, Erik, *Buzz in the Brain and Humility in the Heart: Doing It All, Without Doing too Much, on Behalf of Children,* 6 Nev. L.J. 1350-1361 (2006).

*Renne, Jennifer, *Protecting Client Confidences in Child Welfare Cases,* ABA Child Law Practice, Vol. 22, No. 9, November 2003.

*Renne, Jennifer, *Representing a Client with Diminished Capacity,* ABA Child Law Practice, Vol. 23, No. 1, March 2004.

*Smariga, Margaret, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know,* Zero to Three Policy Center, July 2007.

Youth Engagement and Youth Voice

Desetta, Al, *The Heart Knows Something Different, Teenage Voices from the Foster Care System,* Youth Communication, 1996.

*Khoury, Andrea, *With Me, Not Without Me: How to Involve Children in Court,* ABA Child Law Practice, Vol. 26 No. 9, November, 2007.

Forms

*Checklist for Foster Home Visits

Additional copies of this package may be ordered:
Phone: (860) 570-5327
Fax: (860) 570-5256
web: www.kidscounsel.org

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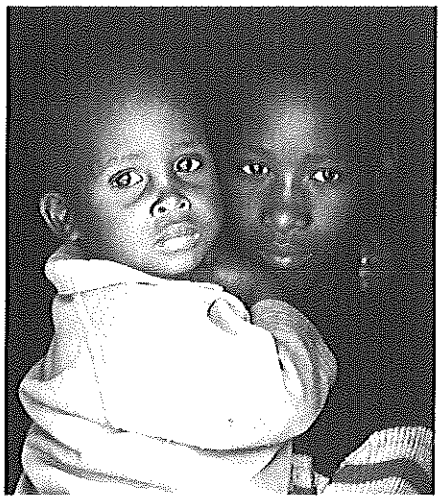
Moving From Evidence to Action

The Safe Start Center Series on Children Exposed to Violence

Issue Brief #7

Victimization and Trauma Experienced by Children and Youth: Implications for Legal Advocates[1]

By Lisa Pilnik, JD, and Jessica R. Kendall, JD, Child & Family Policy Associates



Many children and youth in the child welfare (dependency) and juvenile justice (delinquency) systems have experienced or witnessed violence or other traumatic events and suffered the fear of ongoing exposure to harm; these experiences can lead to increased social, emotional, and physical needs. Trauma-informed care and evidence-based mental health treatments are a crucial part of recovery (Clawson, Salomon, & Grace, 2008). In trauma-informed care, treatment is guided by an understanding of exposure to violence and trauma-related issues that can present themselves in youth when they get involved with the courts. (In this document, the term "exposure to violence" includes both witnessing and personally experiencing violence.) Trauma-informed care is an important framework for accommodating these young people's vulnerabilities, although it is not designed to treat specific symptoms or syndromes. Evidence-based therapeutic and, sometimes, pharmacological approaches are the best path to improved functioning and quality of life from specific symptoms. Attorneys, guardians ad litem (GALs), Court Appointed Special Advocate (CASA) volunteers, and judges in abuse/neglect and juvenile justice cases can help the youth they work with and create a trauma-informed court system by learning about trauma, helping ensure youth receive appropriate treatment, and performing trauma-informed advocacy, as described on page 2.

The Safe Start Center Series on Children Exposed to Violence

Each Issue Brief in the series explains the importance of addressing exposure to violence to ensure the well-being of children from birth to age 18 in all systems that interact with vulnerable children and families. Through the use of literature reviews, case scenarios, and analyses of data, the Issue Briefs translate lessons learned from research and program practices into actions that can effectively prevent or reduce the negative impact of exposure to violence.

Issue Brief #7 translates emerging research and program practice into action steps for dependency and delinquency judges, attorneys, and legal advocates. The goal is to build their capacity to meet the needs of children and youth who are victimized and exposed to violence or other traumatic events. (For a complete list of Issue Briefs, see the box on page 16.)

Prevalence of Exposure to Violence

Numerous studies have shown that a large number of children have witnessed or experienced violence in their homes or communities and that these experiences are linked to negative outcomes later in life. The National

(continued on page 2)

[1] This educational document is not meant to provide legal advice or to diagnose or rule out any mental or physical health problems. It does not represent the official policy of the American Bar Association (ABA), the Safe Start Center/JBS International, Inc., or Child & Family Policy Associates.

An electronic version of this publication can be found on the Web at www.safestartcenter.org.

SAFE START — Working Together to Prevent Children Exposed to Violence

ABA Center on Children and the Law — American Bar Association

Child & Family Policy Associates

OJJDP — Office of Juvenile Justice and Delinquency Prevention

Case Scenarios: How Trauma Can Affect Children and Youth

From a dependency case:

An attorney GAL represents a 10-year-old client, Shayla, who was allegedly physically abused and neglected by her mother. Shayla's foster parents say she spends most of her time sleeping or watching television, and they often have difficulty getting her to wake up for school or join them for dinner. Shortly after Shayla had a phone conversation with her mother, she purposely cut herself. The GAL asks the caseworker to arrange a mental health assessment and learns that Shayla suffers from depression and has symptoms of traumatic stress. The GAL, therapist, and evaluator agree that Shayla should receive weekly therapy with a psychologist and visits twice a week from an in-home caseworker. Shayla's foster parents also meet with a counselor to learn how they can make Shayla feel more secure in their home. The GAL and the caseworker ensure that Shayla has regular followup to monitor her progress and encourage her to get involved in extracurricular activities at school.

From a delinquency case:

A juvenile defender has his first meeting with his 15-year-old client, Tyler, who broke into a neighbor's house and stole cash and electronics. A mental health screening administered during intake at the detention facility suggests Tyler needs further assessment for possible depression and post-traumatic stress disorder (PTSD). The defender learns that Tyler has been the subject of several unsubstantiated neglect allegations. After several meetings, Tyler confides in the defender that he has run away from home several times because he is scared of his mother's boyfriend, who has been violent with him and his mother, and he used the money he stole to buy food for himself. After receiving counseling about the benefits of sharing some of this information with the court, Tyler agrees to let the defender share some of his experiences with the court at the preliminary hearing, helping the judge understand Tyler's behavior in context. The judge agrees to hold the case in abeyance while Tyler and his mother seek services. The defender explains that if the judge is not satisfied with the family's effort, the defender will recommend to Tyler that they ask for an abuse/neglect case to be opened in place of the delinquency case. Tyler's defender gives Tyler and his family a list of agencies in the community that provide free or low-cost services. Tyler's family contacts the local mental health agency, and a counselor works with Tyler and his mother to educate them about the impact Tyler's exposure to violence may have on him. The counselor also shows Tyler some exercises he can use when he feels overwhelmed or stressed.

Survey of Children's Exposure to Violence (NatSCEV) (Finkelhor, Turner, Hamby, & Ormrod, 2011) interviewed a nationally representative sample of children and adolescents and found that approximately half had experienced two or more types of victimization in the past year.[3] Eight percent of respondents had experienced seven or more types of victimization (these children were termed "polyvictims" by the researchers). When only direct victimization was asked about (e.g., the child was the target of violence, rather than a witness to it), 10 percent of children had experienced more than 1 type of victimization, and 1.4 percent had experienced 10 or more types.

These numbers are likely higher among court-involved youth. Children in the dependency court system are alleged to have been abused or neglected, and research has shown a much higher level of past child maltreatment among youth in the juvenile justice system than among other youth (Siegfried, Ko, & Kelly, 2004). A national study of alleged child abuse or neglect victims found that nearly 12 percent had increased PTSD symptoms, including depression and anxiety related to trauma (compared with 2 percent of the general population reported in an earlier study) (Kolko et al., 2010).[4] Studies of youth in the juvenile justice system have found that these youth are at least twice as likely as other youth to have had past traumatic experiences and meet the diagnostic criteria for PTSD (Ford, Hartman, Hawke, & Chapman, 2008; Ford, Steinberg, Hawke, Levine, & Zhang, 2012). Polyvictimization has also been found to be more common among children with disabilities, particularly those with psychiatric problems (Turner, Vanderminden, Finkelhor, Hamby, & Shattuck, 2011).

[3] The study included the following types of victimization: "conventional crime, child maltreatment, victimization by peers and siblings, sexual victimization, witnessing and indirect victimization (including exposure to community violence and family violence), school violence and threats, and Internet victimization."

[4] Researchers in that study actually expected the difference to be greater and theorized that the results were influenced by the fact that the sample included all alleged victims, not just those for whom allegations were substantiated, so a number of the children probably had not actually been abused or neglected.

Although children who are court-involved are more likely to have experienced trauma and to exhibit increased traumatic stress symptoms, it is important to remember that children have different reactions to exposure to violence, and not all children who experience traumatic events will have lasting issues as a result (Conradi, Kisiel, & Wherry, 2012; Kolko et al., 2010). Whether traumatic experiences lead to PTSD or other conditions can be influenced by many different factors, such as frequency with which youth are exposed to reminders of trauma, preexistence of anxiety disorders, and family support (Agency for Healthcare Research and Quality, 2012). NatSCEV data has demonstrated that, for a large number of youth, any one type of victimization rarely occurs in isolation from other types, and a single traumatic experience is often the exception rather than the norm. Furthermore, individual incidents of exposure increase the risk for further victimization and have a negative impact on the safety and well-being of youth. (Finkelhor, Omrod, and Turner, 2007).

New Understanding of Characteristics and Impact of Multiple Exposures to Violence on Court-Involved Youth

Exposure to violence occurs along a continuum of complexity. Less complex instances may involve an isolated incident (e.g., witnessing a random shooting) where everything else is stable in the child's life. However, for children exposed to repeated and intrusive experiences, often of an interpersonal nature, such incidents may result in their being more vulnerable to traumatic stress symptoms that are due to a variety of factors, such as exposure to domestic violence or continued victimization. Court-involved youth are often on this end of the continuum.

The NatSCEV found that many children—called polyvictims—experience very high levels of victimization of different types. That is, for many youth, any one type of abuse rarely occurs in isolation of other types of abuse, and a single abusive experience is often the exception rather than the norm. The NatSCEV also found that polyvictimization onset is disproportionately likely to occur in the years prior to a child's 7th and 15th birthdays, corresponding roughly to his or her entry into elementary school or high school.

NatSCEV data indicate that the number of different kinds of victimization is a very important predictor of trauma symptoms. The data suggest the possibility that polyvictimization, more than the history of any type of individual victimization, is the greater risk factor for negative impacts from exposure to violence (Finkelhor, Omrod, Turner, 2007).

These NatSCEV findings are also supported by the Adverse Childhood Experiences study (one of the largest and longest running of its kind), which linked abuse, maltreatment, and instability at home (such as having a substance-abusing or suicidal parent) in childhood with an increased likelihood of risk behaviors and diseases. Children having 4 or more adverse childhood experiences were 4 to 12 times more likely to struggle with depression, suicide attempts, alcoholism, and drug abuse as adults (Felitti et al., 1998). Exposure to family or community violence and other forms of indirect victimization have also been linked to mental health issues, such as PTSD symptoms, depression, low self-esteem, anxiety, and aggression, as well as poor social functioning and academic performance (Siegfried et al., 2004).

The emotional effects of exposure to violence and polyvictimization can be persistent and devastating. Victimized youth may suffer from anxiety, panic disorders, major depression, substance abuse, and eating disorders, as well as combinations of these disorders.

Symptoms of Traumatic Stress[5]

In some cases, exposure to violence results in PTSD, a diagnostic category that was created originally for war combatants and disaster victims but that also applies to victims of other traumatic experiences, including exposure to violence (American Psychiatric Association, 2005). There is little information on the presentation of PTSD in children, because mental health systems have only recently begun identifying PTSD in this population (Pfefferbaum, 1997).

For those who struggle with PTSD, *typical* symptoms include:

- *Re-experiencing:* Children suffering from traumatic stress often have strong reactions to reminders of the trauma or loss they experienced. They may also have nightmares or flashbacks, feel as if they are reliving the events, or repeatedly incorporate their traumatic experiences into their play.

[5] This section is adapted from the Child Welfare Trauma Referral Tool available at http://www.nctsnet.org/sites/default/files/assets/pdfs/cwt3_sho_referral.pdf.

- *Avoidance:* Avoiding places, people, or other stimuli associated with past trauma, as well as refusing to discuss specifics of the experiences, can also be symptomatic of traumatic stress.
- *Numbing:* This can include feeling detached or estranged from other people, feeling "out of sync" with others, experiencing a more limited range of emotion, or not wanting to look too far into the future.
- *Arousal:* Children experiencing traumatic stress may have trouble concentrating or seem easily distracted, inattentive, or impulsive (which often leads to a misdiagnosis of attention-deficit/hyperactivity disorder [AD/HD]). They may be irritable, have outbursts of anger, startle easily, have trouble sleeping, or be hypervigilant (overly aware of or concerned about potential dangers).
- *Attachment issues:* Children may have trouble trusting or feeling secure with parents and other caregivers. They may show these difficulties in their interactions with others (e.g., by being overly affectionate with strangers; by avoiding eye contact and failing to engage in interactions or conversations appropriately).
- *Other reactions:*
  - Anxiety
  - Depression
  - Affect dysregulation (trouble expressing feelings/regulating emotions)
  - Attention/concentration difficulties, leading to trouble forming strong friendships or completing work
  - Dissociation (frequent daydreaming, forgetfulness, rapid personality changes, emotional detachment)
  - Suicidal behavior
  - Self-harm
  - Regression
  - Impulsivity
  - Oppositional (hostile/defiant) behaviors
  - Conduct problems

Other common symptoms for victimized youth are substance-related disorders, impulse control issues, conduct disorder, and AD/HD. Besides being exposed to a variety of traumatic events, victimized youth may frequently experience environmental and social stressors, such as involvement in the foster care system, running away, poverty, inadequate health care, academic problems, child abuse or neglect, or homelessness. Evidence suggests that boys are more likely to develop aggressive behavior as a result of their victimization (Finkelhor, et.al, 2009) whereas other research indicates that girls are more likely to experience depression and anxiety and to meet PTSD diagnostic criteria (National Council on Crime and Delinquency, n.d.). For youth, after these symptoms have been established, they can become chronic and debilitating if left untreated (Feeny, Treadwell, Foa, & March, 2004).

Children and adolescents who have been exposed to violence and display trauma-related symptoms may need referrals to mental health practitioners who are trauma-informed and knowledgeable about appropriate assessments and interventions.

Physical problems can also result from stress-related illnesses. For example, victimized children may complain of stomach pain or headaches. For some youth, the impact of exposure to violence, especially when it involves someone they once trusted, results in a pervasive mistrust of others and their motives. This mistrust can make it difficult for first responders and service providers to help. The confluence of these factors can result in children experiencing difficulties in attending school, holding down jobs, and integrating with their peers and community.

Role of Legal Advocates, Judges, and Court Staff

Attorneys, GALs, CASA volunteers, and judicial officers have an important role to play in making sure that children's mental health needs, including those related to trauma, are met, even when the young person already has a caseworker or mental health provider. There are many ways lawyers, lay advocates, and judges can, in both dependency and delinquency cases, become more trauma-informed in their practice. Attorneys representing status offenders may also benefit from reviewing both the child welfare and juvenile justice tips below.

For child welfare cases:

- As discussed, the number of exposures to violent events (including many types of victimizations commonly presumed to be less serious), appears to be linked to emotional problems more closely than any one particular kind of victimization. Therefore, it is important that children and youth are screened and assessed for a broad range of direct and indirect exposure to violence. Assessments should analyze the impact that the exposure had on the young person's

functioning (including symptoms of traumatic stress) and suggest appropriate, evidence-based treatments for those that need it (see information below on screening and intervention for exposure to violence).

- Ask what followup has been completed for identified exposure to violence events, and request that ongoing assessments be performed, where appropriate. Also, be aware that children may be further traumatized as a result of separation from family, their experiences in court, medical examinations or hospitalization, or experiences in foster care or other placements. They may also exhibit new symptoms from previous or cumulative exposure to violence.
- Request that parents and caregivers receive services as well, when appropriate. Many birth parents of court-involved children have also been exposed to violence, which may affect their ability to meet their children's and their own needs and to participate fully in the court process. Viewing parents through a trauma-informed lens can help advocates better understand the issues the child is facing. In some situations, the entire family may benefit from services to address exposure to violence.
- Ensure that biological and foster families learn about how a child's exposure to violence, or other traumatic experiences, may affect him or her and what the warning symptoms are for dangerous symptoms of traumatic stress.
- Help youth stay in the least restrictive setting that is appropriate for them. This includes staying in their own homes, when safe and possible, or therapeutic or family foster homes rather than group facilities when out-of-home care is necessary.
- Help child clients build long-term, positive, and sustaining adult relationships. A critical part of healing for children and youth exposed to violence involves the development of trusting, long-term relationships. This often needs to occur before children and youth are willing to engage in trauma-specific treatment. Connecting youth to mentoring organizations or faith-based groups, or simply supporting relationships with extended family members, can assist the recovery process.
- Ensure safety and basic service needs are met. Professionals working with youth exposed to violence must first ensure the child or young person is both physically and psychologically safe. This may mean working with the child or young person to assess his or her current safety level and working together to develop a plan to remain safe. It can also mean designing each component of the child's service plan to prioritize physical and psychological safety. For example, this can include working with a provider who is respectful and nonjudgmental and allows the young person to explore his or her history in a safe and supportive manner. Children and youth exposed to violence may lack basic necessities or services that are critical to comprehensively meet their needs, such as safe and stable housing, health care, appropriate educational services, and vocational supports.

For juvenile delinquency cases:

- Be aware that many youth experience very high levels of different types of victimization because they reside in a dangerous community; live in a home that is dangerous, chaotic, or facing multiple challenges; or have emotional problems that increase risky behaviors, engender antagonism, and compromise their capacity to protect themselves. This greatly increased risk for victimization has implications for their safety and well-being.
- Protect clients from self-incrimination. Be familiar with the jurisdiction's rules on privilege and confidentiality, and educate clients about what the roles of the attorneys, services providers, and others involved with their case are and how information clients share can or cannot be used by the court.
- Obtain the results of any screenings or assessments administered to the client. Learn about what these measures entail and their reliability; they can be used to support the client's position or argue against inappropriate treatment and intervention recommendations, if necessary.
- Find out what treatment, if any, the client has received. Learn about what the interventions entail and how effective they are (see information below on screening and intervention for exposure to violence). Attorneys and other advocates need to respect clients' privacy and keep client confidences, but they should also talk with clients about using information already before the court on past trauma to argue for their clients' expressed interests. This includes working with clients to tailor a plan that includes only necessary and appropriate services and interventions and using the information to advocate for dismissal, mitigation, or other preferred disposition options.

- Advocate for youth to stay in the least restrictive setting possible. This includes staying in their own homes or therapeutic or family foster homes, rather than group facilities, when out-of-home placement is ordered.
- Become familiar with research that shows the dangers of incarceration for youth (especially youth with trauma histories) and the benefits of appropriate treatment (e.g., cost-effectiveness, lowered recidivism). The Justice Policy Institute's *The Dangers of Detention* (Holman & Ziedenberg, 2006) and *Healing Invisible Wounds* (Adams, 2010) provide helpful information. Use this information to argue against inappropriate out-of-home placement for clients and for interventions and placements that will benefit them.
- Work with clients to develop plans and advocate for options that help youth address exposure to violence rather than exacerbate their stress. This can mean requesting diversion to alternative programs; arguing for adjudication to be held in abeyance to allow for assessment, service delivery, and then dismissal; or advocating for outright dismissal if warranted by the facts of the case (e.g., a truancy case where the real problem is the school's failure to meet a child's special education needs). For youth found to be delinquent of serious offenses, this may include using evidence of past trauma to argue for the least restrictive disposition options and keeping youth in the juvenile system (instead of transferring them to the adult criminal system).
- Learn about free or low-cost services offered in the community so clients can voluntarily get help without court involvement. Voluntary services for parents or the entire family may help address trauma experienced by parents as well as children, leading to more stable home lives and better outcomes for youth. This may be particularly beneficial in cases where status offenses or delinquent acts are triggered by instability at home. Educating families about services they can access on their own is also important, because delinquency courts should never become or stay involved in a case solely to ensure services are received.

For judges and advocates in child welfare, status offense, and delinquency systems

- Ensure that the child is in the most appropriate and helpful "system" possible. For example, an adolescent who has been charged with running away or assaulting a parent may really belong in the dependency system if his or her behavior stems from abuse or neglect by the parent. In delinquency matters, judges should consider holding cases in abeyance while the family works on addressing the issues on its own or with assistance from community providers.
- Learn about trauma and exposure to violence among children and adolescents and join or form a workgroup to bring training on the issue to legal, judicial, behavioral health, and social service professionals in the community.
- Learn about and request or order appropriate measures and interventions that screen for or address trauma and exposure across a broad range of experiences to capture polyvictimization violence (see information below on screening and intervention for exposure to violence). Ensure that decisions are made based only on measures that are reliable and appropriate for the child being assessed and that necessary followup happens promptly.
- Whenever safe and appropriate, allow youth to live with parents or other supportive adults instead of in a foster home, group home, or detention facility.
- Work to promote access to trauma-specific treatment and services. In addition to the trauma-informed care strategies discussed in this brief, courts working with youth exposed to violence must have access to a range of trauma-specific interventions, including clinicians who are willing, available, and culturally competent to work with youth who have been victimized.

Screening for Past Trauma and Exposure to Violence

Identification is the first and necessary step in ensuring youth will get the help they need. Judges, attorneys, GALs, CASA volunteers, and others involved in the child's court case often receive the results of mental health and trauma-specific screenings and assessments performed by mental health professionals, so understanding the basic characteristics of these instruments, which are described below, is important.

Although advocates may be able to introduce past trauma as a mitigating factor during sentencing hearings or request services for youth while they are awaiting adjudication or are in placement, attorneys in delinquency cases have the additional concern that assessment results, treatment outcomes, or other trauma-related information could be used against their clients

and/or that this information could lead to delinquency courts maintaining jurisdiction over youth simply to ensure service delivery. Because increasingly more courts and detention facilities are administering mental health or trauma-focused screenings as youth enter the system, advocates must be aware of what has been, or will be, asked about their clients' histories and how exactly the results will be used throughout the court process. Attorneys should be aware of State and Federal laws regarding privacy of health information and argue for any potentially incriminating information contained in assessment, screening, or other reports to be excluded. If a trauma-related or other mental health issue has been diagnosed, advocates should ensure that their client is receiving appropriate treatment from a qualified professional and that treatment-related information is kept private to the greatest extent possible and is not used to incriminate youth. (See Rosado & Shah, 2007, for more information on protecting youth from self-incrimination.) To the extent an advocate is aware of past exposure to violence or other traumatic experiences that are not currently part of the court case, he or she may wish to counsel the client and his or her family about receiving community-based services to address the issues (see "Role of Legal Advocates and Judges" above for more tips on how attorneys should respond to their clients' suspected or confirmed exposure to violence).

Surveys of child protective and other child-serving agencies indicate that the majority of agencies ask about past traumatic experiences and trauma-related symptoms (Conradi et al., 2012; Taylor et al., 2005). However, other agencies do not, or the information gathered may not be shared with courts or legal advocates. Judges, attorneys, and lay advocates should ask what, if any, trauma-focused or general mental health assessments or screenings have been performed on children in the dependency and delinquency systems and ensure they have access to the results of those measures, as well as to any background information they need to understand them. For general mental health assessments, advocates and judges should find out whether trauma and victimization history was asked about and reported on and request additional trauma-specific followup if necessary.

Trauma screenings, trauma assessments, and psychological evaluations have been described as "exist[ing] along a continuum to address the unique needs" of court-involved children (Conradi et al., 2012). Screening tools may be administered to children entering a system and are generally brief. Assessment instruments provide more types of information (e.g., risks, needs, strengths), may ask more in-depth questions, and may require more training and education to administer properly (Administrative Office of the Courts, 2011; Conradi et al., 2012). Psychological evaluations are much more comprehensive, are completed by a licensed psychologist, and may include trauma measures among tools that look for other mental health issues. Legal advocates and judges may also encounter other mental health assessments beyond those that are trauma focused, such as the Massachusetts Youth Screening Instrument Version 2 (MAYSI-2) (Grisso & Barnum, 2006) or the Child and Adolescent Needs and Strengths Assessment (Lyons, 1999). Although trauma is not their primary focus, these measures may capture some symptoms or issues related to traumatic stress and/or caused by exposure to violence, such as hypervigilance, sleep disturbances, depression, or anxiety.

Selected Screening and Assessment Instruments

- *Child and Adolescent Needs and Strengths Assessment*—http://www.praedfoundation.org/CANS-MH%20Form.pdf.
- *Child Welfare Trauma Referral Tool*—http://www.nctsnet.org/sites/default/files/assets/pdfs/cwt3_sho_referral.pdf.
- *Massachusetts Youth Screening Instrument Version 2*—http://vinst.umdnj.edu/VAID/TestReport.asp?Code=MAYSI
- *Traumatic Events Screening Inventory for Children*—http://www.ptsd.va.gov/PTSD/professional/pages/assessments/assessment-pdf/TESI-C.pdf
- *Trauma Symptom Checklist for Children*—http://www.johnbriere.com/tscc.htm
- *Trauma Symptom Checklist for Young Children*—http://www.johnbriere.com/tscyc.htm
- *University of California at Los Angeles Post-Traumatic Stress Disorder Reaction Index*—http://www.ptsd.va.gov/professional/pages/assessments/ucla-ptsd-dsm-iv.asp

Information on other screening and assessment tools is available from NCTSN at http://nctsnet.org/resources/online-research/measures-review and from the California Evidence-Based Clearinghouse for Child Welfare at http://www.cebc4cw.org/assessment-tools/.

Screenings and assessments that are evidence-based have been tested and shown to be reliable (have consistent outcomes over numerous and varied administrations) and valid (accurate at measuring what they are intended to evaluate). Many tools have been designed for and/or tested with children in different settings (e.g., schools, detention facilities) and of different ages, ethnicities, and social backgrounds. Before making decisions affecting youth based on screening results, judges and legal advocates may wish to ask questions of the caseworker or mental health professional to determine the appropriateness of the tool used.

Evidence-based instruments used with children and youth in the child welfare and juvenile justice systems across the country include:

- The *University of California at Los Angeles Post-Traumatic Stress Disorder Reaction Index* (UCLA PTSD Index) (Steinberg, Brymer, Decker, & Pynoos, 2004) determines whether individuals have experienced events that could cause trauma and whether their reactions to those events meet diagnostic criteria for PTSD.
- The *Traumatic Events Screening Inventory for Children* (TESI-C) (Ford & Rogers, 1997) asks about potentially traumatic events a child may have experienced or witnessed and gauges the child's emotional reactions to those events.
- The *Trauma Symptom Checklist for Children* (TSCC) and related *Trauma Symptom Checklist for Young Children* (TSCYC) (Briere, 1996, 2005) measure distress and related symptoms (e.g., anxiety, anger, depression) and may be used in tandem with other measures that ask about past *experiences* but not current *symptoms*.

Child welfare caseworkers in some jurisdictions also use the *Child Welfare Trauma Referral Tool* (CWTRT) (Taylor, Steinberg, & Wilson, 2006), an instrument that helps them integrate information from a child's case file and key informant interviews and uses a flowchart to make appropriate referrals for further assessment and services. Reliability and validity for the CWTRT, which was developed by the National Child Traumatic Stress Network (NCTSN), have not yet been established, but this measure is currently the only national screening instrument developed specifically for child welfare professionals. A resource for attorneys, GALs, and CASA volunteers is currently being developed by the Safe Start Center, the ABA Center on Children and the Law, and Child & Family Policy Associates and will be available at http://www.safestartcenter.org and http://www.americanbar.org/child when completed.

State and Local Initiatives

Several court jurisdictions and child welfare/juvenile justice programs are focusing on trauma using evidence-supported and promising practices for screening, assessment, and treatment. In most cases, the assessments and interventions discussed are used in the delinquency system only after a young person has been adjudicated. When screening or working with youth who have not yet been adjudicated, advocates and judges should ensure that information obtained is used and shared appropriately (e.g., to help understand a young person's actions in context rather than to incriminate a young person) and that youth are never found to be delinquent because of their service needs.[6]

Ohio's Stark County juvenile court takes a comprehensive approach to addressing trauma in juvenile justice cases. Led by Judge Howard, court, child-serving, and mental health personnel in Stark County have brought in national experts to educate professionals about child trauma, formed a task force on the issue, conducted screenings of youth in juvenile court for trauma, and educated parents and youth about the impact of trauma. Although court officials initially used the UCLA PTSD Reaction Index, they currently use a screening instrument developed by Dartmouth College that includes additional information, such as a depression scale and a substance abuse screen. The instrument uses a combination of interviews and self-reports; officials find that this method identifies a greater number of children who are struggling with traumatic stress. Youth who are identified as needing intervention receive trauma-focused cognitive-behavioral therapy (TF-CBT).

In *New York, the Chautauqua County Family Court* (with support from the New York State Child Welfare Court Improvement Project) is leading a 2-year project called "Integrating Trauma-Informed, Solution-Focused Strategies in Family Court." The work has included surveying youth and parents, guiding attorneys on interviewing clients using trauma-informed strategies, frontloading and expediting dispositions, and inviting youth ages 10 and older to participate in a court

[6] For more guidance, see Rosado & Shah, 2007.

orientation before they attend their first permanency hearing. The trainings are multidisciplinary and include social services caseworkers and their attorneys, attorneys for children, assigned counsel, public defenders, CASA volunteers, judicial and non-judicial court staff, and foster care contract agencies. The project does not use screening tools but assumes that all families entering the system have experienced trauma and should benefit from trauma-informed practice.

Through the *New Hampshire Bridge Project of the Dartmouth Trauma Interventions Research Center,* youth in four juvenile court pilot sites are screened for trauma exposure, PTSD, depression, substance use, and resiliency using a Web-based Stress and Resources Survey. Screening results are available immediately, and youth with identified needs are referred for evidence-based treatment. The project also offers training and supervision in TF-CBT and child–parent psychotherapy for care providers in community mental health centers, residential treatment facilities, and other treatment agencies that work with youth involved in the juvenile justice system and in the community.

North Carolina's Center for Child & Family Health includes legal, medical, mental health, and abuse prevention professionals who provide statewide and national training as well as evidence-based, trauma-focused assessment and treatment services to children and families. Given the Center's focus on trauma, many of the children served are involved with the child welfare, family court, or juvenile justice systems, and clinicians are often subpoenaed to testify. The Center's Legal Director provides in-house training on expert testimony related to trauma and on ways clinicians can support children and adolescents who are preparing to testify.

The *Trauma and Grief Component Therapy Learning Collaborative* provides sites in Delaware, Florida, North Carolina, Ohio, and Tennessee with training on trauma-informed assessment and implementation of the juvenile justice-adapted version of Trauma and Grief Component Therapy for Adolescents (TGCT-A). Staff members at participating sites are trained using NCTSN's Juvenile Justice Trauma Toolkit to help them become "trauma-informed and able to distinguish post-traumatic reactions from antisocial behaviors among the youth they serve and [capable of tailoring] their management and disciplinary strategies accordingly" (Olafson, 2012).

Through a collaboration between the *University of Connecticut Health Center* and the *Connecticut Court Support Services Division*, all youth entering State-run juvenile detention facilities, as well as more than 20 community-based programs, are screened for trauma history using the TESI-C Self-Report and the MAYSI-2 Trauma Experiences Scale; children with identified needs receive an evidence-supported intervention, usually Trauma Affect Regulation: Guide for Education and Therapy (TARGET).

Southwest Michigan Children's Trauma Assessment Center offers comprehensive trauma assessments for children in the child welfare and juvenile justice systems. The assessments include neurodevelopmental screening as well as measures from other disciplines, such as medicine, social work, occupational therapy, and speech and language pathology. The Center also provides training to juvenile justice and child welfare system professionals on the impact of exposure to trauma on brain development to help them view court-involved youth through a neurodevelopmental lens. It also trains mental health professionals to provide neurodevelopmentally informed assessments and TF-CBT.

Core Components of Trauma-Informed Care

Although the needs of children exposed to violence may vary considerably, the systems of care in which they are likely to present (child welfare, criminal justice, public health, behavioral health) can be better prepared to recognize their needs and help accordingly. A system of care that is responsive to trauma-related needs should consider the following core principles:

- At any age, trauma is a central life event with a complex course that can profoundly shape a person's sense of self and others.
- The symptoms, complaints, and behaviors of a young person who has been exposed to violence may be coping mechanisms that are not effective anymore.
- Interventions require the use of relational—rather than confrontational—approaches to behavior change.
- Services should be culturally responsive to the immediate mental health issues presented.

Adapted from Hodas, 2006.

Considerations Related to Developing a Trauma-Informed Legal Practice

Some of the significant challenges lawyers, and the court systems they work in, should consider in their efforts to become more trauma-informed include the following:

Avoiding self-incrimination/protecting others. Children and parents involved in the dependency and delinquency systems may choose not to share information with advocates, court personnel, and mental health professionals to protect themselves or others. Similarly, attorneys and other advocates may choose not to ask about past experiences or request screenings or assessments for fear of uncovering information that could be used against their client. To the extent possible, youth should be encouraged to form relationships and share information with professionals with whom there is a privileged or otherwise legally protected relationship. When mental health assessments and services have been administered, attorneys should obtain necessary consents, releases, and waivers so that they can be aware of the results. Advocates can also give copies of trauma-focused guides or handouts geared toward children or parents to all clients rather than single out particular youth (see http://www.nctsn.org for some examples). Attorneys and other advocates should be familiar with their State's ethical rules and relevant organizational policies. These rules (along with relevant Federal and State health privacy laws) may restrict the information that can be obtained from others in the child's life or may limit what information about the child can be shared with other professionals. Individuals should also be familiar with their State's mandatory reporting statute: although children's attorneys and CASA volunteers are not mandated reporters in the vast majority of States, others involved with the child welfare or juvenile justice systems, such as mental health professionals, may be.

Lack of resources. Many jurisdictions lack adequate resources and appropriate services to help youth affected by violence. Child welfare or juvenile justice attorneys may wish to connect their clients to other legal providers (e.g., a legal aid benefits attorney to address Medicaid eligibility) who can help overcome barriers. Evidence-based mental health services may be difficult to access because of their limited availability and cost, as well as their responsiveness to the full panoply of complex needs presented by youth exposed to violence. Agencies may wish to give priority to children suffering from traumatic stress when scheduling assessment and intervention services. Advocates in many States may be unaware of federally and locally funded trauma centers (a partial list is at http://www.nctsn.org/about-us/network-members). In addition, many free resources for different types of professionals working with trauma-affected youth are available from the Safe Start Center (http://www.safestartcenter.org) and NCTSN (http://www.nctsn.org).

Building relationships/accessing services for special populations. Professionals may struggle to engage youth in services and to establish trusting relationships with others working with these youth. Youth mistrust is often compounded by fears that a connection to a service provider or with law enforcement may compromise their independence. Many services are also time limited, making it difficult for professionals to spend the time needed for clients to open up and begin to address their trauma histories. For example, both domestic violence and runaway and homeless youth programs—where services may be provided to youth who have been exposed to violence—may only provide for short stays. Youth who were born outside the country, speak a different language, or come from a different cultural background may face additional difficulties in accessing services.

Policy Reforms to Promote Trauma-informed Legal Practice

There are many actions legal advocates and judicial officers can take to advance policy and legislative changes that support trauma-informed practice. This work often begins by forming workgroups of key stakeholders or establishing partnerships with entities that advocate for children at the local or State levels. Establishing these relationships will help educate system players on trauma-informed practices and obtain necessary buy-in to implement change. Courts, public defender offices, children's law offices, and CASA programs should:

- Offer classes or host events that raise awareness through presentations by mental health professionals who specialize in trauma-informed care and other experts.
- Urge juvenile justice and child welfare agencies to institute policies that require agency-contracted group homes and detention facilities to provide mandatory staff training on trauma and exposure to violence.

Evidence-supported and Promising Interventions

The following approaches developed for children and youth exposed to violence use individual or group therapy to address skill development, affect regulation, interpersonal connections, and competence and resiliency building. The U.S. Department of Justice's Office of Justice Programs (OJP) offers reviews of most of these interventions at http://www.crimesolutions.gov. According to OJP, effective programs "have strong evidence to indicate they achieve their intended outcomes when implemented with fidelity" and promising programs "have some evidence to indicate they achieve their intended outcomes." More information about these ratings is at http://www.crimesolutions.gov/about_starttofinish.aspx.

Child–Parent Psychotherapy (CPP) is a dyadic intervention that helps children (infants through children age 5) and their parents or caregivers create a more secure relationship and allows children to form healthful attachments and achieve better cognitive, behavioral, and social abilities. It is intended for children who have been victims of maltreatment, witnessed family violence, or have had other traumatic experiences. Treatment includes teaching parents/caregivers how exposure to violence affects children and (for older children) working directly with children through play and other interactions. As of 2010, five randomized trials of CPP had been conducted, and CPP had been used in 143 sites across the country. CPP has been found to favorably affect child and maternal PTSD symptoms, child behavior, and attachment security. OJP rates CPP a "promising" program. More information about CPP is at the Substance Abuse and Mental Health Services Administration's National Registry of Evidence-based Programs and Practices (NREPP) (http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=194).

Trauma Affect Regulation: Guide For Education and Therapy (TARGET) teaches individuals impacted by trauma "a practical 7-step sequence of skills for processing and managing trauma-related reactions to current stressful experiences" (Ford & Hawke, 2012). Originally developed for use with adults, it has been shown to decrease the severity of PTSD, anxiety, and depression symptoms, as well as improve emotional regulation and health-related functioning in adults. TARGET has been adapted for use in juvenile detention facilities, and youth involved in a TARGET pilot test in Connecticut were found to have fewer disciplinary incidents and punitive sanctions than were youth in the same facilities before TARGET was implemented (Ford & Hawke, 2012). In a randomized clinical trial, TARGET was delivered as an individual therapy with girls involved in delinquency and was shown to reduce PTSD (intrusive re-experiencing and avoidance) and anxiety symptoms. Pilot testing in Ohio showed that TARGET delivered as a group therapy and organizational intervention reduced depression, anxiety, and PTSD; increased self-efficacy and satisfaction with services; and reduced threatening behavior and use of seclusion among youth receiving the intervention in specialized residential mental health juvenile justice facilities (Marrow, 2012). OJP rates TARGET an "effective" program.

Trauma-Focused Cognitive-Behavior Therapy (TF-CBT) has been used to reduce traumatic stress symptoms and emotional/behavioral issues caused by trauma in children who have experienced child maltreatment or witnessed family violence, among others. It was initially developed for child victims of sexual abuse. Children and parents/guardians receiving TF-CBT normally work individually and then in joint sessions with a trained therapist (although in some cases TF-CBT may be a group therapy). The therapy is appropriate for children and youth between ages 3 and 17. As of 2008, more than 60,000 mental health professionals had received training on TF-CBT. Experimental research has shown that TF-CBT helps with children's behavior, feelings of shame, depression, and traumatic stress symptoms. OJP rates TF-CBT an "effective" program. The official Web site for TF-CBT is http://tfcbt.musc.edu/. Additional information is available at NREPP (http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=135).

Cognitive Behavioral Intervention for Trauma in Schools (CBITS) aims to increase coping skills and decrease PTSD and depression symptoms, as well as behavioral problems, in students from grades three through high school (most often in grades six through nine). It is also designed to improve relationships with peers and parents. Its target audience is children who have been exposed to violence in their schools, communities, or homes. CBITS uses CBT techniques, such as social problem solving and relaxation methods, and exposes students to trauma reminders and education about trauma symptoms. It is administered in school settings and includes education sessions for teachers and parents as well as individual and group sessions for children. Studies have shown that CBITS improves PTSD and depression symptoms and child functioning. OJP rates CBITS an "effective" program. The official Web site for CBITS is http://cbitsprogram.org/. Additional information is available from NCTSN (http://www.nctsnet.org/nctsn_assets/pdfs/CBITSfactsheet.pdf) and at NREPP (http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=153).

Several other forms of CBT are available, including *Alternatives for Families: A Cognitive-Behavioral Therapy (AF-CBT)* (also known as *Abuse Focused CBT*) for families addressing physical abuse. OJP rates AF-CBT a "promising" program. More information is available at the Child Welfare Information Gateway (http://www.childwelfare.gov/pubs/cognitive/index.cfm) and at the California Evidence-Based Clearinghouse for Child Welfare (http://www.cebc4cw.org/program/alternatives-for-families-a-cognitive-behavioral-therapy/).

Parent–Child Interaction Therapy (PCIT) is an intervention for children who have conduct disorders and were exposed to substances before birth or experienced physical abuse. In this intervention, parents learn skills related to child- and parent-directed interaction and then practice these skills while receiving feedback from a therapist. PCIT focuses on improving family relationships and changing the way parents and children interact. Thousands of families have received PCIT, and numerous experimental trials have shown it to be effective. Research has shown improvements in parent–child interaction, child behavior, and parental distress, as well as decreases in physical abuse. PCIT has been evaluated for children up to age 12, although it was developed for children between ages 2 to 7. OJP rates PCIT an "effective" program. The official Web site for PCIT is http://www.pcit.org/. Additional information is at NREPP (http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=23).

Trauma and Grief Component Therapy for Adolescents (TGC T-A) is an assessment-driven, modularized treatment specifically designed for adolescents exposed to trauma and traumatic loss who are at high risk for severe persistent distress, functional impairment, and developmental disruption. Primary aims of TGCT-A include increasing adolescent insight into the ways trauma and loss reminders continue to affect young people's behavior, strengthening emotion self-regulation and other coping skills, enhancing social support and social connectedness, working through traumatic experiences, adjusting to deaths and other losses, and promoting adaptive developmental progression. TGCT-A's modularized design, engaging activities, and broad array of evidence-supported treatment components allow it to be flexibly tailored depending on adolescents' specific needs, strengths, and circumstances and implemented in group treatment, individual treatment, or classroom-based modalities. Versions of TGCT-A have been extensively field tested in a wide range of high-risk field settings, including juvenile justice, earthquake and war zones, inner-city schools exposed to severe community violence, and post-September 11 New York City. Program evaluations have shown significant and persistent symptom improvement in post-traumatic stress, traumatic grief, and depressive reactions, as well as in school behavior (Olafson, 2012). OJP has not yet rated TGCT-A.

Numerous other interventions exist that may be appropriate for children and youth dealing with trauma. OJP (http://www.crimesolutions.gov) and the California Evidence-Based Clearinghouse for Child Welfare (http://www.cebc4cw.org/topic/trauma-treatment-for-children/) have reviewed many of them. The Agency for Healthcare Research and Quality is conducting a review of interventions for children exposed to trauma (http://effectivehealthcare.ahrq.gov/ehc/products/385/1017/PTSD-in-Children_Protocol_20120326.pdf).

- Advocate for local and State governments to fund programs that use evidence-supported techniques to identify and address trauma and exposure to violence among court-involved children and youth.
- Promote court policies or rules that protect victims' rights during court proceedings and alternative dispute resolution sessions (e.g., developing protocols for children to testify in-camera under certain circumstances; letting victims attend mediation separately from alleged abusers).
- Support court policies or rules that limit or prevent a young person from entering the status offense or juvenile justice system because of neglect or abuse (e.g., preventing a runaway youth from being petitioned as a status offender because he is fleeing an abusive home).
- Adapt child welfare case intake forms to include questions about past victimization, screenings, assessments, and treatment for youth exposed to violence.
- Ensure that information related to trauma is never used as a basis for finding a youth to be delinquent.

Resources

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Mandatory Reporting

Many children experiencing crises or violence are also at risk for child abuse and neglect. All States have child welfare systems that receive and respond to reports of child abuse and neglect, offer services to families, provide foster homes for children who must be removed from their parents' care, and work to find permanent placements for children who cannot safely return home.

Domestic violence is not the legal equivalent of child abuse and neglect, and therefore not all cases of domestic violence must be reported to child protective services. When responding to families affected by domestic violence, it is critically important for practitioners to consider simultaneously the safety of the child and the safety of any adult victim.

State-by-State information on reporting requirements can be found at http://www.childwelfare.gov/systemwide/laws_policies/state.

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Moving From Evidence to Action
The Safe Start Center Series on Children Exposed to Violence

Core Concepts

Exposure to violence. The Issue Briefs in this series use the definition of exposure to violence of the Safe Start initiative: "direct and indirect exposure to violence in [the] home, school, and community."

Impact of exposure to violence. Children react to exposure to violence in different ways, and many children demonstrate remarkable resilience. However, children's exposure to violence has been associated with difficulties with attachment, regressive behavior, anxiety and depression, aggression and conduct problems, dating violence, delinquency, and involvement with child welfare and juvenile justice systems. In addition there is a strong likelihood that exposure to violence will affect children's capacity for partnering and parenting later in life, continuing the cycle of violence for the next generation.

Risk and protective factors. The impact of a child's exposure to violence is influenced by both risk factors that increase the likelihood of a disruption in the developmental trajectories and protective factors in the environment. These risk and protective factors depend on the child's age and developmental level and the type and intensity of challenges present in his or her environment. The presence of supportive adults and/or nurturing environments provides a powerful buffer to children from the more intense stress or anxiety that may occur when children are exposed to violence.

Effective interventions. Research has documented the effectiveness of the following strategies to address the needs of vulnerable children and families—including children exposed to violence:

- Participation in *high-quality early care and education programs* can enhance physical, cognitive, and social development and promote readiness and capacity to succeed in school.
- *Early identification of and intervention with high-risk children* by early education programs and schools, pediatric and mental health programs, child welfare systems, and court and law enforcement professionals can prevent threats to healthy development by detecting and addressing emerging problems.
- For children and families already exposed to violence, *intensive intervention programs* delivered in the home or in the community can improve outcomes for children well into their adult years and generate benefits to society that far exceed program costs.
- Outcomes improve when highly skilled professionals provide *intensive, trauma-focused psychotherapeutic interventions* to stop the negative chain reaction following exposure to traumatic stressors (e.g., child abuse and neglect, homelessness, severe maternal depression, domestic violence). Treatment is an essential component of successful adjustments to exposure to violence, especially for children who have frequent exposure and who have complicated courses of recovery.

Guiding Principles to Support Best Practices

- ***Safety*** of the non-offending parent and of the children ***must be paramount and addressed concurrently*** in cases involving domestic violence.
- Children ***must be understood in the context*** of their individual traits, families, and communities (***a socio-ecological approach***).
- Responsibility for a child's well-being must be owned by parents, community agencies, and public systems together—***addressing children's exposure to violence is everyone's responsibility***.
- Agencies must ***work together in a coordinated manner*** to expand and enhance service delivery.
- Policies, programs, and services must be ***developmentally appropriate and culturally responsive*** and offered in the family's preferred language.
- Programs and services need to be ***evaluated rigorously*** for effectiveness—efficacy is key. We must continue to ***learn what works***.

Available Issue Briefs in the *WORKING TOGETHER TO HELP CHILDREN EXPOSED TO VIOLENCE SERIES*

Each Issue Brief in the series explains the importance of addressing exposure to violence to ensure the well-being of children from birth to age 18 in all systems that interact with vulnerable children and families. Through the use of literature reviews, case scenarios, and analyses of data, the Issue Briefs translate lessons learned from research and program practices into actions that can effectively prevent and reduce the negative impact of exposure to violence.

The goal of the series is to build the capacity of practitioners in a variety of different fields to offer sensitive, timely, and appropriate interventions that enhance children's safety, promote their resilience, and ensure their well-being.

Issue Brief #1: ***Understanding Children's Exposure to Violence***
Issue Brief #2: ***Pediatric Care Settings***
Issue Brief #3: ***Schools***
Issue Brief #4: ***Child Welfare Systems***
Issue Brief #5: ***Domestic Violence Agencies and Shelters***
Issue Brief #6: ***Homeless Shelters, Permanent/Supportive Housing, and Transitional Housing***
Issue Brief #7: ***Victimization and Trauma Experienced by Children and Youth: Implications for Legal Advocates***

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Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the Office of Juvenile Justice and Delinquency Prevention or the U.S. Department of Justice.

Safe Start Initiative

The Safe Start initiative is funded by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention. The goal of the initiative is to increase the knowledge of and promote community investment in evidence-based strategies for preventing and reducing the impact of children's exposure to violence.

Eleven demonstration sites were funded from 2000 to 2006 to create a comprehensive service delivery system to improve the accessibility, delivery, and quality of services for children exposed to violence at any point of entry. A national evaluation broadened understanding of how communities can successfully implement a comprehensive system of care with policy and practice interventions to minimize the negative consequences of exposure to violence. For a description of the evaluation findings, see *Communities Working Together to Help Children Exposed to Violence: Findings from Phase I of the Safe Start Initiative* http://www.safestartcenter.org/pdf/ssc_findings-brief-1108.pdf

Fifteen Promising Approaches sites funded from 2005 to 2010 focused on implementing and measuring developmentally appropriate services for children exposed to violence within the context of the systems that serve them. A national evaluation of these sites conducted by the RAND Corporation analyzed the impact of specific intervention strategies on outcomes for children and families. For a description of findings, see *National Evaluation of Safe Start Promising: Approaches Assessing Program Implementation* http://www.rand.org/pubs/technical_reports/2010/RAND_TR750.pdf.

Eight Safe Start Promising Approaches sites are receiving funding until 2015 and will provide evidence- or theory-based interventions to prevent and reduce the impact of children's exposure to violence in their homes and communities. These interventions address the needs of children and youth who have been exposed to violence and their families through a comprehensive and collaborative approach that uses the current knowledge base to address children's exposure to violence. A cross-site evaluation is being conducted by the RAND Corporation.

The Safe Start Center is a resource center designed to support the Safe Start initiative on a national level and to broaden the scope of knowledge and resources for responding to the needs of children exposed to violence and their families. For more information on the Safe Start initiative and Safe Start Center, visit www.safestartcenter.org.

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Attend 2 ABA National Conferences
July 13-16, 2011 - Details on page 63

Child Law Practice
Helping Lawyers Help Kids
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Counseling Children and Youth in Times of Crisis

Understanding Child Development and Building Rapport (Part 1)

by Lauren Girard Adams, Esq. and Maisley Paxton, Ph.D.

Counseling is key to representing and advocating for any court-involved child.[1] Working with child clients in court presents challenges, including understanding the role of trauma on child and adolescent functioning and understanding how a child's stage of development may impact the counseling role.

This article incorporates principles of child development and trauma into an approach to counseling the child client.

- Part 1 explains how to assess and understand a child's developmental level, and emphasizes the importance of building rapport and establishing trust with your client.
- Part 2 shares multidisciplinary strategies and tools to assist you in counseling the child client and addresses common challenges that arise.

Assessing and Understanding Developmental Level

Chronological age is a poor predictor of a child's abilities. Instead, the client's developmental level—a dynamic composite including the client's level of physical, cognitive, social, emotional, and academic growth—is more insightful. Once you understand your client's limits and capabilities based on developmental level, you can devise appropriate, informed strategies for effective communication and counseling. A good grasp of a client's developmental level also promotes a collaborative working relationship and keeps clients from becoming frustrated, discouraged, oppositional, and/or uncooperative. To gauge a client's developmental level and abilities, begin by gathering information about the following factors:

Cognitive functioning

Review any existing psychological (or psycho-educational) evaluations for a thorough assessment of cognitive functioning. For example, does your client have an Individualized Education Plan (IEP) to receive specialized instruction for a learning disability, emotional disability, or both? Review the testing and IEP documents because they include specific, concrete recommendations for conveying and communicating information to your client based on his learning and communication styles, and information-processing abilities.

Academic achievement

School records such as report cards, teacher comments, honors, disciplinary problems, or transfers are all helpful. Look closely at the client's performance in different classes. This will help you to build on the client's strengths and avoid overextending in areas of limitation. For example, if math is a strength, try communicating and exchanging information about the client's personal data, evidence, or options using quantitative terms. This is important as you develop rapport and establish trust with your client.

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TOOLBOX **Information gathering in a pinch**

If you don't have time to gather information before going to court:

- Gather as many records as you can.
- Talk to caregivers (foster parents, parents) and the child.
- Have your own gauge for knowing what a child of a certain age and developmental level acts like (draw on knowledge of general child development).
- Consult a social worker with experience understanding kids and families.
- Note your own observations of the child.

(Continued from front page)

Pediatric records

Pediatric chart notes include assessments of whether children achieve their physical and developmental milestones on time and other information about developmental level. A pediatrician's general clinical impressions also can be informative.

Home environment

A stable, enriching home environment—which includes at least one consistent, caring, adult caretaker—promotes physical, cognitive, social, emotional, and academic growth. A client with consistent care and an invested caretaker is at a distinct advantage and likely to have a higher developmental level. Many clients come from chaotic home environments, which can diminish one's developmental level.

Gender

In general, the developmental level of girls is more advanced than the developmental level of boys.[2] Females are often better at expressing themselves verbally than males, which promotes social, emotional, and academic growth. Using alternative forms of communication, such as note-taking, diagrams, symbols, outlines, and timelines bolsters communication with male clients, and females as needed.

