Personality Disorders and the Parent-Child Relationship: Breaking the Cycle of Generational Trauma in Family Courts

Ashtar Reem Abboud

Dec 18, 2024 21 min read

Summary

- Parental personality disorders and generational trauma can adversely impact the parent-child relationship and children's development.
- The Intergenerational Trauma Treatment Model provides a promising approach to addressing family conflict.

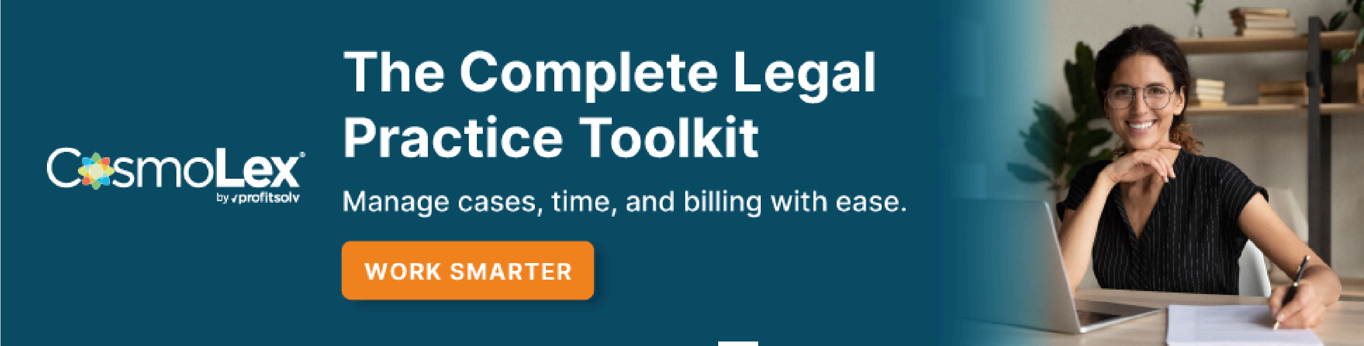
Thang Tat Nguyen/Moment via Getty Images

> This essay was awarded second place in the American Bar Association Family Law Section's 2023 Howard C. Schwab Memorial Essay Contest. The author would like to express her gratitude to her professors, Benjamin Wilson and William Froelich, for their unwavering support in the development of this article. They not only introduced her to the vast possibilities that alternative dispute resolution can offer, but also inspired and encouraged her to explore her ideas in depth. Their guidance and mentorship fostered her intellectual growth and confidence, and without their support, this article would not have been possible.

Introduction

Generational trauma (also known as *intergenerational* or *transgenerational trauma*) is trauma experienced by one individual that passes down from generation to generation. [1] Emerging research suggests that when an individual experiences a traumatic event or multiple traumatic events, their DNA can change in response. [2] "Being systematically exploited, enduring repeated and continual abuse, racism, and poverty" are just some of the traumatic experiences thought to cause genetic changes in an individual, which their descendants may then inherit. [3]

The concept is illustrated by the fictional example of BoJack Horseman. Although the show is primarily a comedy, BoJack's mental health is a central theme of the story. [4] On the outside, BoJack's life is filled with fame and fortune. [5] Nevertheless, on the inside, BoJack's struggles range from alcoholism, drug abuse, and unstable relationships to disordered eating, depression, and self-loathing. [6] One might wonder where these struggles come from for a horse who seems to have it all. Sure, looking at the demands of fame could provide insight into the question, but finding the true culprit requires a deeper look into BoJack's life, namely, his family tree. In doing so, it becomes clear that BoJack's mental health struggles did not start with him or his fame, or even with his broken relationship with his mother, Beatrice Horseman; the story goes back generations, beginning with BoJack's grandmother, Honey Sugarman. [7]



In the 1940s, Honey's son died fighting in WWII. [8] The traumatic experience triggered "intense and prolonged grief," leading to Honey's "inebriated, public breakdown." [9] Unable to deal with the emotional distress, Honey begged her husband to "fix" her by brutalizing her prefrontal cortex, ultimately leaving her with severe cognitive impairments. [10] But our story does not end with Honey's fix. Honey's daughter Beatrice—who witnessed her mother's breakdown—was tasked with keeping her fractured family together. [11] On top of taking on this insurmountable role, Beatrice was emotionally abused and neglected by her father. [12] The show highlights Beatrice's abusive and neglectful parenting of BoJack, and we see how BoJack's poor decision-making directly mirrors the abusive parenting he experienced as a child. [13] Later on in the show, we see the impact of BoJack's childhood on his relationship with his perceived-to-be daughter (actually his half-sister), Hollyhock, as he rebuffs her efforts to foster a healthy parent-child relationship. [14]

Another fictional example comes from the novel *Frankenstein*. Frankenstein's creator, Victor, received emotionally inconsistent affection from his parents, who treated him as "an object of their love, not a participant in it." [15] Having received sparing emotional intimacy as a child, Victor created Frankenstein, who would act as a source of unconditional love and affection. [16] But in the same way that Victor was an object of his own parent's love, Frankenstein embodied the same role, recreating Victor's parent-child relationship, with Victor as parent and Frankenstein as child. [17] As the cycle continued, Victor abandoned Frankenstein, and Frankenstein lacked any source of affection, leading him to a life of aggression and violence. [18]

The parent-child relationship can substantially influence an individual's personality, behaviors, and life path. The parent-child relationship may be impacted in situations where a parent has an untreated mental illness or a personality disorder. Generational trauma can contribute to personality disorders that can impact the parent-child relationship. [19] Although personality disorders were once thought of as mere reflections of "weakness of character or willfully offensive behavior," it is now accepted that they are

shaped by genetics and childhood experience. [20] With the growing research on generational trauma, there has been an increasing emphasis on providing effective treatments for childhood trauma. [21] While family law has come a long way in recognizing the importance of trauma-informed interventions, the focus is sometimes on preventing harm to the children of divorced or separated parents rather than addressing the trauma of the whole family. [22] In this article, I examine current issues in family law conflicts where one or both parents have a personality disorder. In Part I, I provide a background on what constitutes a personality disorder and how personality disorders develop. Next, in Part II, I explain the impacts of parental personality disorders on the parent-child relationship and a child's development. Finally, in Part III, I provide a trauma-informed system design proposal and advocate for a caregiver-first approach to breaking the cycle of generational trauma in the family courtroom.

I. Understanding Personality Disorders

A. Personality, Personality Pathology, and Personality Disorders

A *personality disorder* (PD) is "an enduring pattern of inner experience and behavior that deviates markedly from the norms and expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." [23]

To understand PDs, one must first understand the interaction between *personality*, personality *pathology*, and personality *disorder*. Everyone has a unique *personality*, i.e., "the phenotypic patterns of thoughts, feelings, and behaviors that uniquely define each of us." [24] Of importance, personalities do not simply encompass the "Big 5" *traits*—openness, conscientiousness, extroversion, agreeableness, and neuroticism—rather, personality "encompasses the major functional domains in human life and social interaction." [25] Each domain and the extensiveness of its expression, both internally and in one's social interactions, function to create an individual's personality. [26] As one can imagine, the complex interplay between these domains can create difficulty for an individual with varying degrees of severity. [27] On one end of the spectrum, an individual's personality may lead to minor problems with no significant impact on their functioning and social interactions. [28] Where an individual has "enduring patterns that simply make people's lives more complicated or lead to mild or episodic but temporary distress in themselves or the people around them," these issues may rise to the level of *personality pathology*. [29] Once these enduring patterns "involve dysfunction across

several or all of the domains of functioning" in two or more areas—cognition, affectivity, interpersonal functioning, or impulse control—only then may an individual have a personality *disorder*. [30]

The Fifth Edition, Text Revision to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) delineates 10 PDs, divided into three separate groups based on descriptive similarities: paranoid (PPD), schizoid (ScPD), schizotypal (SPD), antisocial (ASPD), borderline (BPD), histrionic (HPD), narcissistic (NPD), avoidant (AVPD), dependent (DPD), and obsessive-compulsive (OCPD). [31]

B. Nature versus Nurture: Not a Contest

The seemingly everlasting debate between nature and nurture has long been a source of dispute among scholars. The idea is that genes (nature) and environment (nurture) are two distinct concepts: "you're born with certain genetic code that determines your biology and health and you have experiences that shape more malleable things like character and values." [32] Over the years, however, scholars have begun to understand the two models not as distinct but as two interrelated concepts. [33] Thus, the question presents a logical fallacy: It is neither nature nor nurture. The answer is both: Environment *and* genetic code can shape biology *and* behavior. [34] It follows that PDs emerge from "biological susceptibilities shaped by genetic dispositions in concert with environmental insults," specifically *trauma*. [35]

Thus, to understand how PDs develop, we must understand the relationship between genetics and environment, a relationship captured by *generational trauma*. In 1966, Canadian psychiatrist Vivian M. Rakoff found "high rates of psychological distress among children of Holocaust survivors," leading researchers to "assess[] anxiety, depression, and PTSD in trauma survivors" and their descendants. [36] Although there is still a lot to learn about generational trauma, some researchers believe *epigenetics* can explain the transmission of trauma. *Epigenetics* refers to "environmentally driven molecular processes that can turn genes on or off." [37] According to some epigenetic researchers, an individual's environment, including a traumatic experience, can cause changes to their DNA. [38] This DNA change can pass down, leading to biological susceptibilities in subsequent generations. [39] The genes can then be "turned on" due to exposure to environmental factors, such as childhood adversities. [40] With PDs, studies suggest strong evidence for the heritability of such disorders. [41] For example, heritability estimates for BPD vary between 40% and 60% and 40% to 50% for ASPD. [42] As discussed, however, genetic makeup is not the only cause of PDs; environmental influences also play a role.

Studies show that early attachment interactions are crucial in developing an individual's ability "to regulate affect and stress, to mentalize, and to acquire attentional control and a sense of self-agency." [43] Thus, *attachment theory* provides key insight into how PDs develop. [44] Attachment theory was developed in the 1950s by British psychoanalyst John Bowlby. [45] The general idea is that an individual's attachment patterns will mirror the attachment pattern they had with their parents as children:

> If this caregiver is responsive and emotionally available when the infant needs comfort and security and has allowed independent exploration of the environment, the infant is likely to feel safe and valued in the relationship. This pattern of relating is internalized and becomes a model for operating in future relationships. Should the caregiver be unavailable when the infant is distressed, and should he or she curtail exploration of the environment, the infant is likely to feel unsafe, not valued by his caregiver, and incompetent in the world at large. Because attachment relationships are transactional, these interactions continue to be absorbed into a working paradigm about future relationships as insecure and the child approaches future relationships with an expectation that is often confirmed. [46]

These interactions form a pattern of attachment, i.e., *attachment style*, that shapes personality development, expectations of social acceptance, and attitudes toward rejection and influences close relationships later in life. [47] Two categories of attachment styles exist, separated into four specific patterns: secure attachment—which includes *secure* pattern of attachment—and insecure attachment—which includes *preoccupied* (or *anxious*), *dismissive* (or *avoidant*), and *unresolved* (or *disorganized*) patterns of attachment. [48]

Scholars have discovered a link between attachment theory and the "enduring and persistent dysfunctional adaptation[s]" found in PDs. [49] Attachment theory's "capacity to link early childhood to later patterns of enduring adaptation" and "its description of patterns . . . analogous to dispositional characteristics of individuals with PD" support this connection. [50] For example, individuals with a preoccupied attachment style may engage in hyperactivating strategies, i.e., using intense efforts to attain proximity to an attachment figure. [51] Similarly, BPD and DPD are characterized by intense efforts to avoid real or perceived abandonment or neglect. [52] Because preoccupied attachment styles are thought to result from a history of inconsistent caregiving, it then follows that a similar history can contribute to the development of PD. [53] The cause of PDs is both

nature (explained by genetic code and generational trauma) and nurture (explained by environmental influences and attachment theory). [54]

II. The Impacts of Parental Personality Disorders on Children

A. Personality Disorders and the Parent-Child Relationship

Defining "good parenting" is a complex and highly subjective task. [55] Even so, parents need certain psychological capacities to help their children learn skills such as emotional regulation and the ability to form healthy relationships throughout their lives. [56] These include the capacity to manage one's own distress and anxiety without resorting to anger, hyperarousal, or fear; plan and think ahead; respond empathetically to another individual's distress; work with a community of adults involved in a child's welfare, such as family, professionals, and other parents; perceive vulnerability with compassion and concern; ask for and value help; tolerate negative affects without taking impulsive actions or catastrophizing; tolerate waiting for one's own needs to be met; and encourage pleasure and a sense of humor. [57] Depending on the PD, a parent can lack several, or all, of these capacities. [58] In turn, a parent's PD can impact the parent's interactions with their children and overall family dynamics. [59]

Studies show that the quintessential parental quality necessary for healthy child development is parental empathy, which allows for a parent to be attuned to their child's authentic experiences, vulnerability, and needs. [60] Impairments in empathy manifest in a lack of concern for the feelings, needs, or sufferings of others, as well as lacking remorse after hurting or mistreating another. [61] A parent who lacks empathy cannot comprehend their child's feelings, from happiness and affection to sadness and distress. [62] As a result, the parent discourages their child's feelings and needs and is incapable of recognizing the impact of their actions. [63] Lack of empathy is often seen in parents with ASPD and NPD. [64] Others, such as avoidant personality disorder, also may have difficulties with empathy. [65]

Related to the capacity for empathy, a parent's emotional availability is crucial to the parent-child relationship. [66] Each PD is characterized by some impact on emotional availability, leading to parents who are emotionally unavailable, unpredictable, or hostile. [67] For example, individuals with PPD have a "pervasive distrust and suspiciousness of

others. . . ." [68] As a result, they are reluctant to confide in or become close to others, which can lead to an emotionally unavailable parent. [69] At the same time, they are constantly wary about the harmful intentions of others. [70] They may perceive others' actions as attacks, even when no objective evidence supports their belief, and can be quick to respond with hostility and "overt argumentativeness." [71] Thus, a parent living with PPD may raise a child in an emotionally unavailable, unpredictable, *and* hostile environment. [72] BPD also is characterized by "affective instability," although for different reasons. [73] These individuals are highly reactive to interpersonal stresses, are hypervigilant to threats of neglect or abandonment, and alternate between "extremes of idealization and devaluation," i.e., *splitting*. [74] As such, they can show extreme love and affection in one instance but shift to extreme anger and hostility in the next. [75] "[E]xpressions of anger are often followed by shame and guilt." [76] Such parents "may engage in contradictory behaviors," leading to "instability in their interactions with their children" and creating an unpredictable and hostile environment for them. [77]

Another essential component of the parent-child relationship is the ability to focus on their child's needs above their own. [78] Many individuals living with PDs lack the psychological capacity to meet their own emotional and psychological needs, often relying on their children to meet those needs. [79] The result is a "pathological role-reversal relationship" ("*psychological enmeshment*") in which the parent violates, manipulates, and exploits their child's psychological integrity to meet their needs. [80] In comparison, "[i]n a healthy parent-child relationship, the *child* uses the parent to meet the *child's* emotional and psychological needs." [81] The Frankenstein family presents a perfect example of this type of psychological enmeshment. In a desperate search for the love and affection he lacked as a child, Victor created Frankenstein. [82] Before even being created, Frankenstein's purpose was clear: to fulfill his creator's need for unconditional love and affection. [83]

This type of parent-child relationship can exist when a parent is living with a PD. For example, parents with NPD can be "seen as treating their children as extensions of themselves" and thus expect them to fulfill their own needs rather than the other way around. [84] This role reversal, however, is not merely a consequence of a parent's lack of empathy; individuals with BPD, for example, can empathize with and nurture others. [85] This ability, however, is contingent on the expectation that the other person will, in return, meet their own needs. [86] Psychological enmeshment also can result from a parent who simply cannot meet their own needs, as with DPD. [87] Individuals living with DPD need

others to assume responsibility for most areas of their lives, going to "excessive lengths to obtain nurturance and support from others. . . ."[88] Psychological enmeshment can occur in a parent-child relationship where the parent is pathologically dependent on others to meet their needs.[89]

Finally, some individuals with PDs have an extreme need for control.[90] In the parent-child relationship, attempts at control can be both *behavioral* and *psychological*.[91] *Behavioral control* refers to "parental attempts to regulate and structure the child's behavior," such as their manners, study activities, and peer involvement.[92] Conversely, *psychological control* refers to parental attempts to regulate the child's psychological experiences, such as "feelings, aspirations, and identity choices," through "manipulative techniques," including "contingent love, shaming, and guilt induction. . . ."[93] Since individuals living with PDs often cannot manage their anxieties, tolerate negative emotions, or wait to have their needs met, they may resort to controlling their environments and those around them.[94] For example, an essential feature of OCPD is a "pervasive pattern of preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency. . . ."[95] Their emphasis on perfectionism often extends to those around them, forcing "themselves and others to follow rigid moral principles" and stringent performance standards and insisting that others conform to their way of doing things.[96] Other PDs, such as HPD,[97] PPD,[98] ASPD,[99] and NPD,[100] are also prone to parental attempts to control their children.

In a family where both parents have a PD, both parents may contribute to family dysfunction, leaving children without a healthy relationship with either parent.[101] Furthermore, parental PDs can significantly impact children beyond the parent-child relationship and the overall family dynamics.[102] They can influence children's attachment patterns, increase their risk for mental illnesses,[103] and even have damaging and long-lasting effects on their brain development.[104]

B. Impact of Parental Personality Disorders on Children's Development

Beginning in infancy, a child's interactions with their caregivers shape the development of their brain.[105] Moreover, studies show that any form of child maltreatment can cause neurobiological and permanent changes in a child's brain.[106] Children who have parents with PDs and experience instability in their parental relationships may experience chronic stress.[107] This chronic stress leads to overactivation of the hypothalamic-pituitary-adrenal axis (HPA), the mechanism responsible for controlling reactions to stress and

regulating physiological processes, including metabolism, immune responses, and the autonomic nervous system. [108] Overactivation of the HPA causes excess secretion of *cortisol* (the primary hormone for the fight or flight response), leading to a reduction in the volume of the hippocampus, overactivation of the amygdala, and impairments in the prefrontal cortex (similar to *Honey Sugarman's fix*). [109]

The hippocampus plays a major role in learning, forming, and retrieving verbal and emotional memories. [110] Excess cortisol production leads to hyperarousal of the hippocampus, which in turn leads to the misinterpretation of signals (from the natural environment, individuals, or situations) as "constant threats." [111] The hippocampus then sends these threat signals to the amygdala, the part of the brain responsible for regulating fear and aggression. [112] Overactivation of the amygdala results in unstable, unpredictable, and intense emotional turmoil in response to minor stresses, a delay in returning to baseline, and impairments in the prefrontal cortex (PFC). [113] The PFC controls an individual's cognitive abilities by regulating thoughts, actions, and emotions; inhibiting inappropriate actions; and promoting task-relevant operations. [114] Chronic stress during childhood may have a particularly large effect on the PFC by altering and weakening its structure, which can have enduring effects on the adult PFC. [115] In summary, parental PDs not only cause a strain in the parent-child relationship, but also can cause their children to experience continuous stress, which can detrimentally alter their child's brain.

