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NACC Recommendations for Representation of Children in Abuse and Neglect Cases



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National Association of Counsel for Children

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NACC Recommendations for Representation of Children in Abuse and Neglect Cases was produced as part of the NACC's objective to establish the practice of law for children as a legitimate profession and legal specialty. As part of that objective, the NACC periodically produces standards of practice or guidelines for the representation of children.

The document was drafted by the NACC Program Committee and the principal authors listed below.

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Executive Summary

The lack of standards of practice or guidelines for attorneys representing children in child protection proceedings has frequently been cited as a major cause of substandard and ineffective legal representation of children. Unlike more traditional areas of practice where the model of representation and the lawyer code of conduct are essentially uniform from state to state, the practice of law for children has no commonly accepted uniform model or code, and many states provide inadequate guidance for attorneys doing this work. This is the case in part because the practice of law for children is a unique and relatively recent development, and because the evolution has occurred on a state by state basis. Additionally, there has been significant disagreement as to whether representation for children should take a traditional client directed (“expressed wishes”), or an advocate directed (“best interests”) form, making it difficult to adopt a model.

Important progress was made toward the creation of a uniform model of representation with the creation of the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* in 1996. Still, jurisdictions struggle to adopt clear and comprehensive guidelines for children’s attorneys, frequently because of the long-standing debate over the form of representation.

The *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* is a document designed to assist jurisdictions in the selection and implementation of a model of child representation. Rather than urging jurisdictions to choose a particular model, this document sets out a checklist of children’s needs that should be met by whatever representation scheme is chosen. It is the NACC’s hope that this approach will allow jurisdictions to focus on what matters, serving the child client, and avoid becoming mired in the debate over best interests and expressed wishes.

The NACC believes that children’s legal service needs can be met by both client directed (“expressed wishes”) and advocate directed (“best interest”) models of representation. In an effort to help jurisdictions understand various models, this document includes a section describing the various models of representation.

Whatever form of representation jurisdictions choose, the NACC believes that every child subject to a child protection proceeding must be provided an independent, competent, and zealous attorney, trained in the law of child protection and the art of trial advocacy, with adequate time and resources to handle the case.

NACC Recommendations for Representation of Children in Abuse and Neglect Cases

I. Introduction

This document is designed to assist children’s attorneys, courts, and policy makers working to improve the legal representation of children. The focus is on the representation of children in abuse and neglect proceedings. The document also has application in private custody and adoption matters.

Rather than prescribing one specific model of representation, this document provides a policy framework for the legal representation of children, followed by a checklist of children’s needs that representation should meet, whatever form of representation states choose. The document describes various models of representation in an effort to help the reader appreciate the strengths and weaknesses of each.

The NACC is aware of the debate in the child advocacy community over the two primary models of representing children – the attorney guardian *ad litem* (advocate directed “best interests” model) and the traditional attorney (client directed “expressed wishes” model). While this debate can be useful, the NACC suggests that rather than spending time and resources debating the merits of the various models, states should focus on ensuring that the model of representation used meets the children’s needs checklist.

II. Children’s Legal Representation Policy

A. OVERVIEW

The NACC believes that each child must be valued as a unique human being, regardless of race, ethnicity, religion, age, social class, physical or mental disability, gender, or sexual orientation. Each child is vested with certain fundamental rights, including a right to physical and emotional health and safety. In order to achieve the physical and emotional well being of children, we must promote legal rights and remedies for children. This includes empowering children by ensuring that courts hear and consider their views in proceedings that affect their lives.

Children’s attorneys play a critical role in empowering children and ensuring that children’s views are heard in legal proceedings. Outcomes in our adversarial process are directly tied to the quality of legal representation. Additionally, the presence of children’s attorneys is critical to ensuring the timeliness of proceedings.

The NACC believes that attorneys representing children should have a combination of knowledge, training, experience, and ability which allows them to effectively discharge their duties to their clients. The NACC supports federal, state, and local programs to enhance the competence of these attorneys.