Trauma history

Conservative estimates show 50 percent of court-involved children experience traumatic stress symptoms or full-blown Posttraumatic Stress Disorder (PTSD).[3] PTSD is an anxiety disorder characterized by increased arousal and hypervigilance. Children who have experienced trauma and/or are experiencing PTSD are more likely to perceive people and situations as threatening. They also are more likely to exhibit behaviors such as:

- worrying about dying at an early age
- losing interest in activities
- having physical symptoms such as headaches and stomachaches
- showing more sudden and extreme emotional reactions
- having problems falling or staying asleep
- showing irritability or angry outbursts
- having problems concentrating
- acting younger than their age (e.g., clingy or whiny behavior or thumb sucking)
- showing increased alertness to the environment (hypervigilance)[4]

Often, children experiencing these symptoms come from homes characterized by inconsistent care, unhealthy relationships, violence, ambivalence, and/or disorganization. These factors lower the child's self-esteem and place the child at higher risk for aggression.[5] Children who carry these feelings into their social relationships are likely to misinterpret social cues, perceive threats from peers, and respond with anger and aggression.[6]

These factors present challenges for the attorney-client relationship. As the lawyer, you can provide your client with safe, clear, and reliable, experiences by modeling appropriate interactions. Using a trauma-informed approach can reduce client anxiety and its potential impact on the child client. By developing a productive relationship with the child client, you can increase the likelihood of a more positive outcome for the child. Additionally, building rapport and establishing trust are key to a productive, collaborative attorney-client relationship, and the ultimate success of the case.

Assessing competency

Competence involves a basic comprehension of the purpose and nature of the legal process.[7] It includes:

- *Understanding*—capacity to provide relevant information to counsel and to make sense of courtroom procedures and personnel.
- *Reasoning*—ability to recognize information relevant to a legal case and to process information for legal decision making.[8]
- *Appreciation*—ability to recognize the relevance of information for one's own situation.

Assessing and understanding these factors gives you insight into your child client's developmental level and helps you communicate with and counsel your client so he can make informed decisions about his case. Another prerequisite to good decision making is the client's ability to trust you, the lawyer, and your advice.

Building Rapport and Establishing Trust

Successfully counseling the child client requires a collaborative approach. To develop an attorney-client relationship that encourages collaboration, you must build rapport and establish trust with your child client.[9] The following strategies will help you build rapport and create conditions that promote collaboration and establish trust with your child client.

Make establishing rapport the first order of business.

During client meetings, you will severely compromise the collaborative process if you do not cultivate rapport before launching in to discuss legal issues with your client. Let your client begin the conversation. Allow a nonstructured start at the beginning of an interaction to draw a sample of the child's phrasing and language and learn what is important to the client. Such stress-free conversation also helps build rapport and establish trust—key components to successful counseling.

Create a quiet, distraction-free, meeting environment.

Empirical evidence suggests that when a child feels safe and comfortable, he will be more likely to communicate his desires and preferences, and to engage in positive decision making.[10] Children with a history of trauma often have trouble concentrating and may become hypervigilant. Even in the most difficult situations, it is possible to create conditions that enhance your ability to communicate with and counsel your client. Take these steps:

- **View the meeting location and make any adjustments to room configuration.** Reduce/eliminate visual, auditory, and/or motion stimulation that could cause anxiety and distractions. A quiet environment with dimmed lights and reduced visual or tactile distractions works best. For instance, when meeting in a room with a television, window, radio, computer, or other obvious distraction, have your client sit with his back to the distraction.
- **Consider where you sit in relation to your child client.** Sitting directly across the table, interrogation-style, can be perceived as threatening and creates a barrier between you and the client. Instead, sit beside or catty-corner to your client. This shows you are side-by-side working on issues together.
- **Look at materials together to show you are "with the client"** supporting him as he makes sense of the situation and determines his best course of action.
- **Consider the impact your body language has on the meeting environment and tone.** Children are adept at reading the body language of adults. Crossing your arms, frowning, looking down over your glasses, checking e-mail or text messages, and other body language sets the wrong tone and sends your client the message that you are not on the same team.

Develop a collaborative, interactive, style.

Strategies to help you develop a collaborative style to interact with child clients include:

- actively engaging clients in verbal give-and-take
- actively encouraging children to have their full say
- staying open to and encouraging questions and negotiation
- providing clear explanations and rationale behind legal advice
- setting expectations for clients that will instill a "you can do this" attitude
- recognizing the child's individual interests and attributes
- being responsive, warm and nurturing, while at the same time assertive and supportive
- creating a style and atmosphere that encourages the child to ask questions and clarify any confusing issues

TOOLBOX — Communicating with children

Always be prepared with these basic tools:

- 4 Bold, clear stationary images that activate the brain
- 4 Concrete representations
- 4 Paper and pen to draw charts, diagrams, visual representations showing choices
- 4 Calendars and timelines to illustrate when things will happen.
- 4 Agenda—develop and review with child (with very young children, guide them through it)
- 4 Symbols
- 4 Short words child understands
- 4 Drawings—let child draw a person, family, picture of something meaningful (allows you to ask questions)
- 4 Informal, child-friendly settings
- 4 Getting down low/meeting child at her level
- 4 Humor/laughter

- 4 Visit the child when you say you will.
- 4 Don't try to impress the child.
- 4 Be authentic.
- 4 Don't convey judgment.

By setting a collaborative tone and creating an open and respectful environment, you will enhance communication and ultimately your ability to effectively counsel your client.

Use language the child understands.

Legal interviews and counseling sessions with child clients are often conducted in language that exceeds the client's verbal comprehension and developmental level.[11] Child clients are confused by complicated language, compound or excessively long sentences, and legalese. Using language the client does not understand also interferes with your relationship. Conversely, using language the client readily understands reinforces and enhances rapport, trust, and collaboration.

Strategies to match language to the child's level of understanding include:

- **Be attentive to the client's language,** phrasing, terms, and names of important people, places, or things.
- **Use casual conversation at the beginning of an interaction** to draw a sample of the child's phrasing and language and give you a better understanding of the client's developmental level.
- **Get the child to discuss a neutral topic,** using humor to get the child to smile and laugh. This puts the child at ease with the situation and also gives you a sample of the child's own language use.[12]
- **Err on the side of using language below or at a child's developmental level** (and become more elaborate once a client's comprehension is well established) to enhance the likelihood of comprehension. Caveat: avoid assuming clients cannot comprehend relevant information. Child clients usually understand much more than adults give them credit for understanding. Even young children of a relatively low developmental level and those with developmental delays or verbal communication deficits comprehend more than is obvious.
- **Use nonverbal and verbal strategies to enhance comprehension.** Even if a concept seems out-of-reach, try to convey it in ways that make sense to the client. Children, especially those with trauma or maltreatment histories, are adept at "reading" adults and can see when someone is withholding information even in a benevolent, well-intentioned way.
- **Use open, back-and-forth discussions** to enhance your rapport and produce better outcomes for clients.

Using accessible and understandable language with the child client also leads to productive counseling sessions and more informed decision making by the client.

Keep your messages simple, concise.

Making information accessible and understandable to the child client requires not only appropriate language, but also simple and concise delivery of the information. Young children tend to focus on one aspect at a time in conversation and, therefore, the best sentence structure is one with a simple subject, a verb, and an object. This pattern is recommended until at least age eight[13] and probably older (11 years) for this population. Avoid long and complicated sentences altogether.

Lawyers working with children tend to present information in an unstructured way that is fluctuating and off topic, especially with younger children. This sort of topic incoherence is typical in younger child clients, and it may be that attorneys mirror the communication style of younger clients. Thus, take care to avoid frequent or rapid switches of topic. Children can be serious and task-focused when needed, but if they can choose between playing and discussing (likely difficult topics), they might well opt to be playful and off-topic.

In addition, be aware of what your client has been through prior to meeting with you. If you speak with your child client after he has been through a crisis, you will want to keep your meeting especially short and simple, and repeat important points several times.

Practice active listening.

Active listening builds rapport and enhances trust. Active listening can take many forms:

- repeating what a client has said
- asking clarifying questions
- using empathic statements at appropriate times
- restating client-generated ideas
- using the child's words for people and things (e.g., if your client calls her brother "Shorty" (instead of his given name), call him as Shorty as well)

"Active listening is not just a nodding of the head, it is making comments throughout a child's story that lets them know that

you're hearing them. So if they're talking about being frustrated, you might say, 'That sounds really frustrating' and if they are talking about a really difficult situation at home, you might say, 'Wow, that must have been really hard.'"[14] Through active listening, you build rapport with your child client, and further cement the foundation for successful counseling.

Use open-ended questions. Open-ended questions facilitate and reinforce building rapport and establishing trust. Conversely, closed-ended or leading questions, particularly at the beginning of the relationship (and even at the beginning of a conversation) can effectively shut-down communication because they inhibit the exchange of information and severely limit responses.

- Use open-ended questions to optimize the ready exchange of information.
- Be mindful of your phrasing, making modifications as needed.
- Be aware when clients are providing limited, brief, yes-or-no responses, and craft questions that evoke greater responses.
- Use informal prompts (e.g., "tell me more") to encourage a client to provide more information, including key facts that otherwise the client might keep to himself.

The initial, rapport-building period of the legal conference is a good time to ask open-ended questions and set the stage for ongoing open-ended questioning throughout the relationship. Once you have built rapport and established trust with your client, you can then ask more pointed questions to clarify and obtain specific information. This technique, often called the funnel technique, can be effective for gathering information with child clients. It involves three stages:

- **Stage 1:** Begin gathering information using open-ended questions. Let the child tell his story from start to finish without interruption. By letting your client to tell his story uninterrupted, you learn more than just the facts. You also learn what parts of the story are important to *him*. These parts may not be critical to your case theory, but knowing them will help you better understand your client and counsel him effectively. It also shows your client you respect him and what he is saying, thus encouraging further communication.
- **Stage 2:** Continue using open-ended questions, though these questions can be directed at clarifying and filling-in missing information ("Was anyone with you?" and "Where did you go next?").
- **Stage 3:** The goal as lawyer and counselor is to make sure your client fully understands important legal terms and issues and the pros and cons of choosing one option over another. During this stage, you will ask more pointed, specific questions.[15]

Let the client evaluate options. The child must ultimately live with the outcome of his case, as well as the decisions he makes. Actively and continually support your client so he can fully evaluate his options and think through various consequences and outcomes. Strategies to help your client fully understand and evaluate his options include:

- **Have the client make a pros and cons list.** This lets him fully elaborate and evaluate his concerns about potential consequences of choices. For younger children especially, serve as scribe, allowing your child client to voice thoughts and concerns and watch them take shape on paper. This signals how central their input and ideas are to the process and reduces concerns about suggestibility.
- **Have the client evaluate options to reduce impulsive or snap decisions.** This helps the child take ownership over the decision-making process and the ultimate outcome.[16] As the lawyer, you are responsible for making sure the client understands and properly evaluates all options and the short-and long-term consequences.

Take an unbiased approach. Avoid allowing your personal biases or relevant personal history to interfere with providing objective, clear, concise advice. Working with clients in the juvenile justice and child protection systems is challenging and may evoke strong personal reactions. These clients are often difficult interpersonally and have experienced many disadvantages. All of this combined can trigger strong emotional reactions from even the most unflappable adults. Take these steps:

- **Take an honest inventory of personal reactions and biases** that arise from this work on an ongoing basis.

TOOLBOX — Cultural differences matter

Differences in culture, race, and class are real. The best thing you can do as an attorney is be mindful of personal biases and recognize how they could be influencing your interactions with children. Kids will recognize that certain things distinguish you from them. Differences in class are often the biggest issue you will face. While there is no rule of thumb for handling these differences, staying attuned to them and avoiding letting them affect your interactions will help.

- **Acknowledge challenges** when they arise and understand and work within your limits.
- **Develop a system of support** including colleagues, mentors, or others who can provide you relief and serve as sounding boards.

Be honest and reliable.

Dishonesty or not following through can irreparably damage your relationship with your young client. Take these steps:

- **Be honest** with your client and do not make promises you might not be able to keep. It is tempting to want to make your client feel better, but only offer to do as much as you *know* you can achieve.
- **Be reliable.** Child clients often come from backgrounds in which adults frequently let them down and fail to follow-through on promises. Set yourself apart, and show your client he can rely on you. For example, tell your client you will call him every week on a certain day at a certain time to check-in, and do it. And be careful to avoid making promises that you cannot keep.

Using the tips above will help build rapport and establish trust – prerequisites to successfully counseling the child client. Children involved in any court system are regularly called upon to make difficult and sometimes life-altering decisions. Taking the time to build rapport and establish trust will enhance your ability to counsel your young client through these difficult times and ultimately lead to better decision-making and outcomes for your client.

Stay tuned: Part 2 of this article, in next month's CLP, will share counseling strategies and tips for addressing common barriers.

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This article was adapted with permission from *Counseling Children and Youth in Times of Crisis: Tips to Achieve Success and Avoid Pitfalls*, a guide produced by the Children's Rights Litigation Committee of the ABA Section of Litigation. View the complete guide at: http://apps.americanbar.org/litigation/committees/childrights/multimedia.html#guide
To listen to a related teleconference, visit: http://apps.americanbar.org/litigation/committees/childrights/materials.html

Endnotes

[1] "Child" is used in this article to describe anyone under age 18.

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[14] American Bar Association Section of Litigation, Children's Rights Litigation Committee. *Interviewing the Child Client* (video excerpt of interview with Mary Ann Scali), 2008. <http://apps.americanbar.org/litigation/committees/childrights/video/1006-interviewing-child-client.html.>

[15] For more information about the funnel technique, see Binder, David A. et al. *Lawyers as Counselors: A Client-Centered Approach*, 2d ed. West Publishing Co., 2004.

[16] "Because youth tend to have a higher level of trust and satisfaction with attorneys who spend more time working with them, the child is more likely to receive and accept input from the collaborative lawyer. The child will also be able to avoid hasty, short-sighted decisions when he has the assistance of a lawyer who will patiently help him identify and consider all of the long-term implications of any given decision. When provided with all of the relevant information and given all of the appropriate environmental and emotional supports, a child may make well reasoned decisions and appropriately direct his counsel in the course of the representation." Henning, 2005.

What I Wish I'd Learned in Law School

Social Science Research for Children's Attorneys

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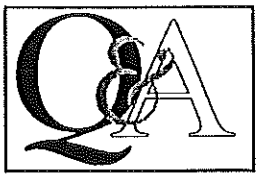

Conducting Developmentally - Appropriate Child Interviews

A Conversation with Dr. Karen Saywitz

by Claire Sandt

An expert in forensic interviewing, Dr. Karen J. Saywitz is an associate professor at the UCLA School of Medicine and Director of Child and Adolescent Psychology at the Harbor-UCLA Medical Center, in Torrance, CA. She conducts research and publishes widely on forensic interviewing, most recently on innovative interviewing techniques and methods for assessing children's competence to testify.

In the following interview, Dr. Saywitz offers guidance on:

- how interviewing children differs from interviewing adults;
- tailoring interviews to match children's developmental needs;
- how to avoid misinterpreting children's responses;
- working with children who offer little or no information;
- appropriate use of leading questions; and
- resources for interviewing children.

How does interviewing a child differ from interviewing an adult?

Children are not miniature adults. The differences are more than distinctions in years and inches. Children think, feel, communicate, and relate in a qualitatively different manner. First, children do not merely absorb the adult view of reality. They construct their own understanding as they try to make sense of the world around them.

Children create their own explanations for what they observe and revise principles as they go. As a result, there are developmental differences in experience and knowledge that dictate the amount and kind of information a child can provide and the techniques required to elicit it successfully.

Second, children are accustomed to interacting with familiar adults they can trust, in familiar settings (e.g., parents, teachers). Children typically fear the unknown (e.g., interviewers, offices, interviews). They have less developed skills for coping with anxiety — anxiety that can interfere with their ability to be forthcoming with complete, reliable reports. Since avoidance is a common way children cope with stress, they may be less than cooperative witnesses, requiring special techniques to establish trust and rapport.

Third, children differ from adults in their ability to comprehend and produce language, rendering the phrasing of questions critical to eliciting reliable statements. Often, children are asked questions in language they do not comprehend about abstract concepts they do no understand. The problem often has more to do with the competence of the interviewer than the child.

The interviewer's sensitivity and demeanor, the setting, and the way questions are phrased can undermine or facilitate children's ability to provide the most reliable and complete accounts of which they are capable. The interviewer's goal is to create an opportunity for maximal functioning and to bridge the world of the child with that of the adult.

How does the child's developmental level influence the kinds of questions a lawyer should ask when interviewing a child?

Children are not a homogenous group. Preschoolers, school-age children, and adolescents pose different challenges for interviewers depending on their stage of memory, language, knowledge, and emotional maturity. Even if they witness the same event, the renditions of a 3, 5, and 10 year old will differ depending on their ability to retrieve details, comprehend questions, resist suggestion, and cope with stress.

Children understand the world from their own concrete viewpoint and limited experiences. They know little of legal procedures or society's need for adjudication.

For example, if you ask, "What happened?":

- A *10 year old* is likely to give a fairly detailed, chronological account which spontaneously recounts the *who, what, where, and when* something happened.
- A *5 year old* will give a more limited response, such as "We played." To find out more information, you will have to ask some open-ended, specific questions, such as "Who did you play with?" or "Where did you play?"
- A *3 year old* rarely gives more information than asked for and might respond with "Nothing" or "I don't know." Specific questions elicit additional information, but if misleading they may distort the child's statement.

Children's spontaneous descriptions tend to be accurate, but incomplete. Preschoolers' spontaneous reports tend to be insufficient for decision-making in the legal arena. More information is forthcoming with follow-up questions, but the methods used to elicit additional information can facilitate or undermine accuracy, relevance, and consistency.

Older children provide more complete and detailed descriptions independently.

Younger children rarely give more information than is requested. Their narratives can be skeletal. Follow up questions can focus them on the topic at hand, trigger retrieval of detail and overcome reticence. But if questions are misleading, they create the potential for distortion.

Three and four year olds are the most vulnerable to the effects of suggestive questions and the reliability of their reports are highly dependent on the way in which they are questioned.

What are some developmental considerations when interviewing children?

Four important areas to consider are the child's stages of language, cognition, emotional maturity, and suggestibility.

Match questions to the child's stage of language development.

Questions should be phrased in language the child can understand. Pay special attention to the child's vocabulary and grammar. Before the interview, listen to the child talk. Count the number of words the child uses in a sentence,

and the average number of syllables in words used. If a child uses short sentences and one- to two-syllable words, keep our sentences short and simple to aid comprehension. Avoid complex grammatical constructions like embedded clauses and double negatives.

Simplifying vocabulary by using fewer-syllable words and short sentences automatically lowers the complexity of the language and helps the child understand questions. For example, a child was asked in the courtroom to *identify* (three-syllable word) the person who hurt her. The child could not identify anyone. Later, when the child was asked to *point to* (one-syllable words) the person who hurt her, she was able to do so. An inconsistency was created by the different wording used in these two requests.

Match the question to the child's cognitive ability and knowledge base.

Inconsistencies and misunderstandings are created when questions require skills children have not yet mastered. Problems arise, for example, when a child who has not learned how to count is asked how many times something happened. Similarly, you cannot ask how tall someone was and expect a young child to answer in feet or inches.

Conventional systems of measurement are learned gradually over the course of the elementary school years. Depending on the specific facts of the case, you may need to determine if the child has the knowledge or ability to provide the desired information.

Simple methods can be used to help easily assess a child's cognitive skills. For example, before asking "What color car was the man driving?" an interviewer can show a box of crayons and ask a child to name the colors. You often need to find alternative ways of seeking information. If a child cannot tell time and timing is critical to verifying an alibi, ask "What program was on TV when he came in?" and check the TV guide to establish the time.

Match the interview process to the child's level of emotional maturity.

The forensic process is stressful even for adult witnesses. Children understand the world from their own concrete viewpoint and limited experiences. They know little of legal procedure or society's need for adjudication. As a result, they have difficulty coping with stress the way adults do. Adult witnesses rationalize that they are cooperating with an aversive process for some greater good. Children have difficulty using abstract knowledge about the "big picture" to put their feelings in perspective. They can be overwhelmed with feelings that contribute to their reluctance.

To make sure the child understands the meanings of words you use, ask the child to define terms in their own language or use the word in a sentence.

Children need interviewers to take the time to establish rapport and build trust. Although you need to maintain an objective, neutral stance toward the veracity of the allegations, this does not preclude showing kindness and respect. Anxiety can be reduced when interviewers show empathy. Saying "Don't feel nervous" devalues the child's feelings and shows you don't understand. Instead, anticipate and acknowledge a child's feelings, "I wonder if it is hard for you to talk to someone you don't know, like me, in someplace you have never been before, like my office."

In addition to rapport and empathy, lawyers should help children understand the context of the meeting. Sketch an outline of what will

happen. Give children a sense of the purpose of the interview, your role and their role in the process. For example, say something like:

> "I'll sit here, you will sit here. Your mom will wait here until we are finished. This will take about as long as one TV program. I will ask you some questions and later you can ask me questions too. Your job is to tell me what you saw and what you heard..."

Address limits on confidentiality if they exist. Children are worried about who you will tell. If perceived confidences are later betrayed you lose all rapport and trust. Educating children about the steps of the legal process is essential (e.g., flow of information from police investigation, to lawyers, to parties, to public courtroom).

Design the interview to minimize the potential for distortion of children's statements.

Very young children (3 to 4 year olds) are the most vulnerable to suggestive questions. Although young children are capable of giving reliable and meaningful information, their responses are more easily influenced by the interviewer's demeanor, the context, and the way questions are asked. By age six or seven, children's resistance to suggestion increases significantly. By age 10-11, there is another shift towards adult levels.

Questions fall on a continuum. On one end are highly-leading questions ("It was John who hurt you wasn't it?"). On the other end are nonleading questions ("Is there anything you want to tell me?"). Not all leading questions are equally dangerous. Differing opinions exist about the potential for questions in the center of the continuum to aid or distort a child's responses, depending on the child's age, interviewer's competence, and the circumstances of the case.

To guard against contaminating the responses of very young children:

- Maintain an objective, neutral stance toward veracity of allegations.
- Avoid creating an accusatory atmosphere. Do not refer to suspects as "bad" people who did "bad" things.
- Start with open-ended questions and move to more specific questions cautiously after nonleading approaches fail. First use "wh" questions ("Where were you?" "Who was there?") And, if necessary, follow with questions to clarify, elaborate, or justify.
- Limit leading questions. Turn potentially leading "Yes-No" questions (e.g., "Did he touch your pee-pee?") into open-ended "wh" questions (e.g., "What did he do with his hands?")
- Help children elaborate on spontaneous comments in their own words (e.g., "Can you tell me more?") Do not interrupt with information from other sources.
- Introduce new information cautiously as a last resort toward the end of the interview.
- Avoid multiple choice questions with very young children.
- Explore alternative explanations for children's statements (e.g., bathing).

What kinds of words should lawyers use/avoid when questioning a child?

Avoid legalese and uncommon usage.

Research on children's understanding of legal terminology reveals children confuse terms with other similar-sounding words (e.g., jewelry for *jury*), or they assume the more common meanings for words (e.g., *charges* are something mom does with her credit card; a *court* is a place to play basketball; a *hearing* is something you do with your ears). To make

sure the child understands the meanings of words you use, ask the child to define terms in their own language or use the word in a sentence. The child may say yes when you ask if he or she knows what allegations are, but be thinking of alligators.

Use concrete, visualizable terms (e.g., gun), rather than abstract or categorical terms (e.g. weapon). Talk in terms of pictures, not ideas.

Use proper names (Mary, Mr. Smith) instead of pronouns (him, her, they, him, she).

Use active voice ("Did he hit her?") rather than passive voice ("Was she hit by him?")

Avoid words ending in "-tion" (molestation). Children do not understand them.

How can a lawyer avoid misinterpreting a child's responses to questions?

The three most common misinterpretations involve adults: (a) misinterpreting certain behaviors as indicators of reliability; (b) misinterpreting answers when questions are developmentally inappropriate; and (c) misinterpreting inconsistencies or implausibilities as indicia of veracity.

Be careful not to mistake emotional reactions as indicators of reliability. Emotional reactions associated with certain disorders, such as depression or post-traumatic stress disorder (PTSD), can easily be misinterpreted as insincerity or confabulation. A child who is depressed may be indecisive, pause for long periods before answering questions, or be indifferent ("I don't care."). If a witness waits a long time before answering, you may think he or she is making up an answer. Or if the witness is indecisive, you may think his or her testimony is unreliable. In some cases, these are indicators of psychological distress, *not* honesty.

Similarly, a child suffering from PTSD may go to great lengths to avoid you and the courtroom to avoid any reminders of trauma. Avoidant behaviors, common in persons suffering from PTSD, may make the child appear incompetent for reasons having nothing to do with reliability.

If you believe a child suffers from an emotional or psychiatric disorder, have the child evaluated by a mental health professional. If the child is already seeing a mental health professional, consult him or her to find out what kinds of symptoms the child may show on the stand.

Be careful not to ask questions requiring skills the child has not yet mastered. Do not discount a child's testimony based on a few implausible statements. Children *will* try to answer questions even if they lack the requisite skills. The result may be irrelevant, inconsistent or even bizarre responses. As children try to make sense of the world in terms of their own limited experience, their responses may sound implausible. For example, a child may say the train went by because the dog barked, rather than understanding the reverse to be true. The child is correct about the facts — there was a dog and a train — but has misinterpreted the causal relationship (i.e., the train caused the dog to bark).

At certain stages of development, young children reason illogically, overgeneralizing from one thing to another, assuming causal relations where none exist. A mistake adults often make is allowing a few unbelievable comments (that are to be expected at early stages of causal reasoning) to invalidate the rest of what a child may have to offer. Even descriptions of genuine abuse will include inconsistencies and lack detail depending on the child's stage of development.

What advice can you offer lawyers about the use of leading questions during interviews?

The argument is sometimes made that the interviewer misled the child into false allegations of abuse. In some cases, the argument has merit, especially when the child is very young and precautions have not been taken to create an objective atmosphere, to use nonleading approaches first, to explore alternative hypotheses, and to avoid strongly-worded, accusatory questions. In other cases, when such precautions are taken, and/or the child is older, this argument may carry little weight.

Interviewers face a dilemma. If they limit themselves to open-ended questions ("Is there something you want to tell me?"), some abused children will not disclose the experience for a variety of reasons beyond the scope of our conversation. On the other hand, if interviewers proceed with focused and specific questions, at some point they run the risk of becoming suggestive and distorting children's statements. Which risk is more tolerable? Neither. Interviewers must strive to reduce both false allegations and false denials of genuine abuse to the greatest degree possible, depending on the age of the child and the circumstances of the case.

Open-ended questions do not guarantee accuracy. If too general or vague (Interviewer:"Did he put *something* in your mouth?" Child: "No") they can go sailing over the child's head and result in greater error than specific questions (Interviewer: "Did he take your temperature with a thermometer?" Child: "Yes"). In a study of children's memory for a medical exam, we used these two questions and the more specific question elicited the accurate responses. On the other hand, highly leading questions ("It was John who hurt you, wasn't it?") must be avoided. The merits and dangers of specific questions depend on a host

Confusing Questioning Styles*

Overloaded Questions

Problems often arise when one question contains a number of previously established facts. It is better to rephrase such a question into several short sentences, each with one topic. For example, "When you were with your uncle in the bedroom of the blue house your mom took you to that Sunday, what did he do to you?" should be broken down into several short questions, such as, "Where did your mom take you Sunday?" "Who was there?" What rooms did you go to? "What happened in the bedroom?

Negatives

Negatives that are placed in unusual positions break up and fragment the content of a question. This is confusing to all witnesses, and particularly to young children who may not realize they do not understand. For example, in one case a lawyer asked, "You had a bruise, *didn't* you, on your arm?" Is this question asking "Did you have a bruise? "Did you not have a bruise?" or "Was it on your arm? The child's response could be to any of these three questions.

Changing Topics

Children require transitional comments to signal a change of topic. For example, "Before, we were talking about school. Now I want to ask you some questions about your mother."

Yes/No Questions

Some long and complex questions contain multiple options, yet restrict answers to yes or no (e.g., "Did he push you down and then hurt you?" "Did he use a bat and hit you in the chest?") In such cases, it is impossible to know if the child's yes refers to being pushed, hurt, hit or the use of a bat. Children under eight may respond to one part of the question and may not realize that the answer is interpreted as applying to other parts of the question as well.

Repeated Questions

Children may become confused as to why the same content is being asked about over and over again. They may come to believe that the adult is indicating that the original response was incorrect and change their answer.

*Adapted with permission from Karen J. Saywitz, *Children in Court: Principles of Child Development for Judicial Application*, A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE (ABA Center on Children and the Law 1994). © 1994 American Bar Association. Contact the ABA Service Center to order this publication, 800/285-2221.

of characteristics about the child (e.g., age, temperament), the context (e.g., familiar, accusatory), the event to be recalled (e.g., traumatic, distant past), the interviewer (e.g., supportive, intimidating) and the interview process itself (e.g., repeated questions, multiple interviews, phrasing). A question may be "too" leading in one case and justified in another.

Sometimes developmental limitations can be overcome with judicious use of specific questions that are as nonleading as possible. The consensus among researchers is that :

- children should be interviewed promptly to minimize forgetting and maximize accuracy;
- highly leading questions should be avoided; and
- nonleading approaches should be used first.

Do you have any other advice for lawyers who are involved in interviewing children?

Researchers have not produced a protocol that can be held out as the gold standard by which all interviews should be conducted. Studies have produced guidelines where there is consensus. There is probably more consensus than recent debates in the literature would lead you to believe. However, controversies and inconsistent data do exist and reasonable minds do differ on a few key issues. Due to methodological and ethical limitations, research findings remain silent on many critical questions. We do not have all the answers.

When a child walks into your office, often the choice is between an imperfect interview or none at all. There is no doubt that errors will be made in the honest pursuit of truth. We need to accept the fact that even when interviewers ask all the "right" questions, interviews with young children often fail to meet fully the interviewer's objectives. Relevant and meaningful information may be elicited, but key questions can remain unanswered (especially in a single interview).

Interviewers need to accept the differences between adult and child witnesses. They need to make informed choices on a case-by-case basis about the best methods for managing a child of a given age in a given situation.

Children's statements can rarely be characterized as simply true or false, nor can their behaviors be simply described as competent or incompetent, credible or incredible. Reliability, credibility, and competence are multiply determined. With young children, we do our best to minimize the potential for distortion, maximize the opportunity for the child to give the most reliable and complete report they can, and place the least stress on children possible in the process.

RESOURCES

National Organizations

Contact these organizations for general information on forensic interviewing and upcoming workshops:

- **The American Professional Society on the Abuse of Children (APSAC)**, 332 S. Michigan Ave., #1600, Chicago, IL 60604; 312/554-0166
- **National Center on Child Abuse and Neglect**, P.O. Box 1182, Washington, DC 20013-1182; 202/205-8586.
- **American Prosecutors Research Institute**, 1033 N. Fairfax St., #200, Alexandria, VA 22314; 703/549-4253.
- **National Center for the Prosecution of Child Abuse**, 99 Canal Center Plaza, #510, Alexandria, VA 22314; 703/739-0321.

Background Reading

- John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (2d ed. 1992). Cost: $220 (2 vol. set). To order, contact John Wiley & Sons, 800/225-5945.
- Karen Saywitz & Dianna Elliot, *Interviewing Children in the Forensic Context* (forthcoming 1997). When released, order from the American Psychological Association, 750 1st St., NE, Washington, DC 20002, 202/336-5500.
- Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*. Cost: $34.95. To order, contact the ABA Customer Service Center, 800/285-2221

Adults questioning children in a courtroom setting often use phrasing that is too complex to elicit accurate responses.

Children in the courts: when language gets in the way

Anne Graffam Walker

When children and the justice system in this country collide, language gets in the way.

Adults ask questions, children respond, and based on the language of the response —or lack of one—judgments are made until a conclusion is reached: This child's statements are (in)consistent; that child is (not) telling the truth; this child is (in)competent in the eyes of the law.

From each conclusion flows a decision that affects the lives of the children and the lives of the adults around them. Too often, however, it is a flawed decision, caused by our ignorance of the complexity with which we adults use the one tool without which our legal system could not exist: language.

Complexity in our language is caused by, among other things, use of vocabulary (unfamiliar words or phrases); word order (Did you then come home?); negation; numbers of ideas contained; syntactic methods of combining the ideas (embedding, relative clauses); and ambiguity of either words (pronouns with no clear referent) or utterance (John has painted furniture). Any one of these is sufficient to render a question or utterance incomprehensible (sometimes even to the speaker) and therefore useless for gaining or transmitting accurate information.

Adults who have reached their highest level of linguistic competence have trouble when confronted with one or more of the above. Children, whose language and cognitive abilities are still developing, should not be expected to succeed where adults fail. With some rare exceptions, that fact remains unrecognized on all levels of our justice system.

Sometimes we get away with that lack of recognition. Sometimes we don't. And when we don't, that lack of recognition can lead child, adult, and the legal system astray, as the following cases illustrate.[1]

Case 1: 'in'/'on'

Prepositions are such an integral part of our speech that we use them unconsciously. We generally begin to acquire them at about the age of two to two and a half, and for the normally developing child, the prepositions "in" and "on"—significant words in sexual abuse cases—are the first to be used with regularity.[2]

The facts. A nursery school child's explanation for her unusual behavior in not joining the other children at play on the floor was, "My bottom hurts. Daddy put his hand in my bottom." The police were called, and on the basis of the child's statement to the investigating officer, the father was charged with sexually abusing his daughter.

The next person to interview the child was a psychologist, who noted some inconsistency in her use of prepositions. Based on a simple test he devised, he dis-

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covered that what the child had meant was Daddy had "put" his hand *on* her bottom. What she had described as "putting," however, fell more into the category of "beating." She was, in fact, badly bruised, she did hurt, and the father was guilty—but not of the sexual abuse charged.

Comment. Inconsistency in the use of "in" and "on" can be expected in normally developing children who are younger than two and a half. The fact that this child was four years old is a strong indicator of the nature of language acquisition: It is not an all-or-nothing affair. Children acquire a rule of grammar, misapply it ("my foots hurt"), perhaps misapply it again ("my feets hurt") before finally gaining command.[3] And while the order of acquisition of linguistic forms hardly varies, the age and rate of acquisition vary widely from child to child.[4]

Had either of the child's first two questioners been alert to those facts, the outcome would have been different, and an inappropriate charge, with all its ramifications, could have been avoided.

Case 2: 'swear'

Only 5 of our 50 states have statutory provisions that require children to demonstrate competency before they can testify in a court of law.[5] Nevertheless, there is an understandable inclination of all questioners of children to want to know if the child before them has the ability to experience, recall, and report truthfully an event; to understand the concepts of truth and lie; and to be aware of the consequences of lying.

As a result, regardless of the statutory provisions or lack thereof, children who appear in court—in an odd reversal of ritual—are regularly asked first to "swear" to tell the truth, and then are asked in one form or another if they know what "truth" is. It might be better to find out first what they think "swear" means.

The facts. A Canadian court was trying a man who, after three attempts, had succeeded in setting the young daughter of his girlfriend on fire. The testimony of the child, who was the only witness other than the defendant, was crucial. But, in court, she refused to "swear" to tell the truth. As a result, her testimony was barred, and the judge dismissed the case.

Comment. Children do not know that everyday words often take on a specialized meaning in legal contexts. Consider what children think when they hear the word "parties." Outside a courtroom, to "swear" is to say bad words; to say bad words is to get into trouble; to get into trouble is to be punished—and why would any child, already so damaged, want that to happen?

Had Queen's counsel prepared the child for the kind of language and tasks she would face during the proceedings, or had the judge been aware of the implications of the word "swear" for the child and asked her instead, "Will you promise me that you will tell the truth?"[6] her testimony most probably could have, and certainly should have, been heard.

Case 3: 'tomorrow'

Children have a lot of "time" words at their disposal. In this society, time is almost a palpable concept, and they hear us speak of it in many ways. "In a minute"; "just a little while longer"; "three months ago"; "too late"; "when . . . ." Children use these words appropriately in sentences and questions (from an unusual two-and-a-half-year-old: "Mommy, what time is it?"), but not until they are about 10 years old do they understand the concept behind them (a few minutes later: "Mommy, what is time?").

Three common time words that sound simple but require the ability to recognize that they relate only to the time of utterance are "yesterday," "today," and "tomorrow."[7] Children generally are accurate as to what "today" means, but "yesterday" is, to most children under seven, simply something that is over and done with, and "tomorrow" hasn't come yet. They know, however, that those words are possible responses to questions that ask about "when."

The facts. "Do you know what men and boys do to you? They make you open your mouth real wide and then they put their peanuts in." That statement from a precocious three-year-old about her abuse by five juveniles led to an investigation by law enforcement, social workers, and doctors.[8]

The account she gave to her multiple interviewers was credible, was complete with names and descriptions of her attackers, and was supported by medical evidence. The child, however, was unable to pinpoint the date. As one of the officials who interviewed her is reported to have said, "You ask her *when the last incident occurred*, and she will answer 'Tomorrow.'" Given that response (and the unexpressed but general distrust of three-year-olds as sources of information), he expressed concern that prosecuting any of her abusers would be successful.

Comment. If, in fact, that question was put to the child in those words (a probability rather than a possibility), it is not surprising that the only thing she recognized about the question was that a time word was expected in reply. The problem was not hers; it was the adult's.

First, the three-year-old was asked an explicit time question, which children that age are not equipped to handle.

Second, the time question was asked in an inappropriate way. "When" questions are abstract and do not supply the concrete context young children need. Even very young children are capable of encoding an event they experience and later decoding it in a legally satisfactory way *if* questioned in age-appropriate ways.[9]

"What" and "where" questions can often supply information that can give clues as that to the time frame of the event. "What did you have on?" can give a clue to season and time of day. "Where was Mommy?" can elicit information that could fix an incident in time.

And, third, the child's "tomorrow" was taken at face value. Had the adult been aware of the inappropriateness of that question (including the use of legal-speak rather than simple words), the concern over prosecution of what appeared to be a gang-rape of this three-year-old could well have been overcome.

Cases 4 and 5: strings of words

The next two examples illustrate how stringing many familiar words together can complicate the meaning of a sentence—especially for children. The examples have been taken from *Sensitively Assessing Children's Testimonial Compe-*

tence: Final Report to the National Center on Child Abuse and Neglect.[10] Both questions in the examples were asked in courts of first jurisdiction during the part of voir dire testing children's competence to distinguish between the truth and a lie.

Question the state's attorney asked a three-year-old

Q. If you crossed the street after your mommy told you not to [cross the street], do you think you'd get in trouble?

A. [Shakes head] I did not.

Finding of the trial court: Child is incompetent to testify; reversed on appeal.

Comment. The question asked was far too complex for a three-year-old.

The question the court asked contained

- three verb forms which switch from active voice past tense ("crossed," "told"), to active voice present tense ("think"), to future conditional contracted tense ("'d get"), which although in the active voice, is semantically passive ("you" is not an agent or actor, but the recipient of an action by "Mommy"). Young children understand best simple statements in the active voice that maintain a consistent verb tense.
- an elided verb phrase (not to [cross the street]). Elided forms permit ambiguity. Ambiguity is not a characteristic that promotes clear communication with anyone, especially not with children.

The question the state's attorney asked is a hypothetical. Many children this age have difficulty in understanding the word "if"(which represents conditionality), and generally do not produce "if" statements (If you want, we can buy a puppy) much before the age of four.

Some younger children can understand simple hypotheticals if they represent a familiar situation and follow the "If X, Y" form, in which Y is one simple clause (If Grammy gives you a present, *what do you say?*).[11] However, if the situation is unfamiliar, or the premise seems implausible or undesirable, three-year-olds will refuse to participate in the hypothetical at all.[12]

The question is a hypothetical that

- has five propositions—"you crossed the street," "after your mommy told you," "not to [cross the street]," "do you think," "you'd get in trouble." This many propositions in a hypothetical places much too heavy a load on working memory for a young child.
- incorporates the word "after." "Before" and "after" clauses and prepositional phrases ("after lunch") are problematic for preschool children[13] and, under stressful circumstances, for children as old as seven. The difficulty can be compounded, as it was in this question, by clauses that don't follow the order in which the actions took place or were proposed to have taken place.[14]

Given the levels of complexity of this seemingly simple question, it is not surprising that the child responded with an ambiguous denial. Denial of what is not clear (that she crossed the street? thought she'd get in trouble? did get in trouble?).

Question the court asked an eight-year-old at trial

Q. Do you ever not tell your mother the truth?

A. No.

Finding of the trial court: Child is competent to testify. Reversed on appeal. The child should have been found incompetent to testify.

Comment. This example is taken from a long line of questions first asked by the prosecutor during preliminary examination and by the court during voir dire. In the preliminary hearing, the child said "no" to the questions "Do you know what it means to tell the truth?" and "Well, do you know the difference between the truth and a lie?" The boy, however, when asked the question "Well, when you tell the truth, what are you actually saying?" responded, "You say what you saw and what you know," and otherwise demonstrated an awareness of the difference between truth and lies and of an obligation to tell the truth.

During the court's examination, the boy indicated he didn't know what would happen if he didn't tell the truth (no context given to him as to when or where) and he didn't know if he would be punished (for what? not supplied in the question). In response to a question about always telling the truth to his mother, he said "yes."

On cross-examination, he did not know what the word "oath" meant (not a word in most children's vocabulary) and, once again, did not know what would happen to him "if you swore to tell the truth and you didn't tell the truth." Again, no context as to time or place was given.[15]

The problem with the question asked by the court, however, was not related either to lack of context or to the difficulty inherent in being asked to explain the concept of truth and lies, which is a late-acquired skill.[16] The problem was that the question was complex in its syntax because of

- incorporation of syntactic negation ("not"), and its placement between the subject and the main part of the verb phrase ("tell"). Such a construction inevitably generates ambiguous responses.

A "no" response (using a simpler question, "Do you not love your mother?") could mean either *disagreement* with the proposition (You do not love your mother), as in "No, [it isn't the case that I don't love my mother; I *do* love my mother.]"; or *agreement* with the proposition, as in "No, [that's right; I *don't* love my mother.]."

A "yes" answer to such a question is equally ambiguous, meaning either "Yes, [that's right, I don't love my mother.]" or "Yes, [I *do* love my mother; you're wrong.]." The ambiguity results from the separation of the auxiliary ("do," in this case) from the negative ("not"). In everyday speech, "do" and "not" appear as a contraction: ("*Don't* you love your mother?"), a question form that expects the answer "Yes [I do]," and treats "No [I don't]" as an unexpected exception.

Adults are uncertain as to how to treat this kind of question. It is unreasonable to expect children to be able to do so.

- the addition of the intensifier "ever." It compounds the complexity of the question and results in one that is impossible to respond to unambiguously. Adults would probably ask for clarification in a form that expresses the implicit intent of the question: "Do you mean do I ever lie to my mother?"

Given their general inability to recognize incomprehensible questions, children, however, would be more likely to respond to the form of the question, supply whatever interpretation to it they could, and respond with an ambiguous yes or no.

For all the reasons outlined above, this is a question that should *never* be asked of

a child—or an adult—if accurate communication is the goal.

Reaching the goal

Children of all ages have many strengths and many capabilities and with age-appropriate questioning can tell us what they know. But we can't learn what age-appropriate questioning is without revisiting the language acquisition process. For that there is only one solution: education.

For professionals who question children, education is a must. Without it, we run the risk of continuing to deny everyone—adult and child—the simple right to understand the language we use and the equally critical right to be understood. In denying those rights, we simply perpetuate errors that our ignorance has already cost us. □

Notes

1. Examples one and two are from personal communications between the author and a detective and an appellate judge, respectively.

2. ROGER BROWN, A FIRST LANGUAGE: THE EARLY STAGES (1973).

3. Peter A. de Villiers & Jill G. de Villiers, *Language Development, in* DEVELOPMENTAL PSYCHOLOGY: AN ADVANCED TEXTBOOK 337-481 (Marc H. Bornstein & Michael E. Lamb eds., 1992).

4. Roger Brown, *Development of a First Language in the Human Species, in* CHILD LANGUAGE: A READER 75-80 (Margery B. Franklin & Sybil S. Barten eds., 1988).

5. Four of the five states are Idaho, Illinois, Michigan, and Texas. (DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 57 (2d ed. 1992).) The fifth state, Pennsylvania, has case law holding that a witness under 14 years of age must be questioned closely by a judge in order to make the determination of competency. Virginia has no specific rule governing competency of children. As of 1975, all witnesses appearing in federal courts are presumed competent.

6. This language is strongly recommended. Studies by Thomas D. Lyon and Karen Saywitz have shown that young children perceive the word "will" as placing a stronger obligation on them to do something than the word "promise" does. A fuller discussion of the use of "promise" can be found in Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective.*

7. JILL G. DE VILLIERS & PETER A. DE VILLIERS, LANGUAGE ACQUISITION 121 (1978).

8. Nancy Lewis, *3-Year-Old Says She Was Raped by 5 Juveniles*, WASH. POST, Apr. 18, 1995, at C1.

9. Robin Fivush, *Developmental Perspectives on Autobiographical Recall, in* CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 1-21 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

10. KAREN SAYWITZ & THOMAS D. LYON, SENSITIVELY ASSESSING CHILDREN'S TESTIMONIAL COMPETENCE: FINAL REPORT TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT (1997).

11. LUCIA A. FRENCH & KATHERINE NELSON, YOUNG CHILDREN'S KNOWLEDGE OF RELATIONAL TERMS: SOME IFS, ORS, AND BUTS (1985).

12. Judy Snitzer Reilly, *The Acquisition of Temporals and Conditionals, in* ON CONDITIONALS 309-31 (Elizabeth Closs Traugott et al. eds., 1986).

13. *See* FRENCH & NELSON, *supra* note 11.

14. HERBERT C. CLARK & EVE V. CLARK, PSYCHOLOGY AND LANGUAGE: AN INTRODUCTION TO PSYCHOLINGUISTICS (1977).

15. I am indebted to Thomas D. Lyon of the University of Southern California Law School for supplying me with the details given here.

16. SAYWITZ & LYON, *supra* note 10.

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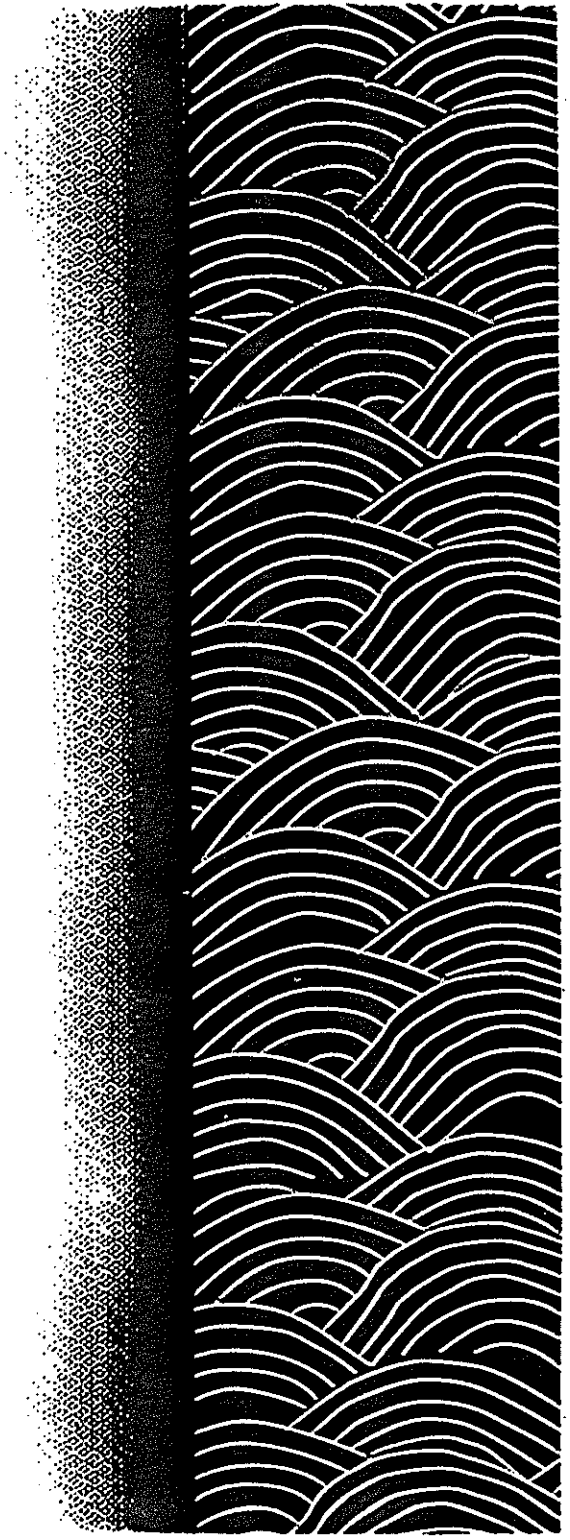

Handbook On Questioning Children

A Linguistic Perspective

2nd Edition

Anne Graffam Walker, Ph.D.

ABA Center on
Children and the Law

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I. Introduction

In this Introduction, I want to take the personal approach, and address myself directly to everyone who picks up this book. It is, as the title indicates, a book about the linguistic complexities of questioning children, and although its primary intended readers are lawyers and judges, all interviewers of children should find it of some benefit. I have written it because I am deeply concerned by the fact that children in our courts today are being denied a right that should belong to everyone who enters the legal system: to have an equal opportunity not only to understand the language of the proceedings, but to *be understood*. This is a situation that puts not just children, but all those who stand both with and against the child, in jeopardy.

A glance at the Table of Contents may make you feel like putting this book in the stack of all the others that you intend to read someday but probably never will. So because I think that what is in this book is very important for you to know, I am going to take the somewhat unusual step of gathering together in the Introduction a few facts about children and their language that you can read quickly to get the flavor of what follows. It is my hope, of course, that at some point you will read every word, because anything you can learn that will help you level the playing field for children in our courts will eventually help level the playing field for all of us.

Some Facts About Children

To start you off, here is something that you should know. There is no doubt whatever about the following:

1. Children as young as 2 and 3 can recall and report past experience accurately (Hewitt, 1999; see Peterson, 1990, for a review)
2. Children as young as 3 have testified competently and credibly in court, (e.g., *Strickland v. State* (Alabama, 1988); *Macias v. State*, (Texas, 1989); *State v. Brovold*, (Minnesota, 1991); *State v. Ward*, (Ohio, 1992)).
3. **Even very young children can tell us what they know if we ask them the right questions in the right way.**

You will probably not be questioning children as young as 2 and 3 very often. But as children enter our court system in ever-increasing numbers, you will be seeing more and more preschool children, more school-age children, and more adolescents. This book focuses primarily on the under-10 group, but what follows is a thumbnail sketch of a few characteristics of each group. As you read through them, please keep in mind that they have been chosen not to represent weaknesses in children's ability to process adult language, but to point the way to the kind of questioning that will build on children's strengths in telling us what we need to know.

Preschoolers:

1. Use and interpret language very literally. A typical example: Asked if she could "read" an eye chart, the child responded, "No! It doesn't make words."
2. Do not handle abstractions well. Preschoolers are particularly ill-equipped to discuss with you the difference between truth and lies. They do better with concrete examples that ask them to *demonstrate* rather than *articulate* their awareness of these two very abstract concepts.
3. Aren't good at collecting things into adult-like categories. This can make it hard for them to respond to questions that ask them if "anything *like this*" happened before.
4. Use words for time, distance, kinship, size and so on, long before they understand their meaning.
5. Define words only in the simplest, action-oriented ways. A "mother" may be, "She takes care of me."
6. Have difficulty with pronoun reference. Keeping track of your "he's," "we's," "they's," "that's," and whatever it is that these pronouns refer to is not something they are good at.
7. Have difficulty with negatives. Even simple negatives like "Did*n't* you see the car?" may confuse them. "Did you *not* see the car?" is sure to.
8. *Tend* to supply a response to questions even if they have no knowledge. One reason for that is that in English, questions and answers form an indivisible pair. Answers don't happen without a question first. And if a question is left unanswered, something is perceived to be wrong. Most children learn that very early.

   The answer children supply is often (but not always) "Yes" for a number of reasons. One, in this society, it is a valued answer which indicates cooperation. Two, it is often perceived to be the one that the adult wants, particularly in response to a tag question in which the tag is negative (e.g., "You like it, *don't you*?"). And three, presented with a short restricted choice question ("Was it red *or* blue?"), children may respond to the *form* of the question, and simply reply "Yes," rather than explicitly picking one option or rejecting both.
9. Do best with simple sentences of Subject, Verb, Object. No frills.
10. Tend to focus on only one aspect of a situation or question at a time. Asking complicated questions that contain numbers of ideas is fruitless.
11. Don't organize events in their minds in an adult way. They often leave out settings, descriptions, chronology, motivations, and emotions in the telling of some past event.

12. Are still in the process of *acquiring* language. Don't be fooled by a child who sounds mature. But don't dismiss as incompetent one who doesn't seem to follow your questions. Chances are, it's the language of the question that's the problem.
13. Usually don't know that they don't understand something. So asking them, "Do you understand?" is probably a waste of breath.
14. Believe in general that adults speak the truth, are sincere, and would not trick them.

School Age, roughly 7-10:

1. Still may have difficulty in handling abstract concepts.
2. Still have problems processing complex questions and complex verb phrases that express, for instance, the future as seen from a perspective in the past (e.g., *"Were you to have been taken* to school that day?")
3. Still make errors with passives, the difference between "ask" and "tell," and with pronoun reference.
4. Are still easily confused by complex negation. Multiple negatives such as "You don't deny you did it, do you?" will probably go right over their heads.
5. Are still not mature at organizing in an adult-satisfactory way the details of narratives.
6. Are still unequipped to deal with adult insincerity such as sarcasm, irony, and so on.
7. May still believe that adults in general speak the truth.

Adolescents, roughly 11-18:

1. May or may not have acquired adult narrative skills.
2. Don't understand time as both a historical concept (one that goes on and on without them) and a day-to-day concept that affects their lives. For most adolescents, what concerns them is the here-and-now.
3. Still have difficulty with complex negation. Questions that are packed with negatives, such as "It's not untrue that you forgot, is it?" are hard to decipher. This problem continues on into adulthood for most of us.
4. Are often confused by linguistic ambiguity such as is found in newspaper headlines, some ads, metaphors, idioms, proverbs, and jokes.
5. Are likely to lose track of long, complex questions.
6. Are reluctant to ask for clarification of a question or acknowledge that they don't understand.
7. A lot of teens, particularly the under-educated, under-parented, unattached (and developmentally delayed) children remain stuck in the School Age stage above.