III. A System Design Proposal for Working with Parental Personality Disorders in Family Law Conflicts: Introducing Generational Trauma into the Courtroom

Over the years, family courts have been moving away from the traditional adversary system, and alternative dispute resolution (ADR) has become widely accepted in resolving child custody and parenting disputes. [116] Examples of interventions include parenting education programs, mediation, counseling interventions, assessments, parenting coordination, supervised visitation, and monitoring programs. [117]

Although these interventions are beneficial because they recognize the impacts of divorce on children and apply a trauma-informed approach, they fall short by not considering the impacts of generational trauma on family conflicts. To remedy this shortcoming, I make four proposals: (1) appreciate that the effects of trauma are not only prevalent in families deemed "high-conflict"; (2) transition from the "best interests of the child" to a "best

interests of the family" standard; (3) recognize the importance of past experiences on current relationships; and (4) apply a caregiver-first approach to treating family conflicts.

A. It's Not About "High-Conflict"

While certain interventions are more intensive and take a therapeutic approach in handling family law conflicts, they are generally reserved for those families deemed high-conflict. [118] For example, parents who quickly come to an agreement through traditional mediation may, at most, attend a brief parenting education program. [119]

Studies on the relationship between high-conflict personalities and PDs find that individuals living with BPD, NPD, ASPD, HPD, or PPD are most often involved in high-conflict disputes. [120] Other PDs that do not share the same high-conflict traits may slip through the court's selection process. Take, for instance, a case example of an individual living with ScPD:

> Betty recently found out that her husband is having an affair. When her husband confronted her with the news, she felt a sense of relief, as she often did not enjoy sex or intimacy with him and viewed their marriage as a necessity in her life, a role she had to fill. Soon after, her husband divorced her and obtained custody of their son *without any contention fromBetty*. Betty is currently pleased with her life, living alone in a small apartment, and receiving a monthly alimony check that covers her basic needs so she can continue to read her books and watch TV. [121]

A court would likely consider Betty's divorce low-conflict. That should not mean, however, that the family is in any less need of intensive intervention than had Betty been living with, say, NPD. [122] Individuals living with Cluster C PDs are also less likely to be involved in high-conflict disputes because they have generally adopted methods of avoiding conflicts and do not seek to prolong disputes. [123] As discussed above, however, *all* parental PDs can significantly impact children.

Furthermore, low-conflict divorce can be just as damaging to a child's well-being as those that are high-conflict. [124] In addition to exposure to interparental conflict, the quality of parenting is a critical factor that influences a child's post-divorce adjustment. [125] High-quality parenting is characterized by high levels of "affectively positive, affirming parent-child interactions"; responsiveness to children's needs; and effective discipline by

consistently and fairly enforcing rules.[126] When these characteristics are missing, the risk of divorce negatively impacting a child's mental health increases, along with increasing the risk of substance abuse and social adaptation problems post-divorce.[127] Thus, divorce may still negatively impact a child's well-being even when there is low interparental conflict.

Rather than using the intensity and duration of the conflict to measure when more intervention is needed, family courts should measure the risk for negative post-divorce relationships. One way to assess for a risk of a negative post-divorce relationship is to introduce a screening tool in the early stages of the divorce process. The Adverse Childhood Experiences International Questionnaire (ACE-IQ) measures Adverse Childhood Experiences (ACEs)[128] and the association between those experiences and risk behaviors later in life.[129] The questionnaire covers "family dysfunction; physical, sexual, and emotional abuse and neglect by parents or caregivers; peer violence; witnessing community violence, and exposure to collective violence."[130] In a study on the relationship between parents' childhood trauma and the quality of co-parental relationships, researchers found that parents who reported four or fewer ACEs also reported higher-quality co-parenting.[131] By introducing the ACE-IQ in the early divorce stages, courts can better identify families at higher risk for negative post-divorce relationships and select the appropriate interventions.

B. Rethinking the "Best Interests of the Child" Standard

When courts make decisions regarding custody or access disputes, they generally apply the "best interests of the child" standard.[132] The standard is a "case-by-case determination of what living arrangements would best meet the particular needs" of the children.[133] As a result, even those interventions designed to help parents build skills or provide them with treatment are based on the premise that such interventions are in the child's best interest.[134] The idea is that by equipping parents with better parenting and conflict-resolution skills and educating them on the impacts of divorce on their children, programs can mitigate the negative effects divorce and conflict can have on their children.[135] Scholars have argued that trauma-informed parent education programs can promote parents' *and* children's best interests.[136] While I agree with their stance and fully support their recommendations, I believe more is required. Generational trauma and family systems theory underscore the interdependence of parents' and children's interests.[137] Moreover, studies show that improving family health[138] can reduce children's adverse family experiences.[139] Thus, rather than distinguishing between the

interests of the parents and the children, the standard should be transformed from the "best interest of the child" to the "best interest of the family." By making this shift, interventions can be better focused on methods that emphasize the importance of each family member's health on the other members and the family's overall health.

C. The Past Informs the Future: Finding the Source of the Trauma

Most of the interventions used in family court are future-oriented. The focus is on developing skills and educating parents about the impacts of family conflicts on their children and how to address their children's needs. [140] When it comes to healing generational trauma, however, experts emphasize the importance of looking at the past. [141] Thus, the first step in an intervention program is to identify the source of the trauma. [142] One source of trauma can be an adverse childhood experience, which includes experiencing physical or emotional abuse, abandonment, or neglect; losing a family member to suicide; growing up in a household with substance abuse or alcoholism; having a parent living with a mental illness; having an incarcerated parent; or being a child of divorce or parental separation. [143] Generational trauma also can result from a family history of systematic exploitation, repeated and continual abuse (such as domestic violence and sexual assault or abuse), racism, and poverty. [144] Thus, identifying the source of the trauma requires an in-depth look at a family's history. [145]

Marriage and family therapies often use *family diagrams* and *genograms* to understand the factors impacting family dynamics. [146] *Family diagrams* are "schematic diagram[s] of the three-generational family relationship system." [147] *Genograms*, the descendant of the family diagram, are a combination of the "genealogical family tree and the family diagram." [148] In order to create these tools, clinicians collect data on each family member, such as their "education, occupational history, physical and emotional health, birth dates, death dates and causes," and "cultural and ethnic backgrounds." [149] The tools assist clinicians in evaluating (1) the "family structure and composition," including "current marital configuration and information on sibling birth and spacing"; (2) the "particular place of the family in the life cycle"; (3) the "presence or absence of multigenerational patterns that include various symptoms and cutoffs"; (4) the family roles; and (5) the family's overall functioning. [150] By integrating family diagrams or genograms into family conflicts, interventions can begin to help families better understand the root of their traumas and assist legal and mental health professionals in developing a tailored plan. [151]

D. A Caregiver-First Approach

With the growing understanding of adverse childhood experiences and their associations with adult physical and mental illnesses, chronic disease, and risk for violent victimization, we have become aware that these childhood traumas are a "major underreported source of adult health problems." [152] However, most methods, even those that include parents, take a child-centered approach. [153] One complex program has emerged that takes a caregiver-first approach and addresses the unresolved trauma history of the parent or caregiver. [154] The Intergenerational Trauma Treatment Model (ITTM) takes the position that parents are "the primary agents of change for the child." [155] Because a parent's unresolved trauma may impact the parent-child relationship, [156] courts must integrate interventions focused on treating both parents and children.

The ITTM offers a promising model. The ITTM is conducted in three phases: Phase A ("Trauma Information Sessions"), Phase B ("Caregiver Treatment Sessions"), and Phase C ("Child-Therapist Sessions Co-Directed by Therapists and Caregivers"). [157] Phase A is a six-week course involving six 90-minute psychoeducational sessions in a group of up to 50 caregivers. [158] Caregivers receive education on topics such as trauma; "differences in the experience of trauma for children and adults"; the caregivers' role in the parent-child relationship; "thoughts, feelings and actions associated with cycles of self-defeating behaviors, and anger and emotional regulation." [159] The goals of the sessions are "(1) to develop caregiver empathy for their child's experience, (2) to reposition caregivers[] to be better able to provide their children with security and containment, (3) to improve caregiver self-regulation and disengage them from conflict with their child, and (4) to develop caregiver hope, self-efficacy and motivation for change." [160]

Phase B involves an average of eight individual treatment sessions with the children's caregivers. [161] In the earlier sessions, the clinician assesses caregivers' understanding of the material from Phase A and potential barriers to a caregiver's ability to engage fully in the intervention. [162] After assessment, the sessions focus on assisting caregivers in identifying "their most impactful childhood experience" and creating "detailed diagrams of the thoughts, feelings and actions associated with" the experience. [163] The goals of the sessions are helping caregivers understand their trauma and "ma[ke] changes in their own faulty belief system"; increasing caregiver empathy for their child's traumatic experiences and resulting understandable behaviors and symptoms; disengaging caregivers from "conflictual interactions with their child"; and developing caregivers' "emotional attunement with the[ir] child and the capacity to provide containment for the child's traumatic experience(s) and symptoms." [164]

Finally, "Phase C consists of three to eight [treatment] sessions for the child with the caregiver present." [165] The clinician begins each session by meeting with the caregiver "to review homework, share observations, and plan for the session." [166] The clinician then works with the child on "processing trauma and attachment-related issues," with the caregiver observing. [167] Finally, the clinician meets with the caregiver again to discuss and reflect on the child's reactions, revelations, and behaviors during the treatment session. [168] In this phase, the clinician and the caregiver act as co-leaders to positively change the child's life experiences. [169] The goals of the sessions are to support caregivers in helping their children "regulate their emotion[s], interrupt negative behavioral patterns or address unresolved traumatic grief." [170]

The possible benefit of using this model for family conflict interventions is "its explicit recognition of the strong intergenerational component" of families' traumatic experiences. [171] It can provide parents with the tools necessary to resolve their own trauma, which is often a barrier to effective conflict resolution and a healthy parent-child relationship. [172] Additionally, it emphasizes the importance of familial bonds by involving parents in the children's therapy and strengthening the parents' therapeutic skills as they co-direct their children's treatment. [173] While this model is intensive and may not be necessary for many families, the combination of each of these recommendations—screening for risk of negative post-divorce relationships, transitioning to a best interests of the family standard, recognizing the importance of past experiences, and taking a caregiver-first approach—allows courts to determine appropriate interventions that recognize and address the impacts of generational trauma.

Conclusion

The parent-child relationship shapes an individual's personality, behaviors, and life path. Moreover, with the growing understanding of generational trauma and how it impacts families, family law must begin to focus on the generational effects of conflict. While this article concentrates on parental PDs, these recommendations also may apply to any family conflicts where a parent is living with a mental illness. Furthermore, divorce itself, while unavoidable, can be a source of generational trauma. [174] As such, family courts must learn from generational trauma and tailor interventions toward remedying its effect and breaking the cycle.

Endnotes

1. Claire Gillespie, *What Is Generational Trauma?*, HEALTH (Mar. 13, 2023), https://www.health.com/condition/ptsd/generational-trauma [https://perma.cc/QKX7-AYSR].

2. *Id.*

3. *Id.* (quoting Dr. Gayani DeSilva).

4. Charlie Gearon, "*You Were Born Broken"–Bojack Horseman and the Impact of Family on Mental Health*, HUFFPOST (Nov. 9, 2017), https://www.huffingtonpost.co.uk/charlie-gearon/bojack-horseman_b_17949068.html [https://perma.cc/X2S2-LZV2].

5. Amelia Kidd, *"BoJack Horseman" Makes Sense If You Know About Intergenerational Trauma*, DOT & LINE (Sept. 14, 2017), https://dotandline.net/bojack-horseman-intergenerational-trauma-b96033050df5/ [https://perma.cc/BY5V-XEW8].

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* This is an important metaphor whose significance will become clearer in the subsequent parts of this article. See *infra* Part II.B. As a preliminary explanation, the prefrontal cortex is responsible for cognitive functioning, moral reasoning, impulse control, affect regulation, and more. Of importance to this article, traumatic events have been found to have significant impairments on the functioning and development of the prefrontal cortex. Jim Hopper, *Sexual Assault: Brain, Behavior and Memory* (Tufts Univ.), YOUTUBE (July 2015), https://www.youtube.com/watch?v=dwTQ_U3p5Wc [https://perma.cc/9528-FA79].

11. Kidd, *supra* note 5.

12. *Id.*

13. Gearon, *supra* note 4.

14. Kidd, *supra* note 5.

15. MARY WOLLSTONECRAFT SHELLEY, FRANKENSTEIN; OR, THE MODERN PROMETHEUS (1818); Laura P. Claridge, *Parent-Child Tensions in* Frankenstein*: The Search for Communion*, 17 STUD. IN NOVEL 14, 15 (1985).

16. Hannah Jackson, *Creating a Monster: Attachment Theory and Mary Shelley's* Frankenstein, 20 OSWALD REV. 51, 55 (2018).

17. *Id.* at 55–56.

18. *Id.* at 59.

19. See *infra* Part II.

20. John M. Oldham, *Personality Disorders: Recent History and New Directions*, *in* The American Psychiatric Association Publishing Textbook of Personality Disorders 3, 3–4 (Andrew E. Skodol & John M. Oldham eds., 3rd ed., 2021) [hereinafter Textbook of Personality Disorders].

21. *See* Katreena L. Scott & Valeria E. Copping, *Promising Directions for the Treatment of Complex Childhood Trauma: The Intergenerational Trauma Treatment Model*, 1 JOBA-OVTP 273 (2008).

22. *See* Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help*, 22 U. Ark. Little Rock L. Rev. 453, 453 (2000).

23. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed., Text Revision 733 (2022) [hereinafter DSM-5-TR].

24. Oldham, *supra* note 20, at 3.

25. Drew Westen & Amy R. Kegley, *Theories of Personality and Personality Disorders*, *in* Textbook of Personality Disorders, *supra* note 20, at 13, 14; Kendra Cherry, *What Are the Big 5 Personality Traits?*, Verywell Mind (Mar. 11, 2023), https://www.verywellmind.com/the-big-five-personality-dimensions-2795422 [https://perma.cc/HTB3-MVX7].

26. Westen & Kegley, *supra* note 25, at 14.

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.*; DSM-5-TR, *supra* note 23, at 735.

31. DSM-5-TR, *supra* note 23, at 733.

32. Nadine Burke Harris, The Deepest Well: Healing the Long-Term Effects of Childhood Trauma and Adversity 82 (2018).

33. *Id.*

34. *Id.*

35. Sharely Fred Torres et al., *Genetics and Neurobiology*, *in* TEXTBOOK OF PERSONALITY DISORDERS, *supra* note 20, at 189, 189. The DSM-5-TR defines trauma in the context of posttraumatic stress disorder as "[e]xposure to actual or threatened death, serious injury, or sexual violence. . . ." DSM-5-TR, *supra* note 23, at 301.

36. Tori DeAngelis, *The Legacy of Trauma: An Emerging Line of Research Is Exploring How Historical and Cultural Traumas Affect Survivors' Children for Generations to Come*, 50 MONITOR ON PSYCH. 36, 39 (Feb. 2019).

37. *Id.* at 42.

38. *Epigenetics and Child Development: How Children's Experiences Affect Their Genes*, HARV. UNIV. CTR. ON DEVELOPING CHILD, https://developingchild.harvard.edu/resources/what-is-epigenetics-and-how-does-it-relate-to-child-development/ (last visited Feb. 27, 2024).

39. *See id.*

40. *See id.*

41. *See generally* Torres et al., *supra* note 35.

42. *Id.* at 191, 210.

43. Peter Fonagy et al., *Development, Attachment, and Childhood Experiences*, *in* TEXTBOOK OF PERSONALITY DISORDERS, *supra* note 20, at 167, 167.

44. Sonia G. Austrian with Toni Mandelbaum, *Attachment Theory*, in DEVELOPMENTAL THEORIES THROUGH THE LIFE CYCLE 365, 366 (Sonia G. Austrian ed., 2008). Bowlby claimed that human beings are born with an innate psychobiological system (*attachment behavior*) that induces them to turn to parents, children, or romantic partners (*attachment figures*) in times of need. Fonagy et al., *supra* note 43, at 168 ("Attachment theory (Bowlby 1969) describes how individuals manage their most intimate relationships with their 'attachment figures': their parents, children, and romantic partners."); *see* 1 JOHN BOWLBY, ATTACHMENT AND LOSS (1969).

45. Austrian, *supra* note 44, at 365.

46. *Id.* at 370.

47. *See* Fonagy et al., *supra* note 43, at 168.

48. *See id*.

49. *Id.* at 171.

50. *Id.*

51. *See id.* at 169.

52. DSM-5-TR, *supra* note 23, at 770 ("Both dependent personality disorder and borderline personality disorder are characterized by fear of abandonment … the individual with borderline personality disorder reacts to abandonment with feelings of emotional emptiness, rage, and demands … the individual with dependent personality disorder reacts with increasing appeasement and submissiveness and urgently seeks a replacement relationship to provide caregiving and support.").

53. *See* Fonagy et al., *supra* note 43, at 171 ("The characteristics, behaviors, and symptoms associated with insecurely attached adults are often manifested by individuals with a PD. Studies of attachment patterns in people with PDs … indicate that such individuals show higher rates of insecure attachment than the general population.") (citations omitted).

54. *See id.*; Torres et al., *supra* note 35, at 189.

55. *See* Gwen Adshead, *Parenting and Personality Disorder: Clinical and Child Protection Implications*, 21 BJPsych Advances 15, 15 (2015).

56. *Id.*

57. 57. *Id.*

58. *Id.* at 16–17; *see, e.g.*, DSM-5-TR, *supra* note 23, at 750 (ASPD).

59. *See* Adshead, *supra* note 55, at 16.

60. *See id.*; C.A. Childress, The Narcissistic Parent: A Guidebook for Legal Professionals Working with Families in High-Conflict Divorce 4 (2016); Janet Weinstein & Ricardo Weinstein, *"I Know Better Than That": The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & Fam. Stud. 351, 371–72 (2005).