B. CHILD WELFARE CASES

The NACC believes that in order for justice to be done in child abuse and neglect related court proceedings, all parties, including children, must be represented by independent *legal* counsel¹. The children who are the subjects of these proceedings are usually the most profoundly affected by the decisions made, and these children are usually the least able to voice their views effectively on their own. In many jurisdictions, however, courts do not appoint independent attorneys for all children in abuse

¹ The U.S. Department of Health and Human Services supports this principle. *Adoption 2002: The President’s Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of HHS ACF ACYF Children’s Bureau, 1999.

and neglect related proceedings. NACC believes that federal, state, and local law must mandate that independent attorneys be appointed to represent the interests of children in all such proceedings.

C. PRIVATE CUSTODY AND ADOPTION CASES

The NACC believes that while legal representation is not required for every child who is the subject of a child custody determination, the judge *should* appoint an attorney to represent the child in certain cases: when there are certain substantive allegations that make child representation necessary – i.e., when there is an allegation of child neglect or abuse (physical, sexual, or emotional) by a parent or household member, when there is a culture of violence between the parents, when there is an allegation of substance abuse by a parent, when there are allegations of non-paternity, or when there is an allegation of or fear about child snatching – as well as when there are certain procedural situations which make child representation necessary – e.g., when a child will be a witness or when the case develops an extremely adversarial nature. In addition, the judge *should consider* appointing an attorney to represent the child in certain other cases: when there is an allegation of mental illness on the part of a parent, when a custodial parent is relocating geographically, when child representation can reduce undue harm to the child from the litigation itself, when the child has exceptional physical or mental health needs, when the child expresses a strong desire to make his or her opinions known to the judge, when there is a pro se parent, when there is a third-party custody action against a parent (e.g., by a grandparent), or when the failure to appoint a representative for the child would otherwise impede the judge’s capacity to decide the case properly. (Attorneys can be instrumental in ensuring that judges have the necessary data upon which to make an informed decision.)

III. Needs Checklist for Children Involved in Abuse and Neglect Cases

The NACC encourages jurisdictions to adopt a system of legal representation of children which satisfies the following checklist. The representation scheme should ensure that each of the following children’s rights or needs are satisfied through a combination of systemic safeguards, advocacy duties, and basic advocacy issues.

A. SYSTEMIC SAFEGUARDS

1. Children need competent, independent, and zealous attorneys. The system of representation must require the appointment of competent, independent, zealous attorneys for every child at every stage of the proceedings. The same attorney should represent the child for as long as the child is subject to the court’s jurisdiction.

Comment A: Competence is the foundation of all legal representation. The fundamental requirements of competency as defined in each jurisdiction, combined with the ability to function without constraint or obligation to any party other than the child client is of paramount importance. (See, ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a); ABA Model Code of Professional Responsibility (Model Code): EC 7-1; EC 7-12; ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (ABA Standards): Preface; A-1.)

Comment B: Competent representation includes knowledge, skill, thoroughness, and preparation. This includes knowledge of placements and services available for the child, and services available to the child’s family. (See, Model Rule: 1.1; Model Code DR 6-101(A)(1)(2); ABA Standards B-1; C.) Jurisdictions should provide special initial and periodic training to all attorneys in child welfare proceedings covering substantive law (federal, state, statutory, regulatory, and case law), procedure, trial advocacy, child welfare and child development.