Although this is a book devoted primarily to alerting questioners of young children to stages of language and cognitive development that can create misunderstandings, a note might be in order here about the status of adolescents in our courts. Their linguistic and cognitive development is virtually complete, but that fact often does not work in their favor. Adults have a higher expectation of adolescents' ability to understand the convoluted language typical of court proceedings, and improbable responses to questions such as "How many times did it happen?" A: "400," are more likely to be heard as lies than as metaphors. Adolescents are, in fact, in some ways at greater risk than young children of misjudgment, and we would do well to keep that in mind.

Some Suggestions For Your Questions

And now for some suggestions for simplified questioning that will get more accurate answers from all three age groups above:

1. DO use simple, common, everyday English words and phrases. "Attorney," "Court," "deny," "subsequent,"

"take the witness stand," "at that point in time" and the like do not fall into that category.

2. DO put names and places back in where pronouns once lived. Ask, "What did Albert say?" instead of "What did *he* say?" Ask, "Were there a lot of people in the kitchen?" instead of "Were there a lot of people *there*?"
3. DO stay away from negatives. Phrase your questions positively, whenever possible.
4. DO use questions and comments that keep the number of ideas in them to a minimum. The younger the child, the smaller the number. One main idea is good.
5. DO start your questions and comments off with the main idea. "Did the bell ring when you were eating?" instead of, "When you were eating, did the bell ring?"
6. DO remember: This is a child. Children are not short adults. Try to listen to the proceedings with a child's ears. You might be surprised at what you hear.

A Final Introductory Comment

Q. Who's Tim?

A. He's my advocate.

Q. What's an advocate?

A. Someone who prays and has sex with you (Baladerian, 1993).

By taking a step too many of us fail to take – checking on the child's understanding of a word he used – this interviewer avoided the most critical error that adults make in questioning children: assuming that children use, process, and understand language in the same way we do. This is a serious mistake that can lead to 1) not formulating age-appropriate questions, 2) not properly interpreting children's responses to our questions, thereby 3) missing information that may be vital to the case, or 4) creating "information" out of a misinterpretation.

There is more, of course, to the successful questioning of children than the appropriate use of language. But language is the *essential* tool: our courts cannot function without it. And the children who come into our courts cannot function adequately without our willingness to speak *their* language. The responsibility for clear communication has to be ours. Until we accept that responsibility, until we learn how the language of children and the language of adults differ, we will not be doing our jobs as effectively, or fairly, as we can.

And now, I invite you to turn the page.

Appendix A: Checklist for Interviewing/Questioning Children

Developed by Anne Graffam Walker, Ph.D.
Revised February 1994

I. Framing the Event

1. Did I tell the child my name and what my job is—in non-technical words?
2. Did I help the child become familiar with the surroundings of the interview?
3. Did I tell the child the purpose of our talk, and why it is important, and what will happen afterward?
4. Did I give the child a chance to ask me questions about this talk? Did I try to establish a common vocabulary for the things we talk about? Was I listening to the kind of words and sentences that the child used?

II. Using Clear Language

5. Did I use easy words instead of hard ones? (Do I know what a "hard" word is?)
6. Did I avoid legal words and phrases?
7. Did I use words that mean one thing in everyday life, but another thing in law?
8. Did I assume that because a child uses a word, he or she understands the concept it represents?
9. Was I as redundant as possible? That is, did I use specific names and places instead of pronouns (like "he" and "she") and vague referents (like "there" and "that")?

III. Asking the Questions

10. Did I keep my questions and sentences simple? Did I try for one main (new) thought per utterance?

11. Did I avoid asking "DUR-X" questions? [Questions that begin, "Do you remember," followed by one or more full propositions.]
12. When I shifted topics, and when I moved from the present to the past or vice versa, did I alert the child that I was going to do so?
13. Did I give the child the necessary help in organizing his or her story?
14. Did I avoid asking the child about abstract concepts, like, "What is truth?" Did I choose instead to give the child everyday, concrete examples and let him or her *demonstrate*, rather than *articulate* knowledge of truth and lies, right and wrong?
15. Did I use as few negatives as possible in the questions I asked?

IV. Listening to the Answers

16. Were the child's *responses* to my questions, or *answers* to my questions? Am I sure?
17. If the child's answers were inconsistent, did I ask myself if:
    a. I had asked the exact same question repeatedly?
    b. I had changed the wording of a question I had asked before?
    c. I was forgetting that children can be very literal in their interpretation of language?
    d. The child's processing of language might not be as mature as mine?

V. Global Checks

18. Did I stay in the child's world by framing my questions in terms of the child's experience?
19. Did I take the child's understanding of language for granted?
20. Was I listening to my *own* language, my *own* questions
21. Did I ask myself before I began: Am I gathering information, or am I doing therapy?

Appendix B: A Few Suggestions for Questioning Children

Developed by Anne Graffam Walker, Ph.D.
Revised March 1999

General precepts:

1. Reduce the processing load that children must carry: aim for simplicity and clarity in your questions. If the child uses simple words and short sentences, so should you.
2. Be alert for possible miscommunication. If a child's answer seems inconsistent with prior answers, or doesn't make sense to you, check out the possibility that there is some problem 1) with the way the question was phrased or ordered, 2) with a literal interpretation on the part of the child, or 3) with assumptions the question makes about the child's linguistic/cognitive development or knowledge of the adult world.

Some specifics:

1. Break long sentences/questions into shorter ones that have one main idea each.
2. Choose easy words over hard ones: use Anglo-Saxon expressions like "show," "tell me about," or "said" instead of the Latinate words "depict," "describe," or "indicated."
3. Avoid legal jargon, and "frozels" (my term for frozen legalisms) like "What if anything," "Did there come a time."
4. It is important that you and the children use words to mean the same thing, so run a check now and then on what a word means to each child. Although children generally are not good at definitions, you can still ask

something like, "Tell me what you think a ____ is," or "What do you do with a ___?" "What does a ___ do?" Don't expect an adult-like answer, however, even if the word is well-known. The inability to define, for example, "wind" does not mean that the person does not know what the wind is. Definitions require a *linguistic* skill.

5. Avoid asking children directly about abstract concepts like what constitutes truth or what the difference is between the truth and a lie. In seeking to judge a young (under 9 or 10) child's knowledge of truth and lies, ask simple, concrete questions that make use of a child's experience. Ex: I forgot: how old are you? (Pause) So if someone said you are ___, is that the truth, or a lie? [Young children equate truth with *fact*, lies with *non-fact*.]
6. Avoid the question of belief entirely (Do you believe that to be true?).
7. Avoid using the word "story." (Tell me your story in your own words.) "Story" means both "narrative account of a happening" and "fiction." Adults listening to adults take both meanings into consideration. Adults listening to children, however, might well hear "story" as only the latter. "Story" is not only an ambiguous concept, it can be prejudicial.
8. With children, redundancy in questions is a useful thing. Repeat names and places often instead of using strings of (often ambiguous) pronouns. Avoid unanchored "that"'s, and "there"'s. Give verbs all of their appropriate nouns (subjects and objects), as in "[I want you to] Promise *me* that *you* will tell *me* the truth," instead of "Promise me to tell the truth."
9. Watch your pronouns carefully (including "that"). Be sure they refer either to something you can physically point at, or to something in the very immediate (spoken) past, such as in the same sentence, or in the last few seconds.
10. In a related caution, be very careful about words whose meanings depend on their relation to the speaker and the immediate situation, such as personal pronouns (I, you, we), locatives (here, there), objects (this, that), and verbs of motion (come/go; bring/take).
11. Avoid tag questions (e.g., "You did it, *didn't you*?"). They are confusing to children. Avoid, too, Yes/No questions that are packed with lots of propositions. (Example of a bad simple-sounding question, with propositions numbered: "[1] Do you remember [2] when Mary asked you [3] if you knew [4] what color Mark's shirt was, and [5] you said, [6] 'Blue'?" What would a "Yes" or "No" answer tell you here?) It does not help the factfinder to rely on an answer if it's not clear what the question was.
12. See that the child stays firmly grounded in the appropriate questioning situation. If you are asking about the past, be sure the child understands that. If you shift to the present, make that clear too. If it's necessary to have the child recall a specific time/date/place in which an event occurred, keep reminding the child of the context of the questions. And don't use phrases like, "Let me direct your attention to." Try instead, "I want you to think back to...," or "Make a picture in your mind ...," or "I'm going to ask you some questions about...."
13. Explain to children why they are being asked the same questions more than once by more than one person. Repeated questioning is often interpreted (by adults as well as by children) to mean that the first answer was regarded as a lie, or wasn't the answer that was desired.
14. Be alert to the tendency of young children to be very literal and concrete in their language. "Did you have your *clothes* on?" might get a "No" answer; "Did you have your *p.j.'s* on?" might get a "Yes."
15. Don't *expect* children under about age 9 or 10 to give "reliable" estimates of time, speed, distance, size, height,

weight, color, or to have mastered any relational concept, including kinship. (Adults' ability to give many of these estimates is vastly overrated.)

16. Do not tell a child, "Just answer my question(s) yes or no." With their literal view of language, children can interpret this to mean that only a Yes or a No answer (or even "Yes or No"!) is permitted — period, whether or not such answers are appropriate. Under such an interpretation, children might think that answers like "I don't know/remember," and lawfully permitted explanations would be forbidden.

Appendix C: Some Basic Sentence-Building Principles For Talking to Children

Developed by Anne Graffam Walker, Ph.D.
Revised March 1999

1. Vocabulary

- Use words that are short (1-2 syllables) and common.
  Ex: "house" instead of "residence"
- Translate difficult words into easy phrases.
  Ex: "what happened to you" instead of "what you experienced"
- Use proper names and places instead of pronouns.
  Ex: "what did Marcy" do? instead of "what did she do?"; "in the house" instead of "in there"
- Use concrete, visualizable nouns ("back yard") instead of abstract ones ("area").
- Use verbs that are action-oriented.
  Ex: "point to," "tell me about," instead of "describe"
- Substitute simple, short verb forms for multi-word phrases when possible.
  Ex: "if you *went*" instead of "if you *were to have gone*"
- Use active voice for verbs instead of the passive.
  Ex: "Did you see a doctor?" instead of "Were you seen by a doctor?"
  [Note: One exception: the passive "get" ("Did you get hurt?"), which children acquire very early, and is easier to process than "Were you hurt?"]

2. **Putting the words together**

- Aim for one main idea per question/sentence.
- When combining ideas, introduce no more than one new idea at a time.
- Avoid interrupting an idea with a descriptive phrase. Put the phrase (known as a relative clause) at the end of the idea instead.

  Ex: "Please tell me about the man *who had the red hat on*" instead of "The man *who had the red hat on* is the one I'd like you to tell me about."
- Avoid difficult-to-process connectives like "while" and "during."
- Avoid negatives whenever possible.
- Avoid questions that give a child only 2 choices. Add an open-end choice at the end.

  Ex: "Was the hat red, or blue, or some other color?"

BOTTOM LINE: SHORT AND SIMPLE IS GOOD.

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C

Fordham Law Review
March, 1996

*1505 THE ROLES AND CONTENT OF BEST INTERESTS IN CLIENT-DIRECTED LAWYERING FOR CHILDREN IN CHILD PROTECTIVE PROCEEDINGS

Jean Koh Peters [FNa]

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*1507 Introduction

LAWYERS for children in child protective proceedings in the United States must reconceive their role and their responsibilities. While lawyers for juveniles in delinquency and quasi-criminal matters have been understood, since In re Gault [FN1] in 1967, to provide traditional legal representation for their clients, a lawyer for a minor in a child protective proceeding has generally been expected to play the role of guardian ad litem with respect to his clients. As guardian ad litem, the child's lawyer determines the child's best interests, and represents those interests through advocacy and testimony before the court.

The book Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, of which this Article forms two chapters, reviews, rejects, and replaces that guardian ad litem role. Through historical, [FN2] statutory, [FN3] and ethical [FN4] analysis, the book demonstrates that the guardian ad litem role for lawyers for children has outlived its historical usefulness. Because it requires lawyers to make decisions which they are not qualified to make, and because it deprives *1508 children of the traditional competencies of a good legal representative, the guardian ad litem role doubly disadvantages child clients and should be abandoned.

The book thus tries to answer the central question facing lawyers for children: How do lawyers for children represent children in a lawyerly way, one that is deeply respectful of the individuality and unique perspectives of the client? I recommend that lawyers for children be guided in their role by the letter and spirit of Model Rules of Professional Conduct ("Model Rules") Rule 1.14, which provides:

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a) When a client's ability to make adequately considered decisions in connection with the representation 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.

b) 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 adequately act in the client's own interest. [FN5] In Chapter Four, I argue that Rule 1.14, despite its broad and flexible language, offers useful guidance to the lawyer for children. The child's attorney can understand the rule in terms of three practical defaults for action in his representation of his client. These defaults are:

1. the relationship default -- the lawyer must meet and get to know his client.

2. the competency default -- the lawyer should initially presume some level of competency for his client on each issue in the representation in which a client's point of view would ordinarily be sought.

3. the advocacy default -- the lawyer should initially attempt to advocate for the position expressed by his client. The lawyer may deviate from these default positions only when independent evidence, that is, evidence not arising exclusively within the lawyer-client relationship, such as psychological, educational, and psychiatric evaluations, demonstrate that the default position is erroneous, and that deviation from the default position would clearly benefit the child.

Without a consensus about these default positions, the danger in the discretion inherent in Rule 1.14 lies in the following scenario. In traditional lawyer-client relationships, lawyers are constrained to follow the wishes of their clients when they are convinced that those wishes are based on information and thorough legal counseling. The lawyer may not override those wishes, even if he is convinced that *1509 they are wrong-headed. Clients, not lawyers, set the objectives of their legal representations. [FN6]

The danger arises when the lawyer for a child or a person with a disability takes Rule 1.14(b) as a license to overrule a client's stated wishes, simply because the lawyer disagrees with the client's well-counseled decision. In this undesirable scenario, the lawyer would retain the final trump card in any decision-making process. If the client, after careful counseling, reaches the decision that the lawyer favors, the lawyer can congratulate herself for operating under Rule 1.14(a) and retaining a clear conscience. If the client, after careful counseling, reaches a decision that the lawyer thinks is foolish and that the lawyer has advised the client is foolish, the lawyer can use that decision as evidence for her "reasonable" belief that the "client cannot adequately act in the client's own interest" and represent what the lawyer considers to be the "right" decision rather than the client's stated desires. [FN7]

Because this kind of circular, lawyer-centric thinking epitomizes the inadequacies of the guardian ad litem model and fundamentally excludes the child client from the representation, this profession must reject it. The central theme of the defaults is this: a lawyer for children should start by trying to have a conventional professional relationship with her client. Only after the lawyer has determined, through independent evidence and her own observations, that crucial elements of the conventional lawyer-client relationship cannot be maintained, should the relationship be modified.

To be sure, a lawyer for children must acknowledge that, for many of her clients, these defaults will not hold. I firmly believe, and the book is designed to demonstrate, however, that lawyers can and must individualize every representation, in a way that allows the maximum possible participation of the client so that the representation reflects the uniqueness of each child client.

The conceptual change that I am suggesting may be understood in the following way. Posit a spectrum in which a fully competent, involved, adult client contributes 100% to his representation -- by providing information, listening to counseling, providing direction for the representation, and expressing opinions about substantive and procedural choices to be made. Traditional thinking about lawyering for anything but this fully competent client suggests that

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competency is a light switch -- on or off: if the client cannot contribute 100%, the client *1510 should not be expected to contribute at all. [FN8] At that point, the lawyer is free to determine the goals and methods of representation with total discretion. [FN9]

I believe, however, that every client can contribute some amount to his lawyer's representation. Even the newborn child evinces a personality, a level of health, physical characteristics, a gestational and birth history, and a family context and history that distinguishes her from the next newborn client. [FN10] While this uniqueness may provide, perhaps, only eighteen or twenty-six percent of what the lawyer requires to determine how to represent the child, the lawyer's representation must reflect this contribution, and remain true to its individuality. 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. The lawyer must strive to incorporate every percentage of the client's contribution into the representation. Thus, I would suggest that a lawyer whose client can contribute thirty percent to the representation, but who assumes that the client can only contribute fifteen percent, is failing to represent her client to a significant degree. [FN11]

*1511 Of course, these percentages are artificial and imprecise, but they are useful to conceptualize what lawyers for children already know. In fact, child clients are unique individuals from the day that they are born. In practice, however, especially high-volume, low-paid practices, client representations have had a disturbing cookie-cutter sameness. We assume a great deal about our clients without getting to know them, we slot clients whom we have just begun to represent into categories, and we participate in extraordinarily important decisions in the child's life with extraordinarily little information. This Article attempts to outline the concrete steps a truly individualized representation requires, so that the sophistication of our representation of child clients can reflect the gravity of the family decisions in that we participate.

To double check the lawyer's actions and their harmony with Rule 1.14, Chapter Four of Representing Children also sets forth the following seven questions to keep lawyers for children honest:

(1) In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?

(2) Does the child understand as much as I can explain about what is happening in his case?

(3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?

(4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

(5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?

(6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?

(7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

These questions memorialize my concern that, when lawyers are asked to exercise broad discretion over their client's lives, filling in, for example, the seventy percent that the infant client cannot provide to the representation, adult concerns and the lawyer's own needs will tend to fill the vacuum. Representation of very young and nonverbal clients can and ought to resemble the child's perspective and not those of the adults around him.

*1512 The Chapters included here address the roles and content of best interests in lawyering for children. As a practitioner, I knew that I was deeply uncomfortable with the "guardian ad litem" orientation of much of my

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practice, and hoped that a strictly "advocacy-oriented" child's lawyer, as described above, could largely avoid the responsibility of contending with her client's best interests. Further examination of the ethical codes as well as my experience as a supervisor and teacher, however, have convinced me that, not only must lawyers for children be expected and required to understand and act on their client's best interests, [FN12] but in fact all lawyers are expected and required to do so. Thus, even as I lay out a "client-directed" role for children's lawyers in the book, I must explain how the principled lawyer for children factors best interests into his representation, and how he determines the content of best interests.

Thus, Chapter Five [FN13] identifies the roles that best interests play in even the most child-directed lawyer's representation. Chapter Six [FN14] describes prevailing views of how an attorney should determine those best interests, and then presents a model integrating those views. These chapters follow in their entirety.

Part One of the book concludes with a discussion of interdisciplinary consultation and learning as well as sample representations of two clients. [FN15] Part Two of Representing Children outlines the practical application of the principles presented in Part One through an in-depth look at the lawyer-child client relationship. [FN16] The book concludes*1513 with a discussion of selected issues in representing a child client in various fora in Part Three. [FN17]

I. The Roles of Best Interests in Lawyering For Children

Resolving that, wherever possible, the lawyer will represent her child client through as traditional a lawyer-client relationship as possible does not relieve the lawyer of the obligation to confront and determine her client's best interests in a number of contexts. This part will

identify the roles of best interests in lawyering for children.

All lawyers for children must develop a sophisticated understanding of the best interests of each client in order to carry out their representation for three reasons: (1) the ultimate legal standard governing the client's case will often require a determination by a fact finder of best interests; (2) all conversations with other professionals in the case, whether in preparing litigation or seeking settlement, will be framed by their concern for your client's best interests; and (3) the logistics of representing children require lawyers to make choices based on their clients' best interests on a daily basis. Lawyers who can meaningfully counsel their child clients must understand best interests for two more reasons: they are permitted and encouraged to counsel the client about the client's best interests in assisting the client in making decisions directing the representation; and, in addition, responsible lawyering for these clients requires a lawyer to confront his assessment of a client's best interests, to ensure that bias and personal values have not assumed too important a role in the representation. Lawyers who cannot meaningfully counsel their child clients must understand best interests also, for the most daunting reason of all: they will be required to determine the goals of the representation, and a myriad of other decisions for their clients, with relatively little client input.

The following list of roles for best interests in the representation of child clients is meant to be exclusive and narrow. It excludes other determinations of best interests in the relationship because lawyers for children should wherever possible defer to their client's expressed statements about a matter rather than determine independently what they think is best for their clients. In addition, each moment in the representation when best interests is implicated should be approached as a narrow event, allowing the lawyer as little leeway as possible in conceiving a view of best interests unrelated to the child's views. Even a determination of best interests must begin and end with the child in her context and the child's expressed views. Thus, this list of roles of best interests must not be seen as carte blanche to override a child's point of view. Rather, lawyers at these moments in the representation *1514 must recognize the responsibility and danger of losing track of the child client that inheres in these small and large invitations to lawyer discretion. Each of these roles of best interests will be considered in turn.

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A. Best Interests As a Looming Legal Standard in the Case

Courts in the dispositional phase of an abuse, neglect, or dependency proceeding must generally determine the child's best interests to resolve the proceeding. [FN18] Similarly, best interests is usually the standard in the dispositional phase of a termination of parental rights proceeding. In other stages of proceedings, for instance, the emergency removal phase of a dependency proceeding or interim visitation decisions, best interests may be one important factor among others. [FN19] In keeping with the lawyer's duty to approach this moment of best interests determination narrowly, it is critical to note that while best interests lurks at any potential dispositional phase of child protective proceedings, the child's lawyer may, pursuant to his client's instructions or otherwise, seek to resolve the case at the adjudicative phase, at which the standard is parental unfitness. Often, a child's attorney will conclude that moving to prevent an adjudication of parental unfitness and thus end the case will best achieve the client's objectives. This is particularly true when the client clearly wants the lawyer to oppose further state intervention of any kind into her family. In these instances, therefore, a child's lawyer may well decide to attempt to focus the parties and the court exclusively on questions relating to the existence or absence of parental unfitness, and not on the sprawling question of best interests. [FN20]

*1515 Despite her best efforts to keep the court focused upon adjudicatory matters, however, a lawyer may find that she is fighting a losing battle. As a result of the prevalence of the "best interests" standard, judges will often be preoccupied throughout all phases of all proceedings with the "best interests of the child," even when, at a given phase of the proceeding, another standard, such as parental fault, is controlling. At this point, the lawyer may decide that she must battle on two fronts: seeking to focus on parental unfitness to the greatest extent possible, and formulating a theory of best interests. Thus, any child advocate must become adept at translating her proposals to the court into the language of "best interests." Just as a tort attorney must translate a client's story into the legal language of fault and negligence, children's attorneys must often translate their clients' desires and goals into the framework of "best interests." Like any attorney who respects the client's right to make her own informed decision, the attorney may be in the odd position of advocating a result which, personally, the lawyer believes is not in the child's best interests. [FN21] Thus, a lawyer should be prepared to make an argument that a client's desire is in her best interests as long as the lawyer can do so in good faith. The lawyer should press herself to make those arguments even when they conflict with her personal assessment of the client's "best interests." [FN22]

Thus, in a majority of the legal proceedings faced by the child advocate in doing child protective work, best interests will be a lurking concern for the court. Preparation for legal argument in the case must therefore often be done with an eye towards framing the client's position in terms of that looming legal standard. [FN23]

*1516 B. Best Interests As the Ultimate Concern for Most Other Professionals Involved with the Client

The lawyer must understand best interests additionally because best interests frames the ethical purview of most of the other professionals dealing with the client in the case. Although the lawyer who has not been assigned guardian ad litem does not necessarily have this duty, certainly the child's therapist, state social worker, teacher, counselor, and other professionals are charged with protecting their client's "best interests." For instance, the social work code of ethics clearly places the interests of clients before straight advocacy of a client's desires. [FN24] The lawyer getting information from these professionals, cooperating with them on various matters, meeting with them, and seeking settlement with them would do well to remember this primary concern of these professionals.

The lawyer should also be mindful that the straight advocacy role of the lawyer will seem anomalous or repugnant to some of these professionals. Many professionals are horrified to think that a lawyer would represent the stated wishes of a child. A child's lawyer's failure to factor in this potential gulf between professional responsibilities can sometimes make initial communication with other professionals extremely awkward. This tension is compounded

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because many non-legal professionals understandably approach lawyers with a negative bias due to popular negative opinions about lawyers.

Therefore, the child's attorney who stresses that he understands the best interests mandate of the professionals with whom he is talking may break down uncomfortable barriers to communication. It is often useful to spell out the responsibilities of the various professionals to make clear that everyone understands whose role is whose. [FN25] The child's lawyer must understand and speak the language of best interests to communicate usefully with other professionals. Often, a lawyer well-versed in best interests terminology and theory may forge settlement out of court with those crucial nonlegal professionals on issues both central and ancillary to the case.

At critical points in building relationships with other professionals, it is useful to ask them to explain to you their understanding of their ethical duties and their understanding of the child's best interests. Be aware that various other professionals almost certainly have conflicting ***1517** theories within their profession about the definition of "best interests." For instance, the writings of Goldstein, Freud, and Solnit seek to replace a focus on best interests with a focus on permanent "least detrimental" alternatives for the child. [FN26] That permanency view involves in turn an assumption that the child's long-term best interest is usually served by preserving one long-term permanent caregiver for the child. Nevertheless, another school of thought suggests that a permanent caregiver may be less important than the family network surrounding the child. [FN27] Therefore, the child's attorney must educate herself about the factors contributing to a professional's view of best interests as she enters an ongoing dialogue, to create a basis for possible agreement and collaboration.

Determining the ethical duties of other professionals need not be cumbersome or overly artificial. Generally, as the attorney introduces himself to other players in the case, his words and actions will clarify his role in the case. It is very common, for instance, for nonlegal professionals unfamiliar with family court to wonder and ask, "Say, how did this kid get a lawyer in the first place?" The lawyer can briefly explain what statute and custom led to his appointment. Usually conversations about role need only take place in the initial encounters. The lawyer, however, should clarify his role at critical junctures in the case. For instance, at a presettlement phase of a case, one may have heated interactions with case workers or therapists whose views of one's client differ from one's own. It is often useful in those highly charged situations to step back and comment about the differences among the lawyer's roles, to reiterate the lawyer's understanding and respect for other ethical imperatives, and to search for ways to resolve the issue at hand in a way that is consistent with all of those roles. [FN28]

Often professionals gather at various kinds of meetings before court, whether it is a settlement meeting or an interdisciplinary team meeting or a case conference of some kind. [FN29] Meetings of this kind sometimes descend quickly into confusion for the simple reason that people do not know the identities and roles of everyone at the meeting. Even when meetings begin by having everyone introduce himself, late-comers or those who cannot write fast enough are often lost about the identities of the different people at the meeting. Circulating ***1518** an attendance sheet listing name, organization, and phone number to consult during the meeting is often useful. As Part Three of Representing Children discusses, a well-prepared lawyer should know in advance who will attend each meeting and what is each person's role. [FN30] The attorney may then anticipate how that person's view of the case, usually couched in terms of best interests, will lead her to react to the client's position in the case. Once those roles and positions are identified, the lawyer can begin to strategize about convincing those professionals to support the client's position and building consensus around the client's position generally. Thus, even a lawyer utterly committed to representing the stated wishes of his client must be able to couch his client's position in terms of best interests in dealing effectively with other professionals serving the same client.

C. Best Interests As a Guide to Conducting Your Relationship with the Client: Making Micro Choices that Affect Your Client's Well-Being

The logistics of the lawyer-child client relationship require the lawyer for the child to make, on behalf of the client, many decisions that are appropriately resolved by reference to the client's best interests. For instance, the first interview with a client will often present a number of logistical choices for the lawyer. Should the interview

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take place at the lawyer's office, at the child's home or foster home, at the child's school, at the foster care agency serving the child, or some other place? How should that meeting be scheduled and who should prepare the client for the meeting in the first instance? Should anyone besides the lawyer and the client attend? It is appropriate and necessary for the lawyer to make educated guesses about the client's best interests in setting up that visit before the lawyer-client relationship has even begun. [FN31]

Another classic "micro" decision that a lawyer might make would involve the timing of breaking adverse news to a client such as news about a negative evaluation of a mother with whom the child wished to be reunited or even a negative psychiatric evaluation of the child herself. [FN32] Picking the time and place for those encounters with the ***1519** client must inevitably be done based on the lawyer's assessment of how the client would be best prepared and supported in receiving that information. Especially in planning a first meeting, the lawyer may only have an educated guess at the child's best interests to guide her in small decisions that may have a big impact on the lawyer-child client relationship.

Even when the determination of best interests is based on very preliminary information, the lawyer should think through these decisions as carefully as possible. Whether large or small, these common decisions may deeply affect the lawyer-child client relationship. An excellent, comfortable first meeting may propel the relationship forward; a painful awkward one may set the relationship back. While the lawyer should not expect to control the tenor of a meeting completely, the lawyer should attempt to make each meeting as comfortable as possible for her child client. [FN33]

D. Additional Roles for Best Interests Based Upon Child's Ability to Be Counseled

In addition to those three roles that best interests plays in the representation of all lawyers for children, best interests plays additional roles depending on the client's ability to be counseled. Lawyers counseling clients should confront their own conclusions about the child's best interests and the client's decision making to keep the lawyer's counseling as free from bias as possible. Lawyers representing clients who cannot be counseled are called upon to do the biggest job of all: to determine the objectives of the client representation.

1. For Clients Who Can be Counseled

a. Counseling The Client About The Lawyer's Conclusions About The Client's Best Interests

If the client is someone who can communicate with the lawyer and be counseled effectively, the ethical codes permit and encourage all lawyers to counsel their clients about the lawyer's view of their "best interests." For instance, Model Rule 2.1 advises that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations ***1520** such as moral, economic, social and political factors, that may be relevant to the client's situation." [FN34] As the Comment notes:

Advice couched in narrowly legal terms may be of little value to a client especially where practical considerations, such as cost or effects on other people, are predominant. . . . Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. [FN35] The rules therefore clearly contemplate that lawyers will advise clients about the broader effects that any legal decision might have upon their lives and the lives of others. [FN36] In that counseling capacity, the lawyer thus properly discusses the lawyer's assessment of the client's best interests and the impact of the client's decisions upon those best interests. [FN37]

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***1521** In addition, the client will often solicit the lawyer's advice: "What do you think I should do? Do you think I'm doing the right thing?" We have come to assume that professionals of all kinds -- doctors, architects, technical support people -- will be able to tell us what they believe is the best choice in a given situation. Indeed, we would often be appalled if a treating professional did not supplement her explanation of available options with one or two preferences based on her own experience and knowledge of us as patients.

b. Confronting One's View of Best Interests to Promote Honest Counseling

Best interests also plays a role in the lawyer's representation of a client as an inevitable part of honest lawyering. In preparing for a counseling session with a client, for instance, a lawyer may be aware that a client wishes to pursue a course of action that the lawyer finds repugnant or does not believe is best for the client. Especially when the client is a child, the lawyer will be tempted to impose her own belief upon the client. It may be easier, for instance, for a lawyer to seek to manipulate her client into accepting the lawyer's position instead of disciplining herself to advocate zealously for the client's position. [FN38] Every lawyer must be aware of this temptation. Because children are even more likely than adults to be cowed by a lawyer's strong recommendation, the lawyer must approach a child client's choice with particular restraint. [FN39]

Therefore, before counseling her client, a conscientious child's lawyer should confront herself with her own views of the client's best interests to remind herself to listen to the client's desires and not to superimpose her own. Lawyers who confront their own views of what is in their client's best interests and who expose these views free themselves ***1522** up to hear what the client is really saying as opposed to what the lawyer hopes the client is really saying. [FN40]

2. For Clients Who Cannot Be Counseled: Determining the Objectives of the Representation

For the client who cannot be counseled, e.g., the baby, the nonverbal child, or the child with a severe intellectual deficit, best interests plays the biggest role of all: it is the ultimate goal of the representation. It is difficult to consider a greater task than to determine the best interests of the client on both macro and micro issues, somewhat independent of the client's input. This basically replicates the role of the former guardian ad litem.

A central theme of this Article is that the lawyer should question any role that requires her to make large best interests determinations for her clients and then seek to achieve them as a goal of the representation. As discussed in part II below, little in the lawyer's training or the lawyer's role in society qualifies her to do that job. [FN41] The discussion of the contents of best interests that follows explores how a lawyer should make best interests determinations of any kind. It must be noted from the outset, however, that calling upon a lawyer to determine the goal of her own representation of a client, largely independent of that client's direct input and largely independent of the client's wishes, is an anomalous and deeply complicated divergence from the usual path of legal representation. [FN42] Moreover, it is not even clear ***1523** that Model Rule 1.14 allows the lawyer to take on the full guardian ad litem role. Rule 1.14(b) authorizes a lawyer to "seek appointment of a guardian or take other protective action," but it is unclear if that protective action could include deciding the client's best interests and pursuing them as a goal of the representation. At least one commentator has suggested that "other protective action" is necessarily smaller than determining the client's best interests and pursuing those lawyer-defined interests. [FN43]

The lawyer entrusted with the job of representing a child's best interests must determine those interests with extreme caution. Every lawyer who claims to pursue the client's best interests must have a principled understanding of what that best interests determination looks like and how those principles are applied from case to case. [FN44] It may appear that, because I contemplate that lawyers will continue to make best interest

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determinations on behalf of their clients, and because I believe that lawyers can continue, for some clients, to determine the ultimate objectives of the representation, I am essentially ratifying the continuation of lawyers acting as guardians ad litem for their clients. This is not the case. I believe that it is useful and necessary to abandon the guardian ad litem role for the following reason: Lawyers playing the role of guardian ad litem often have felt unconstrained by traditional lawyering duties. They have acted as witnesses, they have abrogated duties of confidentiality, they have disregarded or downplayed their client's desires, and they do not always include their client in decision making in the representation. In the extreme, these lawyers have seen the role of guardian ad litem as permission to pursue representation without meeting their clients, and with little or no investigation. [FN45] As noted in the Introduction, I believe that there *1524 is a lawyerly way for a lawyer to represent a nonverbal child or other children who cannot fully direct their representation. I believe that lawyers representing children can abide by the Model Rules, including the duties of confidentiality, the duties of knowing and respecting client views, the duties of client direction, and the prohibition on lawyers becoming witnesses. The process outlined at the end of part II is designed to guide lawyers in confronting the dilemma of making best interests decisions without full client input in a way that is client-centered and lawyerly.

E. Summary

To summarize, all children's lawyers, even the most client-directed ones, inevitably must make some kinds of determinations about the child client's best interests. They may be as tiny as deciding how an interview should be structured or how a piece of information should be delivered; they may be as large as deciding the entire goal of the representation. Thus, it is critical that lawyers employ a principled process in discerning the content of best interests. The next part will review the various definitions of best interests and propose an integrated model for use by contemporary child advocates.

II. An Integrated Approach to Determining Best Interests

To derive a principled, integrated definition of best interests to be used by lawyers in the various moments in the representation examined in part I, this part must first explore the definitions of best interest that have been in use to date. This part identifies four such models:

(1) The Total Lawyer Discretion Model;

(2) The Expert Deference Model;

(3) The Psychological Parent Model;

(4) The Family Network Model.

Model One relies upon the total discretion of the child's attorney. Model Two defers the best interests decision to one of three kinds of experts in the case: one already involved with the child or family, one appointed by the court, or one retained by the attorney. Model Three relies upon principles enunciated by an eminent trio of scholars who have focused upon continuity of care, the perspective of the child, and the psychological parent as crucial principles guiding all determinations of "best interests." Model Four proposes instead a child welfare analysis focusing on preserving the child's family network. Each model is discussed briefly before deriving an integrated model for use by attorneys for children today.

*1525 A. Four Existing Models for Determining Best Interests

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1. The Total Lawyer Discretion Model: The Guardian ad litem

Recent empirical research suggests that a majority of lawyers throughout the country are left to their total discretion in determining best interests. [FN46] This section defines and critiques this approach and discusses why, despite its patent flaws, the approach continues to flourish.

a. Definition: Whatever the Lawyer Thinks Is Best

In its rawest form, this "definition" of best interests has no substantive content at all. Best interests is left to the complete discretion of the lawyer in the case. This lawyer, assigned to represent a child, arrives at a decision about the best interests of a client through whatever process the lawyer sees fit to use, based upon no set substantive guidelines. The lawyer is constrained by no procedural mandates nor any substantive principles that are consistent from case to case. Thus, procedurally, a lawyer could determine the goals of his representation based wholly, for instance, upon his reading of the neglect petition, or upon a single conversation with the state child welfare caseworker, or upon an exhaustive investigation of the matter at hand, or upon something in between. Substantively, no matter what procedure the attorney uses, a lawyer ultimately takes whatever information he is using and, applying his own gut instinct and "common sense," reaches an opinion about a child's best interests, and advocates for that opinion.

b. Critique of the Total Discretion Model

The total discretion model suffers from three related but distinct flaws. The model gives a lawyer a job for which he is neither trained nor qualified, prevents the lawyer from doing the job that he is qualified to do, and creates an unjust system where similar clients are not represented similarly.

First, "the total discretion guardian ad litem" model gives the lawyer the responsibility for an important job for which he is neither trained nor qualified. Nothing in the traditional legal education qualifies ***1526** a lawyer to make determinations of a client's best interests. Law school curricula often do not include guidance about human welfare, child development, child welfare, family dynamics, or even philosophy that might inform an educated guess about the best interests of another. It is unclear what qualifies the average lawyer, as opposed to the average social worker or a person close to a particular child, to make a judgment about a child's interests which will then receive special attention from the judge.

Having lawyers who are supposed to do what is "best for them" must mystify and infuriate many child clients, just as it would many adult clients. The child confronted with state workers in her home and a lawyer claiming to want what is best for her will understandably wonder what gives the lawyer the right to pry into her life. When the lawyer advises his client about his view of the client's best interests, the client might legitimately wonder, "Why should this lawyer's opinion about my life be important to me?" The lawyer, especially one court-appointed for a child, may appear to be one in a parade of adults invading the family.

Lawyers are not qualified to represent clients in this way, because, in many ways, the model turns the lawyer-client relationship on its head. This extreme form of best interests representation omits several of the most fundamental characteristics of lawyering. The lawyer-client partnership and dialogue is reduced to a one-person monologue wholly unchecked by the client. The client becomes an object, rather than the subject, of the representation. The lawyer, usually agent, acts as the principal in the relationship.

I believe that this level of discretion makes it inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from

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his, and his own lay understanding of child development and children's needs, in assessing a client's best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming. This jeopardizes the child client even more, as her unique circumstances are quickly distorted by a stranger through his own lens of experience and preconception.

Second, this model further frustrates child clients because it prevents lawyers from doing what they are trained to do. The model prevents lawyers from offering clients the chance to have their perspectives aired before the court. The total discretion model deprives child clients of the chance to direct the representation, to instruct the lawyer to pursue certain goals, and to think through and understand her options thoroughly and with counseling. This model, in extreme cases, may deprive a client of even the knowledge that a lawyer or court proceedings exists. Seen from the client's view, the child does not receive two of the traditional benefits of professional *1527 service: adherence to a consistent code specifying ethical standards of practice and in-depth professional training. [FN47] Instead, the client becomes suddenly subject to the relationship. The lawyer, far from being constrained to communicate with, counsel, and present the client's cause to the tribunal, is not constrained to know the client at all.

Third, the total discretion model has led to a system containing unacceptable variability in child client representation. Seen in this extreme form, the "whatever the lawyer thinks is best" view of lawyering creates a huge area of unpredictability and inconsistency for child clients. Because this view guarantees no consistency among practitioners, the course of a child's case may be changed forever because practitioner A, who believed X was in the child client's best interests, was appointed to the case, instead of practitioner B, who believed Y was in the child client's best interests. [FN48] Indeed, this view does not even guarantee that the same lawyer will be consistent with himself from case to case, because no practical or substantive guidelines make the lawyer's approach to his different cases uniform. [FN49] Thus, the total lawyer discretion model disserves both the client and a legal system that seek quality representation, predictability, and consistency.

c. Why the Model Persists and Even Prevails

Despite the patent unacceptability of the total discretion model, many attorneys in many jurisdictions practice along these lines. Why should such a manifestly unlawyerly model persist?

Ironically, the model gratifies a number of powerful constituencies, while frustrating those least empowered to change it. For instance, many practitioners enjoy the discretion the model affords them because, by definition, they are always doing what they believe to be best. A practitioner is bound to feel good about her work when she believes that her efforts are always being used for her client's good. Likewise, some judges may find that having a lawyer in the case whose job resembles the judge's job simplifies the difficult task of judging. Especially where the judge thinks highly of the child lawyer's values, finding them similar to his own, judges can take comfort and convenience *1528 in relying upon the child's lawyer's judgments in the case. [FN50] Similarly, legislatures seeking to improve the quality of deliberations in child protective cases may find it easier to appoint lawyers, generally at very low rates of pay, in these cases, rather than authorizing money for courts to retain experts in child welfare to assist them.

Scarcity of resources also hampers the development of more sophisticated models of child representation. Private practitioners paid a low hourly fee or high-volume legal aid practices may be hard-pressed to spend more time per client on their cases. Currently, expert input and testimony to aid both practitioner and court is generally far beyond the means of most lawyers and court systems. Other professionals, who repeatedly are frustrated by this model of representation, for instance, workers and clinicians at agencies working with children, may decide that, of the many battles for better resources for their clients in the community, the battle for better legal representation is not the highest priority. Other players exposed to this model tend to be involved with the system only for one child or a few children, e.g., a concerned relative, an involved teacher, or the parents and children themselves, and are hardly in a position to effect legal change. Children, as a constituency, have no power to lobby for better lawyers.

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Additionally, the historical version of the total discretion model, the guardian ad litem model, appears to have served an important purpose in its day. When proceedings concerning child welfare were populated only by judges, lawyers for the state, and lawyers for the parents, a vocal figure focusing concern about the child's perspective probably provided an important balance to courtroom discussions. The presence of the guardian ad litem may have prevented those proceedings from dissolving into a simplistic two-sided custody battle between parent and state. Now that guardians ad litem or lawyers for children of some kind must, by statute, appear in all these proceedings, however, I believe that it is time for children's lawyer's role to be definitively clarified. Child clients require both much more and much less of lawyers than the total discretion model has asked. The remaining models, and the integrated model which concludes this part, attempt to provide a more principled method of determining a child client's best interests.

2. The Expert Deference Model

Some attorneys, recognizing their lack of qualifications in assessing their client's interests, have concluded that they must defer to experts in determining their client's best interests. These experts are usually one of three sorts: (1) a professional already involved with the child; ***1529** (2) an expert consultant (who may also be an expert witness) retained by the attorney; or (3) an independent expert appointed by the court. After describing each kind of expert, I will discuss briefly my hypothesis that court-appointed experts currently enjoy the most deference from courts, when in fact experts who have been or will be involved with the family long term should be given special deference over one-time evaluators of the case.

a. A Professional Already Involved with the Child

A substantial number of our clients are already involved with professionals when they come to our attention. For instance, any child enrolled in school has a school guidance counselor and teacher; some others may be in community counseling or therapy. Most of them (but always fewer than one would hope) have doctors or clinics who see them regularly. These and other professionals have become involved with the client separately from the court case and have goals for the professional relationship which are distinct from, but often affected by, the legal proceeding. They may, in some cases, have long-term relationships with our clients and their families. These relationships may not only have pre-existed the family's court involvement, but also last well after the lawyers and the courts have finished their work.

Ordinarily, the child's attorney would identify and, optimally, meet most of these professionals in the early fact-finding stage of the case. [FN51] Early on, a child's attorneys should seek to identify professionals who are especially important to the client, either because of extensive day-to-day contacts or because a particular individual has established an especially strong interpersonal relationship with the client. These strong relationships may be positive or negative, but if they are important to the child, for whatever reason, then they will likely be very important to the lawyer as she gets to know the client.

These professionals may have goals for the client and their professional relationship with the mutual client that are not fully consistent with the demands of the proceeding that brought the child a lawyer. [FN52] Many of these professionals have confidential relationships with the clients that they share with us, and therefore they need to be extremely careful in not breaching that confidentiality in encounters with the lawyer and the court. Although some lawyers and judges believe that those confidentiality provisions fall away in light of the gravity of the legal claims which give rise to child protective proceedings, [FN53] it is critical to note that the child has often come to rely upon the safety of the confidential relationship. [FN54] Lawyers should be careful to get releases from their clients before extensive conversations [FN55] with other professionals, to be careful not to endanger these pre-existing professional relationships.

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As hard as it may be to admit, most of the time these professionals will be more important to the client and his welfare than is the lawyer. While lawyers can intervene at critical moments in their clients' lives, solve nagging problems and, one hopes, otherwise contribute to bettering the quality of clients' lives, these professionals are often an important *1531 ongoing part of the clients' lives. Therefore, lawyers must treat these pre-existing, and often post-existing, relationships with the utmost respect. Even after lawyers are gone, these social workers, doctors, teachers, counselors, therapists, lay advocates, and other professionals will continue to work closely with the clients, day in and day out. It is important that the short- term lawyer-client relationship not disrupt these important services for the lawyer's clients.

For the same reason, involving these professionals as experts in the quest to determine the client's best interests is often complicated, because these professionals already have established procedures and goals with the client which may conflict with or supersede the lawyer's procedures and goals. First, if a professional is currently treating the client, writing a report to a court or attorney about the client's best interests could easily run afoul of the confidentiality which the professional promised to the client. Second, even if the confidentiality problems are resolved, through waiver, for instance, the professional may still conclude that stating an opinion and laying forth the evidence for that opinion at this juncture in the professional-child client relationship would compromise the relationship. For instance, a professional who has premised his relationship with his child client on nonjudgmental listening may find that foundation disrupted when forced to take a position on the client's best interests in front of a lawyer or judge. Similarly, testifying in court on a delicate matter like a child's removal from the home may forever taint the professional's relationship with the family. Third, the professional may loom so large in the client's life already that his importance to the child transcends the professional's role, like a teacher who assumes a big-brotherly relationship with the child after hours or the highly respected family doctor who attends the same church as the family. Requiring that professional to aid the court could put the court's needs before the child's long-term need for the friendship and solidarity of this important figure.

Fourth, because these professionals are already enmeshed in the client's life, they may not always have unbiased information to offer. They may be unable to shake outmoded views of the family, or they may be overly invested in their own theories of the family's well-being. They also may have other institutional concerns, related to the agencies they serve. While the best professionals over a long period of time may develop strong, constructive, trusting relationships with clients, other less skilled or less caring practitioners may develop biases, misconceptions, and investments which disserve both the client and the lawyer's representation.

Therefore, the child's attorney must recognize a central conundrum in seeking advice and early factual investigatory information from these professionals. On the one hand, these professionals represent an extraordinary font of useful information about the client and his *1532 family. On the other hand, the same history of involvement that makes these professionals so potentially helpful to the lawyer, or to the court, makes working with a strange lawyer or a powerful judge a complicated and threatening new role for the professional. In addition, should the lawyer later discover that the client does not trust a certain professional, the attorney will likely regret closely associating with that professional at the outset of the attorney's relationship with the child and may suffer in her own relationship with her client as a result.

In seeking information from these professionals, then, children's attorneys must: (a) value and respect the ascendant importance of that professional's long-term relationship with the attorney's client; (b) act in ways that do not jeopardize or compromise that relationship by being sensitive to issues of confidentiality and other long-term dynamics of those preexisting relationships; and (c) consult the professional about the client's best interests only (i) when doing so would yield helpful information while preserving the ongoing professional relationship, or (ii) as a last resort.

In the end, these professionals ought to be given special consideration by lawyers and judges in child protective proceedings. Inasmuch as they have no institutional loyalty to the lawyer or court (as the next two kinds of experts do), they represent an extraordinarily rich potential source of wisdom for the case. These experts have a more ongoing relationship with the client than they have with the lawyer or the court, and thus are not hamstrung by the perspectives and demands of the court proceeding. For these reasons also, however, relying on pre-existing

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professional relationships to determine a client's best interests can be tricky. Because of the delicate considerations involved in using a professional already involved in a client's life to help one determine a client's best interests, it is best not to rely on those judgments exclusively.

b. An Expert Consultant (Who May Also Be an Expert Witness) Working with the Attorney

In an increasing number of cases, lawyers representing children work side-by- side with social workers and other professional consultants hired to aid the lawyer in her representation. At the Legal Aid Society-Juvenile Rights Division in New York City, for instance, a Juvenile Services Unit of staff social workers work in the same offices as the staff attorneys. At some law school clinics, law student interns and social work interns work together, supervised by attorneys and social workers, to represent child clients. [FN56] Private attorneys for children also may retain social work or other professional assistance on a case-*1533 by-case basis, paying the consultants either an hourly rate or a yearly set rate for all cases. [FN57]

Just as the professionals already working with the clients when the lawyer meets them have ongoing relationships with the clients, these expert consultants have ongoing relationships with the children's lawyers. This difference subtly, but significantly, changes the expert's perspective on the client's case: by contrast with the treating professionals, these retained consultants are, like the lawyers, short-term intervenors into the family's life who, once the case is resolved, will continue to have a relationship with the child's attorney, but not necessarily with the child.

Professionals working with attorneys can provide a useful, and often, crucial array of services to the client. First, where a client's specific needs require all professionals working with her to have special knowledge or sensibilities, for instance, with a deaf client or a client with mental illness, specialized professionals can help train lawyers in necessary skills and perspectives. Like any lawyer undertaking a representation which involves specialized expert knowledge, for instance a products liability attorney facing intricate technological questions, the child's attorney ought to have these kinds of expert advice as well. Although written materials introducing the attorney to issues of child development, childhood mental illness, or mental retardation and the like do exist, only a consultant can help the attorney apply this expertise in the particular context of a new client.

In these cases, nonlegal professionals can offer practical, concrete help. They may help lawyers prepare for complicated interviewing. In some cases, perhaps the professional would accompany the attorney to an initial client meeting, to help the attorney develop a working relationship with the client. [FN58] Professionals with strong community *1534 contacts may suggest helpful resources for the family, which may be especially crucial in shoring up the family to avert the need for foster placement of the attorney's client. Professionals may also participate in interdisciplinary negotiations, being more able than the lawyer to understand and respond to the nonlegal professionals working with the child.

Finally, nonlegal professionals may be crucial to the lawyer faced with the daunting task of determining the client's best interests. Some lawyers delegate this function to their consultants, reasoning that these professionals, unlike lawyers, have been trained to make principled determinations of best interests in family contexts. Lawyers may also decide that consultant experts are critical when the issue of best interests is in active litigation, because the consultant can put on the child's case through her expert testimony.

Leaving the best interests determination to a retained expert, however, is an extremely expensive option, available currently to only a tiny fraction of the lawyering for children community. Even when these expert services are more widely available, it is unclear how much of the tasks of lawyering should ultimately be delegated to nonlawyer consultants, creating, as it does, an inevitable distance between lawyer and client. While all lawyers for children should attempt to make these services available to their clients, and should sensitize themselves to the specific circumstances that suggest that those services must be deployed for a particular client, [FN59] lawyers

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should not assume that all determinations of best interests can ultimately be delegated to others. Lawyers continue to need to develop principled ways of determining best interests for themselves in circumstances where these experts are not available to them.

c. An Independent Expert Appointed by the Court

Courts in child protective proceedings often appoint experts to investigate specific questions and provide guidance to the court on ultimate legal issues such as "best interests of the child." These provisions make eminent good sense, because judges are regularly entrusted with determining a child's best interests and may not completely trust the parties to present thoroughly the facts needed to make such a determination. [FN60] Generally, experts are not appointed on all cases, or even most cases. When they are, they tend to be experts with ongoing relationships with the court; once a case is over, these experts will probably never see the child or family, and perhaps ***1535** not even the attorneys again, but will most likely have an interest in being appointed to evaluate cases for the court in the future.

Court-ordered evaluations can involve a tremendous amount of time, investigation, and preparation time. Evaluators must review all relevant records, interview all relevant parties and service providers, prepare written reports detailing their findings, and testify in court on these findings. Each of these steps may be very time-consuming: for instance, rounding up all the records through the appropriate releases may take weeks or months; interviewees may have schedules that make appointments hard to schedule, and then may miss some, extending the interviewing period. Writing thoughtful, comprehensive evaluations takes hard work and much time, as does preparing for heavily cross- examined testimony.

Unfortunately, rates of payment for these court-appointed experts remain relatively low. Until the rate of compensation is raised to compensate fully the amount of time a capable evaluation would take, many court-appointed experts will be forced to seek high volumes of evaluations in order to be able to devote a substantial amount of their practice (and to be able to make a living) doing this difficult work.

Attorneys for children may provide input into the choice of court-appointed experts in some instances. If the attorney knows of any specific concerns that children have with new adults (e.g., a little girl who is very shy with older men, a Spanish-speaking child who relates much better in Spanish than in English), those should certainly be made known to the court. If the child has given the attorney a clear wish as to the issues the expert is to evaluate, the lawyer should act in every strategic way to make sure that the expert chosen is one likely to recommend the child's desired result. [FN61] Often, the local courthouse or judge may have an established slate of experts whose reputations and predilections can be investigated through word-of-mouth; while being attentive to the vagaries of rumor and sour grapes, the child's attorney should investigate those experts thoroughly. For the reasons detailed above, the child's attorney should think carefully before allowing a professional already involved with the family to be appointed an expert by the court.

Commentators such as Albert J. Solnit eloquently warn against the intrusive and possible harmful effect of the evaluations on the child and family. [FN62] A lawyer must acknowledge the possible ill-effects on the family and on the child of another evaluation by a stranger. Interviews with the court-appointed expert, the time spent waiting for ***1536** these evaluations to be completed, and the diversion of resources by other professionals in the case spent in speaking with and providing records to the expert may all take their toll. In determining whether to support an appointment and how to structure an evaluation's logistics, the child's lawyer must carefully factor in all these considerations.