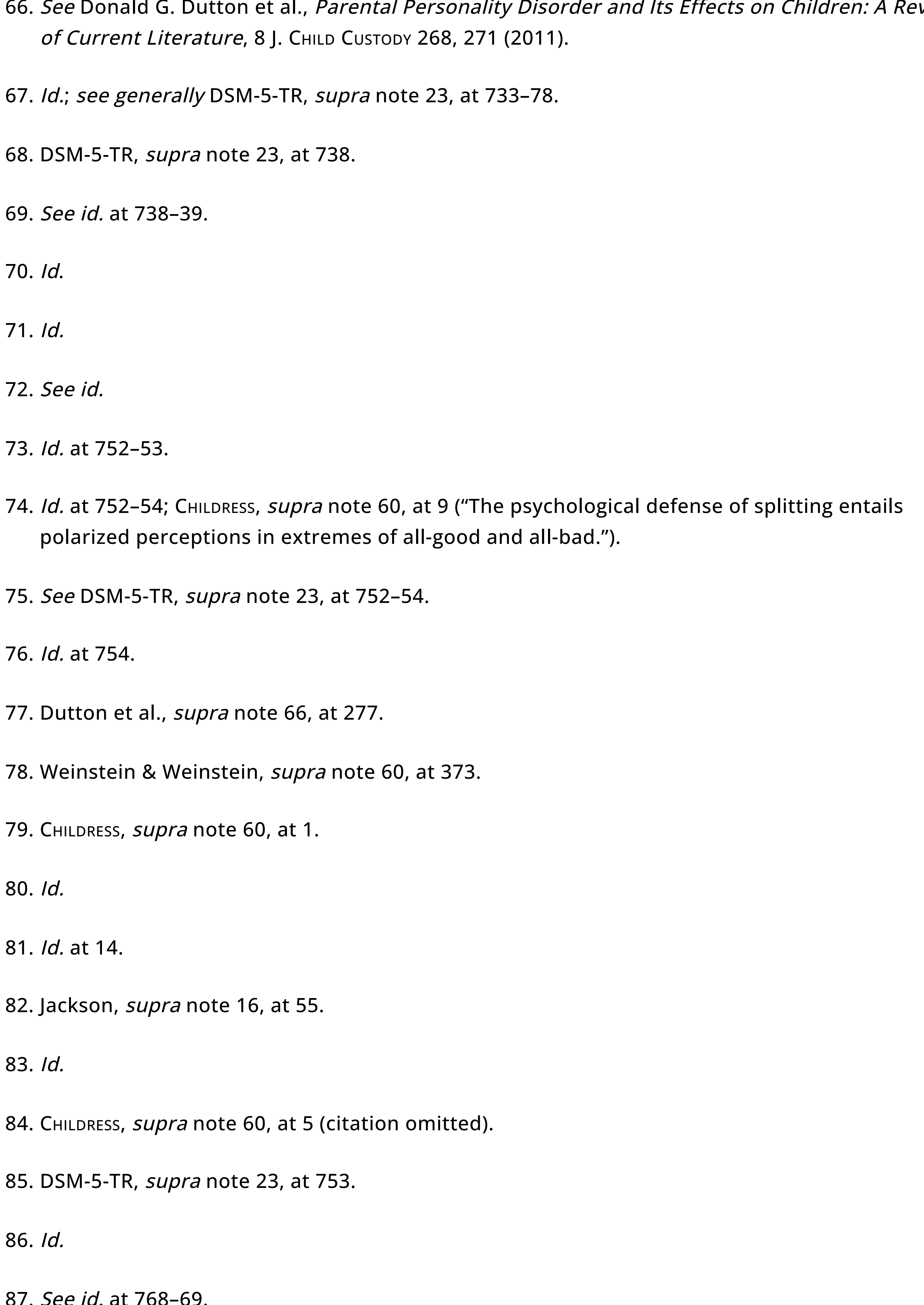
61. *See* DSM-5-TR, *supra* note 23, at 761–62 (NPD).

62. *See* Childress, *supra* note 60, at 1, 4.

63. *See* Weinstein & Weinstein, *supra* note 60, at 371–72; Childress, *supra* note 60, at 4.

64. DSM-5-TR, *supra* note 23, at 749 ("Individuals with antisocial personality disorder frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others."), 761 ("Individuals with narcissistic personality disorder generally have a lack of empathy and are unwilling to recognize or identify with the desires, subjective experiences, and feelings of others. . . .").

65. *Id.* at 766, 885.



66. *See* Donald G. Dutton et al., *Parental Personality Disorder and Its Effects on Children: A Review of Current Literature*, 8 J. Child Custody 268, 271 (2011).

67. *Id.*; *see generally* DSM-5-TR, *supra* note 23, at 733–78.

68. DSM-5-TR, *supra* note 23, at 738.

69. *See id.* at 738–39.

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.* at 752–53.

74. *Id.* at 752–54; Childress, *supra* note 60, at 9 ("The psychological defense of splitting entails polarized perceptions in extremes of all-good and all-bad.").

75. *See* DSM-5-TR, *supra* note 23, at 752–54.

76. *Id.* at 754.

77. Dutton et al., *supra* note 66, at 277.

78. Weinstein & Weinstein, *supra* note 60, at 373.

79. Childress, *supra* note 60, at 1.

80. *Id.*

81. *Id.* at 14.

82. Jackson, *supra* note 16, at 55.

83. *Id.*

84. Childress, *supra* note 60, at 5 (citation omitted).

85. DSM-5-TR, *supra* note 23, at 753.

86. *Id.*

87. *See id.* at 768–69.

88. *Id.* at 769.

89. *See id.* at 768–69.

90. *See generally id.* at 733–78.

91. Bart Soenens & Maarten Vansteenkiste, *A Theoretical Upgrade of the Concept of Parental Psychological Control: Proposing New Insights on the Basis of Self-Determination Theory*, 30 Developmental Rev. 74, 74–75 (2010).

92. *Id.* at 75.

93. *Id.* at 76.

94. *See generally* DSM-5-TR, *supra* note 23, at 733–78.

95. *Id.* at 771.

96. *Id.* at 772.

97. *Id.* at 757 (individuals living with HPD may "feel unappreciated when they are not the center of attention").

98. *Id.* at 739 (individuals living with PPD "seek to maintain complete control of intimate relationships").

99. *Id.* at 749 (individuals living with ASPD are "frequently deceitful and manipulative in order to gain personal profit or pleasure").

100. Childress, *supra* note 60, at 18.

101. *See* Dutton et al., *supra* note 66, at 270.

102. *See id.* at 271–73.

103. *See* Adshead, *supra* note 55, at 16.

104. *See id.* at 17–18.

105. *Id.*

106. Pranita Mainali et al., *From Child Abuse to Developing Borderline Personality Disorder into Adulthood: Exploring the Neuromorphological and Epigenetic Pathway*, 12 Cureus, no. 7, July 30, 2020, art. e9474 at 1–2.

107. Dutton et al., *supra* note 66, at 277.

108. Julietta A. Sheng et al., *The Hypothalamic-Pituitary-Adrenal Axis: Development, Programming Actions of Hormones, and Maternal-Fetal Interactions*, 14 Frontiers Behav. Neuroscience, no. 14, Jan. 13, 2021, art. 601939 at 1–2; Mainali et al., *supra* note 106, at 2.

109. Mainali et al., *supra* note 106, at 2.

110. Martin H. Teicher, *Scars* T*hat* W*on't* H*eal: The Neurobiology of Child Abuse*, 286 Sci. Am. 68, 70 (2002).

111. Mainali et al., *supra* note 106, at 3.

112. *Id.*

113. *Id.*

114. Amy F. T. Arnsten, *Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function*, 10 Nature Rev. Neuroscience 410, 410 (2009).

115. *Id.* at 418–19.

116. Karen Oehme et al., *Trauma-Informed Co-parenting: How a Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents' and Children's Best Interests*, 39 U. Haw. L. Rev. 37, 39–42 (2016).

117. *See* Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Fam. L.Q. 617 (1999).

118. *See* Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Model*, 51 Fam. Ct. Rev. 131, 136, 143 (2013).

119. *See id.* at 134.

120. Bill Eddy, High Conflict People in Legal Disputes loc. 524 (2d ed. 2016) (ebook).

121. Daniel J. Fox, The Clinician's Guide to the Diagnosis and Treatment of Personality Disorders 35 (2014) (emphasis added).

122. Kathleen Kelleher, *"Low Conflict" Divorces May Be Harder on Kids*, L.A. Times (July 9, 2001), https://www.latimes.com/archives/la-xpm-2001-jul-09-cl-20178-story.html.

123. Eddy, *supra* note 120, at loc. 543.

124. Kelleher, *supra* note 122.

125. Irwin Sandler et al., *Effects of Father and Mother Parenting on Children's Mental Health in High- and Low-Conflict Divorces*, 46 Fam. Ct. Rev. 282, 282 (2008).

126. *Id.* at 283.

127. *Id.* at 292–93.

128. ACEs are traumatic events that occur in childhood that can have lasting impacts on an individual's mental and physical health. *See* Wendy Wisner, *What Are Adverse Childhood Experiences (ACEs)?*, VERYWELL MIND (Aug. 18, 2024), https://www.verywellmind.com/what-are-aces-adverse-childhood-experiences-5219030 [https://perma.cc/JZ5S-AP8Y].

129. *Adverse Childhood Experiences International Questionnaire (ACE-IQ)*, WORLD HEALTH ORG. (Jan. 28, 2020), https://www.who.int/publications/m/item/adverse-childhood-experiences-international-questionnaire-(ace-iq) [https://perma.cc/3WHQ-WKFN].

130. *Id.*

131. *See* Anthony J. Ferraro et al., *Improving Court-Mandated Divorce Education by Recognizing the Effects of Parents' Childhood Trauma*, 40 PACE L. REV. 273, 295 (2019).

132. *See Family Law Quarterly* Editors, *Charts 2023: Family Law in the Fifty States, D.C., and Puerto Rico*, 57 FAM. L.Q. 377, 389–97 (2024) (Chart 2, Child Custody Statutes in 2023).

133. Oehme et al., *supra* note 116, at 39.

134. *Id.* at 46 ("[T]he content of [parenting education programs] does not require consideration or accommodation of parent's individual needs or differences.").

135. *Id.* at 42.

136. Ferraro et al., *supra* note 131, at 275–276; Oehme et al., *supra* note 116, at 59.

137. Emma M. Reese et al., *Intergenerational Transmission of Trauma: The Mediating Effects of Family Health*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH, no. 10, May 2022, art. 5944 at 1, 3 (consistent with generational trauma, family systems theory asserts that "family members are interdependent, and one family member's well-being can have a significant impact on another member's well-being").

138. Measures of family health include "access to physical, social, emotional, financial, and medical resources; healthy habits; strong emotional and social health processes, and external social support." *Id.* at 7.

139. *Id.* at 7–8.

140. *See Generational Trauma: Breaking the Cycle of Adverse Childhood Experiences*, THRIVE BY IU HEALTH (Dec. 10, 2020), https://iuhealth.org/thrive/generational-trauma-breaking-the-cycle-of-adverse-childhood-experiences [https://perma.cc/B7LZ-FSQY].

141. *See id.*

142. 142. *See id*.

143. 143. Wisner, *supra* note 128.

144. Gillespie, *supra* note 1.

145. 145. *Id*.

146. John F. Butler, *The Family Diagram and Genogram: Comparisons and Contrasts*, 36 Am. J. Fam. Therapy 169, 169 (2008).

147. *Id.* at 171 (citation omitted). The diagrams "visually record the facts of functioning" (factual information such as physical problems, emotional symptoms, and educational achievements) across at least three generations of multigenerational families. *Id.*

148. *Id.* at 169–70.

149. *Id.* at 171–74.

150. *Id.* at 174.

151. *Id*. at 171.

152. Oehme et al., *supra* note 116, at 46–47.

153. *See* Scott & Copping, *supra* note 21, at 278.

154. The Intergenerational Trauma Treatment Model, https://theittm.com [https://perma.cc/Z3J6-3Y7T] (last visited Apr. 21, 2023).

155. Scott & Copping, *supra* note 21, at 278.

156. Udita Iyengar et al., *Unresolved Trauma in Mothers: Intergenerational Effects and the Role of Reorganization*, 5 Frontiers in Psych., Sept. 1, 2014, art. 966, https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00966/full.

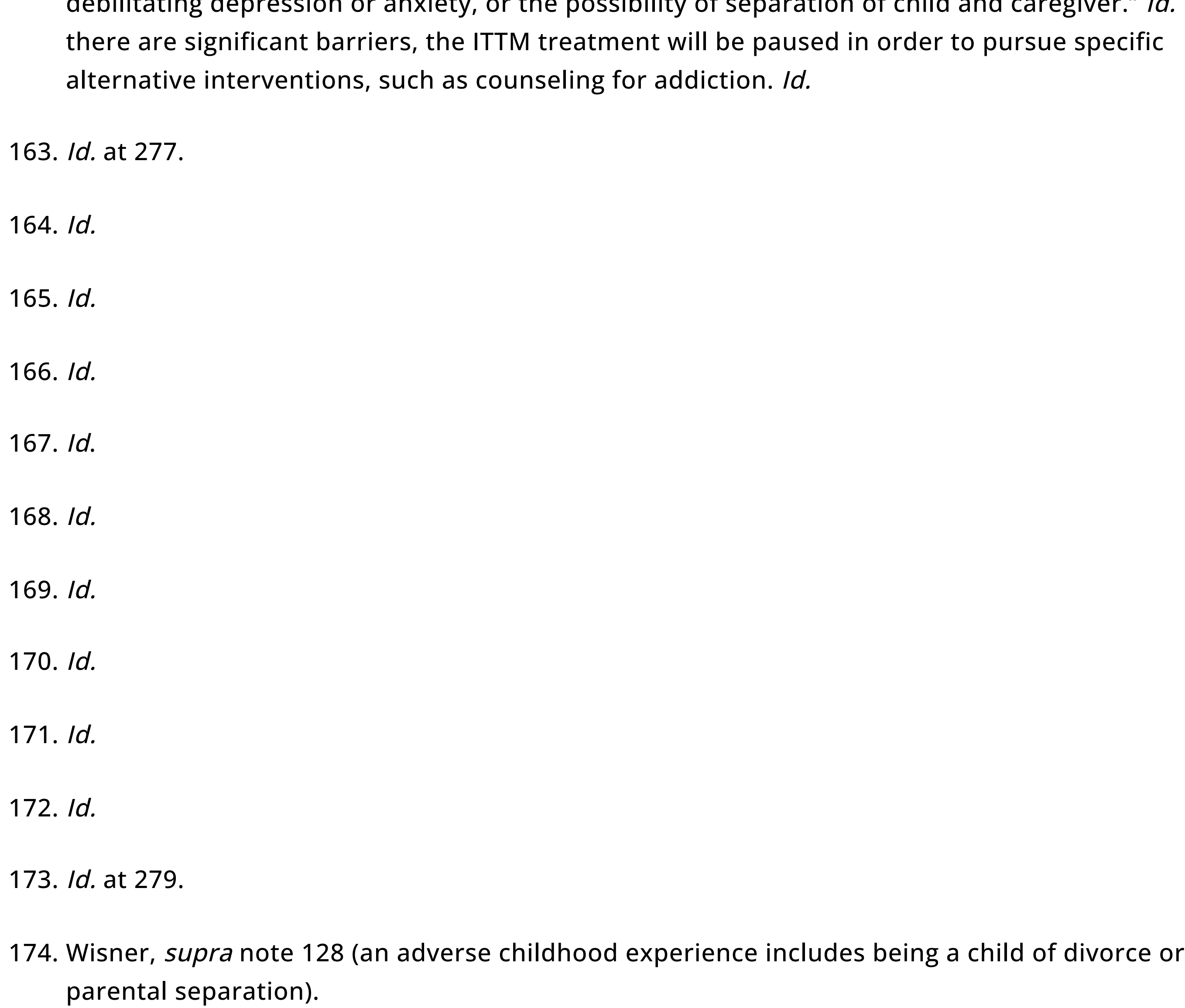
157. Scott & Copping, *supra* note 21, at 276–77.

158. *Id.* at 276.

159. *Id.*

160. *Id.*

161. *Id.*



162. *Id.* Barriers include “active addiction to drugs or alcohol, ongoing domestic violence, debilitating depression or anxiety, or the possibility of separation of child and caregiver.” *Id.* If there are significant barriers, the ITTM treatment will be paused in order to pursue specific alternative interventions, such as counseling for addiction. *Id.*

163. *Id.* at 277.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id*.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 279.

174. Wisner, *supra* note 128 (an adverse childhood experience includes being a child of divorce or parental separation).

Author

Ashtar Reem Abboud

...

Published by the American Bar Association ©2025. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

ABA American Bar Association | https://www.americanbar.org/groups/family_law/resources/family-law-quarterly/2024-december/personality-disorders-parentchild-relationship-breaking-cycle-generational-trauma-family-courts/?utm_source=sfmc&utm_medium=email&utm_campaign=MK20CNTT&promo=MKCONTENT1&RefId=tuescon&utm_id=967014&sfmc_id=45298015

©American Bar Association 2006, All Rights Reserved

American Bar Association

Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

Introduction

These standards promote quality representation and uniformity of practice throughout the country for parents' attorneys in child abuse and neglect cases. The standards were written with the help of a committee of practicing parents' attorneys and child welfare professionals from different jurisdictions in the country. With their help, the standards were written with the difficulties of day-to-day practice in mind, but also with the goal of raising the quality of representation. While local adjustments may be necessary to apply these standards in practice, jurisdictions should strive to meet their fundamental principles and spirit.

The standards are divided into the following categories:

1. Summary of the Standards
2. Basic Obligations of Parents' Attorneys
3. Obligations of Attorney Manager
4. The Role of the Court

The standards include "black letter" requirements written in bold. Following the black letter standards are "actions." These actions further discuss how to fulfill the standard; implementing each standard requires the accompanying action. After the action is "commentary" or a discussion of why the standard is necessary and how it should be applied. When a standard does not need further explanation, no action or commentary appears. Several standards relate to specific sections of the Model Rules of Professional Conduct, and the Model Rules are referenced in these standards. The terms "parent" and "client" are used interchangeably throughout the document. These standards apply to all attorneys who represent parents in child abuse and neglect cases, whether they work for an agency or privately.

As was done in the *Standards of Practice for Attorneys Representing Child Welfare Agencies*, ABA 2004, a group of standards for attorney managers is included in these standards. These standards primarily apply to parents' attorneys who work for an agency or law firm – an institutional model of representation. Solo practitioners, or attorneys who individually receive appointments from the court, may wish to review this part of the standards, but may find some do not apply. However, some standards in this section, such as those about training and caseload, are relevant for all parents' attorneys.

As was done in the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases,* ABA 1996, a section of the standards concerns the Role of the Court in

©American Bar Association 2006, All Rights Reserved

implementing these *Standards*. The ABA and the National Council of Juvenile and Family Court Judges have policies concerning the importance of the court in ensuring that all parties in abuse and neglect cases have competent representation.

Representing a parent in an abuse and neglect case is a difficult and emotional job. There are many responsibilities. These standards are intended to help the attorney prioritize duties and manage the practice in a way that will benefit each parent on the attorney's caseload.

©American Bar Association 2006, All Rights Reserved

SUMMARY: ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

Basic Obligations**:** The parent's attorney shall:

General:

1. Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.

2. Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.

3. Understand and protect the parent's rights to information and decision making while the child is in foster care.

4. Actively represent a parent in the pre-petition phase of a case, if permitted within the jurisdiction.

5. Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.

6. Cooperate and communicate regularly with other professionals in the case.

Relationship with the Client:

7. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.

8. Act in accordance with the duty of loyalty owed to the client.

9. Adhere to all laws and ethical obligations concerning confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client's rights in the

©American Bar Association 2006, All Rights Reserved

pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.

12. Work with the client to develop a case timeline and tickler system.

13. Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.

14. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.

15. Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.

17. Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.

18. Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case.

Investigation:

19. Conduct a thorough and independent investigation at every stage of the proceeding.

20. Interview the client well before each hearing, in time to use client information for the case investigation.

Informal Discovery:

21. Review the child welfare agency case file.

22. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

Formal Discovery:

23. When needed, use formal discovery methods to obtain information.

Court Preparation:

©American Bar Association 2006, All Rights Reserved

24. Develop a case theory and strategy to follow at hearings and negotiations.

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

27. Aggressively advocate for regular visitation in a family-friendly setting.

28. With the client's permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

29. Thoroughly prepare the client to testify at the hearing.

30. Identify, locate and prepare all witnesses.

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

Hearings:

32. Attend and prepare for all hearings, including pretrial conferences.

33. Prepare and make all appropriate motions and evidentiary objections.

34. Present and cross-examine witnesses, prepare and present exhibits.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

37. Request the opportunity to make opening and closing arguments.

38. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client.

Post Hearings/Appeals:

39. Review court orders to ensure accuracy and clarity and review with client.

40. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.