Comment C: *Continuity of representation is important to the child. The same lawyer should represent the child for as long as the child is under the jurisdiction of the court. Temporary substitution of counsel, although often unavoidable, should be discouraged. Any substitute counsel must be familiar with the child and the child's case.*

2. **Children need attorneys with adequate time and resources. The system of representation must include reasonable caseload limits and at the same time provide adequate compensation for attorneys representing children.**

Comment A: *The NACC recommends that a full time attorney represent no more than 100 individual clients at a time, assuming a caseload that includes clients at various stages of cases, and recognizing that some clients may be part of the same sibling group. This is the same cap recommended by the U.S. Dept. of HHS Children's Bureau and the American Bar Association². One hundred cases averages to 20 hours per case in a 2000-hour year.*

Comment B: *For the sake of the child client and the interests of the system, attorneys must be provided appropriate and reasonable compensation. The NACC adopts the following position of the Dept. of HHS on this point: "Primary causes of inadequate legal representation of the parties in child welfare cases are low compensation and excessive caseloads. Reasonable compensation of attorneys for this important work is essential. Rather than a flat per case fee, compensate lawyers for time spent. This will help to increase their level of involvement in the case and should help improve the image of attorneys who are engaged in this type of work. When attorneys are paid a set fee for complicated and demanding cases, they cope either by providing less service than the child-client requires or by providing representation on a pro bono or minimum wage basis. Neither of these responses is appropriate. Rates should also reflect the level of seniority and level of experience of the attorneys. In some offices, lawyers handling child welfare cases receive lower pay than other attorneys. This is inappropriate. Compensation of attorneys handling children's cases should be on a par with other lawyers in the office handling legal matters of similar demand and complexity. The need for improved compensation is not for the purpose of benefiting the attorney, but rather to ensure that the child receives the intense and expert legal services required."³*

3. **Children need attorneys who understand their role and duties. The system of representation of children must be well defined by statute, bar standards, administrative guidelines, supreme court directive or other documents such that every attorney appointed for a child can understand his/her precise role and duties, and such that an attorney can be held accountable for performance of those duties.**

Comment: *It is helpful here to distinguish between role and duties. Role refers to whether, for example, the attorney is client directed (traditional attorney model or child's attorney models) while duties refer to those actions to be taken by the attorney (investigation, calling witnesses, etc.). Although duties are in part dependent on role, most commentators agree that certain fundamental duties should apply regardless of role. See ABA and ABA / NACC Revised Standards ¶ C Actions to be Taken.*

² ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, §§L-1, L-2; The U.S. Department of Health and Human Services supports this principle. *Adoption 2002: The President's Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of HHS ACF ACYF Children's Bureau, 1999, page VII-5.

³ *Adoption 2002: The President's Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of HHS ACF ACYF Children's Bureau, 1999, page VII-4.

4. Children need an opportunity to present their positions to the court through counsel. The system of representation must provide the child with an opportunity for his/her needs and wishes to be expressed to the court.

Comment: Children have an independent perspective and may have information and positions to present to the court on a wide range of issues including but extending beyond the issue of placement. Other parties and the court may otherwise be unaware of the child's perspective or of how certain decisions subjectively affect the child.

5. Children need confidential communication with their attorneys. The attorney has a duty to explain the extent of confidentiality in developmentally appropriate language.

Comment A: Every child should have the right to communicate confidentially with the representative. (See, Model Rules: 1.6, 3.7; Model Code: DR 4-101; 5-102; ABA Standards: A-1; Comment B-2(2).)

Comment B: But see Alaska Ethics Op. 854. Some jurisdictions include attorneys as mandatory reporters, and pure confidentiality may be precluded with a GAL — advocate directed representation system.

6. Children need to be involved as litigants in the entire litigation process, including any post disposition, termination of parental rights, and adoption proceedings. The system of representation must recognize the child as a party to the litigation and must include the child in all phases of the litigation, including the opportunity to participate in arguments and jury selection where applicable, offer exhibits, call witnesses, examine and cross examine witnesses and engage in motions and discovery processes. The child must also be given notice of all proceedings and copies of all pleadings.