As becomes clear when thinking through the logistics of court-appointed experts, the child's attorney cannot rely upon these experts to advise her about the client's best interests, largely because of the timing of the expert's involvement. Because courts generally appoint these experts later in the case, where settlement has been explored and abandoned, and trial is inevitable, the child's attorney should have developed a view of best interests long

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before the court expert is identified. By the time the expert is appointed, the child's attorney should be proactively trying to assure that any expert appointed will vindicate the child's view of the case. Thus the attorney cannot wait to formulate a view of best interests until such time as a court-appointed expert may advise him. The client's and lawyer's view of best interests may change as a result of the evaluation, but until that time, the lawyer must continue to pursue the client's initial instructions and objectives. To the extent that the lawyer must determine and factor in his client's "best interests," he must do so for much of the investigation without the benefit of the court-appointed expert's thoughts.

d. Summary

While various kinds of nonlawyer experts can aid the lawyer and the court in determining best interests, lawyers for children cannot rely upon these experts exclusively. Professionals already involved with the clients when the attorney is appointed have established investments and goals for the professional-client relationship which may well preclude the attorney from obtaining best interests information in a reliable way. Some attorneys can retain experts, but those collaborations are currently rare, given their expense, and even when available may unduly distance the lawyer from her child client. Court-appointed experts may prove indispensable in some cases, but are rarely appointed in time to aid the lawyer in his best interests determinations. Because each of these professionals also has other institutional commitments (the first to his agency or employer, the second to the child's attorney, and the third to the court), they are not perfect advisors as to any given child's best interests.

Ironically, courts may currently give disproportionately heavy weight to the opinions of court-appointed experts who, in most ways, are the least knowledgeable of the three kinds of experts. Professionals already serving the client and consultants working with the child's attorney may actually have known the child longer and explored more fully the background material on the family. Because the first two kinds of experts are prevented in many cases from telling "all they *1537 know" to the judge, however, the court- appointed expert, who exists in the case to serve the judge, will often seem to the court to be the most reliable source. Strangely, professionals who have worked with the family for years are virtually invisible to the court while these evaluators, who may meet the child only once or twice, take center stage. Lawyers for children should keep in mind this understandable distortion of reality as seen from the bench in preparing their presentations to the court.

3. The Psychological Parent Model

As described briefly above, [FN63] the interdisciplinary Best Interests of the Child trilogy has profoundly affected judging and lawyering *1538 around the country. Armed with the principles laid out by Goldstein, Freud, Solnit, and Goldstein, some attorneys for children may believe that they are now equipped to determine a client's best interests based upon that interdisciplinary teaching. After describing the trilogy's central teachings in more depth, this section examines why such a use of their principles would violate the authors' own prescriptions for their work. This section also briefly examines critical views of the trilogy, which suggest that the trilogy's principles do not fully protect all children's best interests.

a. The Least Detrimental Alternative: Placement of The Child With His Psychological Parent

Goldstein, Freud, and Solnit propose replacing the "best interests of the child" standard with a guideline requiring "the least detrimental available alternative for safeguarding the child's growth and development." [FN64] The authors stress that the best interests terminology leads *1539 decision makers to forget that the child "is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development." [FN65] In addition, the authors

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note that courts in fact do not act in the best interests of children because they must balance the child's rights against competing adult interests, including parental rights and policies of administrative agencies. [FN66] The authors hope that the "less awesome and grandiose, more realistic" [FN67] standard will

serve to remind decisionmakers that their task is to salvage as much as possible out of an unsatisfactory situation. It should reduce the likelihood of the decisionmakers becoming enmeshed in the hope and magic associated with "best," which often mistakenly leads them in to believing that they have greater power for doing "good" than "bad." [FN68] Thus the authors propose replacing the "best interests" standard with "the least detrimental alternative."

The authors define the least detrimental alternative as follows:

[T]hat specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent. [FN69] This definition incorporates the five critical concepts expounded in Beyond the Best Interests of the Child, which are described in turn below. Also described briefly below are the limited grounds for state intervention set forth in Before the Best Interests of the Child.

i. The Child's Sense of Time

The authors fear that placement decisions more often reflect the adult's, as opposed to the child's, sense of time. "Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs." [FN70] Children under two-years-old, for instance, cannot endure more than a few days absence of their parents without feeling overwhelmed. Time frames like months and years can be "beyond comprehension" for children before adolescence. [FN71] "Therefore, to avoid irreparable psychological injury, placement, *1540 whenever in dispute, must be treated as the emergency that it is for the child." [FN72] The authors warn in a footnote: "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." [FN73]

ii. The Limitations of Knowledge

The authors believe that "[t]oo frequently there is attributed to law and its agents a magical power -- a power to do what is far beyond its means." [FN74] Instead, law is properly seen as "a relatively crude instrument . . . [having] neither . . . the sensitivity nor the resources to maintain or supervise the ongoing day-to-day happenings between parent and child . . . ." [FN75] As a result, the authors urge that prediction be avoided, and, where inevitable, limited to "a few . . . modest, generally applicable short-term predictions." [FN76]

iii. The Wanted Child

The authors insist: "Only a child who has at least one person whom he can love, and who also feels loved, valued, and wanted by that person, will develop a healthy self-esteem." [FN77] Offering a child the chance "to become a wanted and needed member within a family structure" [FN78] provides children with the important advantage of supporting his self-esteem, his love and regard for himself, and "consequently his capacity to love and care for others, including his own children." [FN79] The authors repeatedly stress that a child's "primitive and tenuous first attachments form the base from which any further relationships develop." [FN80]

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iv. Continuity of Relationships

The authors believe that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development." [FN81] Precisely because children's mental processes early in their lives are unstable, their primary relationships must be stable *1541 and represent uninterrupted support. [FN82] The authors note the different consequences that disruptions of continuity produce at different ages: in infancy, difficulties with sleeping and eating; in infants and toddlers, separation anxieties leading to less trustful, more shallow, and indiscriminate relationships; in older children under five, setbacks in achievements such as toilet training, cleanliness, and speech; in school-age children, achievements based on identification with the parents' demands, prohibitions, and social ideals; and in adolescents, possibly feelings of rejection and abandonment. [FN83] For this reason, the authors insist that "each child placement be final and unconditional and that pending final placement a child must not be shifted to accord with each tentative decision." [FN84] The authors' commitment to continuity prompts their quite controversial position that, after a divorce, "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." [FN85]

v. The Psychological Parent

The authors believe that an adult becomes a child's psychological parent through "day-to-day interaction, companionship, and shared experiences." [FN86] An "absent, inactive adult" can never be a psychological parent. [FN87] Because "[u]nlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development," [FN88] the psychological parent may be either a biological parent or a longtime caretaker with no legal claim. [FN89] The authors urge decisionmakers to prize this psychological relationship over traditionally privileged relationships, including blood ties, to mirror the child's attachment.

vi. Grounds For State Intervention

The trio's recommendations for placement with a psychological parent cannot be applied properly without an understanding of the very limited circumstances in which they would allow state intervention in the first instance. Because the authors believe that the state can only rarely offer alternatives which improve upon the opportunity to form and maintain nurturing familial bonds in a child's existing family, [FN90] they recognize only a few legitimate grounds for state intervention. Legitimate grounds are limited to parental requests for the state to place the child, requests by long-term caretakers to assume parental rights or to give up the child, gross failures of parental care, and refusal by parents to authorize lifesaving medical care. The child's need for legal assistance is a ground for state intervention (in the form of appointing counsel) only at the parents' request, or after an adjudication on one of the previously stated grounds, or after an emergency removal of the child from the parents' custody. [FN91]

vii. Summary

Goldstein, Freud, and Solnit have thus laid out a proposal for those faced with determining a child's best interests: place the child with his psychological parent swiftly and permanently. As their second book clarified, they believed that the state could legitimately consider the child's "least detrimental alternative" only in stringently limited circumstances. As the following section demonstrates, however, neither the authors nor their critics suggest that a simple application of these principles equips a lawyer to address a client's best interests in all cases and situations.

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b. The Limits of the Psychological Parent Model in Informing the Lawyer's Determination of Best Interests

Neither the authors nor their critics believe that the psychological parent approach resolves the lawyer's concerns about best interests in all circumstances. The authors themselves proffer their own unique recommendations as to the role of the lawyer for children. Their critics fear that the psychological theories upon which their approach is based are incomplete or wrong and that an inevitable bias against poor families of color will result if the approach is not properly implemented. This section first examines the authors' direct statements about the role of the lawyer for children, and then the concerns of their critics.

i. The Authors' Recommendations About the Role of the Lawyer for Children

The authors believe, in the first instance, that children are presumed to be represented before the law by their parents. "[A]n integral part of the autonomy of parents is their authority and presumed capacity to determine whether and how to meet the legal care needs for their child . . . ." [FN92] They continue:

The appointment of counsel for a child without regard to the wishes of parents is a drastic alteration of the parent-child relationship. Indeed, *1543 it is in effect a disposition by the state. It intrudes upon the integrity of the family and strains the psychological bonds that hold it together. Therefore it cannot take place until the presumption of parental autonomy has been overcome -- until the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for [state] intervention. [FN93] Clearly, the authors believe that the appointment of counsel for a child should be an unusual step.

Only when parents have, in a sense, forfeited their autonomy in raising their children should the state impose counsel for the child on the family. In addition, when imposed, counsel is "a disposition for a limited purpose and a limited time. Such counsel are to act as lawyers, not as parents. They are to represent a child's legal needs by gathering and providing the court with information that it requires in order to determine the least detrimental placement." [FN94]

The authors formulate the role of the lawyer for children in a number of different ways. The authors require that a child whose placement is the subject of judicial proceedings should be represented by counsel "who has no other goal than to determine what is the least detrimental alternative for his client." [FN95] Counsel for the child "must independently interpret and formulate his client's interests, including the need for a speedy and final determination." [FN96] "[T]he role we would assign to court-imposed counsel for a child is to advocate what, in accord with statutory and case law, is in the child's best interests." [FN97] Unless the parents specifically delegate the role of directing counsel to the child, [FN98] the lawyer should seek the least detrimental alternative for placement, usually with the psychological parent.

As to the necessary attributes of that lawyer, "[a] child's advocate must, of course, be sufficiently knowledgeable about children and their development to determine what information he must obtain and present about the specific child he represents. Our guidelines should *1544 facilitate his task." [FN99] Although this passage suggests that the guidelines could significantly inform a lawyer as to an individual client's least detrimental alternative, in the third book, the authors make clear that counsel's role should be limited and informed by consultation with experts. [FN100] For instance, the authors chide a lawyer who offers an opinion about the advisability of his client visiting her parents based upon his own assessment of her possible mental illness or need for treatment. [FN101] If the lawyer's job was to advocate for her "best interest," the authors write, "he should have recognized the need to organize expert knowledge about the meaning of the visits for [the girl] in order to equip the judge to make his decision." [FN102] Similarly, the authors urge a lawyer representing a child to base his decision whether or not to push a case forward by being "informed by experts in child development about his client's needs." [FN103]

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Thus, the authors themselves do not expect lawyers for children to be able to determine a child's least detrimental alternative simply by referencing their writings. In fact, in In The Best Interests of the Child, the authors urge children's lawyers, as well as other professionals, to stay within professional boundaries, cross professional borders with care, avoid dual roles, recognize that they have no license to act as parents, and remain both softhearted and hardheaded. This role faithfulness, born of the recognition that the parent alone is charged with general responsibility for the child, while professionals must exercise specialized limited responsibility, [FN104] leads the authors to prefer that lawyers do legal work and leave social work and mental health determinations to experts in that field. [FN105]

ii. Critics' Concerns About the Goldstein, Freud, and Solnit Model

As Patricia Wald has noted, Beyond "became a storm center." [FN106] In the foster-care context, [FN107] the trilogy provoked deep debate even as many of the trilogy's principles were made law by admiring legislators and judges. In the academic debate, in large part culminating in an *1545 exceptionally thoughtful symposium held at Rutgers University and published in the New York University Review of Law and Social Change, [FN108] commentators voiced three major related criticisms. First, a number of readers roundly criticized the authors for using inappropriate or inadequate data and authority for the psychological principles underpinning their work. Second, one set of critics expressed grave concern that the trio's work reflected an overly narrow and culture-bound view of families, which failed to recognize the existence and success of diverse family forms larger than the two-parent nuclear family. [FN109] Third, a number of commentators voiced their fears that the authors' principles would be disproportionately harsh on poor families and children. Each of these criticisms will be briefly summarized.

First, mental health professionals criticized the psychological parenting theory. One set of commentators at the 1983 Rutgers conference noted that "parenting theory places too much emphasis on identifying a particular most significant attachment figure, when it is evident that there will often be several." [FN110] The trio's focus on a psychoanalytic perspective distorts the wide applicability of the principles upon which they rely -- because psychoanalytic research focuses on disabled children with more limited coping skills, while research psychologists examine nondisabled children, psychoanalytic conclusions may underestimate the ability of most children to handle separation or to form new relationships. [FN111] Critics fear that the trio derives conclusions about the effects of separation from studies of children who have faced other traumas besides separation from parents, such as institutionalization, war, and severe deprivation of care. [FN112] Commentators consistently discuss the research of Michael Rutter, whose *1546 research suggests that the "effects associated with breaking of bonds are significantly related to the circumstances surrounding the separation or loss, and are generally not long in duration." [FN113] These commentators fear the consequences of an overly broad and rigid application of the trio's social policy guidelines, divorced from the evidence and research which led to their psychoanalytic conclusions.

A second set of critics make many of the same points from sociological and historical perspectives. These critics argue that because the authors based their work on a nuclear family model, psychological parenting fails to account for extended family models which prevail in many non-American contexts. [FN114] For instance, "shared parenting responsibilities among kin" predominate in many Caribbean, African, and African American contexts, in long-standing cultural patterns, and as a hedge against poverty. [FN115] Children raised under such circumstances experience a healthy "emotional universe" populated by people in addition to their biological parent. [FN116] These commentators caution that an overly narrow application of the Goldstein, Freud, and Solnit principles could lead child welfare professionals to search mechanically for a single focus of attachment, find the biological parents wanting in that regard, and sever parental bonds, removing the child from a healthy family system. [FN117] Commentators stress that *1547 breaking the tie with the biological family can hamper, rather than enhance, the child's development : "The disappearing act which is a behavioral consequence of the psychological parenting theory is destructive to the child's developmental needs and utterly disrespectful of the frailties of the human situation under conditions of poverty." [FN118]

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On the historical side, commentators have expressed their concern that psychological parenting theory seeks to impose on everyone, for all time, the concerns peculiar to a particular class at a particular time. At the 1983 symposium, Linda Gordon linked the psychological parenting focus on the mother to the "redefinition of women's labor as housework and child care" precipitated by the wage labor system that sent men out of the home to earn wages, as well as by the industrial production system that took productive work out of the home. [FN119] She noted that full-time mothering and male breadwinning were characteristic of urban, business, and professional families, and were simply not an option for rural and proletarian families. [FN120] Gordon concludes that, while children certainly need "continuing bonds with particular people," she wished to call attention to the "social conditions and class perspective that gave rise to this view of children's needs," calling for "humility regarding the certainty and universality" of psychological parenting theory. [FN121]

***1548** A third, more political set of critiques springs from these insights. Because child protective laws apply overwhelmingly to poor, nonwhite families, these laws justify seizure of children from the politically powerless families "least involved in traditional forms of our culture." [FN122] Child protection laws are necessarily vague, requiring the use of administrative discretion in their application. That discretion, however, often "leads to discriminatory application of the laws that is a function of cultural and class bias." [FN123] In the context of a child welfare system that may needlessly separate poor, nonwhite children from their parents on an emergency basis, followed by long delays until adjudication and disposition, "time is always on the side of the current caretaker" to establish new psychological ties with the child. [FN124] "The result," writes Martin Guggenheim, "is that a politically neutral theory about human behavior works untold harm in actual practice." [FN125] According to Carol Stack, this theory allows us to accept "intervention and intrusion in low-income families, and . . . [to] discount[ ] the cultural backgrounds and solid parenting skills of low-income parents." [FN126] Presumably, these commentators believe that the ***1549** trio's high thresholds for initial state intervention are not being properly followed, while their requirements of permanent placement with psychological parents are followed. [FN127] These commentators fear that failure to completely incorporate the trio's guidelines into law discounts, disrespects, and damages many healthy, nurturing, poor nonwhite families. [FN128]

In short, critics who generally respect the learned trio and their intentions fear that their elegantly clear prescriptions may lead to an overbroad application of only half of their proposals. Applying psychoanalytically learned materials in the broad context of all children underestimates the particular child's ability to cope with separation. The "nuclear family" predicate leads the trio to ignore therapeutic family structures that differ from the traditional mother-child dyad. The propensity of an overtaxed, potentially classist system to heed the trio's urge to sever parental bonds without applying their recommendations for restraint in intervening in the family in the first place has led to a system more prone to penalizing poor, nonwhite families for nontraditional family structures. These critiques have led to another distinct definition of best interests, known as the family network model, discussed next.

*1550 4. The Family Network Model

In response to concerns raised by psychological parenting theory, Peggy Cooper Davis, a New York University law professor and a former New York City family court judge, has identified a new consensus among research scientists, clinicians, and child welfare practitioners. The new consensus rejects the "monotropic view" that a child's development depends primarily upon the quality of his attachment to one person and instead examines how children thrive in a network of relationships.

a. The Recognition that Children Form Attachments With Multiple Caregivers in a Family Network

Professor Davis suggests instead a focus on "a supportive milieu in which caregiving is shared among several

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adults with whom the child is familiar." [FN129] Davis relies upon research compiled by Louis W.C. Tavecchio and Marinus H. van IJzendoorn concluding that "the optimal caregiving arrangement would consist of a network of stable and secure attachment relationships between the child and both its parents and other persons such as professional caregivers, members of the family, or friends." [FN130] These researchers conclude that "[i]n research, attachment should be considered in light of a network of relationships the child builds up in the first years of life." [FN131]

Tavecchio and van IJzendoorn further conclude that "[g]iven the inevitability of temporary separations, the optimal rearing context will, from the child's perspective, be made up by more or less stable relationships with several different caregivers who all act as attachment figures." [FN132] In what these researchers call "an extended rearing context, a separation from an attachment figure does not automatically imply a separation as perceived by the child: there are a number of caregivers who may provide the same source security in potentially threatening situations." [FN133] Davis cites other research that acknowledges that children recognize a "hierarchy of attachment figures, each of whom may [be] qualitatively different." [FN134] Davis also finds support *1551 within the cross-cultural research, including studies done in western Kenya [FN135] and the southern United States, [FN136] which identify multiple caretakers in a family network to be normative and therapeutically sound for children.

Finally, Davis relies upon psychoanalyst Jessica Benjamin's theory of intersubjectivity that challenges "the valorization of the omnipresent, omnicompetent, almost always maternal, parenting figure." [FN137] This notion "lies behind" [FN138] the psychological parenting theory:

In Benjamin's view, the infant has an ability to recognize, to enjoy, and to grow in reaction to the experience of the mother's subjectivity. The expectation that mother will be omnipotent and subject to the child's will leaves the child in a dominating isolation, with an illusion of "mastry," but no sense of otherness. [FN139] Davis summarizes:

The work of parenting -- of caring for children and helping them to grow -- includes the work of meeting their physical needs and providing basic comfort. But it is not the work of protecting the illusion of the omnipotent mother who satisfies all wants. It is the work of helping [children] -- gently, lovingly, playfully -- to grow in health and to learn to relate in health to other independent minds. [FN140] Thus, Davis downplays the importance of a single psychological parent in favor of recognizing the value and validity of a network of supportive caregivers for a child.

Davis challenges the Goldstein, Freud, and Solnit principles in three ways. First, she notes her concerns that the work of psychological parent theorists "does not acknowledge cultural and subcultural differences (and arguably underestimates age differences) in the reaction of children to separations." [FN141] Second, she writes that these theorists "minimize the importance to the child of all but the most intense current bond." [FN142] Third, Davis fundamentally conceives "everyday separations," as opposed to clearly harmful "long-term and other *1552 traumatic separation" from caregivers, as "constructive learning experiences" that aid a child's development. [FN143] Davis suggests that Goldstein, Freud, and Solnit view separations from beloved caregivers as uniformly harmful and dangerous to the "stability and uninterrupted support" that children need during invariably painful developmental initiatives. [FN144] Davis recommends that children be encouraged to confront rather than deny routine and short-term separation. In sum, Davis's "family network" model defines an emotional universe of attachments which, while of differing weight and depth, all interact to create a healthy milieu for the child's development.

b. The Limits of the Family Network Model in Informing the Lawyer's Determination of Best Interests

Davis's alternative model of best interests resolves some nagging problems created by the Goldstein, Freud, and Solnit psychological parenting approach, by offering promising avenues for a broader, more "culturally competent"

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[FN145] vision of the family. The family network model acknowledges roles for noncustodial parents and extended family members in the emotional development of the child. It resembles models that have worked in non-contemporary, non-Anglo-American contexts for generations. Additionally, it creates a model for understanding and evaluating the extended family systems developed *1553 by many nonwhite or poor families in America who may have been found wanting under the monotropic psychological parenting approach.

In fact, the Davis model, unlike the Goldstein, Freud, and Solnit model, may provide a prescriptive model that also describes family systems across social class in the United States. Just as a single mother on AFDC, who relies on extended family members locally and "down south" to care for her children could be found to be part of a therapeutic family network, a rich working couple who relies on full-time day care providers and regular babysitting, as well as local and distant family, could similarly be understood to provide a family network for their children. By removing the focus on mothers, Davis's model sees the conscientious parent of any gender and any class as an important part of an integrated web of attachments which a healthy happy child will enjoy during her development.

Ongoing debate of the "emerging consensus" about family networking has just begun. Certainly, the model fails in its current form to provide clear guidelines as to what distinguishes a therapeutic family network from a malfunctioning one. While lawyers for children, through the use of genograms [FN146] and a careful understanding of the child's daily life, can discern who is in the child's emotional universe, they have no direction as to how to evaluate the quality and deficiencies of that universe. While the model offers an excellent alternative paradigm to the Goldstein, Freud, and Solnit single psychological parent, it currently does not provide concrete ideas as to intervention, foster care, and permanency planning in the way that the trio's model does.

5. Summary of the Prevailing Models

Each of the prevailing models of determining best interests used by lawyers for children is partly useful and partly troubling. The total lawyer discretion model recognizes the inevitable remainder of lawyer discretion that will enter a representation, but fails to cabin that discretion with principles which will ensure other-centric decision making or even consistency among the representations of the same attorney. The expert opinion model, in its three forms, is inadequate: professionals already involved with the client are often rightly constrained by ethics and history from disclosing all they know about a child's best interests; lawyer-retained experts are expensive and thus currently available to very few lawyers; and court-appointed experts serve the court and announce their opinions too late to be useful in structuring an attorney's representation.

*1554 The Goldstein, Freud, and Solnit psychological parenting model has captured the discourse and in many ways deepened lawyers' basic understanding of child developmental needs. The model has exhorted children's lawyers to treat time as precious and to put their client's perspective first. Its monotropic focus of power in a single psychological parent, its failure to account for many healthy forms of multiple caretaker family structures, and the disparate impact of its partial implementation, however, have led to serious concerns that the model, unwittingly, has compounded the disparity of treatment between rich and poor families. The Davis family network model thoughtfully addresses many of these concerns by offering an alternative paradigm, but needs to be discussed in greater detail before it can provide true guidance to the practitioner.

B. Towards An Integrated Model: Guidelines for the Lawyer for Children in Making Determinations of Best Interests

Recognizing the thoughtful considerations which gave rise to each of the above models, as well as the critical historical role played by each model in its time, the integrated model attempts to preserve the best of each paradigm while discarding the historically outdated or the unintentionally harmful. This Article's model borrows

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and benefits from each of the models described above. Because the lawyer must make best interests determinations from day one of each case, even before she meets or knows her client, some lawyer discretion is inevitable. Proper deference when appropriate to experts, already involved with the case, appointed by the court, or retained by the lawyer, will be critical in many cases. Especially early in the case, reference to many of the Goldstein, Freud, Solnit, and Goldstein principles will be extremely beneficial to the client, particularly the client's sense of time and the primacy of the child's development. Like the Goldstein, Freud, Solnit, and Goldstein model, this integrated model requires the lawyer to strive constantly to see the past, present, and future options from the child's point of view and to coax others constantly to do the same. Where a psychological parent is clearly in place and able to care for the child, he must be taken very seriously. As prompted by Davis's family network model, the lawyer must also look beyond the traditional mother-child dyad to alternative family arrangements which provide children with the stability needed for their development through an integrated family network.

The model of determining a child's best interests that I espouse requires a principled process based substantively on the uniqueness of each child client. In addition to the description which follows, the model is set forth in step-by-step fashion in part D of the Recommendations Section of this Article.

With respect to process, the attorney must base her determination of best interests on a full, efficient, and speedy factual investigation *1555 that leads the lawyer to a deep understanding of the child's family system, her history, and her daily life. A lawyer can track the progress of her factual investigation by sketching these three perspectives on the child's life through genograms, chronologies, and daily schedules. A conscientious process, which involves the client's own words and desires at every possible point, will, I believe, lead the lawyer to a complex, three-dimensional understanding of who the child client is, what she wants, and why she wants it. This deep understanding, and a careful respect for the desires the child expresses, must form the foundation of the lawyer's options for the representation. This starting point, therefore, returns the question of best interests to the context of the representation of a particular child; while any discussion of best interests implicates fascinating theoretical issues with which the child's lawyer must contend, the lawyer must make actual decisions about best interests in the contexts of the child's unique personality and desires.

Next, when removal of the child from her home is an option, the lawyer must consider the child's current predicament not in isolation, but in comparison to the actual alternative options that foster care provides. For instance, if a baby appears not to be receiving optimal care in his home, but the state foster-care system is known to lack adequate foster homes for babies that age in the local area, the lawyer must factor that reality into her reasoning. Otherwise, lawyers are tempted to see the current home situation in isolation, focused more on what is suboptimal about the child's care than on what the state can actually provide instead. [FN147] The child faces a concrete set of alternatives at any moment in best interests analysis; the lawyer must understand the realities of each before determining a client's best interests.

Next, the lawyer must evaluate the actual alternative options in terms of the psychological parent and family network paradigms that Models Three and Four have set forth. The lawyer should methodically and thoughtfully compare the child's family system, history, and daily life with the priorities and concerns laid out by Goldstein, Freud, and Solnit, and Davis. If the child's family history can be understood clearly in terms of one particular model, the lawyer may be able to eliminate from consideration some of the actual alternative options. For instance, a child who clearly had one primary caretaker from whom she has experienced a separation, and who is clearly in crisis, *1556 may also have no family network to speak of. Available alternatives which would place the child in a network of care with no single caregiver would appear to be inappropriate. The lawyer should explore with the client ways to reunite her with that caregiver, while exploring ways to create a larger group of community ties, including extended relatives, counselors, school personnel, and role models like Big Sisters, to afford the child some outlets for support and relationship while the primary relationship is being repaired. In another example, a child clearly may be living in the midst of an inner-city family network, with a beleaguered potential psychological parent figure in crisis. If the network can support the child adequately, there may be no need to move the child to a foster home. It may also aid the child to shore up the psychological parent with supportive services, to afford the child the security of that special relationship.

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Lawyers must continue to deepen their understanding of the rich and complex debates about child development that continue in other disciplines. At the present time, the psychological parent and the family network paradigms help lawyers benefit from these debates at some level of sophistication. [FN148] The alternative paradigms may at least offer clarity about the changes that a child is undergoing. For instance, a client may be raised by a psychological parent, who has disabilities which prevent her from caring for the child further; the child then may be moved into a foster home that provides a family network of caring and love, without one clearly identified substitute for the biological mother's psychological parenting. While a traditional psychological parent perspective may cause a court or a child welfare bureaucracy to underestimate the strength of the ties developed by the child in this foster placement, a healthy respect for models of alternative family networks can help the lawyer and the court to examine the foster placement with an open mind, with an eye towards consolidating its strengths. When the lawyer feels that she cannot sort through the many factors contributing to best interests, she may need to seek expert assistance. In one such case, our office retained a social worker to work with us to determine whether or not the foster family network would or could offer our client a permanent home, before consenting to the adoption of our client by third parties. [FN149]

If lawyers are to be open to hybrid forms of these two paradigms, how is a lawyer to assess when a hybrid option for the client becomes simply chaos, rather than a "diversified portfolio" of caring *1557 caregivers? The key indicator, it would seem, would be the actual progress of the child's development. Because each paradigm seeks, in the end, to safeguard and promote the child's development, the first by providing a stable, reliable, loving figure, the second by exposing the child to a panoply of loving others, the ultimately successful paradigm for each child will be the one, or the combination of the two, which actually aids her development. Thus, the lawyer should remain concerned about a child who is inappropriately aggressive, or morose, or hyperactive, and look closely at the structure of her contemporaneous home life. The child who is growing well, adjusting adequately at school, and interacting within normal parameters with her peers, despite an unusual family structure, should be presumed, to some extent, to be benefitting from the current structure of her home. This is not to say that there is always, or even usually, a direct correlation between sweet, well-behaved children and therapeutic homes, or ill-tempered children and chaotic homes. I suggest, rather, that attorneys for children must be open to the wide range of idiosyncratic family structures that may benefit children, and make changes to a child's family life only when the child's development is clearly at risk.

When these developmental conclusions are clearly complex, lawyers must consult experts for guidance. In a world of excellent resources, lawyers could retain mental health experts to consult closely on issues of best interests for their clients; this is, I believe, our ethical duty to supplement our lack of expertise. [FN150] In the current world of limited resources, lawyers can also take advantage of pre-existing experts or community resources who can come into the child's life as counselors, teachers, and support people, but only, as noted above, if attorneys can remain mindful of the critical role these professionals play and their ethical duties beyond the court proceedings. When all else fails, the lawyer may also be able to convince the court that a court- appointed expert is critical. This route, however, is especially a concern when a client has a fixed perspective on her case -- the lawyer may advocate for the entrance of a very credible witness who will in the end contradict the child's point of view.

If the analysis under the three models of expert deference, psychological parenting, and family network is inconclusive, either because none of the models point in a particular direction or because the models are in conflict, in the end the lawyer is left with the unavoidable remainder: her own judgment and discretion. Unlike the Total Discretion model, however, the lawyer reverts to her own judgment as a last resort only after a full investigation, which leads to a three-dimensional understanding of the child and her actual options; an exploration of the psychological parent and family network paradigms and *1558 their applicability to the child; and a thorough consideration of how and when experts might be helpful to the representation. Moreover, whenever possible, the lawyer should decline to choose among acceptable options and advocate for multiple options, while opposing options that the foregoing analysis may have rejected.

In addition, I propose two additional constraints. First, in a murky world, where best interests cannot be easily discerned and a decision in either direction can be justified, the lawyer should err on the side of seeking to keep the current family structure intact, while advocating aggressively for state interventions that ameliorate the worrisome

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conditions in the home. [FN151] This default implements a view that Goldstein, Freud, Solnit, and Goldstein, as well as Davis, and many concerned experts clearly share: the value of minimal state intervention, the harm of precipitous removal of children, and the importance of seeking in every instance the least detrimental alternative. [FN152] This default also acknowledges the trauma that the child will experience when she separates precipitously from her family.

Second, at the end of any given decision-making process, the lawyer must return to the child's subjective view of the question at hand. How does the best interests decision that the lawyer has reached match the child's desires? How does the decision reflect what is unique and essential about the child? At this moment, the lawyer should return to consider the "seven questions to keep lawyers for children honest." [FN153] As always, the lawyer should ask both how the child benefits concretely from the lawyer's decision making and also examine whether the lawyer's adult perspectives and needs are playing an unduly large role in the process. If multiple acceptable options remain, the lawyer should present evidence and argument describing all these options to the court while also presenting evidence and argument opposing all rejected options. Thus, in the end, the best interests determination must end where it began: with the attorney trying to see the decision to be made from the child's subjective perspective, with a focus on the child's uniqueness and individuality. This structure of decision making, starting and ending with the child, considering the child's circumstances in light of the two paradigms, and *1559 seeking the input of experts when needed, reduces the range of lawyer discretion to acceptable levels.

Two examples follow to demonstrate briefly the way in which a lawyer could implement this integrated model; a more detailed discussion of the concrete execution of the model appears in Chapter Eight, of the book. [FN154]

Miguel: You are appointed to represent Miguel, a thirteen-year-old boy who is the subject of child protective proceedings due to the death of his grandmother, who has taken care of him since birth. He has had minimal contact with his parents since his birth. You meet him shortly after you are appointed, minutes before the first court proceedings. He mentions that many members of his family live in town. Since his grandmother's death, he has been living with his cousin, Luisa, who is nineteen and the mother of a one-year-old baby boy. He wants to stay there. You convince the court to let him remain there.

In court, Miguel gives you permission to read his Department of Child Welfare file and you agree to meet him at his home the next week one day after school. The file is very thin; Miguel's grandmother and cousin had no previous contacts with the Department. The file reflects that Miguel is often truant from school, especially in the last three months; he is in good health. You speak with the caseworker, who has met Miguel and Luisa only once, and knows little about him.

When you arrive at his home the next week, he is not there. You learn from Luisa that as soon as he began to live with her, his behavior deteriorated: he is seen by police on several occasions with gang members known to sell drugs, he does not attend school, and he is often out until two in the morning. Despite your best efforts, you are unable to see him again.

Two weeks later, Miguel is arrested on charges of possession of drugs. When you arrive at court to meet with him, Miguel's great-aunt introduces herself and tells you that she wants Miguel to live with her. You agree to speak with her after you have seen Miguel. You meet him in detention after learning that the prosecutor is seeking extended pretrial detention due to his truancy and home history. Miguel tells you that his great-aunt has offered to take him into her home, also offering to become his guardian on the understanding that he will abide by her strict rules and curfews. Miguel is honestly confused about what he wants, desperately wants to get out of detention immediately, and asks you what you think he should do. How do you counsel your client?

Analysis: Miguel's lawyer should begin with a clear understanding of what Miguel wants, both in terms of objectives of the representation and feedback from the lawyer. Miguel's nonnegotiable wishes are to leave detention. His request is for advice as to the best *1560 course of action which achieves this goal. The lawyer should also note that she does not know Miguel or his family well, lacking even the information a less harried second meeting with her client would have provided.

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In that light, the lawyer should assess Miguel's actually available options:

(1) release to great-aunt, on her terms;

(2) stay in detention (eliminated from serious consideration based on Miguel's stated wish);

(3) release to stranger foster home (unlikely);

(4) release to Luisa (unlikely); or

(5) release to other family members.

Next, the lawyer should assess those options in light of the two alternative paradigms of family structure. A psychological parenting approach might suggest that the great-aunt is the best option to provide Miguel with the psychological parent that he lost when his grandmother died. Because she is the most prominent option, the lawyer should explore carefully with Miguel his feelings about his great-aunt, and think through the pros and cons of living with her. The lawyer should also interview the aunt, to learn about her family history, the structure of her home, and her plan for caring for Miguel. If she appears to offer a stable home for Miguel, it is probably true that courts would currently welcome a strong new parenting figure and give that figure great deference, and perhaps give Miguel a fresh start, when considering the issues of detention and sentencing. The lawyer should also discuss with Miguel the strict rules that his great-aunt proposes, the positive light in which a court would probably view them, and the negative light in which the court would see a second failed family placement, should Miguel not abide by the rules.

The lawyer should also explore at least briefly Miguel's feelings about his time with Luisa. The court will need an explanation as to why Miguel will behave better at the great-aunt's home, when he did not adjust well to Luisa's home. Learning Miguel's perspective on his cousin will be important to the lawyer's getting to know Miguel and his perceptions of his own needs. The lawyer also needs to know whether Miguel still hopes that living with Luisa in the future is an option.

Psychological parent analysis would also recognize, as well, the deep trauma that losing his grandmother represents. The lawyer should broach the topic of his grandmother's death with Miguel, to gauge his willingness and ability to talk about it. It may well be, for instance, that Miguel's recent behavior, both his truancy and his late-night behavior, stems from his grief and loss. If Miguel is understandably unwilling or unable to discuss these issues with his lawyer, she should think about creative ways to offer Miguel the option of professional expert assistance in dealing with his grandmother's death, through referrals to community counseling or the use of resources already available to Miguel (from school, religious affiliation, and the like). Crucially, involving these resources will *1561 increase his chances of leaving detention permanently and receiving a more lenient sentence should he be convicted in the criminal proceeding.

If Miguel is ambivalent or negative about living with his great-aunt, the family network model offers another option for the lawyer to explore. The many other local family members may individually, or collectively, be able to offer him an alternative home. If Miguel gives his permission, the lawyer can contact these family members to see if they can propose an alternative. This proposal will take time and, because it does not get Miguel out of detention that day, may offer at best a backup plan if living with his great-aunt does not work out.

Because Miguel's main goal is to avoid detention, it is fair to counsel him that his great-aunt is his best hope for release from detention and seems like the available option in his best interests. The lawyer should also make a plan to keep in touch with Miguel and the aunt, and ask Miguel if he wants her to explore his extended family network for backup options.

Thomas: You have represented Thomas, an eighteen-month-old, for nine months. You were appointed when he was originally the subject of neglect petitions based on his mother's failure to attend medical appointments for his

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infant skin disease, which has cleared up. He has lived since birth with his mother, who is Haitian and speaks Creole and only a little English. His mother has recently given birth to twins. She has mild mental retardation and a mixed track record of keeping appointments for his medical and developmental visits and her prenatal visits at the local health plan. Throughout your representation of the children, she has lived with Thomas with a variety of family members, including her father, aunts, and uncles.

Soon after the twins were born, you visited her home before court and observed broken windows and damaged walls. Thomas's mother reports that her boyfriend is responsible for the condition of the apartment, but refuses to say more. You learn from the child welfare worker that she has seen roaches and rats in the apartment. The worker is seriously considering removing Thomas due to the conditions in the home.

At the home, you also observe your client. Thomas is playing actively, riding toys throughout the small apartment, and offering you books in English to read. His mother tells you, however, that he sleeps much of the day, with active periods only in the morning and early evening.

Throughout your representation, Thomas has appeared well-adjusted and happy. He appears comfortable and happy when with his mother. Thomas speaks Creole and some English, and seems to understand you when you speak to him. Developmental evaluations have found him within normal ranges and recommended follow-up at the local health plan. The mother has missed a number of the follow-up visits sporadically.

*1562 One developmental report noted that the mother had a great deal of animosity for Thomas's father, who she has not seen since before Thomas was born. The mother has told you that Thomas is "like his father -- selfish and nasty." Nevertheless, neither you nor any of the case workers who have worked with the family have ever seen evidence of any neglect or maltreatment of Thomas, apart from the various missed medical appointments.

Based upon your knowledge of the current foster care resources, you believe that Thomas, if removed, will probably be placed in the next city, a one and one half hour bus ride from his mother, and probably will live in a non-Creole speaking household.

Analysis: Beginning with the child's perspective, the child appears comfortable and happy with his mother. He has never known any life beyond her care and the company of his extended family. You find it odd that an eighteen- month-old boy should be sleeping much of the day, and tell his mother that you plan to talk to the child's developmental treatment people at the local health plan about that. You also ask her to take him for a medical checkup concerning the possible effect on him of having rats and roaches in the apartment with him.

Thomas's actually available options are:

(1) remain with his mother in the current apartment;

(2) remain with his mother in another place;

(3) live with a relative;

(4) live in foster care with strangers.

Under a strict psychological parenting model, this mother's current situation raises great concern. The strain of raising three children, her postpartum condition, and the disrepair of the apartment could be taken to suggest that she is overwhelmed with her current responsibilities. You are concerned that her current boyfriend, if responsible for the damage to the apartment, has a violent temper. Initially, you wonder whether Thomas would be safer in another home.

A number of factors should prevent the lawyer from seeking removal at this time. First, under the psychological parent theory, there are a number of services that can be provided to Thomas's mother immediately to prevent

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Thomas's separation from her. Thomas's lawyer should work immediately with the mother's lawyer and the child welfare worker to advocate for speedy repair and extermination of the apartment, or alternative housing. Until these repairs or alternatives are arranged, Thomas's lawyer should monitor the case worker's progress and Thomas's situation daily. The child's lawyer should also explore with the mother's attorney whether adequate postpartum support is available to the mother. Referral to a community agency that could support the mother during this difficult adjustment period could be especially useful. Because Thomas has lived all his life with his mother, the prospect of separation, especially in a distant, distinct foster placement, should be an absolute last resort.

*1563 The extensive family network which has previously housed the family should be explored as an alternative home for Thomas's mother and the three children. The family network may also offer support and extra hands for Thomas's mother during the first weeks of the twins' lives. If Thomas is particularly close to a grandparent or aunt whom he knows well, perhaps that relative could plan to spend extra time with Thomas during this important adjustment period. If the strain of raising the three children is too much, the family network should be carefully explored for alternative placements, to prevent Thomas from entering foster care.

The lawyer may feel queasy not immediately advocating that Thomas leave a home that contains vermin and seems chaotic and violent. Once the lawyer has made sure that the system has moved Thomas and his mother into a situation that is safe for the time being, however, the lawyer should examine whether the impulse to "remove Thomas" does not arise from her own anxiety to have Thomas in a risk-free environment which requires less day-to-day attention on the part of the lawyer. The lawyer, returning to the seven questions to keep her honest, should continually explore ways to preserve the mother's and the family network's primary role in Thomas's life, to keep his family intact.

The lawyer need not limit her actions to preserving the home only. As noted earlier, the family should also be asked to take Thomas for medical checkups, especially if he has been near rats and roaches. Thomas's lawyer should also ask the family doctor or a treating professional about Thomas's sleepiness, to inquire as to whether it is, given his level of development, of concern.

As Miguel's and Thomas's stories illustrate, the lawyer's determination of best interests always takes place in the context of the child's wishes and the attorney's understanding of who the child is, in his context. Especially for verbal clients, any best-interests analysis begins and ends with the child's desires. Even for nonverbal, less communicative clients, best-interests analysis must begin and end with the attorney's best understanding of who the client is, what makes her unique, and what has been her context. Beginning and ending with a close focus on the child will keep best-interests analysis focussed on her needs and values, and not the attorney's own.

If noting else, this attempt at an integrated model of process and substance for determining a child's best interests represents a clear improvement over the total discretion model which pervades our current lawyering for children. While I remain open to refinements and criticisms of this first attempt at an integrated approach, I am sure that a uniform acceptance of these prescriptions for lawyers for children alone would immeasurably improve the quality of lawyering for children nationwide.

*1564 III. Recommendations

I therefore propose that the recommendations of the Fordham Conference include the following: [FN155]

A. The Model Rules and the Model Code direct the lawyer for children to conduct as traditional a lawyer-client relationship as possible, being directed wherever possible by his child client's well-counseled wishes. The lawyer may only modify that relationship based upon a "reasonable belief " that the client cannot adequately act in the client's own interests. In order to ensure that child clients receive the full benefit of traditional legal representation, a lawyer for children should begin a representation following these three defaults:

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1. Relationship Default:

a) A lawyer should begin each representation as she would any other lawyer- client relationship: by meeting the client and trying to ascertain the client's goals.

b) Because meeting the client, explaining the lawyer's role, and listening to the client's view of the case are almost always prerequisite to providing the benefits of representation, the lawyer should not deviate from this relationship default unless the lawyer can articulate valid reasons for doing so which are specific to the individual child client's development and circumstances and from which the child clearly benefits. Even when the child is too young to understand who the lawyer is, the lawyer will learn in these meetings about the child's personality, unique temperament, and physical characteristics.

2. Competency Default:

a) A child's lawyer should begin each representation with the presumption that the client can understand the legal issues in the case and express subjective perspectives or offer critical information about them. To the extent that the child's developmental status creates obstacles to communication and understanding, it is part of the lawyer's job to overcome them creatively in order to provide the child client with the benefits of an advocate who listens, informs, counsels, and answers questions.

b) Because this presumption is critical to effective representation, it can only be overcome when the lawyer has independent evidence, arising outside the representation, that the child is incapable of understanding the legal issue or expressing a view of it.

***1565** c) Even if the competency presumption is overcome by limits on the child's ability to communicate and understand some issues, effective representation requires that the lawyer continue communicating with the client at the level of sophistication of which the client is capable. The lawyer's determination of these limits cannot be static, but must change with the child's developmental progress through the course of the representation. Thus, the determination that a child cannot "adequately act in his own interest" must be made on a decision-by-decision, not on a child-by-child, basis.

3. Advocacy Default:

a) All lawyers whose child clients can express a view relevant to the legal representation should proceed in the first instance as if the stated view is the goal of the representation.

b) Inviability or unlikely success of the client's stated view is not a reason to ignore that view. As in any other representation, the child's lawyer is charged with counseling the client about the relative strengths and weaknesses of the client's stated goal. If a well-counseled client decides upon an inviable goal, the lawyer should continue to pursue it, or withhdraw from the representation pursuant to established ethical parameters for withhdrawal.

c) The only time the child's lawyer may advocate for a position other than that stated by the client, is after the lawyer, based upon independent evidence arising outside of the representation, has determined that the client's development or circumstances preclude the client from either expressing a position or being effectively counseled as to the viability of the position. Only then may the lawyer seek appointment of a guardian or take other protective action pursuant to Rule 1.14(b) or make decisions on behalf of the client pursuant to EC 7.12. B. Lawyers who decide to advocate the express wishes of their child clients are not free to ignore considerations of the child's best interests. Best interests determinations must play a key role in all representations of children. Because the best interests standard is prevalent in the child client's interaction with legal, medical, mental health, and social work institutions, the attorney cannot carry out effective representation without developing a sophisticated, principled understanding of the best interests of each client. Every representation of a child includes the following moments at which best interests determinations must be made:

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1. In order to represent their clients in proceedings subject to a best interests standard, children's lawyers must be able to frame the goals of the representation in terms of the child's best interests.

2. In order to work effectively with medical, psychological, mental health, and social work professionals, the child's attorney must understand the various best interests standards applied by professionals in these fields.

*1566 3. A child's lawyer must be able to make principled best interests determinations in those situations where the lawyer is called upon to make day- to-day decisions on behalf of the client such as the timing, setting, and attendees at client meetings, or the release of sensitive information to the client.

4. For clients who can communicate and be counseled effectively, the lawyer is often asked to advise the client about the lawyer's view of the client's best interests. As Model Rule 2.1 provides, the lawyer, "in rendering advice may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." The lawyer should also confront himself with his assessment of best interests, to evaluate whether it is free from bias and stereotype.

5. Lawyers for clients who cannot be counseled and cannot be represented meaningfully pursuant to the three defaults must determine the child's best interests as the ultimate goal of the representation. C. Best interests determinations must be made in a contextual, self-conscious, deliberate, and principled manner. Lawyers should approach the determination of best interests with extreme caution. Nothing about legal training or traditional legal roles qualifies lawyers to determine best interests. References to the lawyer's own childhood, stereotypical views of clients whose backgrounds differ from the lawyers, and the lawyer's lay understanding of child development and children's needs should be considered highly suspect bases for a best interests determination.

D. Lawyers for children who must determine their client's best interests at any given moment in the representation should employ the following process. The lawyer should continue the analysis until only one option remains or otherwise until the analysis is complete at step six.

1. The process must begin with the child in her context. In making a best interests determination, it is the lawyer's responsibility to carry out a full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client's unique personality, her family system, history, and daily life. This process should include the client's own words, stories, and desires at every possible point. Even where the lawyer has determined that the child cannot fully understand or express desires about the legal issues of the case, there will be very few verbal children who cannot express some views about their own lives. As the lawyer gathers information from her client and other sources, the lawyer should organize those facts using devices such as genograms, chronologies, and daily schedules to ensure that the lawyer is working from a thickly detailed view of the child client as an unique individual.

2. Essential to the process at its beginning is also a snapshot of the child at the moment of the determination. How is the child developing? *1567 How is the child behaving? How is the child benefitting or suffering from her current living arrangement? A lawyer should beware of undertaking these determinations without current contact with the client.

3. The determination must consider the options actually available to the child. Best interests determinations are not made in a vacuum. A lawyer who determines that a child's current situation is not in the child's best interest, but who does not consider whether the resulting intervention would be any better has done that child client no service. The lawyer must go further and consider the actual alternative options to the child's current situation in determining whether the proposed state intervention is in the child's best interests. Where the proposed intervention results in no improvement for the child, the child's attorney should be prepared to negotiate other forms of intervention, or no intervention at all.

4. In considering the actually available options that the lawyer and client have identified, the lawyer should examine each option in light of two important child welfare paradigms: the psychological parent model and the

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family network model.

a. The psychological parent model -- Does the option allow the child to remain with or to develop a relationship with a psychological parent who wants him and can provide continuity in day-to-day interaction, companionship, and shared experiences? Does the option respect the child's sense of time? Does the choice of the option recognize the limit of our predictive knowledge and confine itself to small, modest, generally short-term predictions?

b. The family network model -- Does the option allow the child to remain with or to develop a relationship with a family network which provides a supportive milieu in which caregiving is shared among several adults with whom the child is familiar?

In assessing various options available to the child with respect to these paradigms, the lawyer should be aware that these paradigms intersect and interact in various ways. A child may be moving from a situation that resembles one paradigm into a situation that resembles the other. The child may be situated in an inadequate version of a family network, which could use the anchor of a strong psychological parent-like figure. A child may have lost their psychological parent, and have only an extended family network, with no clearly defined parental substitute identified. It will often be conceptually useful for the lawyer to understand the options the child faces in these lights.

In many cases, the lawyer can combine her understanding of the child and her context with these analytical paradigms and reach useful conclusions about best interests. The lawyer may, for instance, find that the child has always thrived in one paradigm and floundered in another, or generally requires a ***1568** hybrid. Because the paradigms seek to identify family structures that aid a child's development, the actual progress of the client's development offers critical input in making those determinations.

In working with analytical paradigms derived from other fields, the lawyer should always remember that a little knowledge is a dangerous thing. This step will, therefore, ordinarily not be dispositive unless one paradigm or the other unproblematically accounts for much of the client's life history.

5. When this analysis becomes too complex, lawyers must consult experts for guidance. Where possible, lawyers should retain mental health and social work experts to aid them in making these best interests determinations in the course of their representations. Because much of the data upon which the decision is based is confidential lawyer-client information, the retained consultant is often the optimal, and only ethically acceptable, guide. When lack of resources or other factors make such a consultant impracticable, the lawyer may look to experts already involved with the client, or occasionally court- appointed experts. These latter experts, however, do not share the lawyer's duty of advocacy with respect to the child client's wishes and perspectives, often have other institutional loyalties, may have important ongoing relationships with the child that must not be damaged, or may not offer opinions to the lawyer in a timely fashion.

6. At this point in the process of determining best interests, there still may be no definitively preferable option for the child. If multiple acceptable options remain, the lawyer should represent evidence and argument describing all these options to the court while also presenting evidence and argument opposing all rejected options. If presenting multiple options is not possible, the lawyer is then left to his discretion. In exercising that discretion, the lawyer may be guided by a number of useful considerations.

a. Where a decision in either direction can be justified, the lawyer should err on the side of keeping the current family structure intact, while advocating aggressively for state interventions that ameliorate the worrisome conditions in the home.

b. The decision-making process should end with the child and his subjective perspective. During and at the end of the exercise of his discretion, the lawyer should consider seven questions to keep his decision child-centered and free of his own biases:

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(1) In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?

(2) Does the child understand as much as I can explain about what is happening in his case?

***1569** (3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?

(4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

(5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?

(6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?

(7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

Conclusion

Lawyers for children are ethically required to pursue as traditional as possible a lawyer-client relationship with their clients. Even traditional lawyer-client relationships, however, require the lawyer to contend with the issue of the child's best interests during important moments in the representation. The "best interests of the child" is often the ultimate legal standard in the pending legal proceedings. "Best interests" is the guiding concern for most of the other professionals involved with the client. The lawyer must make day-to-day decisions in the client's best interests, including structuring encounters with the client, the transmission of information, and the provision of services to the client. For clients who can benefit from counseling, the lawyer will often be asked to outline the client's best interests. In these cases the lawyer must confront herself with her own gut instincts about the child's best interests to be aware of when she may be trying to impose her preferences and biases onto the client. For clients who cannot be represented in an essentially traditional, client-directing mode, the lawyer may have to determine the very objectives of the representation with reference to the child's best interests.

Lawyers for children have tended, empirically, to rely upon their total discretion in determining their clients's best interests in these situations. Recently, other models have begun to inform these determinations. Expert opinions, by experts already involved with the client, court-appointed experts, and lawyer-retained experts, can contribute to the determination, where resources are available to pay them.

The interdisciplinary team of Goldstein, Freud, Solnit, and Goldstein have educated children's lawyers in psychological parenting theory, directing lawyers, judges, and child welfare systems to seek the

specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity ***1570** for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become is psychological parent. [FN156] Peggy Davis has suggested that child welfare professionals focus instead on "a supportive milieu in which caregiving is shared among several adults with whom the child is familiar." [FN157]

In making a best interests determination at any given moment of the representation, the lawyer for children should deliberate as follows: she should begin with the child -- his personality, his subjective perspective, his family history, and context. The lawyer should also look at the child client's immediate situation -- his behavior, his satisfaction with the status quo, the progress of his development. Then the lawyer should identify the actually available options for the child. She should evaluate each option in light of the psychological parent and family

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network paradigms to understand conceptually the options facing her client. In some cases, this analysis will identify a single best path for pursuing the child's best interests.