41. Consider and discuss the possibility of appeal with the client.

©American Bar Association 2006, All Rights Reserved

42. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction's Rules of Appellate Procedure.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

44. Communicate the results of the appeal and its implications to the client.

Obligations of Attorney Managers:

Attorney Managers are urged to:

1. Clarify attorney roles and expectations.

2. Determine and set reasonable caseloads for attorneys.

3. Advocate for competitive salaries for staff attorneys.

4. Develop a system for the continuity of representation.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

6. Establish a regular supervision schedule.

7. Create a brief and forms bank.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

10. Develop and implement an attorney evaluation process.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

Role of the Court

The Court is urged to:

1. Recognize the importance of the parent attorney's role.

2. Establish uniform standards of representation for parents' attorneys.

3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction.

5. Ensure parents' attorneys receive fair compensation.

6. Ensure timely payment of fees and costs for attorneys.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

9. Ensure all parties, including the parent's attorney, receive copies of court orders and other documentation.

10. Provide contact information between clients and attorneys.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.

©American Bar Association 2006, All Rights Reserved

Basic Obligations: The parent's attorney shall:

General[1]

1. **Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.**

Action: The parent's attorney must participate in all required training and mentoring before accepting an appointment.

Commentary: As in all areas of law, it is essential that attorneys learn the substantive law as well as local practice. A parent's fundamental liberty interest in the care and custody of his or her child is at stake, and the attorney must be adequately trained to protect this interest. Because the stakes are so high, the standards drafting committee recommends all parents' attorneys receive a minimum of 20 hours of relevant training before receiving an appointment and a minimum of 15 hours of related training each year. Training should directly relate to the attorney's child welfare practice.[2] This is further detailed in Attorney Managers Standard 5 below. In addition, the parent's attorney should actively participate in ongoing training opportunities. Even if the attorney's jurisdiction does not require training or mentoring, the attorney should seek it. Each state should make comprehensive training available to parents' attorneys throughout the state. Training may include relevant online or video training.

2. **Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.**

Action: Parents' attorneys may come to the practice with competency in the various aspects of child abuse and neglect practice, or they need to be trained on them. It is essential for the parent's attorney to read and understand all state laws, policies and procedures regarding child abuse and neglect. In addition, the parent's attorney must be familiar with the following laws to recognize when they are relevant to a case and should be prepared to research them when they are applicable:

- Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357
- Child Abuse Prevention Treatment Act (CAPTA), P.L.108-36
- Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979)
- State Indian Child Welfare Act laws

- Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998).
- Interstate Compact on Placement of Children (ICPC)
- Foster Care Independence Act of 1999 (FCIA), P.L. 106-169
- Individuals with Disabilities Education Act (IDEA), P.L. 91-230
- Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g
- Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part)
- Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2
- Immigration laws relating to child welfare and child custody
- State laws and rules of evidence
- State laws and rules of civil procedure
- State laws and rules of criminal procedure
- State laws concerning privilege and confidentiality, public benefits, education, and disabilities
- State laws and rules of professional responsibility or other relevant ethics standards
- State laws regarding domestic violence
- State domestic relations laws

Commentary: Although the burden of proof is on the child welfare agency, in practice the parent and the parent's attorney generally must demonstrate that the parent can adequately care for the child. The parent's attorney must consider all obstacles to this goal, such as criminal charges against the parent, immigration issues, substance abuse or mental health issues, confidentiality concerns, permanency timelines, and the child's individual service issues. To perform these functions, the parent's attorney must know enough about all relevant laws to vigorously advocate for the parent's interests. Additionally, the attorney must be able to use procedural, evidentiary and confidentiality laws and rules to protect the parent's rights throughout court proceedings.

3. Understand and protect the parent's rights to information and decision making while the child is in foster care.

Action: The parent's attorney must explain to the parent what decision-making authority remains with the parent and what lies with the child welfare agency while the child is in foster care. The parent's attorney should seek updates and reports from any service provider working with the child/family or help the client obtain information about the child's safety, health, education and well-being when the client desires. Where decision-making rights remain, the parent's attorney should assist the parent in exercising his or her rights to continue to make decisions regarding the child's medical, mental health and educational services. If necessary, the parent's attorney should intervene with the child welfare agency, provider agencies, medical providers and the school to ensure the parent

©American Bar Association 2006, All Rights Reserved

has decision-making opportunities. This may include seeking court orders when the parent has been left out of important decisions about the child's life.

Commentary: Unless and until parental rights are terminated, the parent has parental obligations and rights while a child is in foster care. Advocacy may be necessary to ensure the parent is allowed to remain involved with key aspects of the child's life. Not only should the parent's rights be protected, but continuing to exercise as much parental responsibility as possible is often an effective strategy to speed family reunification. Often, though, a parent does not understand that he or she has the right to help make decisions for, or obtain information about, the child. Therefore, it is the parent's attorney's responsibility to counsel the client and help the parent understand his or her rights and responsibilities and try to assist the parent in carrying them out.

4. **Actively represent a parent in the prepetition phase of a case, if permitted within the jurisdiction.**

Action: The goal of representing a parent in the prepetition phase of the case is often to deter the agency from deciding to file a petition or to deter the agency from attempting to remove the client's child if a petition is filed. The parent's attorney should counsel the client about the client's rights in the investigation stage as well as the realistic pros and cons of cooperating with the child welfare agency (i.e., the parent's admissions could be used against the client later, but cooperating with services could eliminate a petition filing). The parent's attorney should acknowledge that the parent may be justifiably angry that the agency is involved with the client's family, and help the client develop strategies so the client does not express that anger toward the caseworker in ways that may undermine the client's goals. The attorney should discuss available services and help the client enroll in those in which the client wishes to participate. The attorney should explore conference opportunities with the agency. If it would benefit the client, the attorney should attend any conferences. There are times that an attorney's presence in a conference can shut down discussion, and the attorney should weigh that issue when deciding whether to attend. The attorney should prepare the client for issues that might arise at the conference, such as services and available kinship resources, and discuss with the client the option of bringing a support person to a conference.

Commentary: A few jurisdictions permit parents' attorneys to begin their representation before the child welfare agency files a petition with the court. When the agency becomes involved with the families, it can refer parents to attorneys so that parents will have the benefit of counsel throughout the life of the case. During the prepetition phase, the parent's attorney has the opportunity to work with the parent and help the parent fully understand the issues and the parent's chances of retaining custody of the child. The parent's attorney also has the chance to encourage the agency to make reasonable efforts to work with the family, rather than filing a petition. During this phase, the attorney should work intensively with the parent to explore all appropriate services.

5. **Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.[3]**

©American Bar Association 2006, All Rights Reserved

Action: The parent's attorney should not request continuances unless there is an emergency or it benefits the client's case. If continuances are necessary, the parent's attorney should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests. The attorney must notify all counsel of the request. The parent's attorney should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

Commentary: Delaying a case often increases the time a family is separated, and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

6. Cooperate and communicate regularly with other professionals in the case.[4]

Action: The parent's attorney should communicate with attorneys for the other parties, court appointed special advocates (CASAs) or guardians ad litem (GALs). Similarly, the parent's attorney should communicate with the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate. The parent's attorney should have open lines of communication with the attorney(s) representing the client in related matters such as any criminal, protection from abuse, private custody or administrative proceedings to ensure that probation orders, protection from abuse orders, private custody orders and administrative determinations do not conflict with the client's goals in the abuse and neglect case.

Commentary: The parent's attorney must have all relevant information to try a case effectively. This requires open and ongoing communication with the other attorneys and service providers working with the client and family. Rules of professional ethics govern contact with represented and unrepresented parties. In some states, for instance, attorneys may not speak with child welfare caseworkers without the permission of agency counsel. The parent's attorney must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client's interests.

Relationship with the Client[5]

7. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.[6]

Action: Attorneys representing parents must understand the client's goals and pursue them vigorously. The attorney should explain that the attorney's job is to represent the client's interests and regularly inquire as to the client's goals, including ultimate case

©American Bar Association 2006, All Rights Reserved

goals and interim goals. The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. At the same time, the attorney should be careful not to usurp the client's authority to decide the case goals.

Commentary: Since many clients distrust the child welfare system, the parent's attorney must take care to distinguish him or herself from others in the system so the client can see that the attorney serves the client's interests. The attorney should be mindful that parents often feel disempowered in child welfare proceedings and should take steps to make the client feel comfortable expressing goals and wishes without fear of judgment. The attorney should clearly explain the legal issues as well as expectations of the court and the agency, and potential consequences of the client failing to meet those expectations. The attorney has the responsibility to provide expertise, and to make strategic decisions about the best ways to achieve the parent's goals, but the client is in charge of deciding the case goals and the attorney must act accordingly.

8. Act in accordance with the duty of loyalty owed to the client.

Action: Attorneys representing parents should show respect and professionalism towards their clients. Parents' attorneys should support their clients and be sensitive to the client's individual needs. Attorneys should remember that they may be the client's only advocate in the system and should act accordingly.

Commentary: Often attorneys practicing in abuse and neglect court are a close knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The attorney, however, should be vigilant against allowing the attorney's own interests in relationships with others in the system to interfere with the attorney's primary responsibility to the client. The attorneys should not give the impression to the client that relationships with other attorneys are more important than the representation the attorney is providing the client. The client must feel that the attorney believes in him or her and is actively advocating on the client's behalf.

9. Adhere to all laws and ethical obligations concerning confidentiality.[7]

Action: Attorneys representing parents must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client. The attorney must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Consistent with the client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client.

Commentary: Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information early in the proceeding may have a negative impact on the manner in which

©American Bar Association 2006, All Rights Reserved

the client is perceived by the other parties and the court. For this reason, it is crucial for the attorney to advise the client promptly as to the advantages and disadvantages of releasing confidential information, and for the attorney to take whatever steps necessary to protect the client's privileges or rights to confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.[8]

Action: The parent's attorney should ensure the parent understands how to contact the attorney and that the attorney wants to hear from the client on an ongoing basis. The attorney should explain that even when the attorney is unavailable, the parent should leave a message. The attorney must respond to client messages in a reasonable time period. The attorney and client should establish a reliable communication system that meets the client's needs. For example, it may involve telephone contact, email or communication through a third party when the client agrees to it. Interpreters should be used when the attorney and client are not fluent in the same language.

Commentary: Gaining the client's trust and establishing ongoing communication are two essential aspects of representing the parent. The parent may feel angry and believe that all of the attorneys in the system work with the child welfare agency and against that parent. It is important that the parent's attorney, from the beginning of the case, is clear with the parent that the attorney works for the parent, is available for consultation, and wants to communicate regularly. This will help the attorney support the client, gather information for the case and learn of any difficulties the parent is experiencing that the attorney might help address. The attorney should explain to the client the benefits of bringing issues to the attorney's attention rather than letting problems persist. The attorney should also explain that the attorney is available to intervene when the client's relationship with the agency or provider is not working effectively. The attorney should be aware of the client's circumstances, such as whether the client has access to a telephone, and tailor the communication system to the individual client.

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.[9]

Action: The parent's attorney should spend time with the client to prepare the case and address questions and concerns. The attorney should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of reuniting with the child. The attorney should explain any settlement options and determine whether the client wants the attorney to pursue such options. The attorney should explain courtroom procedures. The attorney should write to the client to ensure the client understands what happened in court and what is expected of the client.

The attorney should ensure a formal interpreter is involved when the attorney and client are not fluent in the same language. The attorney should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client as well.

The attorney should be available for in-person meetings or telephone calls to answer the client's questions and address the client's concerns. The attorney and client should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

The parent's attorney should help the client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent needs to understand these issues to make appropriate decisions for the child's care.

The parent's attorney and the client should identify barriers to the client engaging in services, such as employment, transportation, and financial issues. The attorney should work with the client, caseworker and service provider to resolve the barriers.

The attorney should be aware of any special issues the parents may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations.

Commentary: The parent's attorney's job extends beyond the courtroom. The attorney should be a counselor as well as litigator. The attorney should be available to talk with the client to prepare for hearings, and to provide advice and information about ongoing concerns. Open lines of communication between attorneys and clients help ensure clients get answers to questions and attorneys get the information and documents they need.

12. Work with the client to develop a case timeline and tickler system.

Action: At the beginning of a case, the parent's attorney and client should develop timelines that reflect projected deadlines and important dates and a tickler/calendar system to remember the dates. The timeline should specify what actions the attorney and parent will need to take and dates by which they will be completed. The attorney and the client should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The attorney should provide the client with a timeline/calendar, outlining known and prospective court dates, service appointments, deadlines and critical points of attorney-client contact. The attorney should record federal and state law deadlines in the system (e.g., the 15 of 22 month point that would necessitate a termination of parental rights (TPR), if exceptions do not apply).

©American Bar Association 2006, All Rights Reserved

Commentary: Having a consistent calendaring system can help an attorney manage a busy caseload. Clients should receive a hard copy calendar to keep track of appointments and important dates. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

13. **Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.[10]**

Action: The parent's attorney should provide all written documents to the client or ensure that they are provided in a timely manner and ensure the client understands them. If the client has difficulty reading, the attorney should read the documents to the client. In all cases, the attorney should be available to discuss and explain the documents to the client.

Commentary: The parent's attorney should ensure the client is informed about what is happening in the case. Part of doing so is providing the client with written documents and reports relevant to the case. If the client has this information, the client will be better able to assist the attorney with the case and fulfill his or her parental obligations. The attorney must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

14. **Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.[11]**

Action: The parent's attorney must not represent both parents if their interests differ. The attorney should generally avoid representing both parents when there is even a potential for conflicts of interests. In situations involving allegations of domestic violence the attorney should never represent both parents.

Commentary: In most cases, attorneys should avoid representing both parents in an abuse or neglect case. In the rare case in which an attorney, after careful consideration of potential conflicts, may represent both parents, it should only be with their informed consent. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the attorney might be required to withdraw from representing one or both parents. This could be difficult for the clients and delay the case. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.

In analyzing whether a conflict of interest exists, the attorney must consider "whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised."[12]

15. **Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.**

©American Bar Association 2006, All Rights Reserved

Action: The parent's attorney should learn about and understand the client's background, determine how that has an impact on the client's case, and always show the parent respect. The attorney must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client's words and actions accordingly.

Commentary: The child welfare system is comprised of a diverse group of people, including the clients and professionals involved. Each person comes to this system with his or her own set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. An individual's race, ethnicity, gender, sexual orientation and socioeconomic position all have an impact on how the person acts and reacts in particular situations. The parent's attorney must be vigilant against imposing the attorney's values onto the clients, and should, instead, work with the parents within the context of their culture and socioeconomic position. While the court and child welfare agency have expectations of parents in their treatment of children, the parent's advocate must strive to explain these expectations to the clients in a sensitive way. The parent's attorney should also try to explain how the client's background might affect the client's ability to comply with court orders and agency requests.

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.[13]

Action: Upon accepting an appointment, the parent's attorney should communicate to the client the importance of staying in contact with the attorney. While the attorney must communicate regularly with the client, and be informed of the client's wishes before a hearing, the client also must keep in contact with the attorney. At the beginning of the representation, the attorney should tell the client how to contact the attorney, and discuss the importance of the client keeping the attorney informed of changes in address, phone numbers, and the client's current whereabouts.

The parent's attorney should attempt to locate and communicate with missing parents to formulate what positions the attorney should take at hearings, and to understand what information the client wishes the attorney to share with the child welfare agency and the court. If, after diligent steps, the attorney is unable to communicate with the client, the attorney should assess whether the client's interests are better served by advocating for the client's last clearly articulated position, or declining to participate in further court proceedings, and should act accordingly. After a prolonged period without contact with the client, the attorney should consider withdrawing from representation.

Commentary:

Diligent Steps to Locate: To represent a client adequately, the attorney must know what the client wishes. It is, therefore, important for parents' attorneys to take diligent steps to locate missing clients. Diligent steps can include speaking with the client's family, the caseworker, the foster care provider and other service providers. It should include contacting the State Department of Corrections, Social Security Administration, and

Child Support Office, and sending letters by regular and certified mail to the client's last known address. The attorney should also visit the client's last known address and asking anyone who lives there for information about the client's whereabouts. Additionally, the attorney should leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

Unsuccessful Efforts to Locate: If the attorney is unable to find and communicate with the client after initial consultation, the attorney should assess what action would best serve the client's interests. This decision must be made on a case-by-case basis. In some cases, the attorney may decide to take a position consistent with the client's last clearly articulated position. In other cases the client's interests may be better served by the attorney declining to participate in the court proceedings in the absence of the client because that may better protect the client's right to vacate orders made in the client's absence.

17. Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.

Action:

Adoption and Safe Families Act (ASFA) Issues: The parent's attorney must be particularly diligent when representing an incarcerated parent. The attorney must be aware of the reasons for the incarceration. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may request an order from the court that reasonable efforts toward reunification are not necessary and attempt to fast-track the case toward other permanency goals. If this is the case, the attorney must be prepared to argue against such a motion, if the client opposes it. Even if no motion is made to waive the reasonable efforts requirement, in some jurisdictions the agency may not have the same obligations to assist parents who are incarcerated. Attorneys should counsel the client as to any effects incarceration has on the agency's obligations and know the jurisdiction's statutory and case law concerning incarceration as a basis for TPR. The attorney should help the client identify potential kinship placements, relatives who can provide care for the child while the parent is incarcerated. States vary in whether and how they weigh factors such as the reason for incarceration, length of incarceration and the child's age at the time of incarceration when considering TPR. Attorneys must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

Services: Obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult. The parent's attorney may need to advocate for reasonable efforts to be made for the client, and assist the parent and the agency caseworker in accessing services. The attorney must assist the client with these services. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

If the attorney practices in a jurisdiction that has a specialized unit for parents and children, and especially when the client is incarcerated for an offense that is unrelated to the child, the attorney should advocate for such a placement. The attorney must learn about available resources, contact the placements and attempt to get the support of the agency and child's attorney.

Communication: The parent's attorney should counsel the client on the importance of maintaining regular contact with the child while incarcerated. The attorney should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

If the client cannot meet the attorney before court hearings, the attorney must find alternative ways to communicate. This may include visiting the client in prison or engaging in more extensive phone or mail contact than with other clients. The attorney should be aware of the challenges to having a confidential conversation with the client, and attempt to resolve that issue.

The parent's attorney should also communicate with the parent's criminal defense attorney. There may be issues related to self-incrimination as well as concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

Appearance in Court: The client's appearance in court frequently raises issues that require the attorney's attention in advance. The attorney should find out from the client if the client wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the client may prefer to stay at the prison. If the client wants to be present in court, the attorney should work with the court to obtain a writ of habeas corpus/bring-down order/order to produce or other documentation necessary for the client to be transported from the prison. The attorney should explain to any client hesitant to appear, that the case will proceed without the parent's presence and raise any potential consequences of that choice. If the client does not want to be present, or if having the client present is not possible, the attorney should be educated about what means are available to have the client participate, such as by telephone or video conference. The attorney should make the necessary arrangements for the client. Note that it may be particularly difficult to get a parent transported from an out-of-state prison or a federal prison.

18. Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case.