Comment: The child should be physically present early in the proceedings, so as to allow all parties and their representatives the opportunity to become acquainted with the child as an individual. Although the child's presence may not be required at every court hearing, it should not be waived by the representative, unless the child has already been introduced to the court and his/her presence is not required by law, custom, or practice in that jurisdiction. Every child should be notified through counsel of every court hearing, every agency meeting, and every case conference or negotiation among the various professionals involved in the case and the child's attorney should be notified concerning any change in the child's welfare, placement, education, or status. Every child should be considered a party to the litigation, and should therefore, be entitled to any and all benefits under the law granted to any other party. Every child should have access to sufficient information to allow his/her representative to provide competent representation including the child's representative having access to social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school and other records relevant to the case, and opportunity for interviewing child welfare caseworkers, foster parents and other caretakers, school personnel, health professionals, law enforcement, and other persons with relevant information. This access may require the representative to file motions for discovery, subpoenas, subpoenas duces tecum, depositions and interrogatories, according to the discovery mechanisms available in the jurisdiction. Every child should have the opportunity to present his/her witnesses in the court proceedings. This requires the representative to investigate facts, identify and communicate with witnesses, and issue subpoenas to ensure that witnesses appear in court.

7. Children need judicial review of adverse decisions. The system of representation must provide an opportunity to appeal an adverse ruling.

Comment: Children need to have access to the court after the adjudication occurs. This may require the representative to forego informal resolution of issues at the review stage of the litigation. See State ex rel. Jeanette H., 529 S.E. 2d 865 (2000).

8. Children need to be able to hold their attorneys accountable. The system of representation must provide recourse for ineffective assistance of counsel.

Comment: Every child should be able to hold the representative accountable for providing less than competent representation.

9. Children need an attorney with a fair opportunity to be effective in the court system. The system of representation must include a court system that devotes adequate time and resources to cases.

Comment: Courts cannot be “rubber stamp” agencies for social service agencies and must be equipped to handle caseloads responsibly. See, Resource Guidelines, Improving Court Practice in Child Abuse and Neglect Cases, National Council of Juvenile and Family Court Judges, 995 NCJFCJ, Reno, NV

B. ADVOCACY DUTIES

1. Children need attorneys who fully understand their cases. The attorney must perform a full and independent case investigation.

Comment: The child’s attorney has a duty of full investigation of the case. (See, Model Rule: 4.2; Model Code: DR 7-104 (A) (1); ABA Standards: C-2(4); C-6.)

2. Children need meaningful communication with their attorneys. The attorney must observe the child, and dependent upon the child’s age and capabilities, interview the child. The attorney must engage in regular and meaningful communication with the child. Children need to participate in making decisions that affect their cases. The attorney has a duty to involve the child client in the process, whether under a client directed model or advocate directed model. The attorney has a duty to explain his/her role to the child in developmentally appropriate language.

Comment A: Under a client directed model, the scope of representation by the child’s attorney includes the duty to abide by the client’s decision concerning the objectives of the representation. (See, Model Rule: 1.2(a); Model Code: DR 7-101 (A) (1); EC 7-7; EC 7-8; ABA Standards: B-4.)

Comment B: This is a universal need, and it applies whether or not the child is pre-verbal. Visual encounters with children who are represented, even with pre-verbal children, are crucial to the representation. Otherwise, the representative is limited by relying upon the mental impressions of third parties. The child’s attorney has a duty of effective, thorough, and developmentally appropriate communication with the client, including the duty to meet with the client. (See, Model Rules: 1.4 (a), (b); Model Code: EC 7-8; 9-2; ABA Standards: C-1; A-3; B-1(5); D-2; E-2; F-4.)

Comment C: Children need education about the law and all options available under the legal system. This need is restricted to developmentally appropriate clients, capable of communication.

Comment D: The child client must be informed about the responsibilities and obligations of the representative, as well as the ability and requirements of the representative to accomplish these things.

3. Children need loyal attorneys. The child's attorney is prohibited from representation that would constitute a conflict of interest.

Comment: Attorneys must be aware of the potential for conflict while representing a sibling group. Additionally, the child's attorney must be sensitive to the age and maturity of the client where waiver is an issue. (See, Model Rules: 1.7; Model Code: DR 5-101 (A); 5-105(A), (C); 5-107 (B); ABA Standards: B-2(2).)