Where it does not, the child's attorney should consider consulting an expert, one whom she retains or, less frequently, an expert already involved with the child or one appointed by the court. The lawyer should advocate multiple acceptable options for the client, while opposing all rejected options. Where advocacy of multiple options is impossible, the lawyer must exercise her own discretion. This discretion can be further guided by two sets of concerns. First, where alternative paths appear equally appealing, the lawyer should err on the side that preserves the existing family arrangements to the greatest possible degree. Second, the lawyer should end the best-interests decision- making process with the child and his subjective views, by considering once again the seven questions to keep her honest.

This process for determining best interests will need to be continually refined, as new paradigms of child welfare emerge and as resources for interdisciplinary collaborations by lawyers with other professionals expand. This integrated model offers an important alternative to the prevailing total discretion, guardian ad litem, model, which must be replaced.

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[FN1]. 387 U.S. 1 (1967).

[FN2]. Chapter One of Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions offers historical background concerning the history of child protection and parental rights. It concludes that, despite federal and national initiatives designed to preserve families, the current child welfare system is disturbingly continuous with what scholars have described as a dual system of family law, protecting parental rights of rich parents and discounting parental prerogative of poor parents, which originated in Elizabethan England. Chapter Two offers a capsule history of lawyering for children in the United States. It concludes that the prevalent "guardian ad litem" role of lawyers for children originated in property disputes involving orphaned wealthy British

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children and has no logical place in contemporary child welfare proceedings. Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions (forthcoming from the Michie Company) [hereinafter Representing Children].

[FN3]. Chapter Three of Representing Children reviews the substantive law of the 50 states, the District of Columbia, and the U.S. Territories regarding the role of lawyers for children in child welfare proceedings. Although lawyers for children or guardians ad litem are required in all jurisdictions, the role of any given lawyer in any given state, city, county, or courthouse varies wildly, with few areas of consensus or consistent practice. Id.

[FN4]. Chapter Four of Representing Children examines the ethical provisions regarding representation of children. Concluding that lawyers for children are ethically required to design a representation that closely resembles traditional lawyer-adult client representation, the chapter offers three default postures for the child's attorney and seven principles for keeping the attorney true to the ethical requirements. Id.

[FN5]. Model Rules of Professional Conduct Rule 1.14 (1983) [hereinafter Model Rules].

[FN6]. Id. Rule 1.2(a).

[FN7]. Kate Federle warns in her paper for this Conference that giving lawyers discretion to determine client competence invites manipulation when lawyer and client disagree. Katherine Hunt Federle, The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 Fordham L. Rev. 1655, 1661, 1676-77, 1681; see also infra note 34 (discussing results when lawyer and client disagree).

[FN8]. Martha Matthews notes a tension in the Model Rules between a view of competence as an incremental concept and competence as an all-or-nothing concept. On the one hand, the Comment to Model Rule 1.14 notes that the "law recognizes intermediate degrees of competence." Model Rules, supra note 5, Rule 1.14 cmt. On the other hand, Model Rule 1.14(b) authorizes protective action which may remove entirely the client's ability to direct the representation. Matthews notes that the Model Rules drafters acknowledge, but do not resolve, this tension. Martha Matthews, Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases, 64 Fordham L. Rev. 1435, 1439-40 (1996).
The all-or-nothing view is expressed in Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering s 1.14:101, at 439 (2d ed. 1990 & Supp. 1993): "At some point, however, the ability of a disabled client to communicate or to take action is so limited that assigning that person the role of "client" is a mere formality -- as where a lawyer has been assigned to represent a newborn infant."

[FN9]. For general background on the traditional role of the guardian ad litem, see Brian G. Fraser, Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem, 13 Cal. W. L. Rev. 16, 25 -35 (1977).

[FN10]. Peter Margulies in his article for this Conference, notes that because "even infants are taking in information, and giving it out, at a spectacular rate," attorneys for very young children should not forego meeting their clients. Peter Margulies, The Lawyer as Caregiver: Child Client's Competence in Context, 64 Fordham L. Rev. 1473, 1484 n.38 (1996).

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[FN11]. In this regard, I agree with the Council of the Family Law Section of the ABA, which states in its proposed Standards of Practice that client disability is not globally determined, but rather is "contextual, incremental, and may be intermittent," and that "[t]herefore, a child may be able to determine some positions in [a] case but not others." Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 Fam. L.Q. 375, s B-3 cmt. (1995) [hereinafter ABA Proposed Standards]. For a discussion of competence as a contingent construct that varies with the decisions the client confronts and with the way the client is treated by lawyers and other professionals, see Margulies, supra note 10, at 1477, 1485. See also Emily Buss, "You're My What?": The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 Fordham L. Rev. 1699, 1739-41 (1996) (arguing that even a traditional guardian ad litem need not under Model Rule 1.14, conclude that "the entire normal client-lawyer relationship" is not possible, but must preserve the normal relationship as much as possible). Buss points out that even under Model Rule 1.14 "client capacity for decision making and for being informed are quite different." Id. at 1749-50. This is one example of the need for contingent and intermediate determinations of client capacity, rather than a single global determination to govern the entire relationship.

[FN12]. It is fair to say that I was led, kicking and screaming, to this rather uncomfortable conclusion. As a practitioner, I found the responsibility of taking positions on huge issues in my client's life to be awesome and humbling. As a teacher and supervisor, I found the level of discretion entrusted to lawyers for children to be frighteningly huge. When undertaking the project of writing this book, I originally believed that I could enunciate a view of lawyering that would eliminate the discretion to determine and contend with a child's best interests altogether. I am therefore deeply sympathetic with and fascinated by Martin Guggenheim's work, including the article included with this Conference, which seeks principled elimination of lawyerly discretion in representing children. Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399 (1996). The chapters contained herein demonstrate my conclusion, based upon my practice and my research, that while this discretion, and the awesome responsibility it entails, cannot be eliminated, it can nevertheless be reduced to acceptable levels and exercised in a principled manner.

[FN13]. Presented in part I infra.

[FN14]. Presented in part II infra.

[FN15]. Chapter Seven of Representing Children discusses the roles of interdisciplinary consultation and learning. Chapter Eight, which concludes Part One, outlines the nuts and bolts of representing verbal and non-verbal clients, offering a practical roadmap through the representations of various kinds of clients.

[FN16]. Part Two of Representing Children describes in depth a rubric for the relationship of the adult attorney with the child client, addressing issues of interviewing, counseling, and beginning and ending the professional relationship.

[FN17]. Part Three of Representing Children examines selected issues in pursuing the representation, including lawyering at interdisciplinary meetings, and calling the child client to the stand as a witness. Id.

[FN18]. Donald Duquette notes that best interests remains the most common standard for dispositional orders despite widespread dissatisfaction with the standard's subjectivity. Donald N. Duquette, Child Protection Legal Process: Comparing the United States and Great Britain, 54 U. Pitt. L. Rev. 239, 279 (1992). For examples from just two states, see Conn. Gen. Stat. s 46b-129(e)(3) (1995) (requiring court to make best interest determination for

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extension of child's commitment to state custody); id. s 51-165(d) (1985 & Supp. 1995) (requiring that all judges assigned to Superior Court Juvenile Matters have a full understanding of the best interests of the child standard); Conn. R. Super. Ct. Juv. s 1023.1(f)(2) (West 1995) (defining "dispositive hearing" as a proceeding in which the court "orders whatever action is in the best interests of the child and the community"); N.Y. Fam. Ct. Act s 614(1)(e) (McKinney 1983) (requiring neglect petitions to allege that best interests of child requires commitment to state care); id. s 1052(b)(i)(A) (McKinney 1983 & Supp. 1996) (requiring court in neglect cases to state grounds for all dispositions in terms of child's best interest); id. s 1055(b)(iv)(B)(1-3) (setting out three factors court shall consider in determining whether extension of commitment is in child's best interests).

[FN19]. Generally the standard in those proceedings is imminent harm to the child if there is no removal. Many courts may believe that a finding of imminent danger requires a general assessment of the interests of the child at the time.

[FN20]. Certainly the child's attorney should feel comfortable holding the state to its burden demonstrate parental unfitness before further state intervention into the family's life. Likewise, at an emergency removal hearing, an attorney opposing removal should certainly require the state to demonstrate imminent harm to the child and prevent premature court deliberations on the issue of the child's best interests.

[FN21]. Of course, like any attorney, the child's attorney is bound not to make frivolous claims. Model Rules, supra note 5, Rule 3.1. Thus, if there is no argument that a child's desire is in the child's best interest, the lawyer should theoretically be unable to make that argument. In practical application, however, the duty of zealous advocacy requires that a lawyer define the term "frivolous claims" very narrowly. Only claims which are clearly untenable under the controlling law, or which reflect a wish of "harassing or maliciously injuring a person," should be deemed frivolous. Id. Rule 3.1 cmt. Such a narrow definition of frivolous claims prevents lawyers from arbitrarily vetoing their client's wishes. Guggenheim, supra note 12, at 1419 n.68.

[FN22]. As Representing Children will address in Part Two, The Lawyer-Child Client Relationship, a lawyer who believes he is making a very marginal or "likely to fail" claim, should certainly counsel her client about the tenuousness of the argument and encourage the client to consider more constructive positions. Peters, Representing Children, supra note 2. Nevertheless, if after thorough counseling, the client persists in wanting a marginally possible objective, and the lawyer can make a good faith claim for that, Rule 3.1 should not prevent her from putting forth that claim.

[FN23]. Bruce Boyer points out that the prevalence of the best interests standard imposes a similar obligation on parents' lawyers to translate their clients' objective into terms of best interests of the child. Bruce Boyer, Ethical Issues in the Representation of Parents in Child Welfare Cases, 64 Fordham L. Rev. 1621, 1626-27 (1996).

[FN24]. See, e.g., Code of Ethics of The National Association of Social Workers s II.G.1 (1994) (advising a social worker acting on behalf of a client adjudged legally incompetent to "safeguard the interests and rights of that client"); see also Code of Ethics of The National Federation of Societies for Clinical Social Work s II.e (1988) (advising a clinical social worker acting on behalf of a client, "always [to] safeguard the interests and concerns of that client").

[FN25]. The interdisciplinary meeting, which will be explained in Part Three of Representing Children, is often a useful forum for this clarification. See Peters, Representing Children, supra note 2.

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[FN26]. See infra notes 63 -128 and accompanying text (discussing and critiquing the works of Goldstein, Freud, and Solnit).

[FN27]. See infra notes 129 - 46 and accompanying text (discussing the Family Network Model).

[FN28]. For a discussion of how to seek to resolve such conflicts among lawyers and consulting social workers serving the same clients, see Jean Koh Peters, Concrete Strategies for Managing Ethically-based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client, 1- Mar. KY. Children's Rts. J. 15 (1991).

[FN29]. These meetings and the dynamics thereof are discussed in more depth in Part Three of Representing Children. Peters, Representing Children, supra note 2.

[FN30]. Peters, Representing Children, supra note 2.

[FN31]. Indeed Part Two of Representing Children discusses ways to approach the first interview to make the client as comfortable with the lawyer and the lawyer's role as possible. Id.

[FN32]. Note that the comment to Model Rule 1.4 suggests that, in some circumstances, all lawyers may be justified in "delaying transmission of information when the client would be likely to react imprudently to an immediate communication." Model Rules, supra note 5, Rule 1.4 cmt. The rule itself requires that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Id. Rule 1.4(a). The comment offers as an example that "a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client." Id. Rule 1.4 cmt. Under no circumstances, however, may a lawyer "withhold information to serve the lawyer's own interest or convenience." Id.

[FN33]. Keep in mind that "as comfortable as possible" may not in the end be very comfortable. As Part Two of Representing Children explores, because many legal issues pose deeply unpleasant issues for the client, a lawyer should understand that children will often dread meetings with their lawyers. It is critical that lawyers not distort their roles by attempting to overcompensate, through gifts, food, and fun activities, for the pain that their clients are undergoing. Peters, Representing Children, supra note 2.

[FN34]. Model Rules, supra note 5, Rule 2.1.

[FN35]. Id. Rule 2.1 cmt.

[FN36]. A thoughtful debate about the appropriate role of lawyer recommendations in client counseling generally can be found in the writings of Stephen Ellmann, Robert Dinerstein, Peter Margulies, and others. See Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz. L. Rev. 501, 570 (1990) (arguing that Ellmann's presumption in favor of lawyer advice should be reversed in order to counteract rampant lawyer paternalism); Stephen Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717, 746, 761, 767 (1987) (arguing that lawyers owe their clients the full benefit of the lawyer's experience and that a lawyer's determination to protect

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client autonomy by not giving advice actually stifles the client's freedom to decide for herself whether she wants her lawyer's opinion); Stephen Ellmann, The Ethic of Care as an Ethic For Lawyers, 81 Geo. L.J. 2665, 2707-12 (1993) (arguing that an application of Carol Gilligan's concept of an ethic of care to legal practice would result in lawyers being even more forthcoming with moral and ethical advice than Model Rule 2.1 initially suggests); Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberations Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. Rev. 213, 214, 240 (1990) (arguing that the lawyer's obligations to her clients and to society as a whole require the lawyer to give advice regarding the moral, psychological and policy consequences of the client's decisions and in some circumstances to withdraw from representation if the client ignores the lawyer's advice) [hereinafter "Who Are You to Tell Me That?"].
These writers react to their reading of the perspectives on interviewing and counselling legal clients found in David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977) and David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991). Binder and Price's 1977 book called on lawyers to encourage clients to make their own decisions, and set out only a few circumstances in which lawyers should offer advice or respond to requests for advice. Binder & Price, supra, at 166, 196 -203. Binder, Bergman, and Price, in their 1990 book, took a more expansive view of lawyer advice while still placing their focus on client autonomy. Binder et al., supra, at xxii, 279. While specific prescriptions vary among the authors taking part in the debate, all agree that the lawyer must be careful to preserve client autonomy while giving the client the benefit of useful counseling.

[FN37]. Emily Buss addresses the importance of clearly communicating to a child client about the nature of representation so that the child knows whether the attorney is representing the child's wishes or the child's best interests. Buss, supra note 11, at 1720-21. Communication about the lawyer's role is an essential element of the lawyer's obligations under Model Rule 1.14. Because little in a child's experience will cause her to expect that an adult will listen to and advocate her views, it is essential that the child's lawyer communicate fully about the nature of the representation. Id. at 1723-24. The Council of the Family Law Section of the ABA recognized this obligation by including in its proposed standards the lawyer's duty to "remain aware of the power dynamics inherent in adult-child relationships" when expressing the lawyer's assessment of the case. Proposed ABA Standards, supra note 11, s B-4 cmt.

[FN38]. Stephen Ellmann, in discussing client-centered counseling, has pointed out the danger that even a lawyer who has no desire to manipulate her client may still seek to mold the client's thinking in service of what the lawyer sees as the client's interests, or some broader social interest. Ellmann, Lawyers and Clients, supra note 36, at 727.
Peter Margulies, while asserting that lawyers should counsel their clients about the morality, psychological impact, and unintended consequences of their goals, distinguishes influencing clients from manipulating them. Margulies, "Who Are You to Tell Me That?," supra note 36, at 247- 49. Manipulation, according to Margulies, is usually an attempt to achieve the lawyer's goals in the guise of the client's best interests. Id. at 249.

[FN39]. I agree with Martha Matthews that "[t]he child's lawyer has an ethical duty to avoid using her superior skills and social position to silence the child's voice, or coerce the child into passive compliance with the lawyer's views." Matthews, supra note 8, at 1458.

[FN40]. The danger of hearing only what you want to hear from your client may be particularly strong during initial interviews when you are trying to determine the facts of your client's case. While it is inevitable and useful that the lawyer will have one or more working hypotheses in mind at this stage, it is all too easy unconsciously to structure an interview so that it elicits only facts which confirm the hypothesis without ever getting to the truth of the case as the child sees it. See John Rich, Interviewing Children and Adolescents 6 - 9 (1968) (citing Jean Piaget, The Child's Conception of the World 8 (1929), on the difficulty adult researchers have in not imposing their own preconceived ideas upon children with whom they are working). Part Two of Representing Children will offer the child's attorney's techniques for confronting her subjective desires for the child so that her client counselling can

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focus on the client's, not the lawyer's concerns. Peters, Representing Children, supra note 2.

[FN41]. The fact that normal ethical analysis does not apply to a particular representation should be a clear warning sign that the lawyer is out of his professional depth. Christopher Wu's discussion of conflicts of interest notes that a lawyer who gets to set the goals of litigation may never be able to declare a conflict of interest. Christopher N. Wu, Conflicts of Interest in the Representation of Children in Dependency Cases, 64 Fordham L. Rev. 1857, 1861 (1996). Wu warns lawyers against taking any comfort in this; on the contrary it should "be seen as a strong signal that the attorney is engaged in some function other than the practice of law." Id. at 1860.

[FN42]. The conflicts created by this type of representation are analogous to those facing the lawyer for a corporate entity. Under Model Rule 1.13, such a lawyer may have an obligation to inform the entity's officers that the lawyer does not represent them, but rather the best interests of the corporation. Model Rules, supra note 5, Rule 1.13(d). Emily Buss, in her article for this Conference has applied this analysis to the situation of a lawyer who decides to represent a child's best interests. Buss, supra note 11, at 1735-36. Extending the analogy offered by Hazard & Hodes, supra note 8, s 1.14:102, Buss notes that in an entity representation, communication is complicated by the fact that the lawyer must seek information from the entity's human officers while not misleading them about where the lawyer's duties of confidentiality and advocacy lie. Buss, supra note 11, at 1735-37. When the entity is a child's best interests, the situation is even more complicated, because children are more easily mislead about the lawyer's role than are sophisticated adult corporate officers. Id.

[FN43]. Fall Ferguson, Applying Developmental Principles Within the Lawyer's Role: A Central Dilemma for Lawyers for Children (May 1994) (unpublished manuscript) (on file with author). Ferguson distinguishes best interests representation from Rule 1.14(b) protective action by pointing out that nothing in Rule 1.14(b) or the Comment mandates that protective action be permanent or comprehensive. Rather, she urges that protective action should be designed to address specific incapacities at specific moments of the representation. Id. at 28 -29.

[FN44]. Part II, infra, describes four models of determining best interests and proposes a model integrating the four approaches in child placement decisions.

[FN45]. Linda Long cites a conversation with a lawyer friend who said: "I'm so glad that I'm a guardian ad litem in this case. For once I don't have to think and act like a lawyer." Linda L. Long, When the Client Is a Child: Dilemmas in the Lawyer's Role, 21 J. Fam. L. 607, 621 n.44 (1982- 83); see also Wu, supra note 41, at 1861 (discussing the problems that occur when lawyers do not consult their clients when determining the objectives of the representation).

[FN46]. For instance, a study commissioned by the U.S. Department of Health and Human Services and completed in 1993 concluded that a majority of the states direct lawyers for children and guardians ad litem to "represent the best interests of the child," with "no further guidance." The study concluded that, "for these States, the decision of how to represent the child's interests or "best" interests appears to be left to the discretion of the GAL or, perhaps, the courts." U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, National Center on Child Abuse and Neglect, Washington, D.C., Final Report on the Validation and Effectiveness Study of Legal Representation through Guardian Ad Litem (1993). Copies of this Report can be obtained from the National Clearinghouse on Child Abuse and Neglect Information, P.O. Box 1182, Washington, D.C. 20013 -1182 or by calling 1- 800 -FYI-3366.

[FN47]. Christopher Wu notes that children subject to child protective proceedings are already surrounded by

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people who must determine and achieve the child's best interests. What the child's lawyer should bring to the table is not a duplication of this function, but the loyalty and advocacy that are the essence of the lawyer's professional identity. Wu, supra note 41, at 1871-72.

[FN48]. See Guggenheim, supra note 12, at 1415 ("Similar cases will be decided differently merely because of chance assignment of a lawyer.")

[FN49]. Examining judicial decision making, Robert Mnookin points out that the best interest standard, being essentially indeterminate, poses an "obviously greater risk of violating the fundamental precept that like cases should be decided alike." Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law & Contemp. Probs., Summer 1975, at 226, 263.

[FN50]. "In the real world, judges rely on the advocacy of a child's lawyer." Guggenheim, supra note 12, at 1430 n.102 (referencing Patricia S. Curley and Gregg Herman, Representing the Best Interests of Children: The Wisconsin Experience, J. Am. Acad. Matrimonial Law. 9 (1995)).

[FN51]. This is one of the initial steps recommended by the Council of the Family Law Section of the ABA in Standard C-2(6) of their proposed Standards of Practice. Proposed ABA Standards, supra note 11, s C-2 cmt.

[FN52]. Of course, in some cases, these professionals may have participated in the bringing of the child protective action by reporting the family to the state department of child welfare. As one can imagine, these professionals are often experiencing a dramatic crisis in their relationships with the client and his family at the precise moment at which the lawyer is entering the case. In these circumstances, caution in associating oneself too closely with these professionals when initially meeting the client is essential. This need not prevent the lawyer from talking to these professionals (as one would interview anyone who initially reported the family to the state), but does suggest that the attorney keep some distance from them in early encounters with the family until the attorney determines the client's connection and level of trust with these professionals.

[FN53]. For a discussion of the complex interaction among the lawyer's obligation of confidentiality and the obligations prescribed by the ethical codes of social workers, psychiatrists, and other professionals, see Gerard F. Glynn, Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications, 27 J. Marshall L. Rev. 617 (1994). Glynn notes that mandatory child abuse reporting laws have been interpreted to supersede the treating professional's obligations of confidentiality to the client. Id. at 639 - 43. I recognize that the caution I recommend may create a dilemma for lawyers who practice in jurisdictions where the privileges are abrogated in judicial proceedings. See, e.g., N.Y. Fam. Ct. Act s 1046(a)(vii) (McKinney Supp. 1996) (limiting the state's statutory physician- patient, psychiatrist-client, social worker-client, and rape counselor-client privilege in child protective proceedings).

[FN54]. Peter Margulies cautions children's lawyers to respect the "quasi- property" interest that a child may have in information entrusted to a treating professional. Margulies, supra note 10, at 1494.

[FN55]. This will sometimes put the lawyer in a veritable Catch-22. For instance, in one case, a client's therapist protested to me that I should have discussed the case with him before I met with my client. According to my duties to my client, however, I felt that I needed a release from her (and a sense about how she felt about the therapist) before I spoke to the therapist.

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One solution, where a client has a long-term therapeutic relationship, is for the lawyer to have a "preliminary," non-substantive conversation with a client's therapist, informing the therapist simply that the lawyer has been appointed and that the lawyer will be making an appointment to see the child client in the near future. This solution would allow the therapist to talk to his client about the court case and the imminent appearance of the lawyer and thereby prepare the client for the first meeting with the lawyer. This may not be a foolproof solution, however; if the lawyer later ascertains that the client dislikes the therapist, the lawyer may wish that she had contacted the client completely separately from the therapist. Still, if this therapist is a long-term player in the child's life, the lawyer's initial actions should acknowledge the therapist as an important and ongoing resource for the child.

Like many "micro" choices that lawyers need to make in setting up meetings with their clients, this decision must be made based upon the lawyer's best judgment based upon the (probably sketchy) information available to him at the time. I would tend to give heavy weight to the length of the therapeutic relationship, the client's degree of mental illness or emotional disability, and the recommendations of others who know the client as to whether or not to contact the therapist before meeting the client.

[FN56]. This was the model of representation used, for instance, by the Columbia University School of Law Child Advocacy Clinic.

[FN57]. In some states, these retained experts may be paid by the court. See, e.g., N.Y. County Law s 722-c (McKinney 1991) (allowing court to authorize counsel to obtain expert services at the court's expense). In other cases, where legal aid organizations, public defenders, or even groups of private practitioners contract for a group of cases yearly at a negotiated fee, the payment for social work and other professional services may be included in the total fee.

Despite these opportunities, it is painfully clear that the vast majority of lawyers representing children do not have ample access to professional services that would help them represent their clients more thoughtfully. As with the extraordinary low rate of compensation generally paid to lawyers for children, this systemic problem contributes to extraordinary stress and high caseloads for children's lawyers and must be changed. Because the rest of this section details how useful these experts are to sophisticated representation of children, it is hoped that these arguments can be marshalled to convince state legislatures to allocate money for this important need.

[FN58]. Part II of Representing Children will provide more on this initial phase of the attorney-client relationship. Peters, Representing Children, supra note 2. Whenever possible, it is much preferable for the attorney, rather than the consultant, to have the primary relationship with the client, for both financial and ethical reasons. In a rare case, where special expertise is critical to maintaining the lawyer-client relationship, a lawyer may decide that the consultant alone has direct contact with the client.

[FN59]. When and how to work with a nonlawyer consultant on the same case will be discussed further in Chapter Seven of Representing Children. Id.

[FN60]. Indeed, if more states come to accept lawyers for children as advocates for their expressed wishes after counseling rather than guardians ad litem with the same duty to determine best interests as the court has, judges may come to rely upon these experts even more.

[FN61]. Similarly, a child's attorney may be required to lobby against the appointment of an expert, if the attorney has reason to believe that no expert will recommend the client's objective in the case.

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[FN62]. Remarks of Albert J. Solnit at class session of the Advocacy for Parents and Children Clinical Seminar at the Yale Law School (March 20, 1995) (on file with the author).

[FN63]. In Chapter One of Representing Children, Goldstein, Freud, and Solnit are discussed as follows:
Also influential nationally was a trilogy of books written by the distinguished interdisciplinary collaboration of Joseph Goldstein, Albert J. Solnit, and Anna Freud. Goldstein is a Yale Law Professor and a graduate in Career Research from the Western New England Institute for Psychoanalysis. Freud, who died in 1982, was the Director of the Hampstead Child-Therapy Clinic and the prolific author of works on psychoanalysis and child development. Solnit, a child psychiatrist, wrote the books when he was the Director of the Yale Child Study Center and a Yale Medical School professor of Pediatrics and Psychiatry. Sonja Goldstein, who formally joined the collaboration in the third book, is a lawyer and lecturer at the Yale Child Study Center and Law School.
The first book, Beyond the Best Interests of the Child, published in 1973, laid out guidelines for child placement laws, premised upon the child developmental principles of continuity, a child's sense of time, and the limits of law and prediction. The book recommended that judges apply the "best interests of the child" standard placing the child permanently with his psychological parent. The second book, Before the Best Interests of the Child, published in 1979, focused on grounds for state intervention into families in the first instance, laying out concrete standards which are designed to limit state intervention to a minimum. In In the Best Interests of the Child, published in 1986, the trio, joined by Sonja Goldstein, focus on the roles of professionals in the child placement process, arguing that professionals should generally stay within the boundaries of their own professional competence, crossing those boundaries only in rare, carefully thought through circumstances.
The influence of these books was immediate and profound. "[E]very subsequent proposal for reform of the child welfare system has drawn its vocabulary and central ideas from Goldstein, Freud and Solnit's conceptual framework." Nadine Taub, Assessing the Impact of Goldstein, Freud and Solnit's Proposals: An Introductory Overview, 12 N.Y.U. Rev. L. & Soc. Change 485, 485 (1983 - 84). By 1983, one commentator, Brooklyn law professor Marsha Garrison, reported that the trio's "central conclusions about the needs of children in long-term foster care have gained remarkably widespread acceptance." Marsha Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423, 449 (1982- 83) (footnote omitted). Garrison noted that the trio's premises "strongly influenced recent state foster care legislation and several model acts dealing with termination of parental rights for children in long term foster care," id. at 449 -50 (footnotes omitted), as well as social work handbooks and works of national planning commissions. Walking through the halls of juvenile and family courts around the country, one can hear terms coined or popularized by the authors, especially psychological parenting, permanency planning, continuity, and the child's sense of time, bandied about during routine bargaining on individual cases.
At a symposium convened at Rutgers Law School in 1983 to assess the impact of the trio's first two books, one commentator wrote that "the authors have had an impact on the law governing child welfare decisions that would exceed any academician's wildest expectations." Taub, supra, at 485. Another author, surveying judicial and academic reactions to the first book in 1979, wrote that Beyond the Best Interests of the Child "became what any author would most fervently desire his or her book to become: that which everyone must mention or risk being seen as an ignorant provincial." Richard E. Crouch, An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child, 13 Fam. L.Q. 49, 50 (1979). In 1987, the Harvard Law Review published an analysis by New York University law professor and former New York Family Court Judge Peggy C. Davis of 193 judicial opinions published between 1963 and 1984 that cited either the works of the trio or the 1963 unsigned Yale Law Journal Note, Alternatives to 'Parental Right' in Child Custody Disputes Involving Third Parties, 73 Yale L.J. 151 (1963), which previewed some of their ideas. Peggy C. Davis, "There is a Book Out... ": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539 (1987).
As Chapter Six, II.C.2 explains in more depth, critics have lodged cogent, trenchant complaints about the trio's work. In addition, it appears that their ideas have been widely misunderstood or caricatured, inasmuch as some advocates cling to their insistence on minimum state intervention and label them as "pro-biological family" while others focus on their valuing of the psychological parent as "anti-biological family." As a historical phenomenon, however, the extraordinary reception and "absorption" of the trio's ideas, both as they were expounded and as they have been erroneously interpreted, cannot be questioned. Their work signalled a shift towards a child-centered view of the placement process, a concern about hasty state intervention in the first instance, and a concern about lengthy, unresolved stays in foster care. Their books have changed the discourse of child welfare dramatically.

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Peters, Representing Children, supra note 2.

[FN64]. Joseph Goldstein et al., Beyond the Best Interests of the Child 53 (1973) [hereinafter Beyond].

[FN65]. Id. at 54.

[FN66]. Id.

[FN67]. Id. at 63.

[FN68]. Id.

[FN69]. Id. at 53 (emphasis added).

[FN70]. Id. at 40.

[FN71]. Id. at 40 - 41.

[FN72]. Id. at 43.

[FN73]. Id. at 43.

[FN74]. Id. at 49.

[FN75]. Id. at 49 -50.

[FN76]. Id. at 52. In support of this principle, the authors cite three factors identified by Anna Freud which "make prediction difficult and hazardous": (1) possibly uneven rates of maturation of ego and drive developments; (2) inability to quantify or to foresee drive development; and (3) unpredictable "environmental happenings in a child's life." Id. at 51 n.36.

[FN77]. Id. at 20.

[FN78]. Id. at 21.

[FN79]. Id. at 20.

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[FN80]. Id. at 18.

[FN81]. Id. at 31-32.

[FN82]. Id. at 32. "[E]motional attachments are tenuous and vulnerable in early life and need stability of external arrangements for their development." Id. at 34.

[FN83]. Id. at 32-34.

[FN84]. Id. at 35.

[FN85]. Id. at 38 (footnote omitted).

[FN86]. Id. at 19.

[FN87]. Id.

[FN88]. Id. at 12.

[FN89]. Joseph Goldstein et al., Before the Best Interests of the Child 54 (1979) [hereinafter Before].

[FN90]. Id. at 11-14.

[FN91]. See infra notes 92- 98 and accompanying text.

[FN92]. Before, supra note 89, at 112.

[FN93]. Id. The authors suggest, for instance, that In re Gault "reaffirms the right of a child to have his own parents make decisions about what he needs." Id. at 129. The authors read Gault as a strong statement of the right of parents to have their children represented by counsel. Other commentators dispute this reading. See, e.g., Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76, 89 - 90 (1984) (arguing that Goldstein, Freud, and Solnit ignore the concern for the child's personal autonomy underlying Gault). Certainly, states following Gault have focussed primarily on the child's right to counsel. See, e.g., Conn. Gen. Stat. Ann. s 46b-136 (West 1995); N.Y. Fam. Ct. Act s 249 (McKinney 1983 & Supp. 1996).

[FN94]. Before, supra note 89, at 112.

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[FN95]. Beyond, supra note 64, at 66.

[FN96]. Id. at 67.

[FN97]. Joseph Goldstein et al., In the Best Interests of the Child 90 - 91 (1986) [hereinafter In] (describing views set forth in Before).

[FN98]. Before, supra note 89, at 128. Goldstein, Freud, and Solnit prescribe that the parent remain involved in the lawyer-child client relationship unless and until "the presumption of parental autonomy has been overcome." Id. at 112.

[FN99]. Beyond, supra note 64, at 67.

[FN100]. In, supra note 97, at 33, 78.

[FN101]. Id. at 33.

[FN102]. Id.

[FN103]. Id. at 78.

[FN104]. Id. at 3 -5.

[FN105]. The authors also make other interesting points about lawyering for children, relating to requiring one lawyer to represent all siblings, Before, supra note 64, at 116 -17, the special conundra of lawyers representing children in a class action, id. at 116, and the widespread misconception that giving a child a lawyer is an unmitigated good. Id. at 117.

[FN106]. Patricia M. Wald, The Kindness of Strangers, 97 Yale L.J. 1477, 1478 (1988) (book review).

[FN107]. As noted in the historical summary above, the trio's ideas were received favorably in the foster-care context, and resoundingly negatively in the divorce context. Marsha Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423, 453 (1983).

[FN108]. Symposium, The Impact of Psychological Parenting on Child Welfare Decision Making, 12 N.Y.U. Rev. L. & Soc. Change 485 (1983 - 84). The Journal also plans to publish proceedings of a follow-up symposium which took place in April 1994. 22 N.Y.U. Rev. L. & Soc. Change (forthcoming 1995 - 96).

[FN109]. This section will focus on the sociologically based critiques of the psychological data relied upon in the

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trilogy. A larger substantive critique -- attacking the monotropic psychological parenting theory and preferring a "family network" approach focusing on a web of supports for the child, rather than the dyadic mother-child relationship -- is presented as Model Four below.

[FN110]. Everett Waters & Donna M. Noyes, Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons, 12 N.Y.U. Rev. L. & Soc. Change 505, 513 (1983 - 84) (citation omitted).

[FN111]. Id.

[FN112]. See, e.g., Daniel Katkin et al., Above and Beyond the Best Interests of the Child: An Inquiry Into the Relationship Between Social Science and Social Action, 8 Law & Soc. Rev., 669, 675 (1974) (criticizing the authors for their failure to distinguish separation from deprivation). These commentators generally critique the first book for its lack of a "single reference to any empirical study in the extensive literature on adoption and foster placement" and its "failure to review the literature." Id. at 672.

[FN113]. Waters & Noyes, supra note 110, at 511.

[FN114]. Carol B. Stack, Cultural Perspectives on Child Welfare, 12 N.Y.U. Rev. L. & Soc. Change 539, 540 - 41 (1983 - 84).

[FN115]. Id. at 541.

[FN116]. Committee on the Family, Group for the Advancement of Psychiatry, New Trends in Child Custody Disputes 80 - 81 (1980), cited in Peggy C. Davis, Use and Abuse of the Power to Sever Family Bonds, 12 N.Y.U. Rev. L. & Soc. Change 557, 569 (1983 - 84).

[FN117]. Joseph Goldstein, in an interview published with the NYU Review of Law and Social Change 1984 Symposium, notes that the notion of continuity set forth in Beyond acknowledges extended family groupings:
We are very respectful of what families of different ethnic groups, origins or economic status believe is best for their children. Our guidelines are much more protective of a variety of family lifestyles than are many existing laws, which are too broad and vague and put all too much discretion in the hands of workers with middle-class notions about good childrearing.
....
... The notion of continuity pertains to continuity of relationships, continuity of settings, continuity of lifestyles. Consider a child who has grown up in a commune of some sort, and has had to leave the commune at an age where that style of life is what she anticipates and thrives on. If the setting was not the cause for the child's being removed, then every effort should be made to place her in a similar setting to reduce the difficulty of the transfer in terms of as many factors as possible. Interview with Joseph Goldstein, 12 N.Y.U. Rev. L. & Soc. Change 575, 580 (1983 - 84). On December 2, 1995, at a conference in honor of the centenary of the birth of Anna Freud, Joseph Goldstein reiterated that the trio's continuity guidelines would honor one or more psychological parents. Comments of Joseph Goldstein, Anna Freud at Yale, Developmental Concepts Updated & Applied (Dec. 2, 1995) (on file with the Fordham Law Review).

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[FN118]. David Fanshel, Urging Restraint in Terminating the Rights of Parents of Children in Foster Care, 12 N.Y.U. Rev. L. & Soc. Change 501, 503 (1983 - 84).

[FN119]. Linda Gordon, Child Abuse, Gender, and the Myth of Family Independence: Thoughts on the History of Family Violence and its Social Control 1880 -1920, 12 N.Y.U. Rev. L. & Soc. Change 523, 535 -36 (1983 - 84) [hereinafter Thoughts on Family Violence]; see also Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880 - 1960, at 55 -58, 84 - 86 (1988) (discussing the Society for the Prevention of Cruelty to Children's effort to construct a new family ideology according to a modern version of male supremacy where the father had total responsibility for economic support and the mother was involved full-time in psychological development of children; noting great difficulty of the poor in conforming to new family standards); Linda Gordon, Family Violence, Feminism, and Social Control, in Women, the State, and Welfare 178, 187- 93 (Linda Gordon ed., 1990) (arguing that poor urban mothers were extremely vulnerable to loss of their children given new child-raising norms brought on by industrial capitalism); Nancy Chodorow & Susan Contratto, The Fantasy of the Perfect Mother, in Rethinking the Family: Some Feminist Questions 54, 63 - 64 (Barrie Thorne ed., 1982) (arguing that post-Freudian psychology assumes the mother- child isolated unit that nineteenth-century industrial development and cultural ideology produced and thus gives extraordinary significance to early mother-infant relationship for psychological and emotional development of the child); Ilene Philipson, Child Rearing Literature an Capitalist Industrialization, 26 Berkeley J. of Soc. 57, 57-73 (1981) (arguing that industrialization eroded the economic foundation of the family, substituting emphasis on emotional attachment in the mother-child relationship).
I thank Kimberley D. Harris, Yale Law School '96, for her research connected with this subject.

[FN120]. Gordon, Thoughts on Family Violence, supra note 119, at 536.

[FN121]. Id. The period after World War II was a "unique historical juncture" for Western women as mothers, as more middle-class women than ever before in America and Britain occupied an increasingly private and isolated sphere as full-time mothers. Michael J. Bader & Ilene J. Philipson, Narcissism and Family Structure: A Social-Historical Perspective, 3 Psychoanalysis & Contemp. Thought 299, 314 (1980). Not only did fertility rates peak in the twelve years after World War II, Paul England & George Farkas, Households, Employment, and Gender: A Social, Economic, and Demographic View 12-13 (1986), but mass migration to the suburbs weakened extended family ties and left many women to raise their children in relative isolation. Bader & Philipson, supra, at 315. Bader and Philipson argue that this set of unique historical circumstances gave rise to a cultural and scientific idealization of the mother-child dyad, in which "[m]othering took on such ideological significance in the 1940s and '50s that a new host of experts arose to deal with every imaginable problem a mother might encounter, and to warn of every possible disaster that might arise if she were not constantly vigilant." Id. at 316; see also Ann Dally, Inventing Motherhood: The Consequences of an Ideal 96 (1982) (noting that among the complex mechanisms behind the postwar idealization of motherhood was the need for women to leave industrial jobs which they had held in wartime in order to make room for returning male veterans); Representations of Motherhood 6 (Donna Bassin et al. eds., 1994) (noting the "concerted postwar shift to return women to the home"); cf. Juliet B. Schor, The Overworked American: The Unexpected Decline of Leisure 83 -105 (1991) (arguing that the postwar idealization of the isolated mother-child dyad was the culmination of an economic process beginning in the nineteenth century to remove paid work from the home and to restrict women to unpaid housekeeping tasks; ironically, these tasks consumed more time even as household investment in ostensibly labor saving capital equipment (e.g., washing machines, dishwashers) increased in the periods immediately before and after World War II); Reva B. Siegel, Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850 -1880, 103 Yale L.J. 1073 (1994) (tracing women's resistance as early as the 1850s to the shift from a household economy in which women were paid for work brought into the home to one in which women were restricted to unpaid child-rearing and housework).

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[FN122]. Martin Guggenheim, The Political and Legal Implications of the Psychological Parenting Theory, 12 N.Y.U. Rev. L. & Soc. Change 549, 549 (1983 - 84).

[FN123]. Id. at 550.

[FN124]. Id. at 551.

[FN125]. Id.

[FN126]. Stack, supra note 114, at 547.

[FN127]. As noted earlier, it is critical to perceive the trio's recommendations of limited state intervention and psychological parent placement as a package. See supra notes 92-105 and accompanying text. Unfortunately, it appears that in many contexts the trio's recommendations for psychological parent placement have been followed while the high threshold for state intervention has been ignored. Garrison, supra note 107, at 475 -77.

[FN128]. In response, Joseph Goldstein notes:
It is not just child placement where the poor are disadvantaged, nor is it the result of anything we have said in our books. The experiment on poor families was being carried out long before our guidelines. If anything, the guidelines are intended to hold in check the experiment.... We are trying to stay the hand of the state. We hope we have provided a basis for the poor to challenge what social workers do, what child care workers do, and to call into question what has been happening. Interview With Joseph Goldstein, supra note 117, at 582. Professor Goldstein also countered claims that continuity of setting presupposed financial ability and middle class or higher status:
There is an order of importance in continuity. We talk about interpersonal relationships with an adult. That is number one and it has nothing to do with money. Then we talk about continuity of surroundings. Now the surroundings may be poor or rich, but we try to protect them to the extent we can. One of the things that emerges from our guidelines is that it ought to be the state's first priority, if it really believes in the child's well being, to provide the minimum financial basis the family needs, the minimum nourishment base, the minimum shelter base, whatever best serves the development of continuous relationships. In fact, if the only reason that a mother or father can't continue to care for the child is because they have no place to live, or no money to buy food, then we would call it child abuse by the state if the state for that reason removed the child from her family. Id. at 580 - 81.

[FN129]. Peggy Cooper Davis, The Good Mother: A New Look at Psychological Parenting Theory, 22 N.Y.U. Rev. L. & Soc. Change (forthcoming 1995 -1996) (manuscript at 39, on file with N.Y.U. Rev. L. & Soc. Change).

[FN130]. Id. at 24 (citing Marinus H. van IJzendoorn and Louis Tavecchio, The Development of Attachment Theory as a Lakatosian Research Program: Philosophical and Methodological Aspects, in Attachment in Social Networks 24 - 25 (1987)).

[FN131]. Id. (emphasis added)

[FN132]. Id. at 25 (citing Tavecchio and van IJzendoorn, Perceived Security and Extension of the Child's Rearing Context: A Parent-Report Approach, in Attachment in Social Networks 39 - 40 (1987)).

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[FN133]. Id.

[FN134]. Id. at 26 (citing James H. Bray, Psychosocial Factors Affecting Custodial and Visitation Arrangements, 9 Behavioral Sci. & the L. 419 (1991)). Davis also cites Bray for the proposition that the notion of "one psychological parent" is "controversial and has very little empirical support." Id.

[FN135]. Id. at 20 (citing Charles M. Super and Sara Harkness, The Development of Affect in Infancy and Early Childhood, in Cultural Perspectives on Child Development 1, 15 (Daniel A. Wagner & Harold W. Stevenson eds., 1982)).

[FN136]. Id. at 22-23 (citing Shirley Brice Heath, Ways With Words: Language, Life and Work in Communities and Classrooms 116 -17, 121 (1983)).

[FN137]. Letter from Peggy Cooper Davis, N.Y.U. School of Law, to Jean Koh Peters, Yale Law School (October 3, 1995) (on file with the Fordham Law Review).

[FN138]. Id. (emphasis omitted).

[FN139]. Davis, supra note 129, at 36 (citing Jessica Benjamin, The Omnipotent Mother, in Representations of Motherhood 133 (Donna Bassin et al. eds., 1994) and Jerome Bruner, Actual Minds, Possible Worlds 59 - 62, 73 -77 (1986)).

[FN140]. Davis, The Good Mother, supra note 129, at 41 (emphasis added).

[FN141]. Id. at 27.

[FN142]. Id. at 28. Note that Joseph Goldstein includes in his definition of "continuity of settings" settings beyond the parental dyad, as long as "the setting was not the cause for the child's being removed." Interview with Joseph Goldstein, supra note 117, at 580.

[FN143]. Davis, supra note 129, at 9.

[FN144]. Id. at 9.

[FN145]. Richard Dudley, a behavioral scientist who participated in the 1994 Rutgers symposium, gives examples of important ethno-cultural considerations in the child welfare system's work with African American families. Richard Dudley, Deciding What's Best for Children: Recognizing the Role of Ethnicity and Culture, 22 N.Y.U. Rev. L. & Soc. Change (forthcoming 1995 -1996) (manuscript on file with the N.Y.U. Rev. L. & Soc. Change). He defines "culturally competent child welfare-decisionmaking" to require:
the full integration of ethno-cultural issues into the overall knowledge base that informs both the assessment and the planning process; the development of the assessment and planning skills required to manage those

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ethno-cultural issues; and the ongoing work required to remain sensitive to the fact that the differences between one's own ethnocentric view of the world and that of other ethno-cultural groups must be respected and appropriately addressed. Id. at 10. Dudley notes, for example, that African American families are often part of a multi-generational extended family network that includes biologically-related and non-biologically-related ("adopted") kin, who provide emotional and economic support when it is needed. These families are often further characterized by a flexibility in and an overlapping of roles and functions; a flexibility in the boundaries between households; and a subjugation of individual concerns in the interests of family survival. Children raised in families that function in this manner may have numerous adults in their lives who share parenting functions, and they may even move in and out of their biological parents' household.... Id. at 13 -14. Dudley also comments on the "daily experience of racism" experienced by African Americans from birth. Id. at 15.

[FN146]. A genogram is a method for drawing a family tree that records information about family members and the relationships over at least three generations. See generally Monica McGoldrick & Randy Gerson, Genograms in Family Assessment (1985). This book is a helpful manual for constructing genograms in client work.

[FN147]. As the Recommendations of the Fordham Conference note, these "actually available alternatives" should also include alternatives that can be created through innovative lawyering, including law reform. Recommendations of the Conference on Ethical Issues in the Legal Profession of Children, 64 Fordham L. Rev. 1301 (1996) [hereinafter Recommendations of the Conference] (part IV.B.3.d.). For instance, the lawyer may believe she can compel the system to create an excellent foster placement for a client even though one does not currently exist. Nevertheless, lawyers must be realistic, although not fatalistic, about what they may ultimately be able to obtain for their clients.

[FN148]. See id., part III.D. Lawyers should be aware that the understandings of child development and placement issues in other disciplines are dynamic and constantly changing. The paradigms discussed here will certainly shift, evolve, and probably be replaced in the coming years.

[FN149]. This example, taken from my practice, marked my first real understanding of the potential limits of the psychological parent perspective and the necessity of additional child welfare paradigms. I thank Mona Scales, our social work consultant on the case, for her thoughtful and eye-opening teaching about this critical issue.

[FN150]. Chapter Seven of the book explores those collaborations in more depth, and suggests some ways to resolve the current resource crunch preventing children's lawyers from retaining these professionals. Peters, Representing Children, supra note 2.

[FN151]. Martin Guggenheim would ground this default rule in the substantive law in every state recognizing the child's right to be raised by her parents absent a court finding of unfitness. Guggenheim, supra note 12, at 1429-30. By contrast, Peter Margulies would ground this presumption in honoring the value of connection and commitment in children's lives. Margulies, supra note 10, at 1482, 1493-94.

[FN152]. Dr. Solnit, in a discussion at the 1983 Rutgers Symposium, agreed with other participants that the state fails to support low-income families who are at risk of losing their children. "Deprived, confused parents would not have to lose their children, as they do all too often now, if we were more effective in providing supportive services for children and their parents in the home, and if we knew how to provide voluntary services that were attractive and accessible." Solnit/Fanshel Discussion, 12 N.Y.U. Rev. L. & Soc. Change 517, 518 (1983 - 84).

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[FN153]. These questions are outlined in the Introduction, supra.

[FN154]. Peters, Representing Children, supra note 2. The integrated model is also set forth step-by-step in the Recommendations Section of this Article, infra, part III.

[FN155]. The Recommendations of the Fordham Conference contain a modified version of Part D of these Recommendations. Recommendations of the Conference, supra note 147, part VII.A. While this model applied to best-interests decision making in child protective contexts specifically, the conferees modified the model to describe decision making on behalf of the child in a broad range of legal contexts. I fully endorse the conference's broader recommendations.

[FN156].
Beyond, supra note 64, at 53.

[FN157]. Davis, The Good Mother, supra note 129, at 39.

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child as the child understands himself is, I believe, a failure of removing the layers of ordinary adult and professional expectations that we place over our clients who are whole and unique in themselves. The seven questions are designed to help reveal and remove our own countertransferential needs to reveal our unique client beneath.

[d] Seven Questions to Keep Us Honest

Therefore, to double-check their actions throughout the representation, lawyers must remember the following seven questions to keep the representation true to their clients:

1. *In making decisions about the representation, am I making the best effort to see the case, from my client's subjective point of view, rather than from an adult's point of view?*

This question helps protect the lawyer from constant outside pressures to impose an "adult-centric" understanding of the case upon the child. Just as every lawyer must start "where the client is" in the representation, the lawyer must strive for as specific an understanding as possible of how the child sees her situation in the representation. Otherwise, the lawyer's attempts to counsel the client, negotiate for the client, translate the client's wishes into legal terms for the court, or otherwise carefully involve the child in the legal proceedings around her, are doomed.

Even if a child's understanding of her situation is whimsical or divorced from reality, a lawyer must strive to know what *that* understanding is. Take, for instance, a child who believes that she is in foster care because of her naughty behavior the day she was removed from the home. This child will need to understand that other factors caused the removal before she can move to an understanding of the options for her future. A lawyer who fails to address the child's belief that she is globally responsible for the trauma of the family will be hard pressed to engage that child in constructive dialogue or counseling in the legal case, and may inadvertently confirm the child's sense of guilt by not addressing and contradicting it.

In addition, understanding the client's view of her life, as she idiosyncratically perceives it, confirms that a lawyer is using his or her legal skills to focus on *that* child's needs, and not a generalized view of children or a stereotyped perception of the child's circumstances. A commitment to knowing the case from the child's point of view can thus safeguard the representation to some extent from the lawyer's bias as well as his or her transference.

2. *Does the child understand as much as I can explain about what is happening in his case?*

This question helps the lawyer check his or her success at communication with

the client. It may remind the lawyer that he or she has neglected to keep the client apprised of events. It may also urge the lawyer to find creative ways to communicate with a client who is hard to reach in traditional ways.[7]

3. *If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?*

This question in a way concretely honors the exhortation of Rule 1.14 to maintain, "as far as reasonably possible,. . . a normal client-lawyer relationship with the client." Lawyers should ask themselves this question daily, in connection with macro as well as micro decisions. As a micro example, if a lawyer finds himself putting off telling a client of a difficult and painful setback, the lawyer must ask himself whether he could justifiably delay telling an adult in a similar situation.[8] Is the lawyer taking license with his duty to "keep his client reasonably informed about the status of a matter" simply because the client is powerless or unlikely to object? As discussed earlier, a decision to substitute judgment for the client in determining macro issues, such as goals in the legal case, can be made only after a traditional lawyering relationship has been tried or found to be impossible, based upon evidence outside the relationship. By asking this question, a lawyer can remind himself that the decision cannot be made lightly.

Sometimes it is difficult to imagine a "similarly situated adult," because a child client's predicament is unique to being a child, such as being unwanted by parents or hating school. I have sometimes found it useful to analogize my client to a competent, older adult client who is beyond retirement age and living essentially alone. While this adult client has no disability and therefore the lawyer has no permission under the rules to treat this client any differently than any other adult client, the lawyer may be tempted to treat this client as more vulnerable, less powerful in the lawyer-client relationship and be tempted, frankly, to pay less respect to that client. In that situation, the lawyer's duties of counseling, information, respect and zealous advocacy are unchanged; the lawyer must, to be sensitive to his client, exercise care and creativity in *how* he fulfills those duties, but he *may not omit to do them.*

4. *If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?*

Inevitably, a lawyer will feel called upon at various times to treat the child

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[7] Chapter Four and Appendix C.3 further address communication with the child client.

[8] In fact, the note to Rule 1.4 re "Withholding Information" does justify delaying transmission of information for all clients in some circumstances, to wit, "when the client would be likely to react imprudently to an immediate communication." Note that the note continues: "A lawyer may not withhold information to serve the lawyer's own interest or convenience."

client in a way that is different than he or she would treat an adult client with the same concerns. This question helps the lawyer double check that decision. For instance, a lawyer representing a child who has been found by consulting professionals to be self-destructive can recognize that the decision to "take other protective action" for the child is safeguarding the child's health and safety. This is a benefit that could be explained to the child, even if the child is not happy to hear about it. It is important that a lawyer not breezily substitute his or her judgment for the child's on the grounds that "I know best" without thinking through the benefits *as seen by the child*. This is especially true because it is questionable how much a stranger who has known the client briefly in a professional capacity can honestly claim to know about what is best for that client.

Again, the lawyer should ask this question every time he or she decides to modify the traditional lawyer-client relationship, however slightly or temporarily. This will help the lawyer make those modifications only in the event and to the extent that they are necessary. Otherwise, a lawyer may inadvertently begin down a path of acting unilaterally for the client, rather than working in partnership with the client. The choice to treat a client as a traditional lawyer would should be considered instinctively in every decision one makes. Where traditional forms of deference to the client are not available, the lawyer should make decisions in creative ways that are consistent with a respectful view of the client's life and desires.

5. *Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?*

In a way, the entire legal system that is enveloping the child as the lawyer begins the representation is set up to meet adult needs, in a form of systemic transference, if you will. Notices are issued in adult, technical jargon, judges often prefer cases where trained adult lawyers can explain matters in rational, adult terms, and appointments involving the children are made to accommodate adult professional schedules. While the child's lawyer cannot and should not attempt to shield the child from these demands in every instance, lawyers for children can avoid participating in the system's transference by honestly questioning whether modifications to the traditional relationship might meet the lawyer's or system's needs, as opposed to the child's.