Action: Attorneys representing parents must be able to determine whether a client's mental status (including mental illness and mental retardation) interferes with the client's ability to make decisions about the case. The attorney should be familiar with any mental health diagnosis and treatment that a client has had in the past or is presently undergoing (including any medications for such conditions). The attorney should get consent from the client to review mental health records and to speak with former and current mental

©American Bar Association 2006, All Rights Reserved

health providers. The attorney should explain to the client that the information is necessary to understand the client's capacity to work with the attorney. If the client's situation seems severe, the attorney should also explain that the attorney may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney because if the client does not have that capacity, the attorney may have to ask that a guardian ad litem be appointed to the client. Since this action may have an adverse effect on the client's legal claims, the attorney should ask for a GAL only when absolutely necessary.

Commentary: Many parents charged with abuse and neglect have serious or long-standing mental health challenges. However, not all of those conditions or diagnoses preclude the client from participating in the defense. Whether the client can assist counsel is a different issue from whether the client is able to parent the children, though the condition may be related to ability to parent. While the attorney is not expected to be a mental health expert, the attorney should be familiar with mental health conditions and should review such records carefully. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the client seems unable to assist the attorney in case preparation, the attorney should seek an assessment of the client's capacity from a mental health expert. If the expert and attorney conclude that the client is not capable of assisting in the case, the attorney should inform the client that the attorney will seek appointment of a guardian ad litem from the court. The attorney should be careful to explain that the attorney will still represent the client in the child protective case. The attorney must explain to the client that appointment of a GAL will limit the client's decision-making power. The GAL will stand in the client's shoes for that purpose.

Investigation[14]

19. Conduct a thorough and independent investigation at every stage of the proceeding.

Action: The parent's attorney must take all necessary steps to prepare each case. A thorough investigation is an essential element of preparation. The parent's attorney can not rely solely on what the agency caseworker reports about the parent. Rather, the attorney should contact service providers who work with the client, relatives who can discuss the parent's care of the child, the child's teacher or other people who can clarify information relevant to the case. If necessary, the attorney should petition the court for funds to hire an investigator.

Commentary: In some jurisdictions, parents' attorneys work with social workers or investigators who can meet with clients and assist in investigating the underlying issues that arise as cases proceed. The drafting committee recommends such a model of representation. However, if the attorney is not working with such a team, the attorney is still responsible for gaining all pertinent case information.

20. Interview the client well before each hearing, in time to use client information for the case investigation.[15]

©American Bar Association 2006, All Rights Reserved

Action: The parent's attorney should meet with the parent regularly throughout the case. The meetings should occur well before the hearing, not at the courthouse just minutes before the case is called before the judge. The attorney should ask the client questions to obtain information to prepare the case, and strive to create a comfortable environment so the client can ask the attorney questions. The attorney should use these meetings to prepare for court as well as to counsel the client concerning issues that arise during the course of the case. Information obtained from the client should be used to propel the investigation.

Commentary: Often, the client is the best source of information for the attorney, and the attorney should set aside time to obtain that information. Since the interview may involve disclosure of sensitive or painful information, the attorney should explain attorney-client confidentiality to the client. The attorney may need to work hard to gain the client's trust, but if a trusting relationship can be developed, the attorney will have an easier time representing the client. The investigation will be more effective if guided by the client, as the client generally knows firsthand what occurred in the case.

Informal Discovery[16]

21. Review the child welfare agency case file.

Action: The parent's attorney should ask for and review the agency case file as early during the course of representation as possible. The file contains useful documents that the attorney may not yet have, and will instruct the attorney on the agency's case theory. If the agency case file is inaccurate, the attorney should seek to correct it. The attorney must read the case file periodically because information is continually being added by the agency.

Commentary: While an independent investigation is essential, it is also important that the parent's attorney understands what information the agency is relying on to further its case. The case file should contain a history about the family that the client may not have shared, and important reports and information about both the child and parent that will be necessary for the parent's attorney to understand for hearings as well as settlement conferences. Unless the attorney also has the information the agency has, the parent's attorney will walk into court at a disadvantage.

22. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

Action: As part of the discovery phase, the parent's attorney should gather all relevant documentation regarding the case that might shed light on the allegations, the service plan and the client's strengths as a parent. The attorney should not limit the scope as information about past or present criminal, protection from abuse, private custody or

©American Bar Association 2006, All Rights Reserved

administrative proceedings involving the client can have an impact on the abuse and neglect case. The attorney should also review the following kinds of documents:

- social service records
- court records
- medical records
- school records
- evaluations of all types

The attorney should be sure to obtain reports and records from service providers.

Discovery is not limited to information regarding the client, but may include records of others such as the other parent, stepparent, child, relative and non-relative caregivers.

Commentary: In preparing the client's case, the attorney must try to learn as much about the parent and the family as possible. Various records may contradict or supplement the agency's account of events. Gathering documentation to verify the client's reports about what occurred before the child came into care and progress the parent is making during the case is necessary to provide concrete evidence for the court. Documentation may also alert the attorney to issues the client is having that the client did not share with counsel. The attorney may be able to intercede and assist the client with service providers, agency caseworkers and others.

Formal Discovery[17]

23. When needed, use formal discovery methods to obtain information.

Action: The parent's attorney should know what information is needed to prepare for the case and understand the best methods of obtaining that information. The attorney should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. The parent's attorney should consider the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party. The attorney should file timely motions for discovery and renew these motions as needed to obtain the most recent records.

The attorney should, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

Court Preparation[18]

24. Develop a case theory and strategy to follow at hearings and negotiations.

Action: Once the parent's attorney has completed the initial investigation and discovery, including interviews with the client, the attorney should develop a strategy for representation. The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the attorney in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the attorney's preparation for hearings and arguments to the court throughout the case. It should also help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the client's ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services).

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

Action: The attorney must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case. These pleadings must be thorough, accurate and timely.

When a case presents a complicated or new legal issue, the parent's attorney should conduct the appropriate research before appearing in court. The attorney must have a solid understanding of the relevant law, and be able to present it to the judge in a compelling and convincing way. The attorney should be prepared to distinguish case law that appears to be unfavorable. If the judge asks for memoranda of law, the attorney will already have done the research and will be able to use it to argue the case well. If it would advance the client's case, the parent's attorney should present an unsolicited memorandum of law to the court.

Commentary: Actively filing motions, pleadings and briefs benefits the client. This practice puts important issues before the court and builds credibility for the attorney. In addition to filing responsive papers and discovery requests, the attorney should proactively seek court orders that benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When an issue arises, it is often appropriate to attempt to resolve it informally with other parties. When out-of-court advocacy is not successful, the attorney should not wait to bring the issue to the court's attention if that would serve the client's goals.

Arguments in child welfare cases are often fact-based. Nonetheless, attorneys should ground their arguments in statutory, regulatory and common law. These sources of law exist in each jurisdiction, as well as in federal law. Additionally, law from other jurisdictions can be used to sway a court in the client's favor. An attorney who has a firm grasp of the law, and who is willing to do legal research on an individual case, may have more credibility before the court. At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Attorneys should be mindful to preserve issues for appellate review by making a record even if the argument is unlikely to prevail at the trial level

©American Bar Association 2006, All Rights Reserved

26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

Action: The parent's attorney must advocate for the client both in and out of court. The parent's attorney should know about the social, mental health, substance abuse treatment and other services that are available to parents and families in the jurisdiction in which the attorney practices so the attorney can advocate effectively for the client to receive these services. The attorney should ask the client if the client wishes to engage in services. If so, the attorney must determine whether the client has access to the necessary services to overcome the issues that led to the case.

The attorney should actively engage in case planning, including attending major case meetings, to ensure the client asks for and receives the needed services. The attorney should also ensure the client does not agree to undesired services that are beyond the scope of the case. A major case meeting is one in which the attorney or client believes the attorney will be needed to provide advice or one in which a major decision on legal steps, such as a change in the child's permanency goal, will be made. The attorney should be available to accompany the client to important meetings with service providers as needed.

The services in which the client is involved must be tailored to the client's needs, and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Whenever possible, the parent's attorney should engage or involve a social worker as part of the parent's "team" to help determine an appropriate case plan, evaluate social services suggested for the client, and act as a liaison and advocate for the client with the service providers.

When necessary, the parent's attorney should seek court orders to force the child welfare agency to provide services or visitation to the client. The attorney may need to ask the court to enforce previously entered orders that the agency did not comply with in a reasonable period. The attorney should consider whether the child's representative (lawyer, GAL or CASA) might be an ally on service and visitation issues. If so, the attorney should solicit the child's representative's assistance and work together in making requests to the agency and the court.

Commentary: For a parent to succeed in a child welfare case the parent must receive and cooperate with social services. It is therefore necessary that the parent's attorney does whatever possible to obtain appropriate services for the client, and then counsel the client about participating in such services. Examples of services common to child welfare cases include:

- Evaluations
- Family preservation or reunification services
- Medical and mental health care
- Drug and alcohol treatment
- Domestic violence prevention, intervention or treatment

©American Bar Association 2006, All Rights Reserved

- Parenting education
- Education and job training
- Housing
- Child care
- Funds for public transportation so the client can attend services

27. Aggressively advocate for regular visitation in a family-friendly setting.

Action: The parent's attorney should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Preservation of parent-child bonds through regular visitation is essential to any reunification effort. Courts and child welfare agencies may need to be pushed to develop visiting plans that best fit the needs of the individual family. Factors to consider in visiting plans include:

- Frequency
- Length
- Location
- Supervision
- Types of activities
- Visit coaching – having someone at the visit who could model effective parenting skills

Commentary: Consistent, high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's attorney seek a visitation order that will allow the best possible visitation. Effort should be made to have visits be unsupervised or at the lowest possible level of supervision. Families are often more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers. Attorneys should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

28. With the client's permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

Action: The parent's attorney should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals. Parents' attorneys should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. When authorized to do so by the client, the parent's attorney should share information about services in which the parent is engaged and provide copies of favorable reports from service providers. This information may impact settlement discussions. The attorney must communicate all settlement offers to the client and discuss their advantages and disadvantages. It is the client's decision whether to settle. The attorney must be willing to try the case and not compromise solely to avoid the hearing. The attorney should use mediation resources when available.

Commentary: Negotiation and mediation often result in a detailed agreement among parties about actions the participants must take. Generally, when agreements have been thoroughly discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are, therefore, more willing to adhere to a plan. Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Negotiated settlements generally happen more quickly than full hearings and therefore move a case along swiftly. The attorney should discuss all aspects of proposed settlements with the parent, including all legal effects of admissions or agreements. The attorney should advise the client about the chances of prevailing if the matter proceeds to trial and any potential negative impact associated with contesting the allegations. The final decision regarding settlement must be the client's.

A written, enforceable agreement should result from any settlement, so all parties are clear about their rights and obligations. The parent's attorney should ensure agreements accurately reflect the understandings of the parties. The parent's attorney should schedule a hearing if promises made to the parent are not kept.

29. Thoroughly prepare the client to testify at the hearing.

Action: When having the client testify will benefit the case or when the client wishes to testify, the parent's attorney should thoroughly prepare the client. The attorney should discuss and practice the questions that the attorney will ask the client, as well as the types of questions the client should expect opposing counsel to ask. The parent's attorney should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues such as how to get to court on time and appropriate court attire.

Commentary: Testifying in court can be intimidating. For a parent whose family is the focus of the proceeding, the court experience is even scarier. The parent's attorney should be attuned to the client's comfort level about the hearing, and ability to testify in the case. The attorney should spend time explaining the process and the testimony itself to the client. The attorney should provide the client with a written list of questions that the attorney will ask, if this will help the client.

30. Identify, locate and prepare all witnesses.

Action: The parent's attorney, in consultation with the parent, should develop a witness list well before a hearing. The attorney should not assume the agency will call a witness, even if the witness is named on the agency's witness list. The attorney should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

When appropriate, witnesses should be informed that a subpoena is on its way. The attorney should also ensure the subpoena is served. The attorney should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

©American Bar Association 2006, All Rights Reserved

The attorney should set aside time to fully prepare all witnesses in person before the hearing. The attorney should remind the witnesses about the court date.

Commentary: Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make arrangements accordingly. Witnesses may have direct knowledge of the allegations against the parent. They may be service providers working with the parent, or individuals from the community who could testify generally about the family's strengths.

When appropriate, the parent's attorney should consider working with other parties who share the parent's position (such as the child's representative) when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

Witnesses are often nervous about testifying in court. Attorneys should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Attorneys should provide written questions for those witnesses who need them.

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

Action: Often a case requires multiple experts in different roles, such as experts in medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The attorney should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts.

When expert testimony is required, the attorney should identify the qualified experts and seek necessary funds to retain them in a timely manner. The attorney should subpoena the witnesses, giving them as much advanced notice of the court date as possible. As is true for all witnesses, the attorney should spend as much time as possible preparing the expert witnesses for the hearing. The attorney should be competent in qualifying expert witnesses.

When opposing counsel plans to call expert witnesses, the parent's attorney should file expert interrogatories, depose the witnesses or interview the witnesses in advance, depending on the jurisdiction's rules on attorney work product. The attorney should do whatever is necessary to learn what the opposing expert witnesses will say about the client during the hearing.

Commentary: By contacting opposing counsel's expert witnesses in advance, the parent's attorney will know what evidence will be presented against the client and whether the

©American Bar Association 2006, All Rights Reserved

expert has any favorable information that might be elicited on cross-examination. The attorney will be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the attorney does not talk to the opposing expert in advance, the attorney could be surprised by the evidence and unable to represent the client competently.

Hearings

32. Attend and prepare for all hearings, including pretrial conferences.

Action: The parent's attorney must prepare for, and attend all hearings and participate in all telephone and other conferences with the court.

Commentary: For the parent to have a fair chance during the hearing, the attorney must be prepared and present in court. Participating in pretrial proceedings may improve case resolution for the parent. Counsel's failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent's attorney should be actively involved in this stage. Other than in extraordinary circumstances, attorneys must appear for all court appearances on time. In many jurisdictions, if an attorney arrives to court late, or not at all, the case will receive a long continuance. This does not serve the client and does not instill confidence in the attorney. If an attorney has a conflict with another courtroom appearance, the attorney should notify the court and other parties and request a short continuance. The parent's attorney should not have another attorney stand in to represent the client in a substantive hearing, especially if the other attorney is unfamiliar with the client or case.

33. Prepare and make all appropriate motions and evidentiary objections.

Action: The parent's attorney should make appropriate motions and evidentiary objections to advance the client's position during the hearing. If necessary, the attorney should file briefs in support of the client's position on motions and evidentiary issues. The parent's attorney should always be aware of preserving legal issues for appeal.

Commentary: It is essential that parents' attorneys understand the applicable rules of evidence and all court rules and procedures. The attorney must be willing and able to make appropriate motions, objections, and arguments (e.g., objecting to the qualification of expert witnesses or raising the issue of the child welfare agency's lack of reasonable efforts).

34. Present and cross-examine witnesses, prepare and present exhibits.

Action: The parent's attorney must be able to present witnesses effectively to advance the client's position. Witnesses must be prepared in advance and the attorney should know what evidence will be presented through the witnesses. The attorney must also be skilled at cross-examining opposing parties' witnesses. The attorney must know how to offer documents, photos and physical objects into evidence.

©American Bar Association 2006, All Rights Reserved

At each hearing the attorney should keep the case theory in mind, advocate for the child to return home and for appropriate services, if that is the client's position, and request that the court state its expectations of all parties.

Commentary: Becoming a strong courtroom attorney takes practice and attention to detail. The attorney must be sure to learn the rules about presenting witnesses, impeaching testimony, and entering evidence. The attorney should seek out training in trial skills and observe more experienced trial attorneys to learn from them. Even if the parent's attorney is more seasoned, effective direct and cross-examination require careful preparation. The attorney must know the relevant records well enough to be able to impeach adverse witnesses and bring out in both direct and cross examinations any information that would support the parent's position. Seasoned attorneys may wish to consult with other experienced attorneys about complex cases. Presenting and cross-examining witnesses are skills with which the parent's attorney must be comfortable.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

Commentary: Several jurisdictions around the country afford parties in child welfare cases the right to a jury trial at the adjudicatory or termination of parental rights stages. Parents' attorneys in those jurisdictions should be skilled at choosing an appropriate jury, drafting jury instructions that are favorable to the client's position, and trying the case before jurors who may not be familiar with child abuse and neglect issues.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

Action: The parent's attorney should be aware of who is in the courtroom during a hearing, and should request the courtroom be cleared of individuals not related to the case when appropriate. The attorney should be attuned to the client's comfort level with people outside of the case hearing about the client's family. The attorney should also be aware of whether the case is one in which there is media attention. Confidential information should not be discussed in front of the media or others without the express permission of the client.

Commentary: In many courts, even if they have a "closed court" policy, attorneys, caseworkers, and witnesses on other cases listed that day may be waiting in the courtroom. These individuals may make the client uncomfortable, and the parent's attorney should request that the judge remove them from the courtroom. Even in an "open court" jurisdiction, there may be cases, or portions of cases, that outsiders should not be permitted to hear. The parent's attorney must be attuned to this issue, and make appropriate requests of the judge.

37. Request the opportunity to make opening and closing arguments.

©American Bar Association 2006, All Rights Reserved

Action: When permitted by the judge, the parent's attorney should make opening and closing arguments to best present the parent's attorney's theory of the.

Commentary: In many child abuse and neglect proceedings, attorneys waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different services or permanency goals for each of them.   Making opening and closing argument is particularly important if the case is being heard by a jury.

38. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client.

Action: Proposed findings of fact, conclusions of law, and orders should be prepared before a hearing. When the judge is prepared to enter a ruling, the judge can use the proposed findings or amend them as needed.

Commentary: By preparing proposed findings of fact and conclusions of law, the parent's attorney frames the case and ruling for the judge. This may result in orders that are more favorable to the parent, preserve appellate issues, and help the attorney clarify desired outcomes before a hearing begins. The attorney should offer to provide the judge with proposed findings and orders in electronic format. If an opposing party prepared the order, the parent's attorney should review it for accuracy before the order is submitted for the judge's signature.

Post Hearings/Appeals

39. Review court orders to ensure accuracy and clarity and review with client.

Action: After the hearing, the parent's attorney should review the written order to ensure it reflects the court's verbal order. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. Once the order is final, the parent's attorney should provide the client with a copy of the order and should review the order with the client to ensure the client understands it. If the client is unhappy with the order, the attorney should counsel the client about any options to appeal or request rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured. The attorney should counsel the client on the potential consequences of failing to comply with a court order.

Commentary: The parent may be angry about being involved in the child welfare system, and a court order that is not in the parent's favor could add stress and frustration. It is essential that the parent's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see below).

©American Bar Association 2006, All Rights Reserved

Regardless of whether an appeal is appropriate, the attorney should counsel the parent about potential consequences of not complying with the order.

40. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.

Action: The parent's attorney should answer the parent's questions about obligations under the order and periodically check with the client to determine the client's progress in implementing the order. If the client is attempting to comply with the order but other parties, such as the child welfare agency, are not meeting their responsibilities, the parent's attorney should approach the other party and seek assistance on behalf of the client. If necessary, the attorney should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary: The parent's attorney should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When the child welfare agency does not offer appropriate services, the attorney should consider making referrals to social service providers and, when possible, retaining a social worker to assist the client. The drafting committee of these standards recommends such an interdisciplinary model of practice.

41. Consider and discuss the possibility of appeal with the client.[19]

Action: The parent's attorney should consider and discuss with the client the possibility of appeal when a court's ruling is contrary to the client's position or interests. The attorney should counsel the client on the likelihood of success on appeal and potential consequences of an appeal. In most jurisdictions, the decision whether to appeal is the client's as long as a non-frivolous legal basis for appeal exists. Depending on rules in the attorney's jurisdiction, the attorney should also consider filing an extraordinary writ or motions for other post-hearing relief.