4. Children need the full benefit of legal counsel. The attorney must provide competent, independent and zealous representation for each client. The attorney must have adequate time and resources to devote to the child's case, and to understanding his/her role and duties, insuring confidentiality, and full active participation in all stages of the child's case.

C. ADVOCACY ISSUES

1. Children need permanence. The attorney must advocate for timely resolution and permanent resolution (absent compelling reasons to the contrary) of the case.

Comment: The child's attorney has a duty of diligent and prompt representation, and a duty to expedite litigation, especially where placement of a young child is at issue. (See, Model Rule: 1.3; 3.2; Model Code: DR 6-101(A)(3); EC 6-4; ABA Standards: B-1(4); C-6.)

2. Children need their immediate and basic needs met. The attorney must advocate for food, shelter, clothing, and safety, including a safe temporary placement where necessary and for educational, medical, mental health, and dental needs.

Comment: The child's most immediate physical needs must be addressed and should be the highest priority for the child's representative. After the immediate needs of sustaining life have been addressed, the child's education, mental health, medical, and dental needs must be addressed. Children's attorneys should act as a kind of "watchdog" for the children's needs, insuring that services are provided.

3. Children need family relationships. The attorney must advocate for continuation of appropriate familial relationships and family preservation services where appropriate.

Comment: Without jeopardizing the child's physical or emotional safety, arrangements to maintain familial relationships (including siblings) which are not deemed to be harmful to the child should be established as soon as practicable. Family services may include visitation and services for family members: parenting education, medical and mental health care, drug and alcohol treatment, housing, etc. Such family services may also be appropriate to continue other meaningful relationships and ongoing activities where feasible.

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

IV. Representation Models

The following representation models are presented to assist states in evaluating and formulating models of representation. States should consider the requirements of the federal Child Abuse Prevention and Treatment Act (CAPTA) regarding the appointment of representation for the child. The U.S. Department of Health and Human Services, Children's Bureau has indicated that although CAPTA requires a GAL

best interests representative, that role may be filled by either an attorney GAL or more traditional client directed attorney.⁴

A. ADVOCATE DIRECTED REPRESENTATION

1. The Attorney Guardian *ad Litem* Hybrid⁵ Model

This model provides an attorney to represent the child and instructs the attorney to represent the child's "best interests." The attorney GAL advocates for a result which he/she believes (not necessarily what the child believes) is in the child's "best interests." Rather than taking direction from the client, as is the case in traditional attorney representation of adults, the attorney GAL is charged with forming the client's position by using his/her own judgment. Under this model, the attorney GAL's judgment as to the child's "best interests" takes precedence over the client's wishes.

Pros: *This model is favored by many as the traditional model of representing children, particularly young children who cannot meaningfully participate in their litigation. It is also thought to protect older children from the harm of their own bad choices.*

Cons: *Critics charge that this is an "old fashioned," paternalistic model of representation that treats children as chattel rather than empowering them in the system. Critics charge that advocate directed representation is wrong by definition because: 1) attorneys are not ethically allowed to disregard their clients directives; 2) attorneys are not qualified to make "best interests" determinations; and 3) the legal system requires that attorneys be zealous advocates for a client's position, not agents of the court. Critics also charge that the system results in "relaxed advocacy" where attorneys appointed as GAL feel, and are treated, as relieved of their traditional lawyering responsibilities. Critics argue that this model has contributed to sub standard representation of children across the country.*

Jurisdictions Using a Form of This Model: *More than one-third of the US jurisdictions use a form of this model.⁶*

Source: *The Colorado version is comprised of the following sources: Colorado Revised Statutes §§ 19-1-103, 19-1-111, 19-3-203; The Colorado Rules of Professional Conduct at CRS, Volume 12 - pages 711-831; Supreme Court of Colorado Chief Justice Directive 04-05 and 04-06; Colorado GAL Standards of Practice.*

2. The Lay Guardian *ad Litem* Model

This advocate directed model provides for a non-attorney to "represent" the child's "best interests." This person, usually a non-professional volunteer, advocates for what he/she believes (not necessarily what the child believes) is in the child's "best interests." The lay GAL "stands" in the proceeding for the presumptively incompetent child. The focus is the protection of the child by an adult who attempts to know and then articulate the child's best interests.