6. *Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?*

The child's lawyer must regularly question whether his or her decisions serve his or her own needs or the client's needs. For instance, a lawyer may feel reluctant to advocate for a client to return home to a mother whom the lawyer feels does not take optimal care of the client. Most often, a lawyer may simply enjoy advocating for a position that is most comfortable *to the lawyer*. While this is only

natural, and certainly has implications for any client pool the lawyer elects to serve in undertaking a practice, the lawyering role simply does not promise that a lawyer will like every decision the client makes. Just as a lawyer for a recalcitrant adult client is stuck with a well-counseled decision made by the client, so too is the lawyer for the child client who can understand his or her options and express his or her preference. Lawyers representing children and people with disabilities can be tempted by the flexibility of the rule, however, into unconsciously designing every representation to meet the lawyer's, and not the client's, needs.

Because of the prevalence of transference and counter-transference as discussed above, lawyers must continually find creative ways to honestly ask themselves this question. The temptation to do what we believe is right no matter what the client thinks is ever present, especially for those of us who care deeply about children and who want only to do right by them. If we can creatively, continually, and honestly ask ourselves this question, many of my concerns about the way our profession has developed would disappear.

7. *Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?*

To avoid representation based on blanket conceptions of what "children of this age need," it is useful for lawyers to ask themselves how the representation has been molded to serve a particular client. Most often, the goal of the representation will reflect the client's desire to remain with the most important care givers he or she has known or to find one who offers the client what the client wants (e.g., love, support, independence, good schooling, support for hobbies or athletics). Often the logistics of the representation, such as where and when client meetings take place, can reflect the client's needs as well. Some clients may prefer to speak with the lawyer alone, and some may ask the lawyer to come to their foster home and *not* to visit them at school.

Lawyers, especially those with heavy caseloads, may use standardized procedures to move through cases, such as early review of records, office visits with the child, and contact with the child's foster care worker. A lawyer should be alert, however, if a particular case or client is hard to remember, or easily confused with another client in a similar position. This may be a sign that the lawyer does not yet have a critical mass of understanding about this client's unique needs and perspectives on his or her life.

To help get a concrete read on how well the lawyer is tailoring the representation to the client, a lawyer might ask himself or herself, "would a person who knew the child intimately recognize this child in both the substance and process of my representation?" Alternatively, a lawyer can explore whether the child, at an older age, could look back at this representation and understand how

the lawyer translated the child's wishes and needs into legal action.

[e] Summary Comments On the Three Defaults, the Three Principles, and the Seven Questions

Plainly these seven questions dovetail repeatedly with each other, the three defaults, and the three principles enough that the sensitive lawyer may tire of constantly second-guessing his or her best instincts. Nevertheless, until the child-centered, advocacy-oriented mindset becomes deeply intuitive, I urge lawyers to ask themselves these questions to assure that they stay true to the role by examining themselves from these various perspectives.

These questions memorialize my concern that when lawyers are asked to exercise broad discretion over their client's lives, filling in, for example, the seventy percent that the infant client cannot provide to the representation, adult concerns and the lawyer's own needs will tend to fill the vacuum. Representation of very young and nonverbal clients can and ought to resemble the child's perspective and not those of the adults around him.

The three principles and the seven questions seek, first and foremost, to offer lawyers ways to challenge themselves to continually keep the child-in-context in the forefront of their work. The three principles and the seven questions attempt to identify key junctures at which lawyers are most likely to become the context of their representation rather than understanding their client as fully as possible in his or her context. The principles and the questions are pitched on a level general enough to try to be helpful to the lawyer at any moment of decision or confusion in the course of the representation.

The model outlined in the next section, and explored in depth in Part Two of the book, is designed to give lawyers more concrete and specific guidance as they move into, through, and out of the child's world.

§ 3-3 Step-by-Step: The Model of Representation

This section only describes these phases in the relationship briefly; each of these phases is discussed in turn in Chapters Four through Ten below. In structuring this model, an attempt has been made to describe the representation in ways that are both intuitive to the child client and to the lawyer. Central to the paradigm is the image of the lawyer entering the world of the child which is three-dimensional, complex, and in many ways a complete whole before the entry of the lawyer. The model divides the lawyer's representation into four chronological phases: first, entering the child's world, summarized in Chapters Four & Five; making decisions in the child's world, summarized in Chapters Six & Seven; seeking the goals of the representation, explored in Chapters Eight & Nine; and leaving the child's world, explored in Chapter Ten. Below is a brief outline of the four phases.

[a] Phase One: Entering the Child's World

When the lawyer enters the child's world, two critical processes must take place. First, the child must understand the lawyer's role in the legal proceedings in which he or she is involved to the greatest extent possible. A critical piece of the lawyer-client relationship is helping the child get to the fullest possible understanding of that role in the legal decisions which the child faces. Critical to this understanding is becoming aware of the child's expectations of the lawyer-client relationship, however he or she subjectively experiences them. The second, critical piece of entering the child's world is getting to know the child-in-context. In a way, Chapter Four focuses on getting the lawyer to at least a preliminary understanding of the child-in-context. Chapter Four offers two sets of tools for doing that quickly and effectively: frontloading work in the relationship so that one can get to know the client as soon as possible; and integrating information gathered in order to get as holistic an understanding of the child's world as quickly as possible. Chapter Five offers thoughts about the internal thought processes of the lawyer as he seeks to map the child's world from a bewildering quantity of written and oral information received throughout the case. Chapter Five offers a description of this process plus tips with numerous examples for figuring out how to organize the huge volumes of information which often inundate lawyers as they begin their representations. Chapter Five also reflects at the end on the implications of professionals in the system knowing this volume of information about their clients. Developing fact based, non-judgmental forms of organization of these vast quantities of material lay the foundation for a respectful, and individualized representation of the child client.

[b] Phase Two: Making Decisions in the Child's World

While making decisions for the child's world the lawyer must look very carefully at his own thinking processes as well as the information gathered from the client to date. Chapter Six focuses the lawyer on habits of cross-cultural lawyering which are essential to making sure that all decision making jointly with or on behalf of the client is made from the client's legal context and not in the lawyer's personal context. Chapter Six offers five habits of cross-cultural lawyering which the lawyer can incorporate into his daily life and his interactions with the child client in order to remain focused on the child's individualized legal concerns. These habits can be used throughout the representation but are profoundly important anytime the lawyer is making decisions in the child's world.

As much as possible, making decisions about the child's representation should be a team effort. Chapter Seven discusses the decision-making loop, through which the lawyer and client will travel repeatedly in times of making big and small decisions in the representation. These steps include first, taking a snapshot of the child at the moment of decision which is totally up-to-date and understand-

BUZZ IN THE BRAIN AND HUMILITY IN THE HEART: DOING IT ALL, WITHOUT DOING TOO MUCH, ON BEHALF OF CHILDREN

Erik Pitchal*

I. INTRODUCTION

The *UNLV Conference Recommendations* are noteworthy for many reasons. Chief among these is the ringing reaffirmation of the *Fordham Conference Recommendations*, a reaffirmation adopted while also adding significant new findings and determinations based on experiences developed in the intervening ten years since that first landmark gathering.

The breadth and scope of the *UNLV Recommendations* are far-reaching. In addition to the fundamental call of the *Fordham Conference* for children's attorneys to undertake zealous client-directed advocacy, we now have recommendations that those attorneys meet their clients in their communities; engage in broad-based coalition building; utilize financial and demographic data and analysis in their advocacy; undertake legislative advocacy and community education, outreach, and organizing; hold service providers accountable by challenging ineffective or harmful programs; provide legal services in matters ancillary to the matter on which they are initially appointed (holistic lawyering); remain constantly aware of their clients' level of functioning and maturity of thinking (which presumably change rapidly as children grow); re-orient their entire mode of advocacy to incorporate a truly collaborative multi-disciplinary approach, as well as to more fully and authentically incorporate their clients' voices into their advocacy; model the decision-making process for their clients and otherwise assist their clients in developing the capacity to make their own decisions; and use the media as a key component in their advocacy, among literally dozens of other recommendations.[1]

Moreover, along with these *UNLV Recommendations*, children's attorneys are now urged to attend continuing legal education classes devoted to issues of race, ethnicity, class, and culture; sex, sexual orientation, sex identity, and sexual conduct; child and adolescent development and family systems theory;

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[1] *Recommendations of the Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592 (2006) [hereinafter *UNVL Recommendations*].

leadership training skills for fostering systemic change and community empowerment; international law that is applicable to child advocacy; and many other areas.

A practicing children's attorney who reviews just this summary might very well become overwhelmed at all the things experts in the field now expect her to do in order to successfully and comprehensively serve her clients well. The myriad requirements, recommendations, and dictates can make the brain buzz in a short-circuit of nerves. Imagine her confusion, though, when, in the midst of reading the *Report of the Working Group on the Role of the Family*, she discovers that she is *also* being counseled to "do less." For, contained within the Introduction is the following observation and admonition:

> Once involved, the systems over-involve themselves. They seek, in good faith, to do too much. Perhaps counter-intuitively, we ask them to strive to do less.
>
> They believe they have the authority to *force* families to change their ways. Instead, we ask them to help families understand why families should change. There is a lack of humility; a lack of understanding of the capacity for overreaching; failure to check the power that has been unleashed.[2]

The participants in the *UNLV Conference* unquestionably viewed children's lawyers as institutional actors who, as part of the aforementioned systems, could in many instances be considered part of the problem. But in case a practitioner fails to acknowledge or agree with this sentiment, the Working Group Report further admonishes: "The legal players in the system too often fail to appreciate the limitations of their expertise and claim the authority to dictate decisions beyond the scope of their expertise."[3] The UNLV Conference attendees found that the ideals of the *Fordham Conference* have not been fully realized in part because of the "cowboy lawyer" syndrome—a situation in which children's attorneys, believing they are heroic child savers, avoid input from people with knowledge of and experience in the matter at hand—including their clients.[4]

Thus, the *UNLV Recommendations* contain within them what might be viewed as an internal tension. On the one hand, practitioners are urged to learn more, do more, and change fundamental aspects of their advocacy such that they are more involved in their clients' lives and communities than ever before. If not a full re-orientation, then at the very least these *Recommendations* serve as a clarion call for a significant deviation from the path along which even the best advocates, those lawyers most filial to the precepts of the *Fordham Conference*, have been churning. On the other hand, children's lawyers are simultaneously cautioned that over-involvement in their clients' lives is dangerous and debilitating. Far from being rebellious, the intensely involved children's attorney is now declared to be regnant—a force to be restrained and cabined

[2] *Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616, 619 (2006).

[3] *Id.*

[4] *See also* Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 823 (2006) (arguing that children's attorneys advocate for their clients' wishes only when it is consistent with the attorneys' notion of what is safe for the child).

lest, as a representative of an oppressive system, she make things worse for her clients than they already are.[5]

How can these apparently opposite themes be reconciled? How can practicing lawyers, reading the Recommendations, find their way to a balanced accommodation between the habit of humility[6] and the need to go increasingly deeper into the complexities and richness of their clients' lives and cases? The rest of this Paper seeks to answer this question.

II. Why Humility is Uniquely Important for Children's Lawyers

Most lawyers probably would agree that a defining feature of the profession's culture is caution. As officers of the court, and as professionals subject to malpractice claims, no lawyer likes the idea of submitting a brief that miscites a case or signing off on a contract that fails to include a critical provision to protect the client's interests. Thus, most attorneys would no doubt concur with the sentiment that it is important to be careful in their work and to attend to over-reaching or thoughtless zealotry.

Few lawyers, however, would likely characterize their approach to their work as humble. To the contrary, attorneys tend to see themselves as dedicated advocates for clients who must both be confident and exude confidence in order to be successful. Before the tribunal, it is important to be seen as believing in your client, lest your own ambivalence plant seeds of doubt in the trier of fact. In negotiations with other parties, it is important to be able to posture credibly, showing faith in the rightness of your position and commitment to stick to your guns for as long as it takes to get the job done. Approaching these tasks with humility seems peculiar—if not undermining of the entire enterprise. A lawyer does his homework, prepares his case, and then gets in the mix. It is one thing to be aware of those aspects of one's case that are perhaps weaker than others, so as to cover those weaknesses and affirmatively play to one's strengths. But it is quite another to go into a trial or business deal negotiation with humility.

Children's lawyers are different. When representing a child in a dependency matter[7], there are a number of factors that must lead to an advocacy approach that is defined in large part by humility. Lawyers can never be assured of having all the information necessary to do their job well since the facts of the case are constantly changing, and the client's perspective and position on the critical issues in the case are subject to change as well. Moreover, even when the child's lawyer operates in a jurisdiction that requires her to advocate for the child's wishes, the temptation to take a "best interests" approach instead is constant.

[5] *See* Gerald Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992) (describing hallmark features of "regnant" lawyers in contradistinction to "rebellious" lawyers).

[6] For an excellent introduction to the concept of building habits as a means of training lawyers, see Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions 241-327 (2d ed. 2001); *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001). Peters and Bryant collaborated in developing the model of "The Habits," which is an approach to teaching young lawyers how to navigate cross-cultural relationships by relying on five highly developed habits.

[7] For purposes of this Article, I limit the discussion to dependency cases in most instances. The *Conference Recommendations* are of course not so limited, but in order to provide a focused analysis (and to keep within space limitations), I am excluding a broader discussion of delinquency and other types of cases. Humility is no less important a habit for lawyers in these matters, but the analysis may be slightly different.

A. *Imperfect Information*

All lawyers must attend to the possibility that their clients may fail to provide them complete and accurate information, but working with child-clients poses fundamentally different challenges. With adults, lawyers can explain their role and emphasize to the client how critical it is that the client provide all relevant information. Then, if the client omits something, or gives incorrect or misleading facts, the lawyer can disclaim responsibility for any harmful results in the case. As long as the adult client understands why the lawyer needs to know everything, the lawyer can feel justified in assuming that the client is telling him everything.

When children are involved, however, lawyers cannot make this assumption.[8] Even the most intelligent, sophisticated, and cognitively developed teenager will fail to tell her lawyer everything that the lawyer may need to know to provide comprehensive and zealous representation. Certainly, at the beginning stages of a case, when a trusting relationship has yet to develop, an adult advocate can never safely assume that a child client is not holding something back. But even after working with a young person for years, and even if she emphasizes time and again that she needs to have all the facts, a lawyer must always be aware that the information she is getting from the client is imperfect and incomplete. The adolescent's self-report may be accurate as to the youth's own perceptions, but that does not mean that it is accurate.[9]

Undoubtedly, with child clients of any age, the lawyer must do a thorough investigation so as to get a robust picture of the child-in-context.[10] As important as this process is, it highlights the fundamental uncertainty of information concerning the child's life and her case. The more reliance the lawyer places on information gathered from non-client sources, the less facially reliable the information becomes. All external information must be filtered for bias, perception errors, and other classic problems in witness reporting.[11]

[8] Placing the burden on the adult client either to tell the whole story or suffer the consequences if the lawyer is unprepared to deal with a "surprise fact" later may in fact not be justified any more than it would be justified to do so with a child client. For a host of cultural and other reasons, an adult client may not be immediately forthcoming with information just because the lawyer asks for it and explains why it is important, and lawyers should know that they have to work hard to establish trust and bridge divides. Nevertheless, at the end of the day, in most cases, a lawyer should be a lot less certain that he knows everything he needs to know from a child client than from an adult.

[9] Of course, the younger the child, the riskier it is to place heavy reliance on the information reported by the client. And in a high-volume practice, it is particularly hard to get all the information that could be relevant to advocacy. *See* Peters, *supra* note 6, at 13 ("the nagging sense that I frequently knew far less about my child clients than there was to know, in the end, degraded my practice and dampened my morale").

[10] *See* Peters, *supra* note 6, at 1-19 (explaining concept of child-in-context).

[11] The most well known researcher in the field of witness unreliability is psychologist Elizabeth Loftus. For an overview on her work and her findings regarding the cognitive limita-

B. *Constantly Changing Facts*

Another unique feature of dependency cases is that the facts are always in flux.[12] As children grow, their needs, interests, and wishes frequently change. Similarly, the adults in their lives often experience changed circumstances—biological parents complete service plans (or parts thereof), foster parents relocate out of state, relatives come into the picture—and these can directly and indirectly impact on a child and the lawyer's advocacy. The child's lawyer may have a good grasp on the case one moment only to see the ground shift the next. Constant questioning and re-examination is a necessity; applying an outdated assessment of the case based on stale facts is the antithesis of good lawyering.

C. *The Client's Changing Views*

When a case is centered on the present and the future, as opposed to merely the past, any client can fairly be expected to change her views on the matter from time to time. This is even more likely when the client is a child, who, in the middle of everything else, is constantly maturing and learning. Children of course are also susceptible to influence by the adults in their lives, so their expressed wish today may change tomorrow. A lawyer who thinks he understands his client's wishes is probably deluding himself if he is basing it on an interaction with the client six months ago, or three months ago, or perhaps even last week.[13] If an adult client changes her position on an issue in the case, the lawyer is on safer ground in assuming that the adult will call her between court appearances or appointments to tell her this than if the client were a child. Similarly, adult clients are far more likely to contact their lawyer than children clients are simply to tell the attorney about a new development in their lives, as adults are more apt to believe that new facts are material to the lawyer's work and the legal case.[14]

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tions people have when reporting on events they have experienced or witnessed, see ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY (3d ed.1996).

[12] Of course, the fact-finding hearing more commonly will be retrospective, focusing on whether an alleged incident of child maltreatment did or did not occur. Other than this one determination—which may be affected by current factual circumstances in any event—the court's focus is constantly on what is happening in the family's life now. The decisions are almost always prospective in nature, with the court making predictions about what will happen in the future.

[13] This assumes that the lawyer's understanding of the client's wishes was accurate even at the time they *did* have a conversation—which, as noted above, may not be the case when the client is a child.

[14] Again, there is no guarantee that adults will necessarily do this, and lawyers have to work hard to make connections with their clients and overcome whatever cultural differences there may be so as to encourage this kind of proactive client behavior. But overall, it is probably the case that the average adult client is more likely to call her lawyer to tell them news than the average child client. The consequence for the children's lawyer is that he has to work much harder.

D. *The Temptation to Insert One's Own Beliefs*

Much has been written on the question of whether dependency lawyers should advocate for a client's wishes or the child's best interests.[15] Even for those lawyers who take the "straight advocacy" approach, the question of how to formulate positions for clients who, due to age, are unable to express their own wishes presents a host of complicated practical and ethical issues.[16] An analysis of these questions is beyond the scope of this Paper. However, it is worth noting that even the most conscientious and diligent children's lawyer will regularly confront situations in which he must decide which substantive goal to pursue on his child-client's behalf. There is an enormous risk that in these situations the lawyer will think he knows more than he does about the case and his clients and, as a result, make the wrong choice. So long as there are lawyers for children in these cases, the best antidote to overreaching is a generous slice of humble pie.

III. HOW OVER-INVOLVEMENT CAN BE HARMFUL

If the need for humility is driven in part by the recognition that the children's lawyer possesses imperfect information, then the natural instinct in response is to seek to gather more information. Setting aside the ordinary context of large caseloads that functionally prohibit increased investigation and involvement in the case[17], the idealized children's attorney will seek to immerse herself more and more into the case to avoid the pitfalls mentioned above. She will find further encouragement to do this from the *UNLV Recommendations*, because they highlight so starkly the need for lawyers to grapple with issues that experts in the field agree have been by and large ignored for too long.

Take for example the admonition in the *Recommendations* that children's lawyers provide (or arrange for the provision of) legal services in matters ancillary to the matter on which they were initially appointed.[18] Obviously, preliminary to providing these services, the lawyer would have to know about the need for them. Prodded by the notion that she ought to be a holistic lawyer, the children's attorney will undertake to identify any and all issues in the client's

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[15] *See, e.g.*, Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281 (1996); Robert E. Shepherd, Jr. & Sharon S. England, *"I Know the Child is My Client, but Who Am I?"* 64 FORDHAM L. REV. 1917 (1996); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939 (1995); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259 (1995). *See also* PETERS, *supra* note 6, at 46-48 (summarizing scholarly debate on proper role of children's attorney).

[16] *See, e.g., Report of the Working Group on the Best Interest of the Child and the Role of the Attorney*, 6 NEV. L.J. 682 (2006) (offering reasons why the *Fordham Conference* has not been fully implemented).

[17] *See Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616 (2006) (calling for controlled caseloads); *Report of the Working Group of the Role of Race, Ethnicity, and Class*, 6 NEV. L.J. 634 (2006) (same) ; *Report of the Working Group on Representing the Whole Child*, 6 NEV. L.J. 665 (2006) (same) .

[18] *UNLV Recommendations*, *supra* note 1, at pt. I.D.1.

life that could be remedied by legal counsel and advocacy. The list is potentially endless, with those issues highlighted by the Recommendations suggestive of an even broader range of possibilities: housing, education, immigration, public benefits, health, and domestic violence. To this, one might add employment (discrimination claims, wage claims, problems with labor unions, pension benefits, etc.); torts (products liability for clients or their families who are hurt by a faulty consumer item; personal injury claims against the state for physical or severe emotional harm a child experiences while in foster care); or even constitutional claims (First Amendment violations experienced by children in school or at the hands of the public foster care agency or juvenile justice authority).[19]

Traditionally, lawyers provide services to address the problems identified by their clients. Whether it is a small business owner who wants to sue a competitor, or a large corporation seeking to acquire another firm, or an indigent criminal defendant who wants to minimize his jail time, the classic relationship between lawyer and client centers on the client identifying the legal goals he wishes the attorney to pursue. This is what is meant when we say that clients direct their representation. In any of these situations, the lawyer is of course free to suggest to the client that, to the lawyer at least, it appears that the client has some other issues in his life that perhaps the lawyer could also assist in resolving. And when the lawyer does so, the adult client is free to say yes, please, that would be fine—or, no thanks.

It is unrealistic to believe that even the most sophisticated child would understand that she is in a position to tell her lawyer not to work on an ancillary matter, let alone that it is possible for her to direct her lawyer not to ask her

[19] Arguably, a more coherent framework that sets out what is meant by "ancillary" would be incredibly helpful, and I do not mean to criticize the Working Group on Representing the Whole Child for not having offered such a framework, as time constraints at the *UNLV Conference* prohibited a deeper inquiry. That said, there is ancillary and then there is ancillary. In one view, what I might call the "Dependency Only View," anything outside the four corners of a dependency petition would be ancillary. Another view, the "Dependency Plus View," might be that a legal goal directly related to the goal of the dependency representation is not ancillary—for example, if the allegation in the petition relates to educational neglect, and the goal of the representation is to enable the child to stay at home (or return home), and the child needs special education services, then arguably to provide IEP advocacy furthers the dependency representation goal. In either of these two views, representing Alex on a civil damages action (*see infra* text accompanying note 21) would be ancillary, whereas advocating for him to be moved from an unsafe group home falls within the four corners of the dependency case.

A third view, what I would call the Dependency Justice View, holds that even civil damages representation is not ancillary, because it furthers justice for the client *and* arises out of events that would not have occurred but for the dependency petition. It is unclear if the *UNLV Recommendation* on ancillary representation takes the Dependency Justice View for defining "ancillary." As broad as it is, under the Dependency Justice View, there are still other legal matters that would be considered ancillary. Take, for example, a child client suspended from school for wearing a t-shirt that said, "Barbie is a Lesbian." *See* Reuters, *Teen Sues Over Lesbian Barbie T-Shirt Ban*, June 20, 2003, http://www.cnn.com/2003/EDUCATION/06/20/life.barbie.reut. On its face, the suspension is not causally related to the fact that the state filed a dependency petition against the child's parent.

A fruitful area of discussion and research would be an assessment of the various views of "ancillary" and an effort by scholars and practitioners in this area to develop a useful framework for allocating advocacy resources accordingly.

about these ancillary topics.[20] To think otherwise would be to assume that the ordinary child-client has a good sense of what is "ancillary" and what is not. Essentially, the power dynamic between the adult attorney and the child client is most stark when the these two individuals are negotiating the scope of the representation, and the lawyer who seeks to do it all on his client's behalf is likely to think he is helping, when in fact he is being incredibly invasive and disrespectful.

Imagine a twelve or thirteen year-old client, we will call him Alex, who has been in a congregate care setting—perhaps a foster child in a group home, or a child sent to juvenile detention in connection with a delinquency petition. Imagine further that Alex's lawyer learns that Alex may have been assaulted by a staff member in the group home or detention center. The lawyer learns this from a colleague, who learned it from her client, who was in the same placement as Alex. Unquestionably, Alex's lawyer should investigate this matter, and let us presume that he does so. Alex's lawyer has valid concerns about the safety and well-being of his client and questions about whether this is the appropriate placement for Alex. Addressing these concerns and questions is perfectly within the scope of dependency or delinquency representation. But let us also assume that Alex's lawyer learns that Alex was in fact assaulted and in the wake of the incident he has stopped doing his schoolwork, stopped participating in activities, and is no longer participating in visits with his family, among other things. The lawyer is starting to get the sense that Alex is suffering physical and emotional damage directly caused by the assault.

A holistic lawyer would think, "Tort!" The holistic lawyer would then seek to represent, or arrange representation, for Alex in connection with a tort claim against the staff member who assaulted him, the facility director, the commissioner of the agency, and anyone else in the chain of command against whom there is a cognizable claim. In doing the preliminary research for this claim, though, Alex's lawyer would probably want a clearer sense of the injuries Alex has experienced, and to do this, he needs to have Alex evaluated.

Is this evaluation a good idea? Clearly, if Alex were an adult and had identified *for himself* the goal of suing the person who assaulted him, and if he had walked into a lawyer's office to seek representation on this claim, then we would expect the lawyer to say, "The first thing I need to do is send you to a doctor to get an evaluation of your injuries." And the adult Alex would either cooperate or walk out if he objected to the invasion of an evaluation. But faced with an enthusiastic lawyer who has been commanded to provide holistic representation, the child Alex is not in a position to say no.[21]

[20] Of course, children are perfectly capable of telling their attorneys, "I don't want to talk about that," and they sometimes do. The lawyer needs to be able to respect that request. More importantly, the attorney needs to balance the recommendation to provide holistic lawyering (and other recommendations that call for ever-increasing levels of involvement in clients' lives) with the need to respect a client's decision-making authority. This is especially tricky with younger clients, when the temptation is greater to disregard their decision-making authority and, as a professional, decide both the strategic course to take in a case and what the goals of the representation should be.

[21] This hypothetical does raise the interesting question of who is entitled to (or obligated to) consent to medical and psychological evaluations of injuries to children in state custody, before a tort suit has been filed. In some jurisdictions, biological parents whose rights have

Regardless of what happens after the evaluation, the mere fact that Alex's lawyer has subjected his child client to the procedure can be damaging to Alex, if not calamitous. Perhaps the evaluation is done without Alex's mother's knowledge or consent, but when she discovers the truth, she is angry and hostile and she misdirects those negative feelings onto Alex. Or maybe removing his clothes in the doctor's office triggers a cascade of emotions in Alex that results in significant regressive development. Or perhaps Alex is so upset and disturbed by the assault that merely talking about it in the psychological evaluation causes him great emotional distress. Assuming that he knew ahead of time that one of these things would occur to Alex because of the evaluation, should Alex's lawyer have subjected him to it anyway? What if he knew that one of these results *could* occur?

There are probably dozens of other possible unintended and unforeseen consequences that can flow from providing holistic lawyering to children in the manner called for by the *UNLV Recommendations*. Similarly, for the other new tasks that the *Recommendations* urge upon children's lawyers, some of which are listed in the second paragraph of this Article, there are countless scenarios in which a children's lawyer could actually do damage to his client by trying to do too much—or, if short of causing harm, could nevertheless make the client's life more difficult for a period of time.

IV. How to Keep the Brain Buzzing While Maintaining Humility in the Heart

Children's lawyers enter the field because they want to help young people. In particular, they believe strongly in the idea that the legal profession can bring its power and influence to bear for the good of children, and that providing zealous advocacy to children benefits them in individual cases. Experienced children's lawyers know that there is a vast amount of information that they could learn about their clients and their lives that can advance their advocacy and, consequently, produce added benefit to them outside the strict contours of their legal case.

The instinct to learn more, to do more, and to accomplish more is natural and should be encouraged. But it also needs to be tempered. At the same time that lawyers for children take seriously the UNLV charge to contextualize their clients within families and communities, we also have to pause and reflect on the unintended consequences that could and probably will result, in at least some cases.

not been terminated may be consulted, or may be entitled to consent before any such evaluation. In other jurisdictions, this kind of evaluation could be considered a routine procedure that would be done without the parents' consent or even knowledge. Additionally, in some jurisdictions, a persuasive attorney who is assigned to the child by the court for a dependency or delinquency case may convince the state agency to allow an evaluation, in the absence of parental or judicial authorization, even though the attorney will use the evaluation to determine whether to initiate a tort action.

For a general description of the importance of balancing zealous legal advocacy, which should be seen as a short-term intervention, with the more critical and longer-term relationships the child has with other adults, see Peters, *supra* note 6, at 74-78.

Lawyers must know what they know about each case, and they must equally know what they do not know. Humbly acknowledging that they are not the sun in their clients' universe is a critical step. What will the attorney do then? The mandate to be humble cannot be an excuse to stop working; the *UNLV Recommendations* cannot wither away on a falsely fallow field of humility.

Children's attorneys should go back to the basics to find their way out of this seeming dilemma. When we acknowledge that we are not the most important person in our clients' lives, we are simultaneously acknowledging that there are other adults who hold that station, including other professionals. Children have teachers, they have doctors, they have Little League coaches, they have clergy, and they have parents.[22] Children's lawyers should call upon these resources when doing the work that UNLV calls for.[23] Lawyers should do themselves only what is absolutely necessary, and turn to adults who already had a relationship with their clients before the case even began as much as possible. After all, presumably those adults will be in the child's life after the case is over, when the lawyer will not.

More than that, we must expand beyond our legal cocoons and, as the *UNLV Recommendations* state, pursue a truly interdisciplinary approach to our advocacy. All institutional providers of legal services to children should have social workers on their staff, and these organizations must develop a coherent theory of interdisciplinary advocacy in their practice. Advocacy is strengthened when other professionals are brought into the effort, and it is weakened when lawyers do what they are not trained to do.

Alex's situation could be resolved more easily if he were represented by a lawyer who is engaged in interdisciplinary advocacy. Having the discussion with Alex about whether he should have an evaluation, and helping him weigh the pros and cons both of the immediate evaluation and the broader question of whether he should sue for damages, is the kind of task well suited to an interdisciplinary team of a lawyer and social worker who each know Alex well and whose discussions are covered by privilege rules. While the lawyer is expert at the rules of evidence and the law's requirements to win a tort case, the professional social worker is trained to help a client handle trauma and make decisions. In other words, when dealing with an emotionally fragile child, the participation of a social worker is critical to helping the child effectively exercise his right to direct the scope of his legal representation.[24] Assuming Alex decides to do the evaluation, the social worker can help find a forensic professional who can do the evaluation without re-traumatizing the child.

[22] Regarding the importance of seeking parents' input as to what is best for their children, notwithstanding that the parents have been charged with child maltreatment or found to be unfit, *see* Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 Nev. L.J. 1263 (2006).

[23] Peters, *supra* note 6, at 74-78 (discussing importance of lawyer's cultivating "right relationships" with other critical adults in the client's life, noting "almost never is the lawyer the most important person in the child's life").

[24] There are many other benefits to interdisciplinary child advocacy that are beyond the scope of this Paper, and there are few costs—other than the financial ones and the fact that it is *hard work* for lawyers to re-orient their worldview away from the legal-centric.

To take another example, the *UNLV Recommendations* urge children's lawyers to hold service providers accountable by challenging ineffective or harmful programs. Doing so would unquestionably advance a child's legal interests and is well within the ken of lawyers. But this recommendation begs the question: what does a lawyer know about whether a social service provider is doing a good or bad job, let alone whether the provider's program is harmful? Though lawyers know a thing or two about research, it is the professional, master's level social worker who is trained to do social science research, not the lawyer. Social workers also have training in social service delivery systems and are in far better professional position than lawyers to evaluate the effectiveness and safety of a given social service program.[25]

It is far too easy for a lawyer who thinks she has identified a poor service provider (particularly when a client calls it to her attention) to start issuing subpoenas and cross-examining witnesses in a frantic effort to shut the place down, all while wearing the "Child Saver" hat. The client may be right that the provider is substandard, and the lawyer may be right that on balance it needs to be closed. But without working closely with another trained professional—someone who understands social science, someone who can carefully evaluate the benefits and detriments of a given program, someone who can provide individual support to the client and to *other* clients who are also involved with the same failing agency—the lawyer is apt to hew to her tunnel vision and miss significant, collateral consequences to her otherwise laudatory course.

It is important not to overstate the role that interdisciplinary advocacy can play in avoiding the pitfalls of over-involvement. After all, individual social workers are susceptible to hubris too. In fact, given the profession's creed that social workers' responsibility to larger society may sometimes outweigh their responsibility to individual clients, they may be tempted just as much as children's lawyers to make decisions, inappropriately, based on their personal notions of what is best for a client.[26] Just as with lawyers, for certain social workers in certain cases, the drive to become more intertwined with their clients and the drama of their clients' lives is as dangerous as it is irresistible. That said, the different mode of thinking and the alternate worldview that social workers generally offer are invaluable resources for reining in the potentially regnant lawyer.

[25] Council on Social Work Education, *Educational Policy and Accreditation Standards* § 1.0 ("The social work profession . . . is the primary profession in the development, provision, and evaluation of social services."). Lawyers often like to think that because of our training, our intelligence, and our experience, we can handle a seemingly easy task like evaluating whether a program is serving our clients well. In many cases, we can, and we do. However, humility requires us to examine this more closely. Do we handle these evaluations on our own because we can, or because we have to? Lacking an in-house social worker, or access to a consulting expert in social work, we may have no choice but to develop an ad hoc method for doing social service program evaluations ourselves. Certainly in situations in which we have a client in crisis, or learn of obviously dangerous and unhealthy placements, we should have no hesitation to act on our own. That we have done so, with success, does not lessen the need to examine carefully whether attorneys are truly the best class of professionals to do this type of research in the main.

[26] National Association of Social Workers, *Code of Ethics of the National Association of Social Workers*, § 1.01; *see also supra* notes 9-14 and accompanying text (discussing children's lawyers' constant temptation to take "best interests" approach).

The *UNLV Recommendations* are exciting. They preview a world in which lawyers for children will take their place among the most important and influential members of society as they seek to empower and better the lives of their clients and their clients' families and communities. As daunting as it may be to seek their widespread implementation, it is important that we all do so.

But in seeking the widespread adoption of the *UNLV Recommendations*, we cannot lose sight of a classically understood rule of the medical profession, which is also applicable to the law: first, do no harm.[27] We must recognize in ourselves that our desire to do good can sometimes lead us to do harm, and we must stop it before it happens. Collaborating with non-lawyers who also care about children and families is an excellent way to make sure that we stay honest and true to our mission without hurting people in the course of it.

[27] It is commonly believed that "first, do no harm" is part of the Hippocratic Oath. In fact, this phrase does not appear in the Oath, but a similar concept is found in Hippocrates, EPIDEMICS Book 1, § 6. Regardless of its origins, the sentiment is apt when applied to children's lawyers.

ABA

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RAISING THE BAR

Protecting Client Confidences in Child Welfare Cases

by Jennifer Renne

Attorneys handling child welfare cases face difficult ethical dilemmas when protecting client confidences.

- **Agency attorneys** must act in the best interest of the agency while helping the agency act in the child's best interest. What are an agency attorney's ethical duties when she discovers the social worker has put the child's safety or permanency at risk?
- Under what circumstances *may* a **parent's attorney** reveal confidential information? When, if ever, *must* an attorney reveal such information? What are the ethical duties for a parent's attorney who learns the parent is continuing to abuse a child or is placing the child at risk of harm?
- Are there any limits on when a **child's attorney** should keep a client's secrets? What if the child tells her attorney something that raises a question about the child's safety?
- How does a **guardian ad litem** (GAL) reconcile a statutory duty to present all facts to the court relating to the child's best interest when a child has disclosed something and asks the GAL "not to tell anyone?"

The nature of child protection cases can make these decisions difficult for attorneys. It is unusual that parties, who are adversaries in court, must work together for the case to succeed. The adversarial process can pit the parties against each other, especially if hearings are contested and witnesses testify. While a social worker may perceive her testimony as simply "recounting the facts," a parent may perceive the worker as testifying *against* the parent. This adversarial model sometimes leads parents' and children's attorneys to advise clients to withhold important information, and even not cooperate with the agency.

This tendency to protect certain information can delay reunification, and can damage relationships between the parties. Where else in law is there a hearing with three (or more) parties who, after a contested trial, must sit down and cooperatively draft a case plan? The parties must then work together closely, ideally in a relationship characterized by trust and confidence, as they implement the case plan. Attorneys schooled in the adversarial model of justice must first understand the attorney/client confidentiality rules as well as other ethical rules that guide practice. They must also understand the consequences of certain choices and their impact on the client given the unique context of a child abuse and neglect case.

This article looks at attorney/client confidentiality as an ethical issue for attorneys who represent parents, children, and child welfare

(Continued next page)

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- ☑ Confidentiality *(This issue)*
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agencies. It analyzes ethical issues by referencing the ABA Model Rules of Professional Conduct. It also contains a section on applying the confidentiality rules to GALs who are appointed to represent children's best interests.

Parents' Attorneys

When a child is in serious danger, should protecting that child supersede the attorney's traditional duty to protect attorney/client confidences? Consider the following case from the perspective of the mother's attorney:

The Sands case: The case involves neglect allegations that Jackie Sands, a single mother, is abusing drugs and has left her children, Jason (age 15), David (age 7), and Angela (10 months) home alone more than once, never overnight, but often for hours at a time in the evenings. Sometimes Jason is home, but often he is out with friends. Jason has begun skipping school, and his grades have recently dropped. The judge awards temporary care and custody to the agency at the shelter care hearing, pending the adjudication. The judge also orders a substance abuse evaluation for Ms. Sands.

The adjudication date has arrived. Mom's drug screen shows she's negative for all controlled substances. The agency's case is fairly weak because the witnesses who saw the children left home alone are unreliable, and may have been under the influence of drugs themselves, further undermining their credibility. During the interview, Ms. Sands tells her attorney she faked the court-ordered substance abuse evaluation by using someone else's urine. She instructs her attorney not to reveal this information because she's desperate to have her kids home.

Before answering the hypothetical, first consider what the rules say, and the underlying rationale and policy reasons for the confidentiality rule. The circumstances requiring parents' attorneys to disclose information are controversial. The ethical rules give attorneys discretion, and seek to strike a balance between nondisclosure to protect the attorney/client relationship, and disclosure to protect society (in this case, children).

On one hand, strengthening the confidentiality rules protects the attorney/client relationship by encouraging open communication. Preserving client confidences helps develop the facts fully, which allows attorneys to effectively represent clients. The lawyer also needs this information to advise the client to refrain from wrongful conduct. The rule also protects the sanctity of the attorney/client relationship, and protects the client's privacy.[1]

On the other hand, loosening the restrictions on the confidentiality rules holds attorneys more accountable as "officers of the court," to better protect society. Some argue that allowing or requiring attorneys to keep their clients' secrets is inconsistent with public policy, reduces public confidence in the legal profession, and contributes to diminishing respect for attorneys. Sometimes the attorney may be the only one aware of a dangerous, criminal, or threatening situation, and is in a unique position to prevent the contemplated harm.

Model Rule 1.6: Confidentiality of Information

The Model Rule addressing confidentiality is MR 1.6, amended in 2002 (See sidebar, p. 143). Most states have based their rules of professional conduct on the Model Rules. Since the amendments to the Model Rules are so recent, most states have not adopted the changes yet. This article analyzes the issue under both the "old" Model Rule

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Parents' Attorneys: Special Considerations

Civil Liability

An attorney may choose not to reveal even when disclosure could prevent reasonable certain death or substantial bodily harm. An attorney may also choose not to reveal when disclosure is required by state law or a court order. This is because MR 1.6(b)(1) & (4) are permissive, not mandatory. However, beyond ethical rules, the potential for civil liability arises when an attorney *fails* to warn a third party of a threat that the attorney's client made against the third party. This private cause of action would potentially arise from a legal duty to warn third parties of a client's threat. Despite several lawsuits asserting damages, no courts have imposed tort liability on an attorney who fails to warn based on a client's threat, or based on the attorney's knowledge of a continuing crime, including child abuse. However, all jurisdictions permit such disclosure if the circumstances qualify as an exception under MR 1.6(b). The legal community is debating the issue of civil liability for attorneys, especially in light of recent cases where attorneys helped conceal client fraud and misconduct.*

**See* Cooper, Davalene. "The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat that Causes Serious Physical Harm or Death." *Maine Law Review*, 2000.

Mandatory Reporting Laws

All states have statutes that mandate certain professionals to report suspected or known cases of child abuse. Typically, these mandated reporters include health professionals, school officials, and social workers. Further, 21 states have mandatory reporting laws for all citizens, and most do not specifically exclude attorneys by abrogating the attorney-client privilege. In other words, because the law applies to all citizens, attorneys could be subject to a mandatory reporting law, and have a conflicting ethical duty to keep client confidences. Of the 21 states with the general duty for citizens to report, only three—Mississippi, Nevada, and Ohio—have statutes which explicitly *include* attorneys as mandated reporters. Ohio, however, exempts attorneys from the reporting requirement if the information is received in the attorney/client relationship. Nevada also excludes attorneys as mandated reporters when the attorney knows of abuse or neglect from a client who is or may be accused of the abuse or neglect. Mississippi, therefore, is the only state where an attorney in a child protection case, as in the Sands case, would be required to report under state law.

See generally, Beyea, Allison. "Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Attorney-Client Relationship." *Maine Law Review*, 1999.

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(current rule in most states), and the amended Model Rule.

The amended Model Rule provides that absent client consent, attorneys may not reveal information about the representation. The Model Rules provide six circumstances under which an attorney *may* reveal otherwise protected, confidential information. The two relevant circumstances are (1) when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm, or (2) to comply with a law or court order.[2] The recent changes in the Model Rules expanded the grounds for permissive disclosure by eliminating the word "crime" from MR 1.6(b)(1). In other words, in most states that still follow a modification of the *former* Model Rules, a lawyer *could* reveal confidential information only *to prevent the client from committing a criminal act* that the lawyer believed was likely to result in imminent death or substantial bodily harm. Now there is a broader exception with no requirement of client criminal behavior.

The 2002 amendments further expanded the grounds for permissive disclosure by changing "imminent death" to "reasonable certain death," and adding other circumstances under which an attorney *may* reveal confidential information: (1) to secure legal advice about the lawyer's compliance with these Rules; (2) to comply with other law or a court order, and (3) to prevent or mitigate substantial financial injuries to others.[3]

There are some state variations on this rule that impact primarily parents' and children's attorneys. In 11 states the lawyer *shall* or *must* reveal otherwise confidential information in certain circumstances (usually involving cases of substantial bodily harm or death).[4]

Therefore, under the Model Rules, the mother's attorney in the Sands case must keep the information confidential unless the attorney reasonably believes that disclosure is necessary to prevent *reasonably certain death* or *substantial bodily harm*, or if the court or other law requires such disclosure. If either exception to the confidentiality rule applies, the attorney *may* reveal the information, but is not required to. On one hand, these exceptions are meant to apply to extreme cases, and the Model Rules favor protecting the confidence. On the other hand, as the examples above show, the trend is towards expanding the grounds for permissive disclosure with some states actually mandating disclosure.

The confidentiality rule applies not only to matters communicated in confidence by the client but to all

information relating to the representation, *whatever its source*.[5] This distinguishes attorney/client confidentiality from information subject to attorney/client privilege. (See sidebar, p. 144). In the Sands case, if the attorney finds out from a neighbor (and not from his client) that the neighbor saw Ms. Sands using drugs, this information is considered confidential and protected (a future article will address how to handle this neighbor's statement in the context of litigation).

Model Rule 3.3: Candor Toward the Tribunal

Note that under the amended MR 1.6, no disclosure is *mandatory*, even when the purpose is to comply with a law or court order.[6] In fact, the only disclosure *obligation* in the Model Rules is MR 3.3, Candor Toward the Tribunal. Under MR 3.3(a), regardless of whether information is protected by MR 1.6, an attorney must disclose to the court when the attorney has offered evidence that the lawyer knows is false.

Unless and until Ms. Sands insists on testifying that she's clean, or until she wants her attorney to refer to her "clean" drug evaluation, MR 3.3 does not come into play. A later article dealing with litigation issues, will take this case scenario further and explore how the confidentiality rules are impacted by MR 3.3 (Candor Toward the Tribunal), MR 3.4 (Fairness to Opposing Party and Counsel), MR 4.1 (Truthfulness in Statements to Others), and MR 1.2(d) regarding assisting a client in criminal or fraudulent activity.

Deciding Whether to Reveal

Under the Model Rules, the attorney may choose to reveal confidential information only if one of the MR 1.6(b) exceptions applies. In deciding what to do, an attorney should consider the consequences of revealing certain types of information versus withholding it. Child protection hearings are civil proceedings. However, there is often a risk of criminal prosecution, and significant interests are at stake including custody and placement of children. Parents risk losing their parental rights (TPR). Therefore, attorneys for parents need to strike a balance between protecting their clients from state action (losing custody of a child, TPR, criminal prosecution), and encouraging clients to cooperate with the state to regain custody of a child, and prevent losing their parental rights. This dilemma is explored later under the discussion on MR 2.1. Attorneys also need to balance the risks of *not* revealing, such as civil liability (See sidebar, p. 142).

Children's Attorneys

Consider the Sands case from the view of the child's attorney (distinct from the GAL representing the children's best interest, discussed below). While interviewing the children, Jason and David consistently say they want to go home and live with their mother. Further, Jason says he has seen his mother use drugs, but asks his attorney not to tell anyone because he knows if this information comes out, he might be sent to a foster home.

When deciding whether to reveal Jason's disclosures, a child's attorney may try to escape the ethical dilemma by saying he does not have to reveal them because the mother's drug use would become known through other channels. However, what if this is not the case? Drug screens can be inconclusive, and the agency may have no other eyewitnesses or ways of proving Ms. Sands' drug use. Suppose, as well, that Jason tells his lawyer that he thinks it's neat to have a lawyer, and that one thing he knows about lawyers is that "they keep their clients' secrets."

The analysis of MR 1.6 above applies here as well. Under the Model Rules, the attorney must keep this information confidential unless one of the relevant circumstances under MR 1.6(b) applies. In other words, only (1) if the attorney "reasonably believes that disclosure is necessary to prevent reasonably certain death or substantial bodily harm," or (2) "to comply with a law or court order," may the attorney even consider revealing the information. Remember, these exceptions are meant to address extreme cases, and the Model Rules favor protecting the confidence.

ABA Revises Ethics Rules

The Model Rules of Professional Conduct had not been significantly amended since 1983. In 1997, the American Bar Association established the Commission on the Evaluation of the Rules of Professional Conduct to consider amending the rules in light of developments in ethics, technology, and the legal culture. Client matters have become increasingly complex, and the Commission sought to amend the Model Rules to provide guidance for attorneys, and to enhance public confidence in the legal system. Another purpose for reviewing the rules was to promote national uniformity and consistency.

The Commission completed its work in 2001, and after extensive hearings and review, the ABA House of Delegates adopted the recommendations on February 5, 2002. MR 1.6 was amended again. A number of states have formed committees to consider the changes.

Visit **http://www.abanet.org/cpr/** for the latest amendments to the Model Rules adopted by the ABA House of Delegates.

A more common scenario arises when a child is a runaway and has told the attorney his whereabouts. The court orders the attorney to reveal the child's location. The attorney must consider all the consequences when deciding whether to reveal where the client is, including the future relationship with the child and the judge. The attorney may choose to reveal the client's whereabouts, pursuant to the court order and the accompanying risk of contempt of court for failing to comply with the court order. The disadvantages are that disclosing may jeopardize the relationship with the client, and the client may decide to stop communicating with the lawyer, which could make a bad situation even worse.

Choosing to protect the confidence may jeopardize the child's safety because the agency still won't know the child's whereabouts. It may also strain the attorney's relationship with the judge. The attorney, however, may feel it is best to preserve the confidence so the runaway client is communicating with at least one professional in the case. Either choice is warranted under the ethical rules, and each has different consequences.[7]

Model Rule 2.1: Advisor

Children's and parents' attorneys face a dilemma over when it is *ethically permissible* to withhold certain information because it's confidential, or reveal information based on one of the exceptions. The attorney has a choice, and should be aware of other considerations when determining whether to disclose.

An often overlooked ethical rule is MR 2.1, dealing with an attorney's duty to advise her client. The rule explicitly encourages attorneys to provide advice to clients that goes beyond purely legal advice. It encourages attorneys to advise on moral, social, economic, or other factors relating to the client's situation. In the Sands case, the attorney could consider advising Ms. Sands to seek treatment for a possible drug problem, or could advise her to admit the allegations on the petition and seek support from the child welfare agency.

The comments to MR 2.1 make clear that a client is entitled to straightforward advice expressing the lawyer's honest assessment, and that legal advice often involves unpleasant facts and alternatives that a client may not want to confront. In presenting advice, the attorney should attempt to sustain the client's morale, for example, by referring her to a mental health professional, or another person who can help her work through her problems. Although a lawyer is not a moral advisor as such, moral and ethical considerations affect most legal questions and may decisively influence how the law will be applied. Even if the attorney thinks she could get this case dismissed based upon the weak evidence presented by the agency, the attorney might advise Ms. Sands to admit the allegations, especially if the attorney is concerned for the safety of the children, or believes Ms. Sands may be in danger. Opening a child protection case may also give Ms. Sands greater access to community resources, including drug treatment.

When appropriate, the attorney may recommend that the client consult with a professional in another field, such as a psychologist, social worker, or addictions specialist.[8] When a client proposes a course of action that is likely to harm the client, the lawyer's duty under MR 1.4 (discussed in the previous article) may require the lawyer to offer advice. There is no general duty to investigate a client's private affairs or to give advice that the client has indicated is unwanted, but an attorney may give such advice when doing so appears to be in the client's interest.[9]

Model Rule 1.14: Client with Diminished Capacity.

This rule has special confidentiality provisions. It can be relevant when representing a client suspected of using drugs, especially if the client's drug use has a significant impact on the client's cognitive and social functioning. The next article in this series will address representing clients with diminished capacity, including the confidentiality provisions.

The Difference Between Confidentiality and Privilege

	Confidentiality	Privilege
Legal Authority	Ethical rule	Rule of law/evidentiary rule
Purpose	Prohibits attorneys from disclosing client confidences	Prevents government and adversaries from compelling attorneys and clients to reveal communications between them
What it protects	Any information relating to the representation of a client, regardless of its source	Any communication between lawyer and client
When it applies	Applies generally	Applies usually in judicial proceedings in which an attorney can be called as a witness
Remedies	Disciplinary action against attorney	Motion to quash subpoena for records or testimony

Agency Attorneys

Model Rule 1.13 Organization as Client

Suppose a social worker admits to the agency attorney that she has altered dates on her case record. What are the attorney's duties to her,

to other parties, and to the court? To understand how attorney/client confidentiality applies to an agency attorney, consider MR 1.13 regarding agency representation. (See sidebar, this page).

MR 1.13 says "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[10] Therefore, an attorney representing the child welfare agency represents the agency, not the individual social workers or employees. What does this mean in practice?

To start, communications *generally* are protected by Rule 1.6, despite the fact that the attorney represents the agency, not the individual social worker. For example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.[11]

If the actions of the social workers threaten substantial injury to the child welfare agency, the attorney could not be compelled to reveal communications to someone *outside* the organization (e.g., law enforcement or opposing counsel such as the GAL). However, the attorney *must* reveal knowledge of the social worker's wrongdoing to *others within the agency*, including supervisors. This is because the lawyer has a duty to proceed as is reasonably necessary to promote the best interest of the organization.[12]

For example, in the case scenario above, the attorney may not have to reveal the social worker's wrongdoing to anyone outside the agency (although the attorney might choose to reveal, based on Comment [6] to MR 1.13, detailed below.) The attorney, however, should reveal the wrongdoing to a supervisor or higher authority within the organization because the attorney's primary ethical responsibility is to protect the best interest of the organization. The attorney may need to proceed "up the chain of command" within the agency to resolve concerns.

When a social worker makes a serious mistake, the lawyer should consider the following factors when determining how to proceed:

- the seriousness of the violation and its consequences,
- the scope and nature of the lawyer's representation,
- the responsibility in the organization and the apparent motivation of the person involved,
- the policies of the organization concerning such matters and any other relevant considerations.[13]

The lawyer should also try to minimize disruption to the child welfare agency.[14]

Agency Attorneys: Who's Your Client?

Several models of agency representation exist. Sometimes the agency is represented by the attorney general's office, the district attorney's or prosecutor's office, county attorneys, in-house counsel, or private, independent contractors. Some models assume the client is the child welfare agency. Usually when the child welfare agency is represented by the prosecutor's office, the model is more analogous to criminal cases, where the prosecutor doesn't have a client per se, but instead represents the "people of the state," or the "public interest."

Some states have a statute, court rule, or opinion on point that clearly resolves the issue. Most states, however, have not resolved the issue, and may even have different practices throughout the state. In most states the agency is the client, not the individual social worker, not the public, and not the child's best interest.

Usually when the agency is represented by a county attorney's office, or by the attorney general's office, the agency is considered the client, but this is not always the case. Maine, for example, has case law saying that as the chief law officer of the state, attorneys general are vested with considerable discretion and autonomy to exercise power in the public interest. The AG's paramount duty is to act as the legal representative of the people in controlling and managing the litigation of the state and in pursuing the public interest. The agency is not considered the client under this opinion, therefore the analysis under Model Rule 1.13 would not apply in Maine.