Commentary: When discussing the possibility of an appeal, the attorney should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent's goals. For instance, an appeal could delay the case for a long time. This could negatively impact both the parent and the child.

42. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction's Rules of Appellate Procedure.

Action: The parent's attorney should carefully review his or her obligations under the state's Rules of Appellate Procedure. The attorney should timely file all paperwork, including a notice of appeal and requests for stays of the trial court order, transcript, and

©American Bar Association 2006, All Rights Reserved

case file. If another party has filed an appeal, the parent's attorney should explain the appeals process to the parent and ensure that responsive papers are filed timely.

The appellate brief should be clear, concise, and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available in state and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's claim.

In jurisdictions in which a different attorney from the trial attorney handles the appeal, the trial attorney should take all steps necessary to facilitate appointing appellate counsel and work with the new attorney to identify appropriate issues for appeal. The attorney who handled the trial may have insight beyond what a new attorney could obtain by reading the trial transcript.

If appellate counsel differs from the trial attorney, the appellate attorney should meet with the client as soon as possible. At the initial meeting, appellate counsel should determine the client's position and goals in the appeal. Appellate counsel should not be bound by the determinations of the client's position and goals made by trial counsel and should independently determine his or her client's position and goals on appeal.

If oral arguments are scheduled, the attorney should be prepared, organized, and direct. Appellate counsel should inform the client of the date, time and place scheduled for oral argument of the appeal upon receiving notice from the appellate court. Oral argument of the appeal on behalf of the client should not be waived, absent the express approval of the client, unless doing so would benefit the client. For example, in some jurisdictions appellate counsel may file a reply brief instead of oral argument. The attorney should weigh the pros and cons of each option.

Commentary: Appellate skills differ from the skills most trial attorneys use daily. The parent's attorney may wish to seek training on appellate practice and guidance from an experienced appellate advocate when drafting the brief and preparing for argument. An appeal can have a significant impact on the trial judge who heard the case and trial courts throughout the state, as well as the individual client and family.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

Action: If the state court allows, the attorney in a child welfare matter should always consider requesting an expedited appeal. In this request, the attorney should provide information about why the case should be expedited, such as any special characteristics about the child and why delay would harm the relationship between the parent and child.

44. Communicate the results of the appeal and its implications to the client.

Action: The parent's attorney should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. If, as a result of the appeal, the attorney needs to file any motions with the trial court, the attorney should do so.

Obligations of Attorney Managers[20]

Attorney Managers are urged to:

1. **Clarify attorney roles and expectations.**

Action: The attorney manager must ensure that staff attorneys understand their role in representing clients and the expectations of the attorney manager concerning all staff duties. In addition to in-office obligations staff attorneys may attend meetings, conferences, and trainings. The attorney may need to attend child welfare agency or service provider meetings with clients. The manager should articulate these duties at the beginning of and consistently during the attorney's employment. The manager should emphasize the attorney's duties toward the client, and obligations to comply with practice standards.

Commentary: All employees want to know what is expected of them; one can only do a high quality job when the person knows the parameters and expectations of the position. Therefore, the attorney manager must consistently inform staff of those expectations. Otherwise, the staff attorney is set up to fail. The work of representing parents is too important, and too difficult, to be handled by people who do not understand their role and lack clear expectations. These attorneys need the full support of supervisors and attorney managers to perform their highest quality work.

2. **Determine and set reasonable caseloads for attorneys.**[21]

Action: An attorney manager should determine reasonable caseloads for parents' attorneys and monitor them to ensure the maximum is not exceeded. Consider a caseload/workload study, review written materials about such studies, or look into caseload sizes in similar counties to accurately determine ideal attorney caseloads. When assessing the appropriate number of cases, remember to account for all attorney obligations, case difficulty, time required to prepare a case thoroughly, support staff assistance, travel time, experience level of attorneys, and available time (excluding vacation, holidays, sick leave, training and other non-case-related activity). If the attorney manager carries a caseload, the number of cases should reflect the time the individual spends on management duties.

Commentary: High caseload is considered a major barrier to quality representation and a source of high attorney turnover. It is essential to decide what a reasonable caseload is in your jurisdiction. How attorneys define cases and attorney obligations vary from place-to-place, but having a manageable caseload is crucial. The standards drafting committee recommended a caseload of no more than 50-100 cases depending on what the attorney can handle competently and fulfill these standards. The type of practice the attorney has,

e.g., whether the attorney is part of a multidisciplinary representation team also has an impact on the appropriate caseload size. It is part of the attorney manager's job to advocate for adequate funding and to alert individuals in positions of authority when attorneys are regularly asked to take caseloads that exceed local standards.

3. Advocate for competitive salaries for staff attorneys.

Action: Attorney managers should advocate for attorney salaries that are competitive with other government and court appointed attorneys in the jurisdiction. To recruit and retain experienced attorneys, salaries must compare favorably with similarly situated attorneys.

Commentary: While resources are scarce, parents' attorneys deserve to be paid a competitive wage. They will likely not stay in their position nor be motivated to work hard without a reasonable salary. High attorney turnover may decrease when attorneys are paid well. Parents' rights to effective assistance of counsel may be compromised if parents' attorneys are not adequately compensated.

4. Develop a system for the continuity of representation.

Action: The attorney manager should develop a case assignment system that fosters ownership and involvement in the case by the parent's attorney. The office can have a one-attorney: one-case (vertical representation) policy in which an attorney follows the case from initial filing through permanency and handles all aspects of the case. Alternatively, the cases may be assigned to a group of attorneys who handle all aspects of a case as a team and are all assigned to one judge. If a team approach is adopted, it is critical to establish mechanisms to aid communication about cases and promote accountability.

The attorney manager should also hire social workers, paralegals and/or parent advocates (parents familiar with the child welfare system because they were involved in the system and successfully reunited with their child), who should be "teamed" with the attorneys. These individuals can assist the attorney or attorney team with helping clients access services and information between hearings, and help the attorney organize and monitor the case.

Commentary: Parents' attorneys can provide the best representation for the client when they know a case and are invested in its outcome. Continuity of representation is critical for attorneys and parents to develop the trust that is essential to high quality representation. Additionally, having attorneys who are assigned to particular cases decreases delays because the attorney does not need to learn the case each time it is scheduled for court, but rather has extensive knowledge of the case history. The attorney also has the opportunity to monitor action on the case between court hearings. This system also makes it easier for the attorney manager to track how cases are handled. Whatever system is adopted, the manager must be clear about which attorney has

©American Bar Association 2006, All Rights Reserved

responsibility for the case preparation, monitoring, and advocacy required throughout the case.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

Action: The attorney manager must ensure that each attorney has opportunities to participate in training and education programs. When a new attorney is hired, the attorney manager should assess that attorney's level of experience and readiness to handle cases. The attorney manager should develop an internal training program that pairs the new attorney with an experienced "attorney mentor." The new attorney should be required to: 1) observe each type of court proceeding (and mediation if available in the jurisdiction), 2) second-chair each type of proceeding, 3) try each type of case with the mentor second-chairing, and 4) try each type of proceeding on his or her own, with the mentor available to assist, before the attorney can begin handling cases alone.

Additionally, each attorney should attend at least 20 hours of relevant training before beginning, and at least15 hours of relevant training every year after. Training should include general legal topics such as evidence and trial skills, and child welfare-specific topics that are related to the client population the office is representing, such as:

- Relevant state, federal and case law, procedures and rules
- Available community resources
- State and federal benefit programs affecting parties in the child welfare system (e.g., SSI, SSA, Medicaid, UCCJEA)
- Federal Indian Law including the Indian Child Welfare Act and state law related to Native Americans
- Understanding mental illness
- Substance abuse issues (including assessment, treatment alternatives, confidentiality, impact of different drugs)
- Legal permanency options
- Reasonable efforts
- Termination of parental rights law
- Child development
- Legal ethics related to parent representation
- Negotiation strategies and techniques
- Protection orders/how domestic violence impacts parties in the child welfare system
- Appellate advocacy
- Immigration law in child welfare cases
- Education law in child welfare cases
- Basic principles of attachment theory
- Sexual abuse
- Dynamics of physical abuse and neglect
    - Shaken Baby Syndrome

©American Bar Association 2006, All Rights Reserved

    - Broken bones
    - Burns
    - Failure To Thrive
    - Munchausen's Syndrome by Proxy
- Domestic relations law

Commentary: Parents' attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of child welfare developments. While parents' attorneys often lack extra time to attend conferences, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The attorney manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The court and Court Improvement Program[22] may be able to defray costs of attorney training or may sponsor multidisciplinary training that parents' attorneys should be encouraged to attend. Similarly, state and local bar associations, area law schools or local Child Law Institutes may offer education opportunities. Attorneys should have access to professional publications to stay current on the law and promising practices in child welfare. Child welfare attorneys benefit from the ability to strategize and share information and experiences with each other. Managers should foster opportunities for attorneys to support each other, discuss cases, and brainstorm regarding systemic issues and solutions.

6. Establish a regular supervision schedule.

Action: Attorney managers should ensure that staff attorneys meet regularly (at least once every two weeks) with supervising attorneys to discuss individual cases as well as any issues the attorney is encountering with the court, child welfare agency, service providers or others. The supervising attorney should help the staff attorney work through any difficulties the attorney is encountering in managing a caseload. Supervising attorneys should regularly observe the staff attorneys in court and be prepared to offer constructive criticism as needed. The supervising attorney should create an atmosphere in which the staff attorney is comfortable asking for help and sharing ideas.

Commentary: Parents' attorneys function best when they can learn, feel supported, and manage their cases with the understanding that their supervisors will assist as needed. By creating this office environment, the attorney manager invests in training high quality attorneys and results in long-term retention. Strong supervision helps attorneys avoid the burnout that could accompany the stressful work of representing parents in child welfare cases.

7. Create a brief and forms bank.

Action: Develop standard briefs, memoranda of law and forms that attorneys can use, so they do not "reinvent the wheel" for each new project. For example, there could be sample discovery request forms, motions, notices of appeal, and petitions. Similarly, memoranda of law and appellate briefs follow patterns that the attorneys could use,

©American Bar Association 2006, All Rights Reserved

although these should always be tailored to the specific case. These forms and briefs should be available on the computer and in hard copy and should be centrally maintained. They should also be well indexed for accessibility and updated as needed.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

Action: The attorney manager should advocate for high quality technical and staff support. The office should employ qualified legal assistants or paralegals and administrative assistants to help the attorneys. The attorney manager should create detailed job descriptions for these staff members to ensure they are providing necessary assistance. For instance, a qualified legal assistant can help: research, draft petitions, schedule and prepare witnesses and more.

The attorney manager should ensure attorneys have access to working equipment, a user-friendly library conducive to research, and computer programs for word processing, conducting research (Westlaw or Lexis/Nexis), caseload and calendar management, Internet access, and other supports that make the attorney's job easier and enhances client representation.

Commentary: By employing qualified staff, the attorneys will be free to perform tasks essential to quality representation. The attorneys must at least have access to a good quality computer, voice mail, fax machine, and copier to get the work done efficiently and with as little stress as possible

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

Action: The attorney manager should hire the best attorneys possible. The attorney manager should form a hiring committee made up of managing and line attorneys and possibly a client or former client of the office. Desired qualities of a new attorney should be determined, focusing on educational and professional achievements; experience and commitment to representing parents and to the child welfare field; interpersonal skills; diversity and the needs of the office; writing and verbal skills; second language skills; and ability to handle pressure. Widely advertising the position will draw a wider candidate pool. The hiring committee should set clear criteria for screening candidates before interviews and should conduct thorough interviews and post-interview discussions to choose the candidate with the best skills and strongest commitment. Reference checks should be completed before extending an offer.

Commentary: Hiring high quality attorneys raises the level of representation and the level of services parents in the jurisdiction receive. The parent attorney's job is complicated and stressful. There are many tasks to complete in a short time. It is often difficult to connect with, build trust and represent the parent. New attorneys must be aware of these challenges and be willing and able to overcome them. Efforts should be made to recruit staff who reflect the racial, ethnic, and cultural backgrounds of the clients. It is

©American Bar Association 2006, All Rights Reserved

particularly important to have staff who can communicate with the clients in their first languages, whenever possible.

10. Develop and implement an attorney evaluation process.

Action: The attorney manager should develop an evaluation system that focuses on consistency, constructive criticism, and improvement. Some factors to evaluate include: communicating with the client, preparation and trial skills, working with clients and other professionals, complying with practice standards, and ability to work within a team. During the evaluation process, the attorney manager should consider:

- observing the attorney in court;
- reviewing the attorney's files;
- talking with colleagues and clients, when appropriate, about the attorney's performance;
- having the attorney fill out a self-evaluation; and;
- meeting in person with the attorney.

Where areas of concern are noted, the evaluation process should identify and document specific steps to address areas needing improvement.

Commentary: A solid attorney evaluation process helps attorneys know what they should be working on, management's priorities, their strengths and areas for improvement. A positive process supports attorneys in their positions, empowers them to improve and reduces burnout.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

Action: The attorney manager should participate, or designate someone from the staff to participate, in multidisciplinary committees within the jurisdiction that are focused on improving the local child welfare system. Examples of such committees include: addressing issues of disproportional representation of minorities in foster care, improving services for incarcerated parents, allowing parents pre-petition representation, drafting court rules and procedures, drafting protocols about outreach to missing parents and relatives, removing permanency barriers and delays, and accessing community-based services for parents and children. Similarly, the attorney manager should participate in, and strongly encourage staff participation in, multidisciplinary training.

Commentary: Working on systemic change with all stakeholders in the jurisdiction is one way to serve the parents the office represents as well as their children. Active participation of parents' attorneys ensures that projects and procedures are equitably developed, protect parents' interests, and the attorneys are more likely to work on them over the long term. Collaboration can, and generally does, benefit all stakeholders.

Role of the Court:

The court is urged to:

©American Bar Association 2006, All Rights Reserved

1. Recognize the importance of the parent attorney's role.

Commentary: The judge sets the tone in the courtroom. Therefore, it is very important that the judge respects all parties, including the parents and parents' counsel. Representing parents is difficult and emotional work, but essential to ensuring justice is delivered in child abuse and neglect cases. When competent attorneys advocate for parent clients, the judge's job becomes easier. The judge is assured that the parties are presenting all relevant evidence, and the judge can make a well-reasoned decision that protects the parents' rights. Also, by respecting and understanding the parent attorney's role, the judge sets an example for others.

2. Establish uniform standards of representation for parents' attorneys.

Commentary: By establishing uniform representation rules or standards, the judge can put the parents' attorneys in the jurisdiction on notice that a certain level of representation will be required for the attorney to continue to receive appointments. The rules or standards should be jurisdiction specific, but should include the elements of these standards.

3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

Commentary: Once the standards are established, the court must hold all parents' attorneys accountable to them. A system should be developed that would delineate when an attorney would be removed from a case for failure to comply with the standards, and what actions, or inactions, would result in the attorney's removal from the appointment list (or a court recommendation to an attorney manager that an attorney be disciplined within the parent attorney office). The court should encourage attorneys to participate in educational opportunities, and the judge should not appoint attorneys who have failed to meet the minimum annual training requirements set out in the rules or standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction.

Commentary: The parent is disadvantaged in a child abuse and neglect case if not represented by a competent attorney throughout the life of the case. The attorney can explain the case to the parent, counsel the parent on how best to achieve the parent's goals with respect to the child, and assist the parent access necessary services. In most child welfare cases, the parent cannot afford an attorney and requires the court to appoint one. The court should make every effort to obtain an attorney for that parent as early in the case as feasible – preferably before the case comes to court for the first time or at the first hearing. In jurisdictions in which parents only obtain counsel for the termination of

©American Bar Association 2006, All Rights Reserved

parental rights hearing, the parent has little chance of prevailing. A family that may have been reunified if the parent had appropriate legal support is separated forever.

5. Ensure parents' attorneys receive fair compensation.

Commentary: While resources are scarce, parents' attorneys deserve a competitive wage. They should receive the same wage as other government and court-appointed attorneys for other parties in the child abuse and neglect case. Parents' rights to effective assistance of counsel may be compromised if parents' attorneys are not adequately compensated. In most jurisdictions, the court sets the attorneys' fees and individual judges can recommend to court administration that parents' attorneys should be well compensated.

6. Ensure timely payment of fees and costs for attorneys.

Commentary: Often judges must sign fee petitions and approve payment of costs for attorneys. The judges should do so promptly so parents' attorneys can focus on representing clients, not worrying about being paid.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

Commentary: Attorneys can not provide competent representation for parents without using certain specialists. For instance, if the client speaks a language different from the attorney, the attorney must have access to interpreters for attorney/client meetings. Interpreter costs should not be deducted from the attorney's compensation. A parent should be permitted to use an expert of the parent's choosing in some contested cases. If the expert charges a fee, the court should reimburse that fee separate and apart from what the court is paying the attorney.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

Commentary: The maximum allowable caseload should be included in local standards of practice for parents' attorneys. This committee recommends no more than 50-100 cases for full time attorneys, depending on the type of practice the attorney has and whether the attorney is able to provide each client with representation that follows these standards. Once this number has been established, the court should not appoint an attorney to cases once the attorney has reached the maximum level. Attorneys can only do high quality work for a limited number of clients, and each client deserves the attorney's full attention. Of course, the caseload decision is closely tied to adequate compensation. If paid appropriately, the attorney will have less incentive to overextend and accept a large number of cases.

©American Bar Association 2006, All Rights Reserved

9. Ensure all parties, including the parent's attorney, receive copies of court orders and other documentation.

Commentary: The court should have a system to ensure all parties receive necessary documentation in a timely manner. If the parent and parent attorney do not have the final court order, they do not know what is expected of them and of the other parties. If the child welfare agency, for example, is ordered to provide the parent with a certain service within two weeks, the parent's attorney must know that. After two weeks, if the service has not been provided, the attorney will want to follow up with the court. In some jurisdictions, copies of court orders are handed to each party before they leave the courtroom. This is an ideal situation, and if it is not feasible, the court should determine what other distribution method will work.

10. Provide contact information between clients and attorneys.

Commentary: Often parties in child welfare cases are difficult to locate or contact. Some parents lack telephones. The court can help promote contact between the attorney and parent by providing contact information to both individuals.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.

Commentary: Judges should attempt to schedule hearings and make decisions quickly. Allotted court time should be long enough for the judge to thoroughly review the case and conduct a meaningful hearing.

When possible, judges should schedule hearings for times-certain to avoid delaying attorneys unnecessarily in court. When attorneys are asked to wait through the rest of the morning calendar for one brief review hearing, limited dollars are spent to keep the attorney waiting in hallways, rather than completing an independent investigation, or researching alternative placement or treatment options.

Judges should avoid delays in decision making. Delays in decision making can impact visitation, reunification and even emotional closure when needed. If a parent does not know what the judge expects, the parent may lack direction or motivation to engage in services.