The NACC discourages the use of this as an exclusive model. Children, even more than adults, require trained legal representation and this model, by definition, is not legal representation. While the NACC recognizes the value of non-legal advocacy for children, whether in the form of lay GAL or CASA, we

4 Adoption 2002: *The President's Initiative on Adoption and Foster Care. Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of HHS ACF ACYF Children's Bureau, 1999, p. VII-21.

5 Ann M. Haralambie identifies and discusses the "hybrid" role in *The Child's Attorney, A Guide to Representing Children in Custody, Adoption and Protection Cases*, ABA 1993 at p. 37.

6 NACC analysis of results reported in: *A Child's Right to Counsel: A National Report Card on Legal Representation For Abused and Neglected Children, Second Edition*, Children's Advocacy Institute (CAI) and First Star, 2009, p. 24-134.

stress that it cannot be a substitute for trained professional attorneys for children. On this point, the NACC and National CASA have agreed. Non-legal advocates play an important role in the process, and jurisdictions should consider implementing such programs *in addition to* appointing attorneys.

Due to the substantial shortcomings of this model, states which use this model of representation frequently appoint an attorney to represent the child or the lay GAL.

Pros: *The model has value when used in conjunction with legal counsel.*

Cons: *Assuming this is the only “representation” provided, the child has no legal counsel. Lay GALs are unable to provide “legal” counsel and cannot, for example, present evidence, examine witnesses, appeal adverse decisions, or advise the client of the ramifications of legal matters. Lay GALs attempting to serve in the role of legal counsel are engaging in the unauthorized practice of law. Additionally, lay representatives are less accountable than professionals for their actions because their conduct is not governed by ethical and legal standards.*

Jurisdictions Using a Form of this Model Include: *Alaska, Arizona, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Maine, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Dakota, Oregon, Washington, Wisconsin.*

Sources: *The jurisdictions that use lay guardian ad litem, have implemented several variations of this model. For example, Hawaii uses a lay guardian ad litem (GAL) model, but gives the court discretion to appoint an attorney charged with representing the child’s legal interests when the child and the GAL cannot come to an agreement. H.R.S § 587-34 (2010). Wisconsin and Minnesota allow for the appointment of a lay guardian ad litem prior to a child’s 12th or 10th birthday respectively. However, after the child has reached this age, the court must appoint an attorney for the child who is charged with representing the child’s legal interests. Minn. Stat. § 260C.163 (2010); Wis. Stat. § 48.23 (2010).*

Maine law calls for a GAL who is usually an attorney but is not required to be by statute. The GAL is considered a party and has the right to call and cross examine witnesses and has access to discovery. Should the GAL be an attorney, he/she essentially functions in the hybrid role of Attorney GAL defined in IV. A. 1. above. It is not clear how such duties can be performed competently or without violating the law against unauthorized practice of law if the appointment is of a lay person. Maine Supreme Judicial Court Rules for Guardians Ad Litem; 22 M.R.S. § 4005 (2010); 4 M.R.S. §1501 (2010).

3. The “Two Distinct Lawyer Roles” Model

A single lawyer model, either advocate directed (best interests) or client directed, may not meet the needs of all children, given their developing and varied capacities from infants to mature and articulate teens. This model would require appointment of a best interest lawyer-guardian *ad litem* or a traditional attorney under certain circumstances as set out in law.