Consult your state law to determine whether it has resolved the threshold question over who the client is. The ethical analysis varies if your state has not resolved this issue.

Duties to the Social Worker

Sometimes the child welfare agency's interest may become adverse to an employee (in this case, the social worker). Developing the case scenario from above further, suppose the social worker not only admits that she altered dates in her case record, but that she also lied in the termination of parental rights trial. Assume she tells the agency attorney that when she testified that she had no contact from the mother, this was untrue. She was too busy and overwhelmed at the time to respond to the mother, but that the mother had, in fact, made several attempts to reach her.

The attorney's ethical duty is to proceed in the best interest of the organization. When the agency's interest and the social worker's interest diverge, as in the above examples, additional duties arise with respect

to the worker. MR 1.13 says that the attorney "should advise [social worker] that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."[15]

Another way in which the agency's interest may become adverse to that of the social worker is when the social worker places a child in a foster home and the child is injured while in foster care. The agency and the social worker may face civil liability. The agency attorney, therefore, must explicitly warn the social worker that the attorney represents the agency, and *does not represent her*, and that she may want to seek outside legal representation.

Additional Considerations

Agency attorneys should understand that the Model Rules suggest that confidentiality restrictions may be less for a government lawyer because public business is involved, and government agencies are held to a higher standard than private companies. The Model Rules explicitly allow a government lawyer to question fraudulent conduct more extensively than a lawyer for a private organization in similar circumstances, and specific federal or state law may authorize this.[16]

In other words, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring the wrongful act is prevented or rectified. This is especially relevant for agency attorneys because the agency has the prodigious task of protecting children, including keeping them safe from harm, and speeding permanency. Therefore, the agency attorney has to balance the responsibility of protecting children with the ethical obligation to act in the best interest of the agency.

This analysis gets more complex when the child welfare agency is not represented by a government "agency attorney," but instead by the Office of the Attorney General, the District Attorney's Office, or by private contractors. (These varying models of agency representation are addressed in the sidebar, p. 145.)

Withdrawal

The Model Rules provide for withdrawal if a client insists on pursuing a fraudulent course of conduct. MR 1.16 applies to all attorneys in this situation, including agency attorneys. [17] The last article in this series dealing with litigation issues will explore permissive and mandatory withdrawal as well as other rules that prohibit a lawyer from assisting a client in criminal or fraudulent conduct.

Guardians ad Litem

Applying the confidentiality rules to GALs can be confusing. A difficult issue for a GAL is whether and to what degree to keep confidential certain communications between the GAL and child client. The confidentiality normally required in the attorney/client relationship might prevent a GAL from carrying out the statutory duty to advocate what she thinks is in the best interest of the child. This is because MR 1.6 prevents the GAL from disclosing information provided by the child that arguably *should* be disclosed to the court for an adjudication of the child's best interests under the statute. Consequently, a GAL generally must bend the restrictions of MR 1.6 to disclose to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma.

What should the GAL do if the child-client informs the GAL of relevant facts that the child does not want divulged? This analysis applies only to attorney GALs because nonattorney GALs are not bound by a state's code of legal ethics. Suppose, for example, that in the Sands case, the children are represented not by an attorney, but by a GAL.

Different jurisdictions have devised a variety of approaches to help attorney GALs ethically carry out their duties to the client and the court.

- In some states where a GAL is appointed to represent the child's best interests, attorney/client confidentiality still applies because state statute or case law prohibits disclosure without the child client's consent.
- Some states mandate a confidential relationship, *unless* nondisclosure would result in harm, in which case an attorney may breach confidentiality.
- Other states make clear that attorney/client confidentiality does not apply. In one state, this is based on the theory that the GAL does not, in fact, represent the child, but instead represents the child's best interests.

Many states do not have a statute or case on point, and there is no uniformity on how this issue gets resolved, even within a single state.[18] One solution to the GAL's dilemma is to attempt to prevent the possibility that the issue will arise. If a GAL plans to reveal client communications, including those the child does not want revealed, the GAL should advise the child client, before soliciting information from the child, that the information will not be confidential. The child then can make informed decisions about what to disclose.

This advice is especially important when representing older chil-

dren who sometimes have a sophisticated understanding of what characterizes an attorney/client relationship. Many young people see attorneys in movies, television, and other media. They, or someone they know, often have personal experience with the legal system. They may assume their attorney will keep certain information confidential. For example, in the case scenario, Jason has trusted his GAL by disclosing information about his mother's drug use. He also told the GAL that one thing he knows about lawyers is that "they keep their clients' secrets."

To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know the GAL's role is to tell the judge what the GAL thinks is best for the child and why. The GAL also should let the child client know that he might have to reveal what they discussed to the judge, the social worker, or someone else.

Some states *require* the GAL to alert the child before any interview about the GAL's roles and responsibilities, and that the GAL may provide information to the court or other parties, including communications that otherwise would be protected by the ethical rules governing the attorney/client relationship. Absent such an advisement, the child's sense of trust may be violated and confidence in the system designed to protect the child could be undermined.[19]

Conclusion

Attorneys need to look at their state's rules on confidentiality for guidance on when to disclose confidential client information. In some situations, the rules will not provide a clear answer on what the attorney must do. In fact, most exceptions to the confidentiality rule are permissive rules, leaving the decision to the attorney. Even if the rules permit disclosure, an attorney needs to think through the decision, and weigh the consequences when faced with revealing or keeping the information confidential.

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Endnotes

1. Model Rule 1.6 Comment [2].

2. Model Rule 1.6.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

3. MR 1.6(b)(4).

4. The following states have ethical rules that a lawyer "shall" or "must" reveal information to the extent the lawyer reasonably believes is necessary to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm: Arizona, Connecticut, Florida, Illinois, New Jersey, Nevada, North Dakota, Texas, Virginia, Vermont, and Wisconsin.

5. MR 1.6 Comment [3].

6. The rule simply *permits* disclosure under these circumstances.

7. Glynn, Gerard F. "Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications." *John Marshall Law Review*, Spring 1994.

8. Model Rule 2.1 Comment [4].

9. Model Rule 2.1 Comment [5].

10. Model Rule 1.13(a).

11. Model Rule 1.13, Comment [2].

12. Model Rule 1.13 (b).

13. Model Rule 1.13 (b).

14. Model Rule 1.13 (b).

15. Model Rule 1.13(d), Model Rule 1.13 Comment [7].

16. Model Rule Comment [6].

17. Model Rule 1.13 (c).

18. A recent ABA survey in Michigan revealed a variety of ways GALs handled disclosing information the child-client did not want divulged. Some GALs felt that the confidentiality rules strictly applied to their representation of children, and would not reveal certain information even if they felt keeping it confidential might harm the client. Others felt their duty to present to the court what they felt was in the client's best interest overrode a strict application of the ethics rules on confidentiality. Of the group that felt that there was no attorney/client confidentiality with their child clients, some informed the clients of this, while others did not, fearing it would cause the client to withhold information.

19. Alaska Bar Association Ethics Opinion 85-4. Guardian Ad Litem Confidentiality, September 12, 1985. "The guardian ad litem is in every sense the child's attorney . . . [but] sometimes will take a position adverse to the child's position. The guardian should explain his/her role to the child, in a manner consistent with the child's age and understanding. The child's natural trust and perception must not be abused. In that regard, a guardian should immediately explain his/her role to the child including (1) the fact that the guardian's role is to determine what is in the child's best interest, (2) that fact that the guardian may take a position contrary to the child's wishes, and (3) the fact that anything the child tells the guardian may be disclosed to the court if the guardian deems such disclosure to be in the child's best interests . . . the same reasons for the appointment of a guardian ad litem, namely the best interest of the child, also form the basis for the restraint placed on the duty of confidentiality. The lawyer appointed by the court to effect justice is not bound by the normal duty of confidentiality."

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Helping Lawyers Help Kids

RAISING THE BAR

Representing a Client with Diminished Capacity

by Jennifer Renne

When representing a client with diminished capacity, it can be difficult for the lawyer to know when to defer to the client's wishes, and when to substitute his judgment for the client's. It can be hard to determine issues of client autonomy, control of litigation, and decision making with a fully functioning client, but what if there are questions about a client's capacity or ability to make decisions?[1] This article focuses on representing clients with diminished capacity. While confidentiality issues are addressed, an earlier article on confidentiality and an upcoming article on conflicts of interests cover those topics in greater detail.

Series Guide:

This series helps attorneys understand key ethical issues in child welfare. Each article examines one of the following aspects of practice:

- ☑ Quality of representation *(July 2003 issue)*
- ☑ Confidentiality *(November 2003 issue)*
- ☑ Representing a client with diminished capacity *(This issue)*
- ☐ Conflicts of interest
- ☐ Interacting with other parties
- ☐ Litigation issues

Many of our clients suffer from diminished capacity, defined as a client who is not fully functioning, whether as a result of substance abuse, age, or mental health issues. How a lawyer handles these delicate issues can profoundly impact the client-lawyer relationship. Effective advocacy, combined with empowering clients, can result in a more meaningful role for the lawyer, and will positively affect case outcomes. The following case study shows the complexity and challenging nature of such representation. The article provides guidance by explaining lawyers' ethical duties under the relevant ethical rules. It also goes beyond the ethics rules to suggest practical ways child welfare lawyers can represent clients with diminished capacity.

The Mason case

Consider the following case from the view of the child's and mother's lawyers. The case is set for a permanency hearing:

Candace, an 8 year old, is the subject of a child abuse and neglect proceeding. The case arose after a report of physical abuse by her mother, Rhonda Mason. During an interview with Candace, the lawyer tried to talk with her, but she didn't make sense. Candace talked about butterflies really being angels come to earth. She did not seem to understand that she might be separated from her mother.

Her mother was interviewed by her lawyer. Ms. Mason seemed sullen, withdrawn, and depressed. She was nonresponsive throughout the interview. The next week, she stopped by her lawyer's office unannounced, and demanded to meet with her. She was excited, agitated, and insisted that Candace shouldn't have been taken from her. Based upon her extreme mood change, her lawyer asked her what happened. Later in the interview, she disclosed that she had been using drugs.

At the end of the shelter care hearing, Candace was continued in foster care. Her lawyer saw her twice in the 30 days between that time and the adjudication hearing, but she still seemed incoherent. Allegations against her mother were upheld, and Candace remained in foster care. The agency arranged for

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Candace to see a psychiatrist, who diagnosed her with a psychotic disorder. He prescribed antipsychotic medication and saw her once a week. Her condition improved considerably.

Candace is now in foster care with Mrs. Waite, who is 70 years old and has cared for hundreds of foster children, and adopted two of them. Candace is hard to handle and has massive temper tantrums, yet Mrs. Waite is patient and can always calm Candace down. Although she has a lifetime of foster care experience, Mrs. Waite has no formal training in caring for children with special needs.

A year after her foster care placement, Candace was doing well enough to have real conversations with her lawyer. Most of the time, she wanted to return to her mother's house because she felt her younger brothers needed her to care for them. However, when Ray, Ms. Mason's boyfriend, was living at the house, she seemed much less eager to return. When Ray was gone, Candace again wanted to live with her mother. If she couldn't go home, Candace's second choice was to live with her Grandmother Adelaide, Ms. Mason's mother and Candace's biological grandmother.

Ms. Mason wants Candace returned to her. If that isn't possible, she wants Candace placed with her mother (Grandmother Adelaide), who lives nearby. Mrs. Adelaide has shown interest in Candace, and has called her a few times and visited her twice, but Candace has never lived with her. Like Ms. Waite, Grandmother Adelaide has no training in caring for children with special needs. Ms. Mason functions at a low level and has few child-raising skills. She was ordered by the court to attend parenting classes to prepare her for Candace's possible return, but she rarely goes. She was also ordered to work with a parent aide who would help her with the younger children, but the parent aide reports that she often arrives at Ms. Mason's home for her scheduled appointment and no one is home.

The agency wants the court to place Candace in a therapeutic foster home with a childless couple in their late twenties who have taken an intensive course in caring for children with special needs. They have also said that if they bond with Candace, they may be interested in adopting her.

Candace's psychiatrist says the best thing would be either to keep her with Ms. Waite, where she has made so much improvement, or place her in the therapeutic foster home. He believes that if she is returned to her mother, she will probably not be given her medication regularly. Even if she is given medication, he says she will regress because Ms. Mason is unable to deal with Candace's special needs.

Model Rule 1.14: Representing a Client with Diminished Capacity

MR 1.14,[2] amended in 2002, helps lawyers represent clients' wishes when capacity is an issue. Lawyers have been frustrated with the lack of guidance from the ethics rules. While lawyers still have much discretion (and sometimes confusion) in deciding how to best represent clients with diminished capacity, the amended MR 1.14 provides more guidance. (See box above.)

Maintain normal client-lawyer relationship

The client-lawyer relationship assumes that the client, when properly advised and assisted, can make decisions about important matters. In other words, the presumption is that the client has capacity. The rule's first instruction is that when a client's capacity to make decisions is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.[3]

Model Rule 1.14

For a thorough analysis of changes to MR 1.14, see the web links to the following:

Text of the current MR 1.14:
www.abanet.org/cpr/mrpc/rule_1_14.html

Text of the commentary to the current MR 1.14:
www.abanet.org/cpr/mrpc/rule_1_14_comm.html

Redlined version of MR 1.14 to show changes:
www.abanet.org/cpr/e2k-rule114.html

Reporter's explanation of changes to MR 1.14:
www.abanet.org/cpr/e2k-rule114rem.html

Capacity may be diminished by a client's age (as with Candace), drug addiction (as with Ms. Mason), mental impairment (as with both), or for some other reason. A "normal client-lawyer relationship" means the lawyer owes duties of loyalty, confidentiality, diligence, conflict of interest, competence, communication, and advice. The duty of loyalty means that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and that the client has the ultimate authority to determine the purposes to be served by legal representation.[4]

Maintaining a normal client-lawyer relationship requires communicating regularly. The commentary to the rules is clear that a client with diminished capacity often can understand, deliberate upon, and reach conclusions about matters affecting the client's well-being. It further explains that "children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are

entitled to weight in legal proceedings concerning their custody."[5]

Assessing client capacity

In determining whether a client has capacity to make certain decisions, lawyers should know that they can have a strong influence on a client's decisions. Paternalistic tendencies can be problematic for even the most well-intentioned parents' and children's lawyers. Lawyers need to be aware of the power dynamics and other factors that influence the relationship and representation.

Just because a lawyer disagrees with a client's decision, or thinks what the client wants is not best for the client, does not mean the client lacks capacity to make decisions. A client's decision may result from many things—fear, lack of understanding, subjective interests—not necessarily diminished capacity. The lawyer should focus on the decision-making process, not whether she approves of the decision.

Factors to consider when assessing client capacity:

- **Cognitive ability**
  In Candace's case, her lawyer may need to talk to her therapist and psychiatrist to understand her cognitive ability since she's been diagnosed with a psychotic disorder.
- **Emotional and mental development & stability**
  This often changes from one interview to the next, and can change dramatically as in Candace's case.
- **Ability to communicate**
  When the case first came in, Candace could not communicate her feelings. Through time, medication, counseling, and other interventions, she can now communicate.
- **Ability to understand consequences**
  Has the lawyer explained the case, including consequences of certain decisions to help the client understand? (Also see MR 1.4) Ms. Mason, for example, might not understand the seriousness of her lack of attendance at parenting classes.
- **Consistency of decisions**
  There is nothing wrong with saying to the court "Candace has mixed feelings, your Honor ..." The lawyer should discuss in advance with Candace exactly what will be said to the judge.
- **Strength of wishes**
  If Candace had been adamant about wanting to return to her mother's, and the foster mother had reported that she cried constantly for her mother, and that her behavior improved after visits with her mother, this would affect the advocacy efforts.
- **Opinions of others**
  See section below about considering bias when weighing this factor.

For children:

- Child's age (age alone is not dispositive)
- Child's developmental stage

The amended Commentary to the Model Rules says that 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;
- Ability to appreciate consequences of a decision;
- 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.[6]

Candace's lawyer, for example, could consider that while usually Candace says she wants to be home with her mother, sometimes she says otherwise, depending on whether her mother's boyfriend, Ray, will be around. She can articulate reasoning leading to her decision; usually she says she wants to go home because her younger brothers need her to care for them. This can be hard for her lawyer because a well-trained children's lawyer will recognize these signs of a "parentified" child, a child who plays the role of parent or the adult in caring for younger siblings. While Candace's lawyer may feel it is best for Candace to remain in foster care so she can experience her childhood, Candace has been clear about her reasons for wanting to go home. Candace's and Ms. Mason's lawyers should talk to the treating mental health professionals to get their assessments of client capacity and "best interest."

Candace's lawyer also should consider Candace's mental health is-

Assessing Children's Decision-making Abilities

When assessing whether the child's decision-making abilities are impaired, ask:

- Can the child understand the nature and purpose of the proceedings?
- Does the child understand the risks & benefits of her position?
- Does the child understand consequences of particular courses of action?
- Has the lawyer explained, and does the child understand alternatives?
- Can the child express his/her desire concerning the proceeding with some degree of clarity and reasonably communicate his/her wishes?
- Is the child being influenced by adults?

The Difference Between Capacity and Competence

Capacity refers to a client's ability to understand information relevant to the case and the ability to appreciate the consequences of decisions. Does the client really know what the case is about, what is happening, and what consequences might result from certain actions or inactions? Capacity refers to ability and *comes in various degrees.* MR 1.14 refers to diminished capacity and is the focus of this article.

Competence, on the other hand, is a legal standard, and denotes a specific level of skill, knowledge, or ability. The most critical distinction between the two concepts is that competence is a characteristic that someone either possesses or doesn't. It is an all or nothing principle. Usually competence is associated with a legal standard, used to answer a legal question. For example, in asking whether an individual is "competent to stand trial," the court considers evidence and issues a ruling that the individual either is or is not competent.

sues. At the outset of the case, Candace most likely lacked capacity to participate in decisions. At the first interview, it was impossible to determine what Candace wanted. Lawyers need to frequently reassess capacity as interventions such as therapy, medication, and substance abuse treatment can improve the client's level of functioning and ability to participate in the case.

Ms. Mason's lawyer needs to consider how interventions such as substance abuse treatment may improve her functioning. The Model Rules also suggest that lawyers have a duty to maximize client capacities, so lawyers should always consider what interventions may increase capacity, discussed in greater detail below. Parents' lawyers should take a proactive role in maximizing client capacities, and keep in mind their duties to advise the client under MR 2.1.[7] (See "Assessing a Child's Decision-making Abilities," p. 7, for more guidance.)

Viewing capacity as a continuum

Just because a client lacks capacity, a client may be able to understand, weigh, and reach conclusions about matters affecting her well-being.[8] Candace, for example, may not understand permanency issues, and may not be able to answer how she would feel about returning home if Ray lived there full time. But she may understand and give her reasons on issues such as visitation, including how often and under what conditions (unsupervised, supervised by grandmother, supervised by her caseworker) she would like to visit her mother.

Increasingly, the law recognizes degrees of capacity. For example, the earlier version of MR 1.14 was titled "Representing a Client with a Disability." The amended MR 1.14 is titled "Representing a Client with a Diminished Capacity," implying that capacity is measured along a continuum, and is not an either/or prospect. Even when a client is impaired, she can participate in some decisions. In other words, a client may have capacity for some issues, but not others. A recent Wisconsin case held that there are different levels of capacity, and that a juvenile who has been declared incompetent to participate in the delinquency proceedings does not necessarily lack capacity to understand the sanctions in the "juvenile in need of protection and services" case.[9] (See "The Difference Between Capacity and Competence")

Taking protective action

Lawyers have always had the option of requesting a guardian or taking other protective action on behalf of a disabled client. However, the earlier version of the Model Rules offered little guidance on what "other protective action" meant. Therefore, the only form of protective action under the old rules was to ask that a guardian be appointed for the client, considered an extreme measure.

The amendments to MR 1.14 add guidance regarding protective measures that may be taken short of requesting a guardian.[10] These include:

- consulting family members,
- consulting with professionals who can protect the client, and
- using a reconsideration period to clarify or improve circumstances.[11]

For example, if Ms. Mason comes to court on drugs and she cannot make certain decisions, her lawyer could ask to postpone the hearing (without disclosing the reasons) to give Ms. Mason time to improve her circumstances and her frame of mind (an example of maximizing client capacities). This may be an unsuccessful strategy, and the court may place limits on the number of continuances, but Ms. Mason's lawyer needs to attempt to maximize his client's capacity, and needs to protect his client.

Candace's lawyer could consult family members or treating mental health professionals to help make decisions on her behalf. The rules further provide that 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**
  For example, if Candace's mental health regresses again, her lawyer would make decisions based on wishes Candace had expressed in the past.
- **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** Ms. Mason's lawyer might encourage drug rehab, and/or medication for her to improve her functioning and enhance her capacity to participate.
- **respecting the client's family and social connections**[12] Ms. Mason's lawyer, for example, might be reluctant to provide Grandma Adelaide information that might damage the mother/daughter relationship, even if the lawyer thought Grandma Adelaide would be better off knowing Ms. Mason's situation.

When consulting family members or professionals involved with the case, the lawyer must keep the client's interests foremost in her mind. To the degree possible, a lawyer must look to the client to make decisions.

The lawyer should also be aware of any biases and misunderstandings that family members or others may have, and attempt to weigh these factors in determining the client's objectives. In representing Candace, for example, her lawyer would be aware of factors that may influence others' assessment of the case. For example:

- **Agency supervisor** may want to move her from Ms. Waite's home to the younger foster parents because Ms. Waite is not willing to adopt, and the agency is under pressure to facilitate adoptions.
- **Grandmother Adelaide** may say she can't take Candace, but doesn't disclose her reason is that she can't afford it. Perhaps she doesn't realize she would be eligible for a foster care or adoption subsidy.
- **Social worker** hasn't told Grandmother Adelaide that she may be eligible for financial assistance and services if she agrees to take Candace because the social worker does not want to place Candace there.
- **Candace's mother** wants Candace to return home.

Thus, under the Model Rules, the lawyer should speak to others who have an interest in the case to get their input on what Candace wants. But the lawyer needs to be aware of any bias or misunderstanding that may impact Candace's return home.

Appointing a guardian

When a client's capacity is severely diminished and other less onerous protective actions are not successful, a lawyer can ask the court to appoint a guardian for the client.[13] While this is sometimes appropriate, it can traumatize the client and undermine the client-lawyer relationship.[14] In Candace's case, her lawyer has been telling her for two years that she will advocate for what Candace wants. If the lawyer then asks to have a guardian appointed, and the guardian recommends that Candace be placed in the therapeutic foster home, this could upset Candace, who has trusted the lawyer to keep her word. It may cause clients to lose trust in the judicial process and not cooperate with the case plan. It also tips off the judge that the lawyer doesn't think the client can make decisions on her own.

Maintaining client confidentiality

In taking protective action on behalf of a client, such as talking to Candace's family members, lawyers sometimes wonder how the confidentiality rules apply. The Model Rules clearly instruct the lawyer to keep client confidences, disclosing them only to protect the client's interests.[15] Lawyers can disclose information in order to perform their job responsibilities, as long as such disclosure is in the client's best interests. The commentary acknowledges that this is an *unavoidably difficult position.*[16] On one hand, the lawyer may need to disclose otherwise protected information to help make decisions for the impaired client. On the other hand, the lawyer is duty bound to maintain confidences.

Disclosing a client's condition could harm the client's interest.[17] For example, in representing Ms. Mason, the lawyer would not disclose that his client is on drugs. Sometimes simply revealing that the lawyer suspects a disability or diminished capacity violates the confidentiality rules. For example, the Wisconsin Supreme Court recently held that a lawyer violated privilege by testifying about his basic impressions, perceptions, and opinion on a client's competence to stand trial.[18] (For guidance on the difference between privilege and confidentiality, see the last article in this series, "Protecting Client Confidences in Child Welfare Cases" in the November 2003 *CLP.*) Therefore, at the first phase of the case when Candace is behaving bizarrely, and her lawyer is unable to ascertain any of Candace's interests, it might be appropriate for her lawyer to discuss with Candace's psychiatrist her impressions of Candace's overall functioning. The doctor could offer guidance on how to more effectively communicate with Candace. As the Model Rules acknowledge, this is an unavoidably difficult position because the lawyer might need to disclose otherwise protected information *for the purpose of* getting guidance on representation.

Eliciting Client's Position

When a lawyer has concluded that although impaired, the client can understand certain issues, and provide input on decisions, the lawyer should elicit the client's position in the case. The lawyer should explain her role, including what information the attorney may reveal about the client to protect her best interests.[19] It's important to establish this up front so the client doesn't later feel betrayed by her lawyer. Interviews with the client should take place where the client

feels comfortable. Candace's lawyer, for example, should visit her in her foster home instead of relying on contacts in the courthouse.

Lawyers should ask developmentally appropriate questions, provide advice and guidance without persuasion or manipulation, and be aware of verbal and nonverbal expressions and communications. For example, in visiting Candace in her foster home, her lawyer can observe interactions between her and Mrs. Waite. At court, Ms. Mason's lawyer can observe the way Ms. Mason interacts with her daughter. She can talk to foster parents, social workers, a psychologist or therapist, family members, and any other person who might have insight into the child's feelings and preferences.

The key to representing children and parents is developing a relationship. Getting to know the client helps the lawyer understand the case from the client's view. It empowers the client to participate in her case, and gives her a sense that someone is advancing her interests. (See "Seven Questions to Keep Us Honest.")

Seven Questions to Keep Us Honest

These questions are from Jean Koh Peters' book *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions.* They are an excellent reference for lawyers representing children.

1. In making decisions about the representation, am I making the best effort to see the case from my client's subjective point of view, rather than exclusively from an adult's point of view?

2. Does the child understand as much as I can explain about what is happening in her case?

3. If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?

4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

5. Is it possible that I am making decisions for the gratification for the adults in the case, and not for the child?

6. Is it possible that I am making decisions in the case for my own gratification and not for that of my client?

7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

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Advocating in Court

Once the lawyer has determined what the client wants, and whether she suffers from diminished capacity, the lawyer must present her client's position in court. Many lawyers consider their job to be "the mouthpiece of the client," seeing their role to merely reiterate to the court what the client wants. Advocacy is more complicated. *Through creative problem solving and working with others in the case, lawyers should craft a solution so that what the child wants actually is in the child's best interest.*

The more the lawyer knows about the client, the more effective the representation. It's not about standing up in court repeating what the client has said. It's about doing the legwork before the hearing, and finding out the family situation. The more prepared, the better the lawyer can explain to the client her options and the consequences of certain decisions. Candace's and Ms. Mason's lawyers should seek to negotiate a strategy that can allow Candace to return home safely because this is what their clients want. Ensuring a safe return also makes this outcome in Candace's best interest.

For example, Candace tells her lawyer she wants to go home to her mother's, and if she can't, then she wants to be with her Grandmother Adelaide. Her lawyer's job is to try and have this outcome be in her best interest. The lawyer should contact the caseworker and find out if Candace can return home safely, and if not, why. Candace's second choice is to be with her grandmother. Steps Candace's lawyer can take to ensure a safe return or to have Candace placed with her grandmother are:

- contacting Grandma Adelaide to find out if she's interested in the placement;
- finding out if she knows she may be eligible to be licensed as a foster parent for Candace and receive services to meet her special needs;
- determining if the agency has been in contact with grandma;
- telling the social worker that Grandma Adelaide might be willing if she gets some services;
- identifying other issues to be addressed before Candace can go home, such as:
  - Ms. Mason's drug problems
  - the reasons why Ms. Mason's attendance at parenting classes has been poor. Does she need transportation? Do the sessions

conflict with her work schedule? Does she feel the classes aren't relevant? If so, perhaps she can learn better parenting skills by observing how Ms. Waite handles Candace's temper tantrum.

- the reasons why Ms. Mason is not always available for the parent aide
- whether Ms. Mason needs support with the other two children still at home

- talking to Ms. Mason's lawyer about getting a protective order against Ray, if there's a basis for one;
- talking to Candace's therapist and psychiatrist to find out how she's doing and whether medication and therapy have improved her mental health condition;
- exploring family counseling with grandma, Ms. Mason and Candace;
- talking to Candace again, keeping her informed, and finding out if her feelings have changed.

As Candace's lawyer, these steps are also empowering Ms. Mason to participate in case planning which supports your client's ultimate goal of reunification. Getting all players on board is key. Even if no agreement is reached before court, Candace's lawyer should come to court and present the plan to the judge, explain Candace's position, and why it might be best for her to be at home instead of in foster care. Explain how Candace can be returned safely, which includes addressing the relevant issues in the case—protective order against Ray, Ms. Mason's continued participation in drug rehab, Ms. Mason learning to address Candace's mental health needs, ongoing therapy for Candace, possibly including other family members, support from extended family and Grandma Adelaide and so forth. This is advocacy. The goal is to achieve a result for the client. Candace is empowered knowing her lawyer is working for her, even if she has mixed feelings.

This type of advocacy also helps the judge make a best interest determination—the judge must understand the case from each party's perspective, not just what they want, but why they want it. The judge can consider other options presented by the lawyers who know the family dynamics and who have prepared solutions that enhance safety and support reunification.

Conclusion

Representing clients with diminished capacity takes the same hard work as representing a client where capacity is not an issue. Lawyers should begin with the premise that all clients have capacity to direct the representation. When a client's issues are so serious that the lawyer is concerned that the client cannot understand the proceedings, or make reasoned decisions, the lawyer can look to the ethics rules for guidance. A poor decision by a client can result from fear, confusion, or other subjective concerns. The lawyer has a duty to explain matters to the client, and maximize the client's decision-making ability. Spending time with a client, talking to others about the case, being prepared, and knowing the case from the client's view are essential. The lawyer's job is not to repeat the client's position to the court, but to craft a solution so that what the client wants actually *is* in the best interest of the child. When all parties are well represented, children and families are served by the system and outcomes improve.

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Endnotes

1. This article applies to children's lawyers representing the child in a traditional client-lawyer relationship as opposed to a guardian ad litem, representing their view of the child's best interest. MR 1.14 is less relevant to a GAL whose advocacy is not client-centered or client-driven.
2. MR 1.14 Client With Diminished Capacity
(a) 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.
(b) 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.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
3. MR 1.14(a)
4. MR 1.2
5. MR 1.14, cmt. 1
6. MR 1.14, cmt. 6
7. MR 1.14, cmt. 5
8. MR 1.14, cmt. 1
9. In re Eugene W., 641 N.W.2d 467 (Wis. App. Ct. 2002).
10. MR 1.14(b)
11. MR 1.14, cmt. 5
12. MR 1.14, cmt. 5
13. MR 1.14(b)
14. MR 1.14, cmt. 7
15. MR 1.14(c)
16. MR 1.14, cmt. 8
17. MR 1.14, cmt. 8
18. State v. Meeks, 666 N.W.2d 859 (Wis. 2003)
19. MR 1.14(c)

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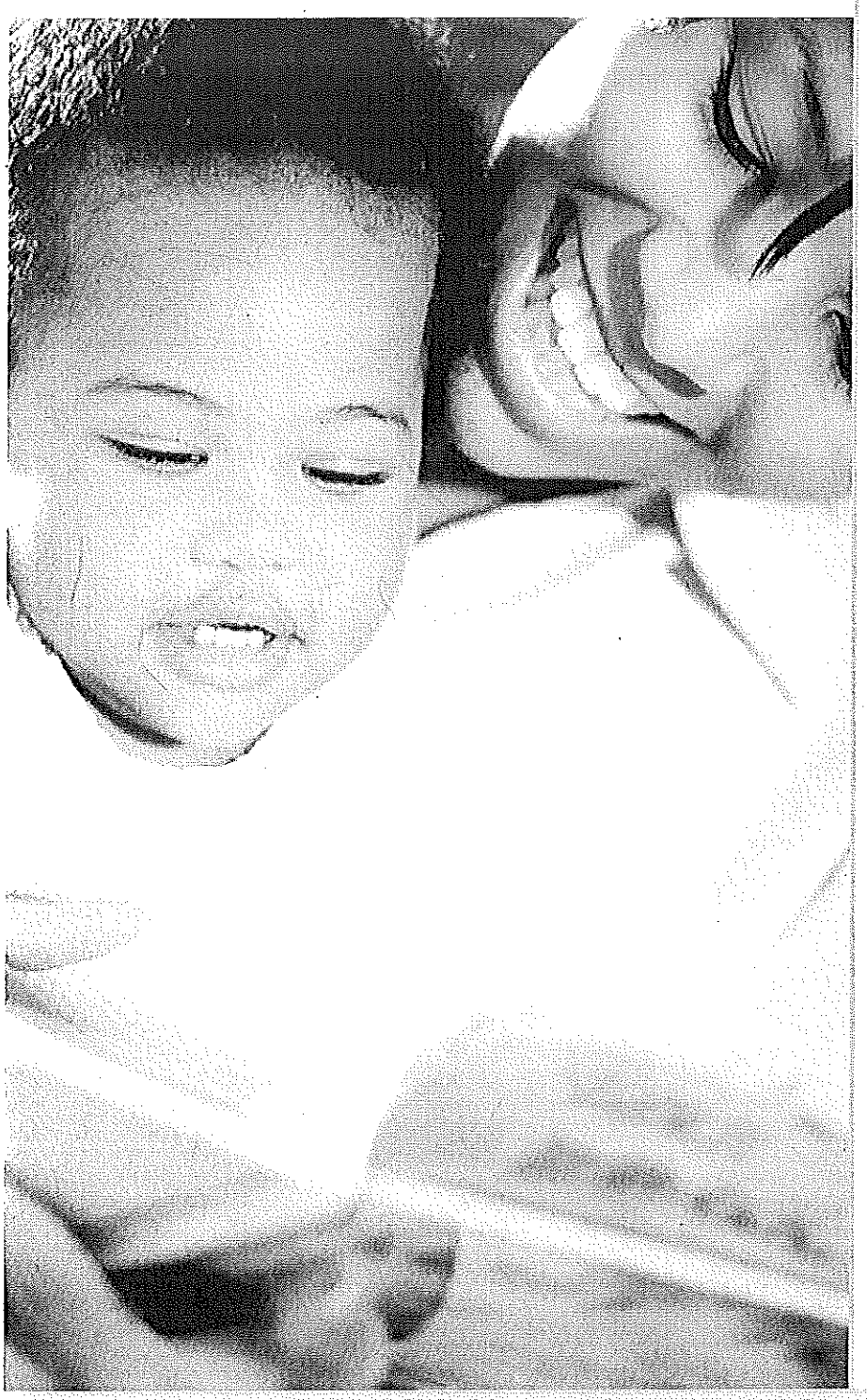

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ABA Defending Liberty Pursuing Justice
AMERICAN BAR ASSOCIATION

ABA Center on Children and the Law

ZERO TO THREE
POLICY CENTER

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About the ABA's Improving Understanding of Maternal and Child Health Project: This project works to enable legal professionals to improve the health outcomes for vulnerable young children who are involved in the legal and judicial systems. It develops new materials and provides training and centers of assistance to improve child health-related knowledge and skills of attorneys and judges who handle cases involving young children.

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Introduction

One-third of all children entering foster care are zero to three years of age, and 15 percent are babies under age one.[1] Children are removed from their parents and placed in out-of-home care because a court has determined that it is not safe for them to live at home. However, children who are removed from home, particularly those who are very young, are exposed to a new danger—the emotional and developmental harm that can result from separation. Children at different stages in life react differently to separation from a parent, based primarily on their ability to understand the reasons for separation and the range and maturity of their coping strategies.[2] The younger the child and the longer the period of uncertainty and separation from the primary caregiver, the greater the risk of harm to the child.[3] Therefore, frequent, meaningful parent-child visits are critical for infants and toddlers in foster care.

Visitation is planned, face-to-face contact between a child in out-of-home care and his/her parents and siblings. This brief:

- explains why visitation is particularly important for very young children,
- emphasizes the role of visitation in permanency planning,
- highlights key elements of successful visitation plans for infants and toddlers,
- suggests strategies for addressing barriers to visitation,
- reviews the judge's role in supporting parent-child visits, and
- shares promising community approaches to visitation.

Tight budgets, high caseloads, and scarce community resources make it difficult to implement all of the visitation best practices presented here. Judges and attorneys are encouraged to incorporate as many of these practices as possible and to take a leadership role in their communities to explore how to safely expand visitation opportunities.

Fast Facts

- Of the 311,000 children who entered foster care in 2005, 46,954 were under age one and 103,090 were age three or younger.[1]
- 15 percent of all children in foster care were admitted before their first birthday and 33 percent were zero to three years of age when they entered care.[2]
- In 2004, approximately three-quarters (72.9 percent) of child victims of maltreatment ages birth to three years were neglected.[3]
- Infants placed in foster care within three months of birth spend the longest time in care – twice as long as other children.[4]
- Up to 82 percent of maltreated infants have unhealthy attachments to their caregivers.[5]
- Infants are less likely to be reunified with their parents than they are to be adopted.[6]

1. *AFCARS Report #13: Preliminary FY 2005 Estimates as of September 2006*. Washington, DC: U.S. Department of Health and Human Services, 2006, October 23, 2006 (http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/repo13.htm).

2. Ibid.

3. U.S. Department of Health and Human Services, Administration on Children, Youth and Families, "Victims," Chap. 3 in *Child Maltreatment 2004*. Washington, DC: U.S. Government Printing Office, 2006.

4. Vinkovic, Ivad and Kristen B. Hislop, "Babies in Foster Care: The Numbers Cut for Attention," *Zero to Three Journal* 22(4), 2002, 14–19; Dicker, Sherri, Laysa Gordon, and Jane Knitzer, *Improving the Odds for the Healthy Development of Young Children in Foster Care*. New York, NY: National Center for Children in Poverty, Mailman School of Public Health, Columbia University, 2002, 5.

5. Goldsmith, Douglas F., David Oppenheim, and Jaulne Wanless, "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care," *Juvenile and Family Court Journal* 55(2), 2004, 2.

6. Nelson and Hislop, 2002, 19.

Understanding Attachment and the Effects of Separation on Young Children

The first few years of life are a time of unparalleled growth. A child's experiences and relationships during these critical years build the foundation for future social, emotional, and cognitive development.[4] Infants and toddlers are completely dependent on the adults in their lives, and the care that they receive and the attachments that they form "are critical building blocks for future development and adult well-being."[5]

Secure and stable attachments with a primary caregiver form the foundation for a child's social, emotional, and cognitive development.

During the first few months of life, babies begin to show a marked preference for one or two primary caregivers. By about four months, babies communicate this preference through their behaviors (e.g., following with the eyes, smiling, quieting more easily) in the presence of the familiar caregiver. As babies get older (age 7 to 14 months), the attachment intensifies, and they often cry or protest when separated from the primary attachment figure. In addition, they may initially protest or avoid their caregiver when reunited. By age three, children begin to generalize attachment (that is, they can feel secure with other attachment figures such as relatives). Attachment behaviors are still present in older children but are less urgent than those shown by infants.[6]

Attachment theory provides a framework within which to understand the effects of separation on very young children and the importance of frequent visitation for infants and toddlers in foster care. Child development specialists regard attachment relationships as "one of the primary goals of infancy."[7] Secure and stable attachments with a primary caregiver form the foundation for a child's social, emotional, and cognitive development. Children who develop secure attachments show a greater capacity for self-regulation, effective social interactions, self-reliance, and adaptive coping skills later in life.[8]

Researchers have found that up to 82 percent of maltreated infants have disturbed attachment patterns.[9] Babies who learn that they cannot consistently depend upon their caregiver to provide nurturing, protection, and security often develop unhealthy attachments. For example, a baby might turn away from or appear indifferent to the caregiver, alternate between seeking closeness with the caregiver and resisting contact, or freeze or show fear when the caregiver approaches.[10] Research has shown that infants and toddlers who do not develop secure attachments produce elevated levels of cortisol (a stress hormone), which may alter the developing brain circuits and cause long-term harm.[11] In addition, young children with unhealthy attachments are at much greater risk for delinquency, substance abuse, and depression later in life.[12]

Even children with secure attachments can be harmed by the loss or disruption of a primary relationship (e.g., through death, military deployment, or placement in foster care).[13] Children's reactions to and ability to cope with separation from a parent depend upon their age and developmental stage.[14] For example, infants who enter foster care before the age of six months—when placed in a stable, nurturing relationship with a foster parent—may not experience harm to their social and emotional functioning. Children placed in care between six months and three years of age are particularly vulnerable to separation and more likely to experience subsequent emotional disturbances. Children older than age three or four when they enter foster care are able to use language to help them cope with loss and adjust to change.[15] Because multiple placements and attachment disruptions are likely to be harmful at any age,[16] and because infants are less likely to be reunified with their parents than they are to be adopted,[17] concurrent planning should be used at the outset of each case. To limit attachment disruptions, very young children should be placed in what could become a new permanent home if reunification efforts fail.

"A young child's trust, love, and identification are based on uninterrupted, day-to-day relationships."

American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care (2000)

Professionals working with very young children in foster care often do not understand the extent of the child's distress over being removed from the parent and placed in a strange environment. It is important to remember that very young children grieve the loss of a relationship. Even though the parent has maltreated the child, she or he is the only parent the child has known, and separation evokes strong and painful emotional reactions.[18]

To promote attachment and strengthen the parent-child relationship, very young children in foster care need frequent and consistent contact with their parents. They need to know that their parent cares for and is there for them. In many jurisdictions, visits consist of brief, weekly encounters, in a neutral setting, under the supervision of a caseworker. According to the American Academy of Pediatrics:

> For younger children, this type of visit is not conducive to optimal parent-child interaction and may minimally serve the parents' needs for ongoing contact with the child or may even be harmful for the child. A young child's trust, love, and identification are based on uninterrupted, day-to-day relationships. Weekly or other sporadic "visits" stretch the bounds of a young child's sense of time and do not allow for a psychologically meaningful relationship with estranged biological parents. . . . For parent-child visits to be beneficial, they should be frequent and long enough to enhance the parent-child relationship.[19]

Benefits of Frequent Visitation

Frequent visitation offers the following benefits:[1]

- Promotes healthy attachment and reduces the negative effects of separation for the child and parents.
- Establishes and strengthens the parent-child relationship.
- Eases the pain of separation and loss for the child and parent.
- Keeps hope alive for the parent(s) and enhances parents' motivation to change.
- Involves parents in their child's everyday activities and keeps them abreast of the child's development.
- Helps parents gain confidence in their ability to care for their child and allows parents to learn and practice new skills.
- Provides a setting for the caseworker or parenting coach to suggest how to improve parent child interactions.
- Allows foster parents to support birth parents and model positive parenting skills.
- Provides information to the court on the family's progress (or lack of progress) toward their goals.
- Facilitates family assessments and can help the court determine whether reunification is the best permanency option for the child.
- Helps with the transition to reunification.

1 Dougherty, Susan. *Promising Practices in Reunification*. New York: National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work, 2004, October 23, 2006 <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/promising-practices-in-reunification.pdf>; Ohio Casedoad Analysis Initiative and ProtectOhio Initiative. *Visitation/Family Access Guide: A Best Practice Model for Social Workers and Agencies*. Ohio Casedoad Analysis Initiative in Partnership with ProtectOhio Initiative, 2005, October 23, 2006 <http://www.pcsao.org/CLA/VisitationGuidelinal.pdf>; Ginther, Norma M. and Jeffrey D. Ginther. "Family Interaction: The Expressway to Permanency - Facilitating Successful Visitation." Presentation prepared for Western Training Partnership at the University of Wisconsin-River Falls, July 2005, 12-13; Wright, Lois S. *Toolbox No. 1: Using Visitation to Support Permanency*. Washington, DC: CWLA Press, 2001, 15-18.

Visitation in Permanency Planning

Visitation, which has been called "the heart of permanency planning,"[20] is a key strategy for reunifying families [21] and achieving permanency. [22] To preserve and strengthen parent-child attachment, promote permanency, and reduce the potentially damaging effects of separation, attorneys who represent very young children in foster care or their parents should make visitation that ensures the child's safety and well-being a focus of their advocacy.[23] Because children in foster care often come from families where the parent-child attachment is unhealthy, visitation should be viewed as a *planned, therapeutic intervention* and the best possible opportunity to begin to heal what may be a damaged or troubled relationship.[24] In addition, visits offer a real-life opportunity to view parental capacity and provide critical information to the court about the parent-child relationship. In this regard, visitation is a *diagnostic tool* to help determine as quickly as possible if reunification is the best permanency option for the child.[25]

Research shows that regular, frequent visitation increases the likelihood of successful reunification, reduces time in out-of-home care, promotes healthy attachment, and reduces the negative effects of separation for the child and the parent.

Because the term *visitation* does not adequately describe the quality and quantity of time that families need to spend together when children are removed from the home, child welfare experts have begun using other terms, such as *family time,*[26] *family access,*[27] and *family interaction.*[28] Research shows that regular, frequent visitation increases the likelihood of successful reunification, reduces time in out-of-home care,[29] promotes healthy attachment, and reduces the negative effects of separation for the child and the parent.[30]

Visitation plays an important role in concurrent planning. While frequent visits allow parents to show their motivation for getting their child back and demonstrate new skills, they also provide evidence when a parent is not making progress toward case goals. For example, when a parent repeatedly does not show up for scheduled visits or fails to make required behavioral changes during visits, this information can help the court decide more quickly to order an alternative permanency plan for the child.[31]

Promoting Successful Visits

Family visitation is a cooperative venture, and all participants (parents, foster parents, relatives, caseworkers, the court, lawyers, and service providers) must work together to ensure that visits "meet the attachment and connectedness needs of children and their families . . . [and] support parenting and case decisionmaking."[32] The following recommendations should be addressed when advocating for visitation for young children in foster care.

Ensure that visits are in the child's best interest.
Visitation should be considered a conditional right of parents and children.[33] Unless the court finds substantial evidence to believe that visitation or supervised visitation would place the child's life, health, or safety at risk, the parent should be allowed to visit his or her child.[34] For example, the court might deny or discontinue visitation

How Visitation Helps Meet Federal Permanency Planning Requirements

Well-crafted visitation plans are an essential component of permanency planning and can actively support the permanency goals of the Adoption and Safe Families Act of 1997 (ASFA) (P.L. 105-89). ASFA emphasizes moving quickly toward permanency so that children who enter foster care do not grow up in temporary living situations. Among other things, the Act:

1. Provides a timeframe for states to achieve permanency for children in state care. Visitation that helps develop and support a parent's caretaking abilities can help her complete the requirements of the case plan and work toward reunification if that is the child's permanency goal. The court may order reunification as the permanent plan at the 12-month permanency hearing if the parent has been diligently working toward that goal and reunification is expected in a timeframe consistent with the child's developmental needs.

2. Requires states to make reasonable efforts to finalize a permanency plan, in addition to the initial reasonable efforts to prevent removal of the child from home. Proof that the agency devised a thoughtful, individualized visitation plan can support a judicial finding that reasonable efforts were made.

3. Encourages concurrent planning. Frequent visitation facilitates family assessments and can help the court determine whether reunification is the best permanency option.

Although ASFA does not directly address visitation, it is clear that visitation supports its goals of timely permanency for all children in foster care.[1]

[1] Wright, Lynch. *Toolbox No. 1: Using Visitation to Support Permanency*. Washington, DC: CWLA Press, 2001, 41-43; Leathers, Sonya J. "Parental Visiting and Family Reunification: Could Inclusive Practice Make a Difference?" *Child Welfare* 81(4), 2002, 596; Allen, Marylee and Mary Bissell. "Safety and Stability for Foster Children: The Policy Goals of." *The Future of Children* 15(1), 2004, 49-[illegible]

when there is danger that the parent will again physically or psychologically abuse the child, even during supervised visits, or when the parent's visits are extremely traumatic to the child.[35]

Visitation should be reviewed at every court hearing to determine whether terms and conditions need to be modified.

When there is any doubt about the safety or benefit of visitation, there should be thorough assessments of the child, the parent(s), and the relationship between the child and parent (known as an attachment assessment). Mental health clinicians can provide important information to attorneys and the court about what is in a child's best interest.

Ensure the placement decision supports frequent, meaningful visits. Successful visitation begins with the child's placement. If reunification is a permanency option, very young children should be placed in out-of-home care as near to their biological parent(s)' home as possible to allow frequent visitation.[36] Traveling long distances to visits is inconvenient for everyone involved and is hard on young children. Infants and toddlers who arrive at a visit after a lengthy confinement in their car seat may be cranky or sleepy from the trip, which detracts from the quality of the visit.

Foster parents can be critical partners in successful visits. Foster parents of infants and toddlers should understand the importance of the child's relationship with his/her parents and the role they can play to help strengthen that relationship. In a growing number of communities, foster parents receive training and support to supervise visits in their home so birth parents can be involved in the child's daily routines.[37]

When a child is placed in kinship foster care (in the home of a relative or another adult who has a kinship bond with the child), the kinship caregiver should receive training and assistance so they can be involved in concurrent planning, support the parent-child relationship, and teach and model parenting skills. In addition, the caregiver must be willing to support the formal visitation plan.[38]

Ensure the visitation plan is individualized and promotes permanency. The written visitation plan should be tailored to the circumstances and needs of each family and the reason for removal of the child from the home. The plan, which the caseworker should develop in consultation with the child's parent(s) and foster parent(s), should be based upon a thorough assessment of the family (including an assessment of the child's needs and the parent's ability to respond to those needs) and reviewed and updated frequently. The plan should specify the frequency, length, participants, location, if and how visits are to be supervised, expected behaviors of parents during visits, visitation services, and planned activities of family visits. A well-crafted plan that clearly states what is expected of parents during visits reduces mistakes and misunderstandings.

Lawyers for the child and the parent(s) should review the written plan to make sure it serves their client's best interests and that only necessary restrictions and supervision are imposed. The judge who oversees visitation should ensure that the plan best serves the child and promotes permanency. The judge should stipulate in the court order the specific frequency, duration, and location of visits, thereby ensuring that visitation begins promptly and is permitted frequently.[39] Visitation should be reviewed at every court hearing to determine whether terms and conditions need to be modified. The court should require the child welfare agency to submit periodic reports about implementation of the plan and the impact on the young child and should hold all parties accountable for meeting plan requirements.[40]

The visitation plan should be guided by careful and ongoing assessment of the parent's ability to safely care for and appropriately interact with the child. The plan may require the parent to meet conditions related to visits (for example, to refrain from a behavior that contributed to the child's removal). If the parent does not comply, it is appropriate to impose restrictions (such as increased level of supervision) to protect the safety and well-being of the child. However, visits should never be used as a reward or punishment. Increased or reduced visitation should be a direct consequence of reduced or increased danger to the child and not linked to some other measure (such as engagement in other court-ordered services or drug test results).[41]

Visitation planning is an ongoing process that should correspond to the child's placement phase in the child welfare system.[42] Although the underlying goal of visitation (to preserve and enhance the parent-child relationship while providing for the safety and well-being of the child) remains the same through all phases, each phase emphasizes different purposes and uses different visitation arrangements.[43]

1. *Initial phase.* This phase focuses on maintaining ties between parent and child, assessing the parent's capacity to care for her child, and goal planning. To ensure the child is safe and appropriately cared for, visits are generally supervised and controlled for location and length. This phase generally lasts from four-to-eight weeks, but the length varies from family to family.

   If, after the initial visitation phase, the caseworker and other professionals working with the family continue to have concerns about moving to less supervision, it may be time to reconsider whether reunification is an appropriate goal for the child. If the court changes the permanency plan to adoption, the visitation plan might call for a gradual decrease in visits and a focus on grief work rather than parenting skills.[44]

2. *Intermediate phase.* During this phase, the parent is working to meet his or her case goals, and visitation activities allow the parent to learn and practice new skills and behaviors. Visits typically occur more frequently, for longer periods, in a greater variety of settings, and with gradually reduced supervision as the parent assumes more and more responsibility for the child.

3. *Transition phase.* This phase focuses on smoothing the transition from placement to home and determining what services are required to support the child's needs and the parent's ability to meet those needs following reunification. Visits should provide maximum opportunities for parent-child interaction. After the child leaves the foster parent's care, it is important to arrange visits between the child and foster parent, recognizing the value of that relationship to the child.

The visitation plan should encourage the birth parent to directly care for the child as much as possible.