These standards were drafted with the input of the following individuals:

Valerie Adelson
Staff Director
ABA Standing Committee on Substance Abuse
Chicago, IL

Kris Berliant
ABA Judicial Division Staff

Chicago, IL

Sharon Biasca
Managing Attorney
Juvenile Court Project
Pittsburgh, PA

Terry Brooks
Staff Director
ABA Standing Committee on Legal Aid and Indigent Defendants
Chicago, IL

Joanne Brown
Consultant
ABA Center on Children and the Law
Washington, DC

Shante Bullock
Program Administrator
ABA Center on Children and the Law
Washington, DC

Kate Chester
Director
Family Preservation Law Center
Siler City, NC

Claire Chiamulera
Communications Manager/Legal Editor
ABA Center on Children and the Law
Washington, DC

Andy Cohen
Staff Counsel
Children and Family Program
Committee for Public Counsel Services
Boston, MA

Emily Cooke
Special Assistant for Court Improvement
Children's Bureau
Washington, DC

Howard Davidson
Director
ABA Center on Children and the Law
Washington, DC

Alicia Davis
Family Issues Unit Supervisor
Division of Planning and Analysis
Colorado State Court Administrator's Office
Denver, CO

Amanda Donnelly
Staff Attorney

National Association of Counsel for Children
Denver, CO

Patsy Engelhard
Staff Director
ABA Litigation Division
Chicago, IL

Debby Freedman
Director, Family Advocacy Unit
Community Legal Services
Philadelphia, PA

Chris Gottlieb
Co-Director
NYU Family Defense Clinic
New York, NY

Judge Ernestine Gray
Orleans Parish Juvenile Court
Representative, ABA Judicial Division
New Orleans, LA

Bill Grimm
Senior Attorney
Child Welfare/Foster Care
National Center for Youth Law
Oakland, CA

Ann Haralambie
Representative for ABA Family Law Division
Tucson, AZ

Mark Hardin
Director, Child Welfare
ABA Center on Children and Law
Washington, DC

Sue Jacobs
Executive Director
Center for Family Representation
New York, NY

Judge William Jones
Consultant
ABA Center on Children and the Law
Charlotte, NC

Candice Maze
Representative, ABA Steering Committee on the
Unmet Legal Needs of Children
Miami, FL

Moreen Murphy
Staff Director

©American Bar Association 2006, All Rights Reserved

ABA Steering Committee on the
Unmet Legal Needs of Children

Joanne Moore
WA State Office of Public Defense
Olympia, WA

Christina Plum
ABA Young Lawyer's Division Chair
PO Box 11756
Milwaukee, WI

Jennifer Renne
Assistant Director, Child Welfare
ABA Center on Children and the Law
Washington, DC

Professor Catherine J. Ross
George Washington University Law School
Representative for ABA Individual
Rights and Responsibilities Section
Washington, DC

Don Saunders
Director, Civil Legal Services
National Legal Aid and Defender Association
Washington, DC

Tanya Terrell-Collier
Staff Director
ABA Individual Rights and Responsibilities Section
Washington, DC

Marvin Ventrell
Executive Director
National Association of Counsel for Children
Denver, CO

Mary Walker
Nashville, TN

Judge Joyce Warren
Tenth Division Circuit Court
Little Rock, AR

Sylvia Young
Washington, DC

Their input was essential to this project, and their willingness to assist was extraordinary.

[1] Model Rules of Professional Conduct 1.1 (Competence).

[2] The National Association of Counsel for Children is accredited by the American Bar Association to certify attorneys as specialists in Child Welfare Law. The Certification Program is open to attorneys who represent children, parents, or agencies in child welfare proceedings.
[3] Model Rule 1.3 (Diligence).
[4] Model Rule 1.4 (Communication).
[5] Model Rule 2.1 (Advisor).
[6] Model Rule 1.2 (Scope of Representation and Allocation of Authority).
[7] Model Rule 1.6 (Confidentiality of Information).
[8] Model Rule 1.4 Communication
[9] Id.
[10] Id.
[11] Model Rules 1.7 (Conflict of Interest: Current Client); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to Former Clients).
[12] Renne, Jennifer L. Chapter 4, page 49, "Handling Conflicts of Interest," *Legal Ethics in Child Welfare Cases*. Washington, DC: American Bar Association, 2004.
[13] Model Rule 1.3 (Diligence).
[14] Model Rules 1.1 (Competence); 1.3 (Diligence).
[15] Model Rule 1.4 (Communication).
[16] Model Rules 1.1 (Competence); 1.3 (Diligence).
[17] Id.
[18] Id.
[19] Model Rule 3.1 (Meritorious Claims and Contentions).
[20] Model Rule 5.1 (Responsibility of Partners, Managers and Supervisory Lawyers).
[21] Model Rule 1.1 (Competence).
[22] The Court Improvement Program (CIP) is a federal grant to each state's (as well as the District of Columbia and Puerto Rico) supreme court. The funds must be used to improve child abuse and neglect courts. States vary in how they allocate the dollars, but funds are often used for training, benchbooks, pilot projects, model courts and information technology systems for the courts.

Model Rules of Professional Conduct - Table of Contents

Share:

©2025 by the American Bar Association. All rights reserved.

Rules

Preamble and Scope

Rule 1.0 Terminology

Client-Lawyer Relationship

Rule 1.1 Competence

- Podcasting of Model Rule 1.1

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.3 Diligence
Rule 1.4 Communications
Rule 1.5 Fees
Rule 1.6 Confidentiality of Information

- Podcasting of Model Rule 1.6

Rule 1.7 Conflict of Interest: Current Clients

- Podcasting of Model Rule 1.7

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
Rule 1.9 Duties to Former Clients

- Podcasting of Model Rule 1.9

Rule 1.10 Imputation of Conflicts of Interest: General Rule
Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13 Organization as Client

- Podcasting of Model Rule 1.13

Rule 1.14 Client with Diminished Capacity
Rule 1.15 Safekeeping Property

- Podcasting of Model 1.15

Rule 1.16 Declining or Terminating Representation
Rule 1.17 Sale of Law Practice
Rule 1.18 Duties to Prospective Client

Counselor

Rule 2.1 Advisor

- Podcasting of Model Rule 2.1

Rule 2.2 (Deleted)
Rule 2.3 Evaluation for Use by Third Persons
Rule 2.4 Lawyer Serving as Third-Party Neutral

Advocate

Rule 3.1 Meritorious Claims and Contentions
Rule 3.2 Expediting Litigation
Rule 3.3 Candor toward the Tribunal

- Podcasting of Model Rule 3.3

Rule 3.4 Fairness to Opposing Party and Counsel
Rule 3.5 Impartiality and Decorum of the Tribunal
Rule 3.6 Trial Publicity
Rule 3.7 Lawyer as Witness
Rule 3.8 Special Responsibilities of a Prosecutor

- Podcasting Model Rule 3.8

Rule 3.9 Advocate in Nonadjudicative Proceedings

Transactions with Persons Other Than Clients

Rule 4.1 Truthfulness in Statements to Others
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.3 Dealing with Unrepresented Person
Rule 4.4 Respect for Rights of Third Persons

Law Firms and Associations

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

- Podcasting of Model Rule 5.1

Rule 5.2 Responsibilities of a Subordinate Lawyer
Rule 5.3 Responsibilities Regarding Nonlawyer

Assistance
Rule 5.4 Professional Independence of a Lawyer

- Podcasting of Model Rule 5.4

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practiceof Law

- Podcasting of Model Rule 5.5

Rule 5.6 Restrictions on Right to Practice
Rule 5.7 Responsibilities Regarding Law-related Services

Public Service

Rule 6.1 Voluntary Pro Bono Publico Service
Rule 6.2 Accepting Appointments
Rule 6.3 Membership in Legal Services Organization
Rule 6.4 Law Reform Activities Affecting Client Interests
Rule 6.5 Nonprofit and Court Annexed Limited Legal Services Programs

Information About Legal Services

Rule 7.1 Communications Concerning a Lawyer's

Services
Rule 7.2 Communications Concerning a Lawyer's Services: Specific Rules

- Podcasting of Model Rule 7.2

Rule 7.3 Solicitation of Clients
Rule 7.4 (Deleted)
Rule 7.5 (Deleted)
Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Maintaining the Integrity of the Profession

Rule 8.1 Bar Admission and Disciplinary Matters
Rule 8.2 Judicial and Legal Officials
Rule 8.3 Reporting Professional Misconduct

- Podcasting of Model Rule 8.3

Rule 8.4 Misconduct

- Podcasting of Model Rule 8.4g

Rule 8.5 Disciplinary Authority; Choice of Law

Russian Translation (2009)

- Other Model Rules Resources

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents

Rule 1.6: Confidentiality of Information

Share:

Client-Lawyer Relationship

(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;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment | Table of Contents | Next Rule

ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information

Rule 4.2: Communication with Person Represented by Counsel

Share:

Transactions With Persons Other Than Clients

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment | Table of Contents | Next Rule

ABA American Bar Association |

ACS'S INTERPRETATION OF THE "NO CONTACT RULE" IMPEDES THE REUNIFICATION OF FAMILIES

*Nanette Schorr**

INTRODUCTION**

The New York Code of Professional Responsibility DR 7-104 prohibits attorneys from speaking with represented parties about the matter in controversy without the consent of the respective counsel for each party, or unless authorized by law.[1] New York State has adopted this rule, commonly referred to as the "no contact rule."[2] The rule states as follows:

> A. During the course of the representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of the representation with a party [he or she] knows to be represented by a lawyer in that matter unless [he or she] has the prior consent of the lawyer representing such other party or is authorized by law to do so.[3]

On August 13, 1999, the New York City Administration for Children's Services ("ACS") issued a protocol to its staff, entitled "Guidelines for ACS Caseworkers in Communicating with Attorneys."[4] The protocol directs caseworkers not to speak to

---

* Nanette Schorr directs the Family Law Unit at Bronx Legal Services, where she has represented parents in child protective proceedings for fourteen years. She is also an adjunct instructor at Fordham University School of Law.

** I wish to thank Fordham Law students Tim Benston, Eric Montroy, Lynn Singband, and Dave Tull, who prepared an extensive memorandum on this subject under the supervision of Professor Ann Moynihan in connection with their work in the Stein Program's advanced seminar on legal ethics.

1. Various rationales have been advanced for this rule. These include protection of attorneys from predatory practices by adverse attorneys, and protection of represented laypeople from overreaching by opposing counsel. Stephen Sinaiko, *Ex-Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. Rev. 1456, 1462 (1991) (discussing various purposes of the "no contact rule").

2. There appears to be no New York case law that directly addresses the question of whether the "no contact rule" applies to communication between parent attorneys and ACS caseworkers in child protective proceedings.

3. N.Y. Code of Prof'l Responsibility DR 7-104 (1999); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.35 (1999).

4. Memorandum from Gerald Harris et al., The City of New York

attorneys representing parents in child protective matters about any issue of substance related to the case.[5] In relevant part, the procedure states: "Other than greeting the attorneys for parents and foster parents ('Parent Attorneys'), the ACS worker should not discuss the case with the Parent Attorneys either in person or by telephone."[6]

While the memorandum forbids communication between ACS caseworkers and parent attorneys, it permits contact between ACS caseworkers and law guardians for children.[7] Specifically, it permits disclosure by the ACS caseworkers of factual information regarding "the child's progress, treatment programs and ACS' [sic] broad plan for the child."[8] ACS caseworkers are also permitted to refer the law guardians to the foster care agency worker working with the child so that they may obtain additional information.[9] In permitting this contact, the protocol refers to its intent "to highlight the objective of coordinated efforts by ACS caseworkers and attorneys as they pursue the shared goal of effectively representing the Commissioner and securing the best interests of children."[10]

While ACS's policy makes no specific reference to the "no contact rule," it seems reasonable to infer from the policy's directive to caseworkers to refer all inquiries made by parent counsel to Division of Legal Services ("DLS") attorneys[11] that ACS intends to eliminate all direct communication between caseworkers and attorneys for parents. This article argues that the "no contact rule" does not apply to these types of communications and that, in the spirit of its stated commitment to further the best interests of the families whose mission it is to serve, ACS should abrogate this policy and open up the lines of communication between parent attorneys and ACS caseworkers.[12]

Administration for Children's Services, to DCP, DFCPS, DLS, DCA, and ACM Staff (Aug. 13, 1999) (on file with the *Fordham Law Review*).

5. *Id.* at 3-4.

6. *Id.* at 3.

7. *Id.* at 2.

8. *Id.*

9. *Id.* at cover page.

10. *Id.*

11. Attorneys who represent ACS in child protective proceedings are members of ACS's Division of Legal Services.

12. *See Recommendations of the Conference on Achieving Justice: Parents and the Child Welfare System*, 70 Fordham L. Rev. 337, 344 (section 3.2.4) (ethics working group) (indicating that the Code permits such contact without prior consent, and recommending that, as part of their representational duties, attorneys for parents should speak directly with caseworkers from ACS and voluntary agencies and that ACS should develop a detailed protocol identifying specific areas parent attorneys and caseworkers are permitted to discuss).

I. ACS'S PROTOCOL EXCLUDES PARENT ATTORNEYS FROM CRUCIAL CASE PLANNING

ACS's self-described mission is to "ensure the safety and well-being of all the children of New York."[13] ACS has set forth, in its new placement principles, the proposition that "all families deserve to be involved in their children's placement in foster care."[14] "Parents must be fully informed about the reasons for their child's placement into care, the conditions for reunification, and the timeframes for meeting such conditions," and "[p]arents must be encouraged to actively participate in family case planning conferences as soon as possible after placement and at other critical points during the child's stay in foster care."[15]

These goals cannot be realized without the active interaction between parents and caseworkers, working together to develop case plans and implement them in a dynamic fashion.[16] Case plans must be developed within thirty days of the time a child enters foster care and updated regularly (i.e., at minimum, every six months, but more frequently, if there is a significant change in circumstances).[17]

While parents may bring representatives, including attorneys, to case planning conferences, and are entitled by statute to be notified of this right,[18] ACS does not permit caseworkers to communicate with parent attorneys nor does it allow parent attorneys (or any other counsel) to attend the Seventy-Two Hour Child Safety Conference, which is the first case conference ACS elects to hold after removal of a child. Yet, central to the extension of placement and permanency hearings is the court's examination of whether the parent has complied with the service plan.[19]

II. PARENT ATTORNEYS SERVE A CRUCIAL ROLE IN REUNITING FAMILIES

Attorneys for parents play a significant and multi-faceted role in the process of family reunification. Parents need strong advocates at all

13. ACS Introduction, *at* http://www.ci.nyc.ny.us/html/acs/html/whatwedo/introduction.html (on file with the *Fordham Law Review*).

14. What We Do: ACS Permanency & Planning Principles, *at* http://www.ci.nyc.ny.us/html/acs/html/whatwedo/pp_place.html (on file with the *Fordham Law Review*).

15. *Id.*

16. *See, e.g.*, N.Y. Soc. Serv. Law § 409-e(2) (McKinney 1992) (mandating preparation of case plans by the social services district in active consultation with the child's parent or guardian).

17. *Id.* § 409-e(1).

18. N.Y. Fam. Ct. Act § 1055(b)(vi)(B) (McKinney Supp. 2001).

19. *See id.* § 1055(b)(iv)(A).

stages of a child protective problem—from pre-removal through termination of parental rights. As was discussed in a recent article published in the *Fordham Urban Law Journal*:[20]

> The attorneys who represent parents in child abuse and neglect proceedings in the New York City Family Court . . . system enter the lives of parents at critical moments of emotional crisis. These are parents who are too poor to provide food and clothing for themselves and their children, or cannot find affordable, adequate housing for their families, or have been abused themselves, or cannot overcome an addiction to drugs or alcohol. . . . These are parents who desperately need a zealous advocate both in court, to ensure their voices are heard, and out of court, to ensure they receive the services they need to get their children back.[21]

Assignment of court-appointed counsel in New York City typically ends after a finding of abuse or neglect and the placement of the child in foster care.[22] However, a parent may be found abusive or neglectful after the fact-finding hearing, in which case he or she would have to "comply with a court-ordered 'service plan' before [his or] her children may be returned home."[23] A service plan "may include parenting classes, drug counseling, domestic violence counseling, or even securing a new home appropriate for [his or] her family."[24] It is during a period in between court proceedings such as this (e.g., post-disposition, but before extension of placement) that parent attorneys could engage in crucial advocacy activities to assist parents in meeting service plan requirements, adjusting service plans where appropriate, and moving the plan forward expeditiously.

At least until ACS changes the permanency planning goal to adoption, there is a presumption that all parties share a goal of family reunification, though the parties may differ on the mechanism, speed of attainment, and impediments to achieving that goal. To the extent that such a goal is shared, parent attorneys should be recognized as crucial players in the joint endeavor.

---

20. Sheri Bonstelle & Christine Schlessler, Comment, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 Fordham Urb. L.J. 1151 (2001).

21. *Id.* at 1151-52.

22. Mark Green, Pub. Advocate for the City of N.Y. & C-PLAN: Child Planning and Advocacy Now, Accountability Project, Inc., Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings, at v (May 2000).

23. Bonstelle & Schlessler, *supra* note 20, at 1189.

24. *Id.*

III. ACS CASEWORKERS SHOULD NOT BE CONSIDERED REPRESENTED "PARTIES" TO THE ACTION FOR PURPOSES OF THE "NO CONTACT RULE"

A. *Application of the "No Contact Rule" to Government Entities Involves a Balancing Test*

Where two parties are involved in a legal controversy, an attorney for one of the parties is prohibited by the "no-contact rule" from contacting the adverse party without the permission of that party's attorney.[25]

In *Niesig v. Team I*,[26] the New York State Court of Appeals held that "corporate employees, whose acts or omissions in the matter under inquiry are binding on the corporation (in effect the corporation's 'alter egos')."[27] are represented "parties" for purposes of applying the "no contact rule."[28] The court further held that employees whose acts or omissions on the matter under inquiry can be "imputed to the corporation for purposes of its liability," as well as those "employees implementing the advice of counsel," are also "parties" for purposes of the rule.[29]

In *Frey v. Department of Health and Human Services*,[30] the court considered the application of the "no contact rule" where the defendant was a government entity. As in *Niesig*, the term "party" was defined as encompassing those employees, "who are the alter egos of the entity, that is, those individuals who can bind it to a decision or settle controversies on its behalf."[31] Explaining its decision to bar ex parte contact by plaintiffs' counsel with high-level managerial employees who made the employment decision at issue in the litigation, while permitting informal contact with other employees who could provide relevant information in the case, the District Court for the Eastern District of New York indicated its agreement with the balancing approach adopted earlier by the Second Circuit in *N.Y. State Association for Retarded Children v. Carey*.[32] That balancing

25. N.Y. Code of Prof'l Responsibility DR 7-104(A)(i) (N.Y. State Bar Ass'n 1999).
26. 558 N.E.2d 1030 (N.Y. 1990).
27. *Id.* at 1035.
28. *Id.*
29. *Id.*
30. 106 F.R.D. 32 (E.D.N.Y. 1985).
31. *Id.* at 35.
32. 706 F.2d 956 (2d. Cir 1983); *see also Frey*, 106 F.R.D. at 36 (denying order to preclude plaintiffs' counsel from questioning employees of defendant state school based on the rationale that the danger of such an interrogation was outweighed by its potential to aid in arriving at the truth).

approach involved weighing the competing interests between "plaintiff's need for information in the possession of [defendant] and the protection of the party-defendant from adverse counsel obtaining uncounselled [sic] disclosures."[33]

Applying the balancing test, the *Frey* court held that permitting a government entity to block plaintiffs from interviewing potential witnesses under the "no contact rule," except through costly discovery procedures, might frustrate the right of an individual plaintiff with limited resources to a fair trial.[34] This, in turn, might have the effect of deterring other litigants from pursuing their legal remedies.[35] Similarly, in *McKitty v. Board of Education, Nyack Union Free School District*,[36] the District Court for the Southern District of New York held that plaintiff's counsel may interview government employees holding "non-managerial and non-controlling positions," but may not make ex parte contact with employees who had "the power to bind the defendants or settle controversies on their behalf."[37]

B. *The Fact That Particular Types of Communication Between an ACS Caseworker and a DLS Attorney Are Privileged Does Not Make ACS Caseworkers Represented "Parties" for All Purposes, Nor Does It Privilege All Their Communications With DLS Attorneys*

In reaching its decision, the court in *McKitty* considered whether its holding ran afoul of *Upjohn Co. v. United States*,[38] where the United States Supreme Court "held that even low and middle level corporate employees are covered by the attorney-client privilege."[39] Determining that its holding was not inconsistent with the decision in *Upjohn*, the *McKitty* court opted to follow the Supreme Court's reasoning,[40] which states:

> The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[T]he protection of the privilege extends only to *communications* and not

33. *Frey*, 106 F.R.D. at 36.
34. *Id.*
35. *Id.*
36. No. 86 Civ. 3176, 1987 WL 28791 (S.D.N.Y. Dec. 16, 1987).
37. *Id.* at *4.
38. *Id.* at *2-*3.
39. In *Upjohn*, information was found to have been needed from lower- and mid-level management to supply a basis for legal advice concerning company compliance with various regulations. Upjohn Co. v. United States, 449 U.S. 383, 394 (1981). The Supreme Court found that the employees were sufficiently aware they were being questioned so that the corporation could obtain legal advice relative to practices which could be illegal. *Id.* All employees of the company were made aware of the legal implications of the questionnaire at issue. *Id.* Under these circumstances the Court held that the communications at issue (i.e., responses to the questionnaire) were protected against compelled disclosure. *Id.* at 395.
40. *McKitty*, 1987 WL 28791, at *3.