In 1998, Michigan passed a version of this model that creates two separate and distinct roles for the lawyer representing children: attorney and lawyer-guardian *ad litem*. Michigan requires the appointment of a lawyer-GAL in every case and the lawyer-GAL is to represent the best interests of the child. The statute permits the court to appoint an attorney where the mature child and lawyer-GAL are in conflict about identification of the child’s interests. The model prescribes aggressive duties for the lawyer-GAL and provides for attorney-client privilege. It requires the lawyer-GAL to tell the court the wishes and preferences of the child even if the lawyer-GAL advocates for a different view and requires the lawyer-GAL to weigh the child’s wishes in making the best interests determination according to the age and maturity of the client. When a lawyer is appointed as “attorney,” however, the attorney owes the same duties of undivided loyalty, confidentiality and zealous representation of the

child's express wishes as the attorney would to an adult client. Some proponents of the Two Distinct Lawyer Role model urge that the law *require* appointment of an attorney instead of a lawyer-GAL at a certain age (unless the child is mentally handicapped), rather than leave attorney appointment to the discretion of the court.

Pros: *Proponents argue that the pure forms of either advocate directed ("best interests") or client directed ("expressed wishes") models are deficient when applied to all children, so that a model which provides clear lawyer duties depending on the age and maturity of the child better serves the child client. This model is also well defined by statute and lessens the tendency toward "relaxed advocacy." This model also reduces the risk inherent in the ABA and NACC models that a lawyer appointed as "attorney" would find an exception to (or water down) the duty of aggressive and client-directed advocacy.*

Cons: *Critics argue that, at its foundation, this is just an attorney directed model with most of the shortcomings of model A. 1. above. The appointment of an attorney GAL is the rule, not the exception, and an attorney is appointed only in rare circumstances. Also, under rare circumstances the child could be represented by both an attorney and a lawyer-guardian ad litem which adds to the cost. The test for appointing one or the other lawyer roles remains unsettled.*

Jurisdictions Using the Model: *Kansas, Michigan*

Source: *K.S.A. §38-2205(a) (2010); MCL 712A.13a(1)(c) (2010) (for definition of "attorney") and MCL 712A.17d (2010) (for duties of lawyer-guardian ad litem)*

B. CLIENT DIRECTED REPRESENTATION

1. Traditional Attorney

A traditional attorney functions as a client directed advocate. He/she advocates for the expressed wishes of the client and is bound by the client's directives concerning the objectives of representation. The model does not prohibit the attorney from acting in his/her capacity as counselor for the client, and state ethics codes include the counseling function. Attorneys are not required, without first counseling their client as to more appropriate options, to blindly follow directives that are clearly harmful to the client. Further, the model does not require attorneys to advocate positions not supported by facts and the law.

Pros: *The model is thought to give voice and autonomy to the client and to empower the child within the system. It allows attorneys to function in a familiar setting. Proponents believe it produces good outcomes for children because it encourages independent, zealous advocacy, and the attorney is not confused by the role or duties.*

Cons: *Critics charge that the model does not work for young children who cannot meaningfully direct their litigation or for older children who may misdirect their litigation.*

Jurisdictions Using a Form of This Model Include: *About 45 percent of the US jurisdictions use a form of this model⁷. In most of these jurisdictions, a traditional attorney model is only required when a court chooses to appoint an attorney. These jurisdictions include: Alaska, Arizona, Florida, Georgia, Hawaii, Minnesota, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania and Washington.*

Fewer jurisdictions require both that courts appoint an attorney and that the attorney serve in a traditional role. Jurisdictions using a form of this model include; Louisiana, Massachusetts, Mississippi, Texas, Vermont, West Virginia and Wisconsin.

⁷ NACC analysis of results reported in: *A Child's Right to Counsel: A National Report Card on Legal Representation For Abused and Neglected Children, Second Edition*, Children's Advocacy Institute (CAI) and First Star, 2009, p. 24-134.

2. Child's Attorney (ABA Standards Model)

The following selected provisions from the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* define the model. "The term 'child's attorney' means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation. To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian *ad litem*. To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests. If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian *ad litem* and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation."