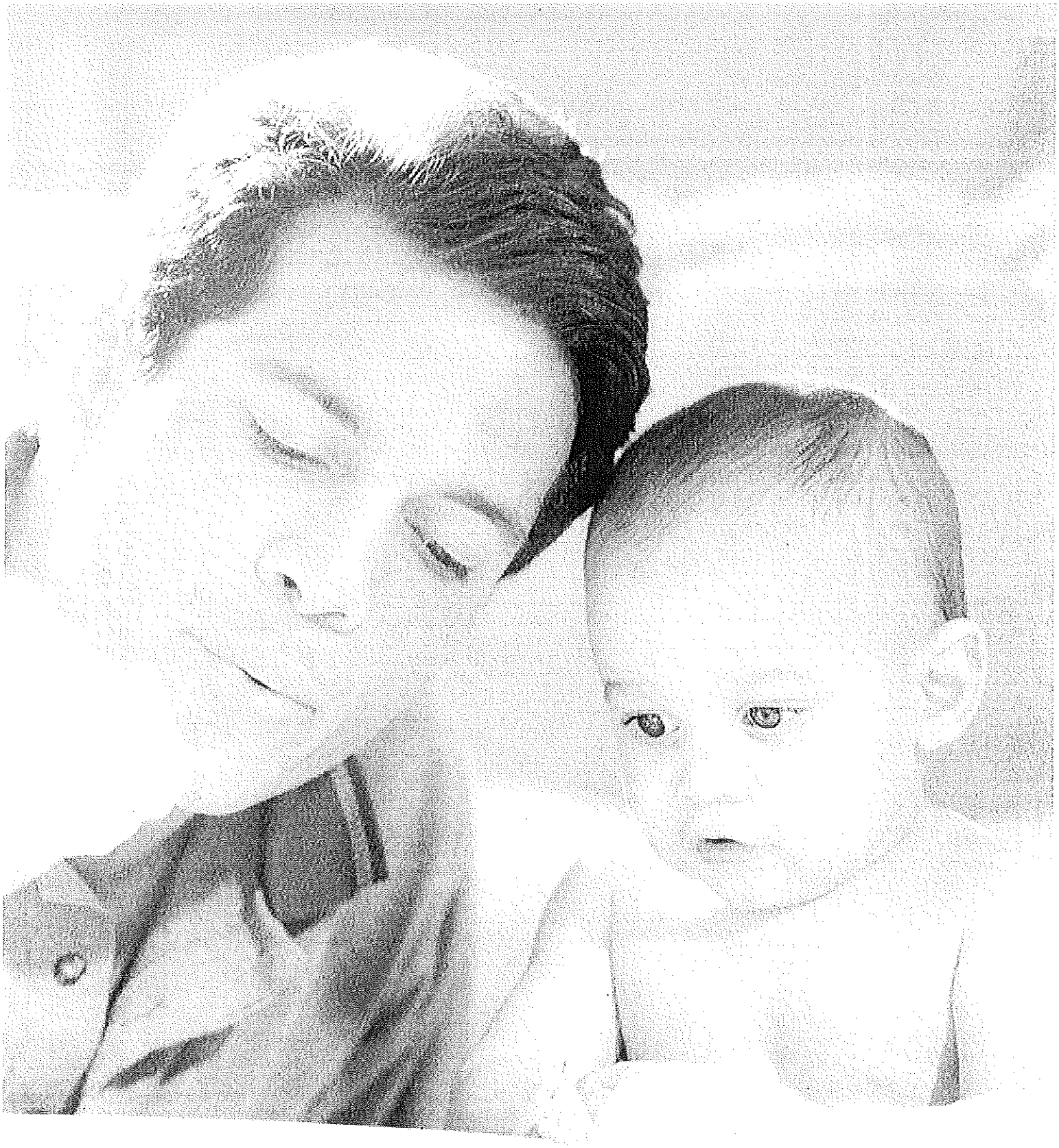
Ensure the frequency, length, and timing of visits promote attachment.
Because physical proximity with the caregiver is central to the attachment process for infants and toddlers,[45] an infant should ideally spend time with the parent(s) daily, and a toddler should see the parent(s) at least every two-to-three days.[46] To reduce the trauma of sudden separation, the first parent-child visit should occur as soon as possible and no later than 48 hours after the child is removed from the home.[47]

Visits should be long enough to promote parent-child attachment. The length of visits should gradually increase as the parent shows she is able to respond to her child's cues in consistent and nurturing ways, soothe her child, and attend to her child's needs. During the initial phase, limiting visits to one-to-two hours allows the parent to experience small successes without becoming overwhelmed. By the transition phase, as the family approaches reunification, unsupervised all-day, overnight, and weekend visits should be completed.[48]

Visits should be scheduled at a convenient time for the parents and the foster parents. For example, if a parent works during the day, it may be necessary to schedule visits during the evening. However, the visitation plan must also consider the child's daily schedule. If a toddler goes to bed at a certain time, it would not be reasonable for the parent to expect to visit after bedtime.

Advocate for visits to occur in the least restrictive setting that ensures the child's safety and well-being.
The visitation plan should encourage the birth parent to directly care for the child as much as possible, and family visits should take place in the least restrictive, most natural setting that can ensure the safety and well-being of the child.

In a growing number of communities, the parent visits the child in the foster home. This model of care, known as *inclusive practice,* regards the foster parent as a temporary caregiver for the child and a supportive role model to the parent. Researchers have found strong links between inclusive visiting practices and (1) frequency of mothers' visits and (2) chances of reunification.[49] Parent-child visits in foster homes can only succeed if the foster parents' role as mentor to the parent is clearly defined from the outset and the foster parents are trained and supported. Similarly, birth parents must have clear guidance about what is expected from them during visits in the foster home. For example, they should be instructed not to say inappropriate things that could jeopardize their child's relationship with foster parents.



For infants and very young children, other appropriate settings for parent-child visitation may include:

- the parent's home (with in-home supervision or in later phases of placement)
- the home of a family member who can supervise and support the parent and model positive parenting skills
- a service provider's office (particularly if the parent is receiving therapy or parenting instruction)
- an early childhood program such as Early Head Start
- parenting classes that include the child
- a supervised visitation center (during the initial phase of placement or if significant safety concerns exist)
- the child welfare agency (This setting should be used only as a last resort. Often agency offices are sterile and uninviting, and many do not provide private rooms or age-appropriate toys and activities for visiting families. Also, this environment can remind parents of their failure as parents and the agency's power over their lives, a sentiment that does not promote good visits.)

In addition, the parent should be encouraged to accompany the child to medical appointments and therapy sessions. Involvement in the child's professional appointments keeps the parent informed about the child's developmental progress and special needs, teaches the parent to respond more effectively to the child's needs, and reinforces the parent's continuing involvement in and responsibility for the child's well-being.[50]

Ensure visitation activities promote parent-child attachment and support the child's development.[51]

Because many maltreated infants and toddlers show developmental delays and many parents of children in foster care do not know how to interact appropriately with their child, parents often need coaching about how to care for their child and how to plan appropriate activities during visits. Many parents simply do not know how to perform daily caregiving routines, play with their child, comfort their child, respond to their baby's nonverbal cues, respond to their child's special medical or developmental needs, or enjoy their child's company. In such cases, the child's attorney can request and the court can order parents to receive services that educate them about their infant or toddler's specific needs. Services such as home visiting programs, Early Head Start and other high-quality early childhood education programs, and early intervention programs provide an opportunity for the parent to interact with her child in a supervised setting while learning to support the child's development.

Home visiting programs, Early Head Start, and early intervention programs provide an opportunity for the parent to interact with her child in a supervised setting while learning to support the child's development.

In addition, caseworkers, foster parents, or parent aides can help parents select visitation activities. The following table lists emotional, cognitive, and motor development tasks of infants and toddlers along with developmentally related visit activities. These activities allow parent and child to enjoy each other's company and to develop a healthy relationship.

Developmentally Related Visit Activities

Age	Developmental Tasks	Developmentally Related Visit Activities
Infancy (0–2)	Develop primary attachment	Meet basic needs (feeding, changing, holding, cuddling)
	Develop object permanence	Play peek-a-boo games
	Basic motor development (sit, reach, stand, crawl, walk)	Help with standing, walking, etc., by holding hand, play "come to me" games
	Word recognition	Name objects, repeat name games, read picture books
	Begin exploration and mastery of the environment	Encourage exploration; take walks; play together with colorful, noisy moving items
Toddler (2–4)	Develop impulse control	Make and consistently enforce rules
	Language development	Read simple stories; play word games
	Imitation, fantasy play	Play "let's pretend" games; encourage imitative play by doing things together such as "clean house," "go to store"
		Play together at park; assist in learning to ride tricycle; dance together to music
	Small motor coordination	Draw together; string beads together
	Develop basic sense of time	Discuss visits and visit activities in terms of "after breakfast," "after lunch," "before supper," etc.
	Identify and assert preferences	Allow choices in activities, clothes worn, foods eaten

Presented with permission from Peg McCarty Hess and Kathleen Olson Proch, *Family Visiting in Out of Home Care: A Guide to Practice*. Washington, DC: Child Welfare League of America, 1988, 34.

Visitation activities should occur in a variety of contexts (feeding, playing, bathing, diapering, soothing, putting to bed, medical appointments, etc.). Visits should be planned along a continuum of increasingly challenging and stressful situations to help the parent build a positive relationship with the child and develop confidence and competence in parenting.

For example, during the first phase the parent might visit at playtime when the child is well rested and then begin visiting at increasingly challenging times such as bedtime or when the child is sick and fussy. This strategy allows parents to gain competence and self-confidence in limit setting and effective discipline.[52]

Parents need to understand that a key goal of visitation is to strengthen their relationship with their child and the importance of this brief time they have together. While it is beneficial for young children to have siblings and family caregivers (such as grandparents) present at some visits, parents should be discouraged from bringing friends, significant others who do not have a relationship with the child, and extended family members to visits.

Request the appropriate level of supervision.
Plans for supervising parent-child visits should be individualized, ensure the child's safety and well-being, and further the goals of the family's case plan. Visitation plans should never impose unnecessary supervision and restrictions. If supervision is required during parent-child visits, the visitation plan should specify the reason(s) (e.g., to protect the child, observe and evaluate interactions between parent and child, or model positive parenting behaviors).

The visitation plan should state who will supervise the visits. Depending upon the purpose of supervision and the degree of supervision necessary, a range of people may do this, including a caseworker, therapist, foster parent, relative, parent aide, or early intervention home visitor. Foster parents or family members who supervise visits should receive training on the child's developmental/attachment needs, mentoring/coaching parents, and knowing when and how to intervene.[53]

Be sensitive to participants' emotions around visitation.
Judges and lawyers need to understand that a young child's emotional dysregulation following a visit does not necessarily mean the parent did something harmful during the visit.[54] Visitation can be extremely upsetting for children, and it is important to understand the developmental context of their feelings and behaviors. Very young children cannot understand the separation, and they tend to respond with bewilderment, sadness, and grief. During visits, they may cling or cry, act out, or withdraw from their parent. At the end of a visit, when another separation is imminent, they may become confused, sad, or angry. Following visits, infants and toddlers may show regressive behaviors, depression, physical symptoms, or behavioral problems.

Parents also find visits to be a time of emotional upheaval, particularly during the first phase of placement. Parents often experience pain and sadness resulting from the separation. They may feel shame, guilt, depression, denial that there is a problem, anger, and/or worry about the child. During the first visits, the parent is likely to be awkward, tense, and uncertain. All parties must help the parent process her emotions and help her interact with her child.[55] See pages 16–17 for guidance on interpreting behaviors of young children and parents during visits.

Judges and lawyers need to understand that a young child's emotional dysregulation following a visit does not necessarily mean the parent did something harmful during the visit.

Interpreting Behaviors of Young Children and Parents During Visits

By Victoria Youcha

The following scenarios offer guidance on interpreting behaviors of young children and parents during visits.[1]

Example 1

Case: A toddler avoids eye contact and resists his mother's touch for the first 20 minutes of a weekly visit. He and his mother then engage in mutually enjoyable play, only to have the visit end with the child going into a hysterical tantrum.

Question: Should visits be increased or curtailed?

Discussion: In the absence of physical or emotional abuse, this pattern of avoidance, engagement, and distress at separation can indicate a positive relationship between the toddler and his mother. The mother's ability to read his cues by allowing him time to warm up to her and reestablish their relationship can indicate that the visit is going well. Even the child's extreme distress at the end of the visit could be a healthy protest against another separation from the mother with whom he maintains a strong connection.

Example 2

Case: A foster parent reports that the eight month old in her care does not eat and wakes frequently for several nights following the weekly one-hour visit with her mother. She asks that visits be curtailed because they are upsetting the baby.

Question: What information does the judge need to decide whether visits are in this child's best interest?

Discussion: Absent documented physical abuse or erratic behavior by the visiting parent, the judge might ask for the following additional information:

1. What does the interaction between parent and baby look like during visits? Is there a pattern of warmup, engagement, and mutual delight followed by increased upset at the end of the visit?
2. What is the relationship between the parent and the foster parent? Is it possible that the foster parent's bond with the baby is so strong that she consciously or unconsciously resents the time the baby spends with the mother?

If mother and baby seem to have a strong attachment, increasing the number of visits per week might reduce the child's distress because there will be less time between contacts. Ideally, the mother and foster parent should work together to help ease the baby's transition into and out of each visit.

If the baby seems fearful of his mother or is unable to be comforted by her, the judge can order an evaluation of the relationship between mother and baby by a clinician with specific training in infant mental health. The results can provide critical information to help the court decide whether visits are in the child's best interest.

Example 3

Case: The mother of one-year-old twins misses the first three scheduled visits. When contacted, she seems sad and depressed.

Question: Why is this mother missing visits?

Discussion: If the mother is clean and sober, several options should be investigated. For example, she might be so devastated by the separation from her children that she cannot bear the pain of seeing them briefly and leaving them again; she might feel that the babies will miss her less if they don't see her; she may be experiencing clinical depression or other mental illness that prevents her from being emotionally available to her twins; or she may lack transportation.

In situations like this, parents are often prejudged because they have already been accused of abuse or neglect. Most parents of children in foster care face a complex array of co-occurring challenges including poverty, substance abuse, domestic violence, and mental health issues. Careful gathering of information and individual assessment is needed to uncover the reasons behind a parent's missed appointments.

Example 4

Case: A two year old became hysterical when taken for a supervised visit at her mother's house. She had been scalded in the bathtub by the mother's boyfriend and could not tolerate entering the home or seeing her mother. The mother's attorney argued that, because the mother was not the perpetrator, she had a right to see the child. The child's mental health therapist strongly recommended against visits. The judge ordered the parties to proceed slowly and to start with the child listening to a tape recording of her mother reading favorite stories. They then were to videotape the mother and show that to the child. The child's reactions would dictate the next steps. If exposure to the mother continued to be too upsetting, visits would be discontinued.

Discussion: The safety and well-being of the child is paramount, and even very young children can be traumatized. When there is any doubt about the safety or benefit of visitation, there should be a thorough assessment of the child, the parent(s), and the relationship between each adult in question and the child. Infants and toddlers can be excellent communicators even before they can talk. Mental health clinicians and other early intervention personnel can assess the child and parents and provide important information to attorneys and the court about what is in a child's best interest.

1 Haight, *Wendy L.*, James L. Black, Sarah Mangelsdorf, Grace Giorgio, Lakshmi Tata, Sarah L. Schoppe, and Margaret Szewczyk. "Making Visits Better: The Perspectives of Parents, Foster Parents, and Child Welfare Workers." In *Contemporary Issues in Permanency Planning*. Edited by Gerald P. Mallon and Bogart R. Leashore. Washington, DC: CWLA Press, 2002.

Ensure visits are well documented.
Caseworkers and other professionals must carefully document the family's progress (or lack of progress) during visits, emphasizing the objectives of the visitation plan, behaviors of and interactions between the parent and child, and assessment of risk to the child and the parent's capacity to care for the child. This information provides important evidence for the court to order reduced or increased restrictions, reunification, or termination of parental rights.[56]

Overcoming Barriers

Because child welfare agencies and juvenile courts are often overwhelmed by high caseloads and lack funding for supervision, many communities lack adequate visitation services for families of infants and toddlers in foster care. Working together, the court, the child welfare agency, child advocates, early childhood mental health specialists, and other service providers should analyze the availability of visitation and explore how visitation resources can safely and realistically be expanded in their community. General strategies for expanding visitation include:

- *Examine supervision policies.* Assess and develop criteria for unsupervised visitation and relative or third-party supervision. These practices will promote visitation and reduce the burden on caseworkers.[57]

- *Prioritize cases.* For example, if a child welfare agency does not have the resources to overhaul its visitation practices for all infants and children in foster care, it could set aside additional visitation resources for the families that are most likely and those that are least likely to be reunified.[58] When reunification appears likely, frequent, successful visits can provide evidence to support timely reunification. In cases where reunification appears unlikely, frequent visits can provide evidence of parental disinterest, which can lead toward a timely decision to move to an alternative permanency plan and termination of parental rights.[59]

- *Involve foster parents.* Recruit and train foster parents who are willing to mentor birth parents and supervise visits within their homes.

- *Use volunteers.* Recruit and train volunteers to serve as visitation monitors and parent mentors.

- *Collaborate with community stakeholders.* Partner with other groups in the community to address gaps in visitation services. (See "Promising Practices" on page 23.)

- *Explore alternative funding for visitation services.* A number of federal and state agencies and nonprofit, charitable, and professional organizations offer grants to improve child welfare services and the court process as it relates to children in foster care.

The Judge's Role

Judges hearing cases involving children in foster care play a critical role ensuring the child has full opportunities for meaningful visitation with the family. Although it is counterproductive for judges to order daily visitation if the community does not have the resources to support this practice, judges are in a unique position to inform the community about the gaps in services and to mobilize community leaders and resources to address these gaps.

Working together, community partners can develop creative solutions to overcome barriers to successful visitation.

To encourage improved visitation practices, Judge Leonard P. Edwards of the Superior Court in San Jose, California, and a former president of the National Council of Juvenile and Family Court Judges, suggests judges take a number of steps:[60]

- Oversee the child's initial placement decision to ensure that it supports frequent, meaningful visitation.
- Develop clear, enforceable, written visitation orders for each case.
- Develop local rules that address visitation issues.
- Encourage cross-systems training for all participants in the juvenile dependency court to address child development principles and strategies to improve the quality and quantity of visitation.
- Examine best practices and draw from model programs to improve visitation practices.
- Facilitate collaborative community efforts to improve visitation practices and overcome barriers to successful visitation.

The checklist on pages 20–21 is a useful tool for judges to refer to when considering visitation for infants and toddlers in foster care.

Infant Visiting Checklist for Family Court Judges[1]

Visiting Plan

- What is the current visiting arrangement? (Where? How frequent? For how long? Who is there? What is the level of supervision?)
- Is this visiting plan frequent enough to build attachment between the infant and parent?
- Does this visiting arrangement allow and support the parent to parent, including changing and feeding the infant, learning about the infant's cries, habits, growth, and demonstrating the ability to keep her/his child safe in real-life situations?
- Was the purpose of visits clearly communicated to the parent and by whom? (to utilize the time to meet the infant's needs, stimulate the child's growth and development, communicate love for and enjoyment of the child to the child, ease the toddler's adjustment to separation)
- What are the beginning and the end of the visits like? (infant's response, parent's response, source of this information, possible reasons for assessment if any negative moods, changes over time, efforts put into place to ease transition)
- If there are other children living separately from the infant, have sibling visits been set up?

Evolution

- How long has this specific arrangement been in place? If longer than three months, what are the reasons the visiting arrangement has not progressed? Answers should be child-related (e.g., safety or developmental concerns) or related to the parent's ability to meet the child's needs—not punitive (e.g., parent has not followed through with referrals or completed service plan, parent relapsed three months ago).

Permanency

- Is this visiting plan moving the court closer to achieving the permanency goal? Whenever possible, are the visits close to real-life situations that will allow the parent to address real-life parenting challenges?

Parental Participation in Child's Life

- Is the parent participating in the infant's medical appointments, early intervention services, and other activities?

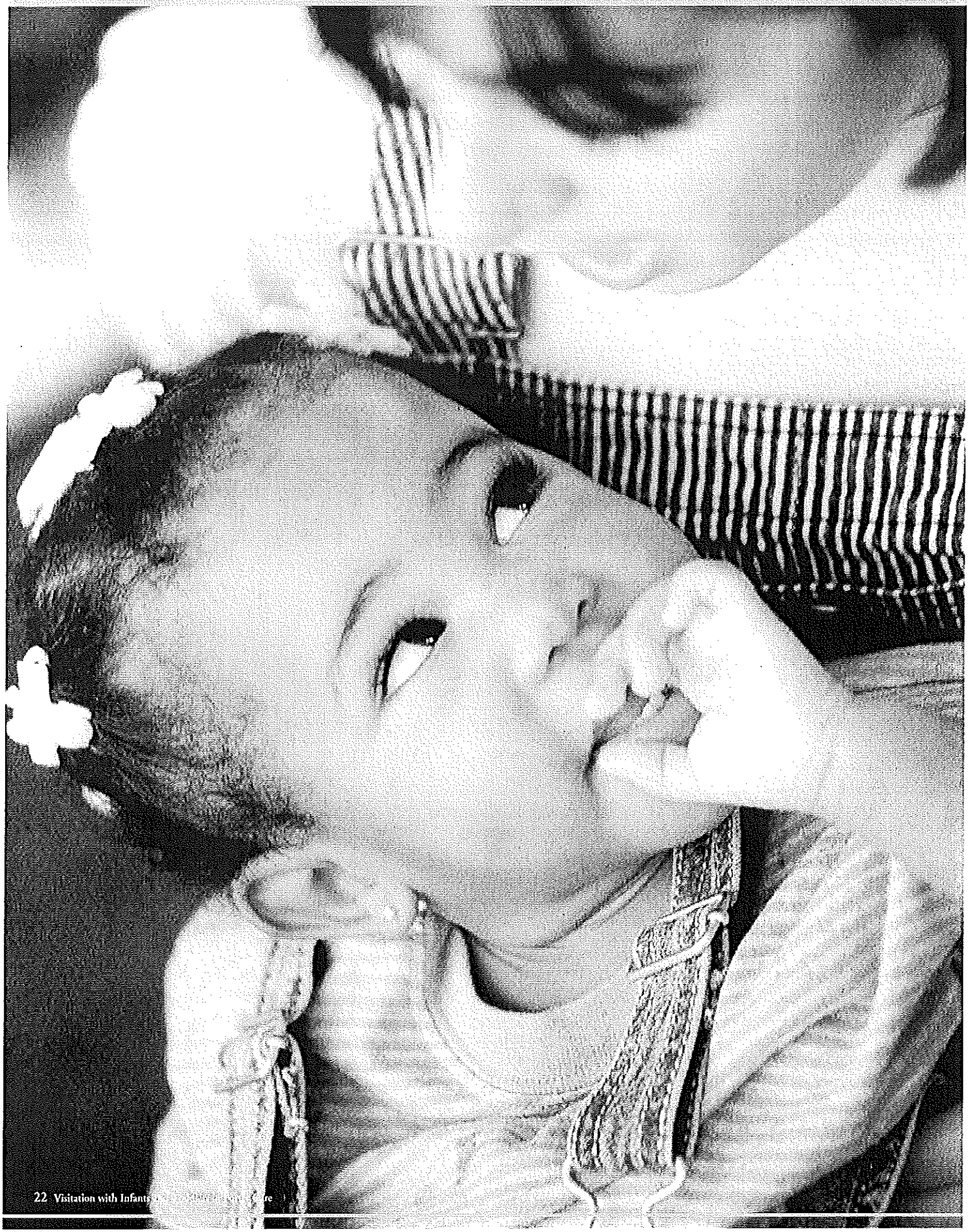
- Has attention been paid to arranging visits on birthdays, holidays, anniversaries, and other special occasions that may be important to the child, parent, and family?
- Is contact/communication facilitated between the parent and the foster parent regarding the infant's habits, routines, behavior, preferences, and development/growth?

Limiting, Suspending, or Terminating Visits

Unless there is imminent risk to the infant's safety or well-being or evidence of visit based harm, before suspending or limiting visits, consider the following:

- What is the basis of this request?
- Has adequate time and explanation of attachment building been given to the parent? Has the parent been encouraged to persistently, actively, and patiently build attachment with the infant? Have efforts to slowly wean the foster parent out of the visits been tried?
- For parents with substance abuse issues: Has the caseworker or substance abuse counselor discussed the expectations, parameters, and purpose of visits with the parent? Have they discussed relapse prevention to address the difficult underlying issues visits may present?
- If due to the parent's inconsistent attendance at visits: What efforts have been made to identify the reasons for irregular attendance? Have there been efforts to engage and support the parent to build an attachment with and parent her/his infant?
- If parental ambivalence toward resuming full-time care of the infant is assessed (including cases where the parent has prior termination of parental rights), has a referral for counseling about options been made?

Adapted with permission from Farber, Sheryl and Tanya Kupat. "Permanent Judicial Commission on Justice for Children's Infant Holding Checklist for Family Court Judges." Unpublished draft. New York State Permanent Judicial Commission on Justice for Children, 2006.



Promising Practices

Lawyers and judges should be familiar with the resources and services for children and families in their community and think creatively to improve visitation practices. In many communities across the country, courts, child welfare agencies, service providers, nonprofit organizations, and faith-based or community organizations are partnering to enhance the visitation experience and promote permanency. Working together, community partners can develop creative solutions to overcome barriers to successful visitation. Promising practices include:

- *Therapeutic Visitation Programs.* Because many parents of infants and toddlers in foster care did not experience positive, nurturing relationships in their own childhoods, they must learn new parenting approaches. Therapeutic visitation programs promote attachment and help parents improve their parenting skills.

- *Supervised Visitation Centers.* Supervised visitation centers serve families of children in foster care who can only visit when an impartial supervisor is present. The centers provide a warm, homelike environment where parents can visit with their children in a safe and supervised setting. The Supervised Visitation Network (www.svnetwork.net) is a helpful resource for advocates interested in learning more about supervised visitation centers.

- *Around-the-Clock Visitation.* Recognizing the importance of parent-child contact, several programs are pushing the envelope on visitation practices and providing what could be regarded as around-the-clock visitation in a controlled setting. For example, shared family care is an arrangement in which the parent is placed with her child in a foster home. The foster family is trained to mentor and support the parent as she develops the skills to care for her child and move toward independent living.[61]

See pages 24–25 for a discussion of several promising community approaches to visitation.

The Supervised Visitation Network (www.svnetwork.net) is a helpful resource for advocates interested in learning more about supervised visitation centers.

Promising Visitation Programs

Across the country, community stakeholders are collaborating in a variety of ways to address gaps in visitation services.

Therapeutic Visitation

Therapeutic visitation programs promote attachment and help parents improve their parenting skills. These programs can take a variety of forms.

For example, in Florida, the Miami-Dade Juvenile Court refers maltreated toddlers and their parents to a 25-week child-parent psychotherapy program with a trained infant mental health clinician. Individualized therapeutic intervention and parental guidance are provided to help parents learn to play reciprocally with their child, understand their child's nonverbal cues, and support their child's healthy development. Three years of data show substantial improvements in child-parent interaction, no further acts of abuse or neglect, and a reunification rate of 36 percent.[3]

Parents and Children Together in Grant County, Washington, is a partnership between Early Head Start and the local child welfare agency that provides specialized services for young children in foster care and their parents. Birth parents spend three days each week with their child in a center-based program that helps parents improve their ability to meet their child's needs. Project staff create a positive, secure, and educationally rich environment that allows parents to develop and demonstrate new parenting skills.[4] A national evaluation concluded that Early Head Start has a positive effect on a range of parenting outcomes as well as on children's cognitive and language development.[5]

The Families Together Program, a partnership between the Rhode Island Department of Children, Youth, and Families and the Providence Children's Museum, is an innovative therapeutic visitation program. Families of children in out-of-home care are referred to the program by their agency caseworker. The program provides opportunities for children ages 1 through 11 and their parents to visit the hands-on museum, where they play and learn together with the support and guidance of family therapists. The therapists work closely with the caseworkers and other members of the treatment team to help parents learn how they can better interact with and meet the needs of their children.[6]

Supervised Visitation Centers

Supervised visitation centers serve families of children in foster care who can only visit when an impartial supervisor is present. For example, public and private community partners in Colorado Springs, Colorado, collaborate to run the Family Visitation Center. Located in a renovated Victorian house, the center provides a homelike setting where parents visiting their children can participate in daily parenting activities (playing, bathing, preparing meals, reading together, etc.). County staff and trained volunteers supervise visits, provide support, and offer hands-on parenting instruction. The center is open six days a week and works with each family to develop a visitation schedule that meets its treatment needs.[7]

In some communities, faith-based organizations have partnered with the court and the child welfare agency to expand supervised visitation opportunities. For example, in Douglas County, Georgia, Saint Julian's Episcopal Church runs the Starting Over Supervised Visitation Program. Trained volunteers supervise family visits in a cheerful, warm environment at the church. The program is open one evening each week and on Saturdays, so parents do not have to miss work.[8]

In Wisconsin, Lutheran Social Services of Upper Wisconsin and Upper Michigan works with the Eau Claire County Department of Human Services to offer the Family Interaction Program. The multidimensional visitation program promotes attachment and permanence in a safe and supervised setting. During the first phase of placement, parents visit with their children in the office, which is a homelike environment. Program staff observe parent-child interactions, provide hands-on parenting information as the situation calls for it, observe how the parent responds to and uses the information, and document the interactions.[9]

The Supervised Visitation Network is a good resource for advocates interested in learning more about supervised visitation centers. Visit www.svnetwork.net.

Around-the-Clock Visitation

The two models discussed below provide what could be regarded as around-the-clock visitation in a controlled setting.

Shared Family Care

Shared family care is an arrangement in which the parent is placed with her child in a foster home. The foster family is trained to mentor and support the parent as she develops the skills necessary to care for her child and move toward independent living. This arrangement provides a safe environment in which to keep families together, reunite them (for example, after the parent completes a drug treatment program), or help the parent decide to relinquish parental rights. Evaluation of the Families First Shared Family Care Program in Contra Costa County, California, found the program to be a cost-effective alternative to treatment foster care. Currently, shared family care programs are operating in several states including California, Minnesota, Pennsylvania, and Colorado.[8]

Residential Treatment Programs in Which Children Are Placed with Their Mothers

Chicago's Haymarket Center, a nonprofit agency that offers comprehensive alcohol and drug treatment programs, helps mothers in treatment continue contact with their children. The center's Athey Hall is a residential treatment facility for chemically affected mothers and their dependent children. The program provides continuity of care and support for the mother and her children, incorporating distinct services and activities at three different stages of care. Typically, it takes three-to-six months to complete the program. The program requires clients to cooperate with human service agencies that help them prepare to live independently. Mothers are allowed to house up to two young children on the unit.[9]

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Conclusion

Parent-child interaction is critical to the healthy development of infants and toddlers, and visitation is an essential component of family reunification and permanency planning. When reunification is a permanency option, judges and those who represent children in foster care and their parents should advocate for frequent, safe, and high-quality visitation.

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This article is a follow up to "Seen and Heard: Involving Children in Dependency Court," in the December 2006 *CLP*.

With Me, Not Without Me: How to Involve Children in Court

by Andrea Khoury

Youth are the most important part of an abuse and neglect case. Failure to give a child a say in court diminishes the process and prevents judges from having the most information to make the best decision.

—Judge Steven Rideout (ret.), Alexandria, VA, Juvenile and Domestic Relations District Court

As the child's advocate or the judge presiding over a child welfare case, you know that involving a youth in court is a key step in the proceedings.[1] The next step is exploring what to do when a youth is in the courtroom. What do you do when a child is in court to ensure her participation is as meaningful as possible to the child and the court? How do you use the child's participation to dig deeper into what you already know and promote permanency for the child?

Children are a resource in the case and can offer valuable insights to aid decision making. This article offers tips to help lawyers and judges in child welfare cases:

- prepare for children's involvement in court;
- make courtroom accommodations that help children feel comfortable participating in the court process; and
- ask age-appropriate questions to obtain information from the child that will aid decision making in the case.

The tips that follow are not new or revolutionary. They remind busy practitioners. Choose the tips that relate to your case and use them to make children's participation routine practice in every case.

Preparing for Children's Involvement

Remember that the child welfare proceedings are about the child. A child who comes to court should not be invisible. The child's involvement should be welcomed and dependency court judges and child welfare advocates should do all they can to prepare and plan for that involvement.

Judges

As the judge, you will not be as intimately involved with the child as the social worker and the child advocate. It's important to get as much information in advance about the child's history, current placement, school progress, health issues, child's relationship with family, and other issues that develop. The information you'll need will differ based on the type of hearing, the child's age, and the child's cognitive and emotional level. The last article[2] discussed the value *to the child* of being in court. This article focuses on the value *to the judge* of the child being in court, so the court needs to be clear on what kind of information the child will provide and how best to elicit that information. The following questions can help identify the reason for the child's involvement and should guide discussions with the child:

- What is the child's role in the proceedings?
- Does the child have important knowledge about the allegations in the petition?
- Has there been a recent change in the child's placement?
- Do you need the child's input about the placement?
- Do you need the child's reactions to child welfare services he has recently received?
- Is termination of parental rights

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being considered and, if so, do you need to hear the child's reaction or do you need to make sure the child understand what is going on?

Once the reason for the child's involvement is clear, judges can prepare for the child's permanency or review hearing by taking the following steps:

- Review previous court orders for outstanding issues (e.g., Is the child participating in the mentoring program that was ordered? Is the child happy with the change in visitation ordered at the last hearing? Has the child increased his grade point average as he promised at the last hearing? Has the child welfare agency been facilitating relationships between the child and stable adults in hopes of creating long-term connections for the child?).
- Require the social worker and other service providers to submit their reports at least three days before the hearing on the permanency plan and efforts to achieve that plan.
- Read the reports highlighting the child's strengths and potential weaknesses (e.g., Notice whether the child's grades have improved or the child's behavior has changed. Notice if the child has stopped attending therapy or refuses to go to school. These are the areas the judge should discuss with the child.)
- If the child welfare agency worker or attorneys would like you to address certain issues with the child, ask them to let you know in advance.
- Become familiar with permanent placement options for the child.
- Encourage the child advocate to submit a written statement to the court identifying anything the child wants to discuss.
- Create the presumption that all children will be present for their hearings unless the court finds it is not in the child's best interest. Require the parties to inform you in advance if they do not want the child present for all or some of the hearing and the reasons it's not in the child's best interests.

Child Advocates

As the child's attorney, you must spend time preparing the child for court involvement. Steps you can take to prepare for the child's involvement include:

- Make sure the child understands who will be present at the hearing and their roles, what will happen at the hearing, and what the child's involvement will entail.
- If the child will testify, provide guidance about how to testify effectively. Advise the child if the judge or other advocates will ask the child questions in court and the nature of those questions.
- Help the child feel comfortable with the questioning process and help him prepare. For example, role play a court hearing in a comfortable environment so the child will know what to expect and has the opportunity to ask questions in advance.

(Continued on page 134)

Getting Kids to Court

Many children do not come to court because they cannot get there. The child is placed too far away. No one has been identified to bring the youth to court. Strategies to address transportation are:

- ☑ Set the hearing date and inform all parties well beforehand so they can arrange for transportation.
- ☑ Set the hearing at a convenient time for the child and transporter.
- ☑ Include transportation in the court order.

(Continued from page 130)

- Encourage the child to write down what she will say in an outline or notes. Speaking to a judge in court can make a child anxious and forget what she wants to say. Having something written down will jog her memory.
- If the youth doesn't want to speak in court, help the youth write something to give the judge to read.

Accommodating Children in Court

Highlight a child's positive accomplishments first, like congratulating her on how well she is doing in school or how well she is adjusting to a new foster home before delving into any issues that may cause some anxiety. Mention things from the previous hearing (based on your notes) that will make the child feel special. Do not ask the same questions over and over signaling that you have not reviewed the case. Conclude the hearing by setting expectations for the child that you will follow up on during the next hearing.

—Judge Juliet McKenna,
District of Columbia Circuit Court

While the child is in court, the role of the judge and attorneys is twofold: to make the experience a positive one for the child, and to gain as much information about the child and family as possible. The following tips accomplish both tasks for verbal and nonverbal children.

Verbal Children

Children tend to be more accurate and complete in providing information when they are familiar with the questioner, their surroundings, and the purpose for being present.[3] When this happens, the child's participation in court is more meaningful to the child and the court. Judges can help make a child more comfortable and familiar with the court process by making a few easy accommodations.

- Hear cases where children are present first.
- Ask any nonparty to leave the courtroom if a sensitive issue will be discussed.
- Arrange for (or allow) children to have a support person present if they desire.
- Respect the child's family members, especially those that may be present in court.

Hearing directly from the child offers a valuable perspective that you won't get from reading reports or getting information secondhand.

- Provide age-appropriate reading material describing the court process to the child.
- Address the child directly using a supportive voice and making eye contact.
- Connect with the child by learning what the child likes/dislikes and commenting on it (e.g., The judge could ask: If you had three wishes, what would they be? If you could change places with anyone in the world for a day, who would you choose and why? Is there something that scares you?).
- Explain your role (and the roles of other adults participating in the hearing) to the child and explain what issues you can address.
- Allow the child to look around and ask questions about her surroundings.
- Provide an age-appropriate list of some legal terms and definitions that may be used during the hearing.[4]
- Avoid acronyms or legal jargon that a child would not understand.
- If the child submits a letter, read it in the presence of the child.
- Publicly praise the child about her accomplishments.
- Thank the child for coming to court.

Children's advocates can also help children feel comfortable in court. Sometimes during court proceedings the child has planned to speak but changes her mind. She may have become nervous or rethought her decision to speak after seeing her parents in court. Be prepared to continue to be the child's voice and present options to the child:

- Offer to speak on the child's behalf.
- Ask the judge to ask parents to leave the courtroom (perhaps in a side bar at the bench).
- Ask for an in-chambers discussion.

The child will look to you for guidance. Make the court experience positive and thoroughly prepare each child based on his/her unique needs and circumstances.

Infants, Toddlers, and Nonverbal Children

If the child is an infant, toddler, or is nonverbal, it is still important for the child to be meaningfully involved in the court hearing. Judges often can learn valuable information simply by observing the child's appearance, demeanor, and interactions with others.[5]

The younger child's involvement differs from an older child's involvement. By taking the following steps, judges can obtain valuable information to shape decisions and ensure nonverbal children benefit from court hearings:

- Expect the child to be present in court only for short periods (no more than 10-15 minutes if the child is restless).

- Observe the child at hearings. Try to make these hearings low key with minimal stress to the child.
- See the child in-chambers.
- Observe the child interacting with her caregivers (parents, relatives, foster parents) and siblings during the hearing.
- Notice the child's demeanor, behavior, and appearance, but be careful about drawing conclusions based on this one snapshot in time.
- When the child does attend court hearings, ensure someone she trusts is present with her.
- Ask someone who has spent time with and fully knows the child to speak about the child.
- Request an updated picture of the child at each hearing.
- Have toys for the child during the hearing. Observe the child playing with the toys.

Questioning Children in Court

Even young children have the competence to tell adults what they know when they are questioned in age-appropriate ways. Until children have fully developed linguistic skills, the responsibility for getting at what children know rests squarely on the adult, and in particular, on the language of the question, and not on the language of the answer.

—Anne Graffam Walker, Forensic Linguist[6]

Hearing directly from the child offers a valuable perspective that you won't get from reading reports or getting information secondhand. The child can take you into his day-to-day life, what's going well at home and what's not, how he is doing at school, and what kind of permanent living situation he desires and how to get there. Consider the child's perspective on these and related issues when reviewing and making decisions about services and the child's permanency plan.

Sample Legal Definitions for Children

Dependency case—A family comes to court because a parent has hurt his or her child or the parent has not taken care of his or her child.

Foster family—A temporary family that a child lives with when his or her parents can't take care of the child. A foster family will make sure that you are safe. They will take care of you until you go home.

Social worker—Someone who will help you and your family. You can talk to your social worker about how you are feeling and if you have any questions.

Judge—Works in the courthouse and is in charge of what happens in court. The judge decides what should happen to you. The judge makes sure everyone is doing what they are supposed to be doing.

Reunification—A child goes home to his or her parents when the home is safe for the child.

Abuse—When a child is being hit or touched in bad ways.

Neglect—When a child does not having proper food, clothing, a place to live, or other things a child needs to live.

Lawyers/Attorneys— A person who goes to college and law school. Lawyers/attorneys give advice and speak for people in court. The judge may give you a lawyer to speak for you. You should meet with your lawyer.

Adoption—The way a child legally becomes part of a new family.

Guardianship—Another person acts as the parent for a child.

Court—The court is the building where the judges work, the hearings are held, and all the papers are filed in your case. The court is where all the decisions are made that will affect what happens to you.

Court hearing or trial—A judge listens to the people and attorneys talk about what is happening with your family. After the hearing or trial the judge decides what should happen to you and how to make sure you are safe. The judge also decides how to make sure your family gets the help they need. Tell your caseworker or attorney if you want to talk to the judge.

Guardian ad Litem (GAL)—Helps the judge decide what is best for you. You can meet with your GAL. Your GAL will probably want to talk to you alone to learn more about you.

Court Appointed Special Advocate (CASA)—There may be a CASA in your dependency case. The CASA will talk to you and your family and tell the judge what is best for you.

Sources: New Mexico Supreme Court, Court Improvement Project Task Force. *What's Going On? A Booklet for Children in Foster Care.* New Mexico: Shaening and Associates, 2001; Judicial Council of California. *What's Happening in Court – An Activity Book for Children Who are Going to Court in California*, 2002 <www.courtinfo.ca.gov/programs/children.htm>; North Carolina Court Improvement Services/Resources Subcommittee. *North Carolina Juvenile Court: Child Protection Hearings—A Handbook for Parents, Guardians, Custodians, and Children*, 2001.

Involving Children in Permanency Hearings: Federal Guidance

Section 8.3C.2c TITLE IV-VE, Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Case review system, permanency hearings

Question: In what way can a state meet the requirement for the court holding a permanency hearing to conduct age-appropriate consultation with the child in section 475(5)(C)(ii) of the Social Security Act (the Act)?

Answer: Any action that permits the court to obtain the views of the child in the context of the permanency hearing could meet the requirement. Section 475(5)(C)(ii) of the Act tasks the state with applying procedural safeguards to ensure that the consultation occurs. However, the statute does not prescribe a particular manner in which the consultation with the child must be achieved which provides the state with some discretion in determining how it will comply with the requirement.

We do not interpret the term 'consult' to require a court representative to pose a literal question to a child or require the physical presence of the child at a permanency hearing. However, **the child's views on the child's permanency or transition plan must be obtained by the court for consideration during the hearing.** For example, a report to the court in preparation for a permanency hearing that clearly identifies the child's views regarding the proposed permanency or transition plan for the child could meet the requirement. Also, an attorney, caseworker, or guardian ad litem who verbally reports the child's views to the court could also meet the requirement. Information that is provided to the court regarding the child's best interests alone are not sufficient to meet this requirement. Ultimately, if the court is not satisfied that it has obtained the views of the child through these or any other mechanism, it could request that the child be in the courtroom, or make other arrangements to obtain the child's views on his/her permanency or transition plan.

Source: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *Child Welfare Policy Manual,* August 7, 2007. Available online: http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=58

Using Language

Before hearing from the child, give thought to the words you will use when questioning the child in court. Consider the child's age, developmental level, cultural background, and verbal ability. Use care to match appropriate language to these factors. When preparing to question a child in court:

- Keep questions short and simple. (e.g., How old are you? What is your best friend's name?)
- Refrain from using pronouns or acronyms. (e.g., "What did Chris do?" instead of "What did she do?")
- Ask the child to explain what was just said if you're concerned that he doesn't understand a question or statement. Children will often not disclose if they don't understand.
- Use concrete (simple and familiar) nouns and verbs. (e.g., use words like "in the back yard" instead of "area")
- Recognize cultural differences in language. (e.g., A long pause is socially acceptable in Native American cultures but may be seen negatively in American culture. In some cultures kinship terms can refer to nonrelatives.[7])
- Avoid abstract questions. (e.g., "How well do you get along with your family?")
- Recognize that children usually respond to questions literally (e.g., Q: Are you in school? A: No. The child is referring to where she is right now (in the courtroom) not the broader question of whether she attends school.)
- Be alert for miscommunication. Ask follow-up questions to ensure both people are speaking about the same topic.[8]

Questioning Children in Child Welfare Proceedings

You are the one who makes the decisions, and I need to be heard so people may understand how I feel or what I need. Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decisions for me, so that I can live life the way it's supposed to be.

—Foster youth[9]

The nature of the proceeding will govern what questions you ask the child in court. Several common areas of focus in child welfare proceedings are discussed below with suggested questions for each.

Placement and Permanency

If you don't ask foster children what they want, how can you make an informed decision about their lives?[10]

Although permanency involves much more than where the child will live, the child's placement, and whether that placement is permanent are important to the child. How the child feels about the placement often determines whether the placement will succeed. It is important to seek the child's opinion and thoughts on current and anticipated placements, including whether changes can be made in the current placement that will resolve a child's

concerns, thereby saving the placement. Children can often find their own placement if the decision makers take the time to talk with them. Too often the child's wishes are ignored. In some cases, they aren't even consulted on this issue which is so central to the quality of their lives.

Aside from questions that will be answered in the social worker's report about whether the child likes her placement, number of placements since the last hearing, and plans for future housing, judges should ask about potential permanent placements. Some questions are obvious but others can reveal information that the court and agency may not have considered. This list of questions is not comprehensive and will vary from case to case but are worth considering.

- Who do you spend most of your time with?
- Is there a relative to whom you are especially close?
- Is there a close family friend with whom you like to spend time?
- Over the holidays, where do you eat dinner?
- If you could take three people to Disney World, who would you take?

The answers to these questions may lead to people who have not already been formally involved in permanency decisions. The child welfare agency should investigate the child's answers to these questions for potential permanent placements or for permanent connections in a child's life.

Education

Children spend many of their waking hours in school. Judges can gain a great deal of information about school from the social worker and educational records. However, the child's well-being is shaped by more than academics. Judges should go beyond the basics available in the social worker's report or the educational records. Certain questions can elicit school-related issues that may not be apparent to the social worker such as relationships with teachers and peers, or participation in extracurricular activities. The child's representative should prepare the child to answer these questions and the judge should be comfortable posing them.

If the child is in regular education and thinking about postsecondary education opportunities, the judge should ask questions about the child's intended field of study and what schools the child is considering. The judge should also ask if anyone is helping the youth consider education options, fill out applications, visit schools, and navigate the complex maze of financial assistance. Children see judges as highly educated people and may be interested in the judge's perspective on higher education and attending a four-year college. Even a short conversation with the judge on this issue can boost a young person's confidence and desire to pursue higher education.

Children can often find their own placement if the decision makers take the time to talk with them. Too often the child's wishes are ignored.

If the child is having problems in his sixth grade class (e.g., suspensions, bad grades) the judge should not focus on the negative but discuss such issues as the following:

- What classes do you like and why?
- Who are your friends and are they in your classes?
- Are there kids at school who are mean?
- What do you do after school?
- Do you have trouble following along in your classes?

These questions help uncover the cause of school problems and can help to build a relationship and trust between the judge and the youth. The youth may need a special education referral, specialized tutoring, or intervention if he's being harassed by his peers. These questions also show the youth that the court is interested in helping to solve his problems, and can help to boost the youth's self esteem.

Services

Most children and families require services to facilitate permanency. Services for parents may include parenting classes, substance abuse treatment, and mental health evaluations and treatment. Services for children may include therapy, mentoring, and facilitated visitation. In most cases children should have input into what services will be ordered. The questions the judge should ask are aimed at discovering the child's view on what the issue is and how best to solve it. When the services are in place the questions should be:

- Are the services helpful?
- Are the services provided at a convenient time and place?
- Are the services addressing the issue?
- Do you like the service provider?
- Has anything changed as a result of the services?
- What still needs to be improved?

The answers to these questions (along with any service provider reports) may make services more meaningful and effective.

Transitioning out of the system

For youth who "age out" of foster care, there are a number of important questions to ask to help prevent later homelessness due to the lack of proper transition planning. In addition to the above questions about placement and permanency, judges should ask the child:

- Have you been formally involved in your discharge planning

(attending case planning sessions, providing input about housing, health, and other long-term needs)?

- What is your plan for health care after you are discharged?
- What are your plans for education or employment?
- If the child is currently in treatment for substance abuse, mental health, or other reasons: Do you know how to continue that treatment?
- Who are the adults in your life that you will rely upon after your case is closed?

Ending Proceedings

Before the child leaves the courtroom, take time to engage the child and ensure his participation has been meaningful. Judges should address the following when closing hearings:

- Ensure the child understands what was ordered and why.
- Ask the child what she wants to accomplish before the next court hearing.
- Encourage the child to attend the next hearing.
- Consult with the child when setting the time for the next hearing.
- Tell the child what she has to do before the next hearing.
- Invite the child to submit report cards, letters, or other personal items periodically to signal interest and concern.
- Review or ensure that someone will review the outcome of the hearing with the child and answer any questions.
- Thank the child for coming to court.
- Finally, ask whether the youth has any questions in a manner that invites questions.

Conclusion

A child can meaningfully participate in her court hearings or she can be left out. The decision is up to the judges and child advocates. Taking the time to prepare for a child's involvement, using proper language, asking good questions, and talking about the right issues will lead to more productive hearings. Through these efforts, everyone benefits.

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Endnotes

[1] See Khoury, Andrea. "Seen and Heard: Involving Children in Dependency Court." *ABA Child Law Practice* 25(10), December 2006, 145. This article discussed why to include youth in dependency proceedings, including:

- empowering the youth,
- giving them a sense of understanding and control of the process, and
- providing valuable information to the court.

It also discussed how to involve youth, including:

- in-chambers discussions,
- bifurcated hearings,
- full participation in all hearings,
- strategies for practitioners, and
- systems changes to make participation meaningful to the youth.

[2] Ibid.

[3] Walker, Anne Graffam. *Handbook on Questioning Children: A Linguistic Perspective,* 2d edition. Washington, DC: ABA Center on Children and the Law, 1999, 22.

[4] Jones, Judge William G. (ret.). "Making Youth a Meaningful Part of the Court Process." *Juvenile an Family Justice Today,* Fall 2006, 20.

[5] Krinsky, Miriam Aroni. "The Effect of Youth Presence in Dependency Court Proceedings." *Juvenile and Family Justice Today,* Fall 2006, 16.

[6] Walker, 1999, 24.

[7] Ibid., 71.

[8] Ibid., 91.

[9] Foster youth quoted in *My Voice, My Life, My Future,* 2006, prepared by Home at Last and the Children's Law Center of Los Angeles. Available at http://www.pewtrusts.org/our_work_ektid19876.aspx

[10] Lockett, Veronica. "Right to Speak in Court Vital to Cases of Foster Children." *The University Star.* www.star.txstate.edu

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(In re Kalil, Continued from p. 131)

cases to place confidential reports in a sealed envelope that is available only to the "parties in the action and their attorneys." The court explained that the court rule describes general procedures for filing GAL reports but does not prevent the court from keeping portions of the GAL report confidential if there is a stipulation and confidentiality is in the child's best interests.

The father's second issue was whether his due process rights were violated when the court refused to let him view the GAL's report? The court explained that while parents have a due process right to be heard, examine witnesses, and to be informed of and challenge adverse evidence, these rights are not absolute. Since the trial court approved the parents' stipulation limiting their right of access to the child's confidential communications, they waived their right to review the report. Therefore, the trial court properly denied the father's request to access the sealed report.

Checklist for Foster Home Visits

Pointers

1. When possible, meet with the child outside the immediate presence of everyone else for at least a few minutes.
2. When possible, meet with the foster parent alone for a while.
3. Explain the role of the child's attorney to both the foster parent and the child.
4. Spend some time just playing with the child and chatting about school, etc. Don't overwhelm the child.
5. Speak to the child in an age-appropriate way. Consult materials on interviewing children before the visit.
6. Give a business card to the child. Give one to the foster parent.

Questions to Keep in Mind

1. Living Conditions
   a. Is the home neat, clean and safe?
   b. Is there a separate bed for the child? With whom does the child share a room?
   c. How many bedrooms are there? How many people are in the home?
   d. Are there age-appropriate toys for the child?
   e. Is the child dressed in clean, appropriate clothes? Is the child's hygiene good?
   f. Do the children in the home appear well-cared for?
2. Foster Parent
   a. Does the foster parent speak the child's primary language fluently?
   b. How experienced is the foster parent? How many years has she been licensed?
   c. Does the foster parent work? How many hours?
   d. With whom does the foster parent leave the child when she has to work or leave the home for other reasons?
   e. Does the foster parent think everything is working out well with the child?
   f. How does the foster parent interact with the child?
3. Others in the Home
   a. How many children and adults live in the home?
   b. What are the children's ages?
   c. How are the children related to the foster parent (e.g., biological child, foster child, grandchild)?
   d. Do any of the other children in the home have significant special needs?
   e. Are there any people who don't live in the home but spend a lot of time there (e.g. foster parent's boyfriend)?
   f. Does the child get along well with others in the home?
   g. How many foster children is the foster parent certified to have in the home?
   h. Does anyone in the home appear to have significant problems or limitations, including substance abuse?
4. Natural Parents/Siblings
   a. Has the foster parent met the natural parents?
   b. What is the visitation schedule?
   c. Have DCF and the parents adhered to the visitation schedule?
   d. How does the child act after visits with the parents?
   e. Does the child have siblings?
   f. What type of sibling visitation is there?
   g. How does the child respond to sibling visits?

5. Child, Generally
   a. Does the foster parent think the child is doing well?
   b. Does the foster parent notice any special needs or problems (e.g., developmental delays, nightmares, inability to sit still, depression)?
   c. Do you notice any special needs or problems?
   d. Does the child appear to have adjusted to the foster home?
   e. Does the child understand who you are?
   f. Does the child appear to feel comfortable around the foster parent and the others in the home?
   g. Does the child have any requests?
   h. Does the child have any questions about anything?

6. Medical Issues
   a. Are there any upcoming appointments? With whom?
   b. Have there been any recent appointments? With whom?
   c. Does the foster parent have the child's medical passport?
   d. Are there any pressing medical issues?

7. Education
   a. Is the child in preschool or school? Where? What grade? Bilingual program?
   b. Is the child receiving special education?
      If not, does the foster parent think that the child should be tested for special education?
      If so, does the foster parent know when the last planning and placement team meeting was? Did the foster parent attend? Is there an upcoming PPT meeting?
   c. Does the child like school?

8. Resources for Foster Family
   a. Has the foster parent been receiving foster care payments?
   b. Has the foster parent been receiving childcare subsidies from Care4Kids, the childcare assistance program?
   c. Does the foster parent need vouchers for particular items, especially big purchases such as baby furniture?
   d. Is the foster parent receiving respite care (i.e. time off)? If not, does she need respite care?
   e. Is the foster parent satisfied with the assistance she is receiving from DCF?
   f. Does the foster parent understand that she should contact us if she believes that DCF is not meeting the child's needs?