Pros: *Proponents see the model as the most significant advance in child representation in many years. They see the model as an evolution from the GAL model of the 1970s. The model is a detailed road map for representation taking role and duty confusion out of the picture. The model also discourages relaxed advocacy.*

Cons: *Critics argue the model still does not work well for young children and that the directive to resort to representation of the child's "legal interests" in some cases is not a meaningful directive. Critics complain that focusing on the child's so-called "legal interests" is unsatisfactory because the legal interests of the child may be unclear or contradictory. For example, a child has a legal interest in being protected from abusive or neglectful parents. The ABA Standards are also criticized for including broad exceptions to the client-directed ideal and thus giving the lawyer unfettered and unreviewed discretion identifying the goals of the child — the same sort of unbridled discretion that critics complain about in the best interests substituted judgment model.*

Jurisdictions Using a Form of This Model Include: *Iowa requires courts to appoint counsel for children. An attorney may serve as both the child's attorney and guardian *ad litem*. However, the court may appoint a separate guardian *ad litem* if a single person cannot represent the child's wishes and best interests. Maryland also requires that courts appoint an attorney who must advocate the wishes of the child if the child has the requisite "considered judgment." If the child lacks such judgment, the attorney should advocate the best interests of the child.*

Source: *ABA Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases, 1996 American Bar Association, Chicago, IL; Iowa Code § 232.89(4) (2010); MD Guidelines for Attys Rep CINA, A.*

3. Child's Attorney (ABA / NACC Model)

The *ABA Standards* were adopted by the ABA in 1996. The following year, the NACC adopted the standards with reservation as to Standard B-4. Standard B-4 is the critical client direction language of the standards and some members of the NACC board believed the *ABA Standards* gave too much autonomy to the child client and was unrealistic where young children were concerned. The *ABA Standards (NACC Revised Version)*, is the NACC's attempt to achieve a better balance of client

autonomy and protection within standard B-4. This child's attorney model places the attorney in the role of traditional attorney and addresses the needs of the young child through the application of an objective best interests evaluation in limited situations.

The model requires that the attorney assume the traditional role of zealous advocate and not GAL to avoid any propensity toward relaxed advocacy. At the same time, it recognizes that some children are not capable of directing their litigation. The model allows for a degree of advocate direction so long as it is the exception to the rule, and based on objective criteria.

The distinction between the *ABA Standards* and the *NACC Revised ABA Standards* is that where the ABA remained consistent with the client directed attorney throughout, the NACC carved out a significant exception where the client cannot meaningfully participate in the formulation of his or her position. In such cases, the NACC's version calls for a GAL type judgment using objective criteria. Additionally, the NACC's version *requires* the attorney to request the appointment of a separate GAL, after unsuccessful attempts at counseling the child, when the child's wishes are considered to be seriously injurious to the child.

Pros: *Proponents believe this is the best blending of the traditional attorney and attorney / GAL, providing the best of both options.*

Cons: *One critic has suggested that, by blending the attorney and GAL roles, this model dilutes both. The NACC model is also criticized for giving the lawyer unfettered and unreviewed discretion identifying the goals of the child — the same sort of unbridled discretion that critics complain about in the best interests advocate directed model.*

Jurisdictions Using a Form of This Model Include: *Connecticut requires courts to appoint an attorney that will advocate for the child in accordance with the Rules of Professional Conduct. If a conflict arises between the child's wishes and that which the child's attorney believes is in the best interest of the child, the court must appoint another person to serve as the child's guardian ad litem.*

Tennessee similarly mandates the appointment of an attorney who is required to advocate for the child's wishes. Tennessee's courts must resolve conflicts by either allowing the child's attorney to remain in his/her role, but appointing a separate guardian ad litem, or appointing a new attorney for the child, and allowing the current attorney to serve as the guardian ad litem.

Source: *ABA Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases, (NACC Revised Version) NACC Children's Law Manual Series, 1999 Edition, p. 177. Connecticut Gen. Stat. §46b-129(a)(2) (2010); Tenn. R. of Juv. P., R 2; Tenn. Sup. Ct R. 40(e).*

V. Resources

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