> to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[41]

Since child protective line caseworkers can neither bind the agency,[42] nor bring liability on it if their actions are not taken pursuant to municipal policy or custom,[43] it is only on rare occasions they would be found, under the holding in *Niesig*,[44] to be represented "parties" covered by the "no-contact rule." Federal courts have consistently granted child protective caseworkers qualified immunity from liability for almost all acts[45] taken in the course of their employment, with the exception of intentional violations of due process rights.[46]

Even if communications between ACS caseworkers and DLS attorneys participating in child protective proceedings were subject to the attorney-client privilege (though the relationship between them is not a traditional attorney-client relationship), the underlying facts upon which those communications are based (e.g., the parent-child relationship, reunification efforts, etc.) would not fall within the scope

41. *Upjohn*, 449 U.S. at 395 (emphasis and alteration in original) (quoting Philadelphia v. Westinghouse Electric, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

42. To this writer's knowledge, there are no documents in the public domain that specifically set forth the responsibilities of caseworkers at each level of the ACS hierarchy with regard to decision-making for individual families. It is public knowledge, however, that ACS has a comprehensive system of supervision that consists of a significant number of levels past the line caseworkers. It is also this writer's experience that, while caseworker input is solicited by supervisory personnel, the power to make decisions on crucial issues such as permanency planning goals and timing of family reunification ultimately remains with supervisors, and line caseworkers cannot make those decisions independently. Moreover, it is rare that higher level ACS supervisory personnel appear in Family Court on any particular matter. If personnel from a higher level were to appear, however, for purposes of binding the agency, they may be presumed to be represented "parties" on those occasions, and the prohibitions of the "no contact rule" would therefore apply. *See McKitty*, 1987 WL 28791, at *2; Frey v. Department of Health and Human Servs., 106 F.R.D. 32, 36 (E.D.N.Y. 1985).

43. Under 42 U.S.C. § 1983 (1994), "for a court to impose liability on a municipal defendant" such as ACS, it "must identify a municipal policy or custom from which the alleged injury arose." *See, e.g.*, Tenenbaum v. Williams, 193 F.3d 581, 597 (2d. Cir. 1999).

44. Neisig v. Team I, 558 N.E.2d 1030 (1990).

45. *See, e.g.*, *Tenenbaum*, 193 F.3d at 597 (affording qualified immunity to child welfare workers against plaintiffs' procedural due process claims).

46. *Cf.* Sundbye v. Ogunleye, 3 F. Supp. 2d 254, 261 (E.D.N.Y 1998) (holding that even intentional torts committed by government actors are not actionable as substantive due process claims, unless the torts are arbitrary and discriminatory or shock the conscience). In *Sundbye*, qualified immunity was not granted to the caseworker because her alleged coercion of a mother into relinquishing custody of her daughter in disregard of her due process rights could not be considered objectively reasonable. *Id.* at 265-66.

of privilege, as delineated in *Upjohn*,[47] and should, therefore, constitute areas of legitimate direct discussion[48] between parent attorneys and ACS caseworkers.

IV. APPLICATION OF THE "NO CONTACT RULE" TO COMMUNICATION BETWEEN PARENT ATTORNEYS AND ACS CASEWORKERS IMPEDES EFFICIENT RESOLUTION OF CHILD PROTECTIVE CASES AND SLOWS DOWN THE REUNIFICATION OF FAMILIES

Prohibiting communication between parent attorneys and ACS caseworkers does not serve the purposes of the "no contact rule," since the rule's purposes[49] relate to overreaching, not to protection of a party from revelation of the underlying facts in a case.

The purpose of child protective proceedings is not to find fault with ACS caseworkers who, in any event, remain mostly immune from the threat of lawsuits, but to reunite families. Caseworkers have obligations to facilitate preservation of the family unit by arranging parental visitation, helping parents obtain appropriate services, and providing information to parents regarding family preservation and reunification.[50]

A caseworker's fulfillment of his or her role requires effective communication with the parents.[51] Such communication ought to involve the parent attorney, who functions as the parent representative, and therefore, when necessary, acts in the parent's

---

47. Upjohn Co. v. United States, 449 U.S. 383 (1981).

48. As the court in *McKitty* held, *Upjohn* does not protect the corporate employee from factual disclosures made by its employees, but inquiry may not be made of the employee as to what he or she told defendants' attorney. McKitty v. Board of Educ., Nyack Union Free Sch. Dist., No. 86 Civ. 3176, 1987 WL 28791, at *3 (S.D.N.Y. Dec. 16, 1987).

49. *See* Sinaiko, *supra* note 1, at 1462 (discussing the various purposes of the rule).

50. *See* N.Y. Soc. Serv. Law § 409-a (McKinney 1992); About ACS Policies, *at* http://www.ci.nyc.us/html/acs/html/whatwedo/principles_parent.html (on file with the *Fordham Law Review*). Section 409-a(1)(a) requires a social services official to provide preventive services to a child and his or her family, in accordance with the family's service plan. The relevant provision states in pertinent part:

> [U]pon a finding by such official that (i) the child will be placed or continued in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with or be returned to his [or her] family . . . ."

§ 409-a(1)(a). Preventive services include the following, which are all described in detail in N.Y. Codes R. & Regs. tit. 18, 423.2 (2000): case management; case planning; casework contacts; daycare services; homeworker services; housekeeper/chore services; family planning services; home management services; clinical services; parent aide services; day services to children; parent training; transportation services; emergency cash or goods; emergency shelter; and housing services (rent subsidies, including payment or arrears or any other assistance necessary to obtain adequate housing).

51. About ACS Policies, *at* http://www.ci.nyc.us/html/acs/html/whatwedo/principles_parent.html (on file with the *Fordham Law Review*).

stead. When the parent attorney contacts a caseworker on his or her client's behalf, the purpose of the contact is to resolve issues impeding the family from being reunited. The attorney might contact the caseworker to determine the parent's responsibilities and confirm his or her clients' rights and obligations, or to facilitate resolution of potential impediments to service plan provision or compliance. Prohibiting direct contact between parent attorneys and ACS caseworkers not only hinders the reunification process, but does so needlessly, since the purposes of the "no contact rule" are not served by its application in this context.

To the extent ACS caseworkers assume the role of service providers,[52] they do not fulfill the definition of "alter ego" in an adversarial relationship, as noted in *Frey*.[53] In fact, if communication between the parent attorney and a caseworker results in an admission by the caseworker about the government's failure to satisfy its obligations, the government may even benefit from such an admission by focusing on remedying any errors that may have been made by the caseworker and figuring out how best to provide services to the family. Indeed, it is the government's duty (similar to its duty in a criminal prosecution) to bring out the truth of the situation at hand and safeguard a just outcome to the proceedings, regardless of which party prevails.[54] Allowing the parent attorney to communicate directly with caseworkers recognizes this obligation of neutrality that the government owes both sides, distinguishing child protective cases from standard adversarial civil litigation cases.

An additional reason for allowing direct contact between parent attorneys and caseworkers arises from the fact that caseworkers in the child protective system, acting under their supervisor's directives, have broad discretion when taking action to achieve what is in the best interests of the child.[55] By expanding the opportunities for communication between parents and caseworkers, parent attorneys can play a crucial role in assisting parents to express their needs and, thereby, help level the power imbalance between the parents and the caseworkers.

Parents need an advocate not only to represent them in court, but also to manage the court-ordered directives they have been given and

52. If children are removed from their family, caseworkers must provide supportive services during the temporary placement, coupled with a plan for how the family will be reunited. N.Y. Soc. Serv. Law § 409.

53. Frey v. Department of Health and Human Servs., 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (stating that "alter ego" analysis applies only to those corporate officers with the authority to bind the company).

54. *Id.* at 37.

55. When service plans have been satisfied, ACS decision-makers determine whether, or if, children should be reunited with their parents. While decisions are subject to Family Court review pursuant to N.Y. Fam. Ct. Act § 1055 (McKinney 1999) and adjustment, the opinion of social service officials is accorded due deference.

help them navigate through the child protective system. In this context, attorneys may advocate for fair case plans, assist parents in complying with court orders, and help manage the overall progress toward reunification.[56] Parents often have difficulty negotiating conflicting requirements of treatment programs, parent-child visits, and work obligations, identifying and retaining affordable and appropriate housing, and integrating themselves into their children's educational and treatment programs. Moreover, many parents involved with the child welfare system are required to participate in the Work Experience Program ("WEP") or have jobs that restrict access to telephones during the work day. Permitting the direct involvement of parent attorneys in case plan implementation through communication with caseworkers and attendance at case planning meetings together with their clients can aid in the speedy resolution of such matters and facilitate reunification of the parents and their children.

CONCLUSION

ACS's policy of prohibiting caseworkers from communicating with parent attorneys inhibits the reunification of families and, hence, the full engagement of parents in the planning process. ACS's openness to its caseworkers communicating with children's law guardians reflects its opinion that direct contact between its caseworkers and lawyers for opposing parties in the proceedings is not only necessary, but productive. The prohibitive policy of ACS with respect to parent attorneys shuts them out of an important avenue of advocacy for parents and shuts parents out of the opportunities such advocacy could have otherwise provided to them. Since ACS caseworkers are not represented "parties" pursuant to the New York Code of Professional Responsibility DR 7-104, there is no firm legal grounding for a policy precluding direct communication between parent attorneys and caseworkers. The policy should be revisited and revoked.

56. For example, if the parents have been referred to a therapy provider to whom they cannot relate, or a provider who is ill-suited to meet the requirements of the service plan, the parent attorney can frame this issue for the caseworker. In addition, the parent attorney can troubleshoot difficulties between the parents and the foster parents with the caseworker. The parent attorney can articulate skillfully the particular impediments the parents face in meeting the service plan requirements and advocate for much needed assistance. The parent attorney can convey general objections or concerns about the family service plan.

CONFERENCE PARTICIPANTS

Mimi Abramovitz
Hunter College School
of Social Work

Eileen Ain
National Association of
Social Workers

Nina Allen-Jackson
Parent Advocate

Michael Arsham*
Child Welfare
Organizing Project

Alex Atkinson
JCCA

Regina Ballard
Seaman's Society

Alexandra Barsdorf
Fordham University,
Department of Psychology

LaTonya Baskerville
JCCA

Nicki Bazer
NYU School of Law

Denis Berger
Brooklyn Legal Services,
Corp A

Irene Berthel
Child Welfare Organizing Project

Stephen Billick
New York Medical College

Rolando Bini
Parent Advocate

Bernadette Blount*
Child Welfare
Organizing Project

Eric Brettschneider*
Agenda for Children Tomorrow

Scott Brown
Manhattan Family Court

Patricia Brownell
Fordham University, GSSS

Susan Bryant
The City University of
New York

Folasade Campbell
Concerned Citizens for
Family Preservation

Joseph Cardieri*
ACS

Sandra Carr
WINGS

Annabel Carreras
Graham-Windham

Jill Cohen*
Child Welfare Organizing Project

Steve Cohen
Special Child Welfare Advisory Panel

Mary Jane Cotter

John Courtney
Hunter College Center for Study of Family Policy (Child Welfare Fund & Watch)

Helene Craner
Resources for Children with Special Needs

Barbara DeMayo*
Manhattan Family Court

Vivian DeMilley
ACS, Department of Advocacy

Annette DePalma*
Fordham University Stein Center for Law & Ethics

Marguerite Dingle*
Parent Advocate

Monica Drinane*
The Legal Aid Society

Ilze Earner
Immigration and Child Welfare Project

Laurel Eisner
Public Advocates Office

Judith Elkin
Talbot Perkins Children's Services

Judge Lee Elkins
Kings County Family Court

Paula Fendall
NYU School of Law

Janet Fink
NYS Office of Court Administration

Jennifer Fisher
Fordham University

Mary Ann Forgey*
Fordham University GSS; Interdisciplinary Center for Family & Child Advocacy

Karen Freedman
Lawyers for Children

Paula Galowitz*
NYU School of Law

Philip Genty
Columbia University Law School

Katherine Gerald
Voices of Women

Jill Gerson*
NASW Committee on

Organizing Project

Children & Families

Linda Gibbs
ACS, Management and Planning

Dave Glenwick
Fordham University, Graduate School of Psychology

Arlene Goldsmith
New Alternatives for Children

Ms. Geetha Gopalan
Graham-Windham

Ms. Carmen Goris
Kinship Foster Boarding Home, JCCA

Theresa Gorski

Bruce Green*
Fordham University Stein Center for Law & Ethics

Daniel Greenberg
Legal Aid Society

Martin Guggenheim
NYU School of Law

Marlene Halpern*
Legal Aid Society, Volunteer Division

Alan Halpin
Lawyers for Children

Dana Hamilton*
Child Welfare Organizing Project

Debra Harris*
Fordham University, Interdisciplinary Center for Family & Child Advocacy

Beth Harrow*
Brooklyn Legal Services, Corp. A

Alison Harte
Agenda for Children Tomorrow

Debbie Heiser
Fordham University Graduate School of Psychology

Dorothy Henderson
JBFCS

Woody Henderson
National Action Network

Ann Higgins-D'Alessandro*
Fordham University, Department of Psychology; Interdisiciplinary Center for Family & Child Advocacy

Leah Hill
Fordham University School of Law; Interdisciplinary Center for Family & Child Advocacy

Edith Holzer*
COFCCA

Judge John Hunt
Queens County Family Court

Jacqueline Israel
Graham Windham

Sue Jacobs*
Legal Action Center

Katherine Jankowski
Fordham University,
Department of Psychology

Sandra Jimenez
St. Christopher's, Inc.

Conchita Jones
People United for Children

Christopher Juge
ACS Law Academy

Stephen Kapovich
Parent Advocate

Caroline Kearney*
Legal Support Unit, LSNY

Tanya Krupat
ACS, Division of Foster Care &
Preventive Services

Madeleine Kurtz
NYU School of Law, Family
Defense Clinic

David Lansner
Lansner & Kubitschek

Katherine Law*
Law Guardian Program,
Appellate Division, 1st Dept.

Amy Liszt
C-PLAN

Susan Lob
Battered Women
Resource Center

Judge Margarita Lopez Torres
Kings County Family Court

Alexandra Lowe
ACS, Division of Foster Care
& Preventive Services

Naomi Lynch
COFCCA Training Consortium

Jessica Marcus
NYU School of Law

Nancy Matles*
Appellate Division,
2nd Department

Brian Maxey
Director, Citizens Jury Project

Bonnie McCoy-Williams*
Professional Development
Program, Satterwhite Academy

Dean McKay
Fordham University Graduate
School of Psychology

David Megley*
Graham-Windham

Sania Metzger
Office of Roger Green,
NYS Assembly

Jan Miner
Fordham University GSSS

Ann Moynihan*
Fordham Law School;
Interdisciplinary Center for
Family & Child Advocacy

Jose Nazario
MFY Legal Services

Marty Needelman
Brooklyn Legal Services,
Corp A

Iya Negra
NRW & Associates
Consulting Service

Catherine Nelson*
Child Welfare
Organizing Project

Jennifer Nelson*
Voices of Youth

Stephanie Nilva
LIFT - Legal Info for
Families Today

Danielle Nisivoccia
Fordham University, GSSS

Gessy Nixon*
Voices of Youth

Emily Olshansky
Appellate Division
1st Department

Hank Orenstein*
C-PLAN

Deirdre O'Sullivan*
Office of the Public Advocate

Lisa Parrish
ACS, Foster Care &
Preventive Services

Diana Pichardo Henriquez
East Harlem Parent's Center

Rose Pierre-Louis

James Purcell
COFCCA

Martha Raimon
The Women's Prison
Association

Martha Rayner
Fordham University Criminal
Defense Clinic

Chantal Regis
Urban Justice Center

Judy Reisman*
Parent Advocate

Edwina Richardson-Thomas
18-B Panel Attorney
New York County

Lawyers' Association

Sara Rios
Puerto Rican Legal Defense and Education Fund

Alison Rivard
Fordham University, Children FIRST

Jayne Roberman

Dorothy Roberts
Northwestern University School of Law

Eve Robinson
Children FIRST

Barry Rosenfeld
Fordham University, Department of Psychology

Joyce Russell Anderson
Seamen's Society

Sharonne Salaam*
People United for Children

Judge Sara P. Schechter
New York County Family Court

Andrew Scherer
LSNY

Christine Schessler
Fordham University School of Law

Nanette Schorr*
Bronx Legal Services

Nanette Schrandt*
Legal Aid Society Juvenile Rights Division

Beth Schwartz
Fordham University, Law Clinic

Junius Scott
Youth & Family Services Div, AC&F/NE Hub, Region II

Yvette Sealy
Fordham University, GSSS

Lauren Shapiro
Brooklyn Legal Services, Corp. B

Carol Sherman
Children's Law Center

Lonnie Sherrod
Fordham University,
Department of Psychology

Lyn Slater*
Fordham University Graduate
School of Social Service

Judge Gloria Sosa-Lintner
New York County Family Court

Evette Soto Maldonado
Puerto Rican Legal Defense &
Education Fund

Jane Spinak*
Columbia Law School

Judge Carol Stokinger
Bronx County Family Court

Virginia Strand*
Fordham University,
Children FIRST

Jim Sugrue

Marybeth Sullivan Kass
Holyoke, MA

Nancy Thomson*
ACS, Division of
Legal Services

Androniki Tsamas
Satterwhite Training Academy

Janice Tudy-Jackson

Ernst VanBergeijk
Fordham University, GSSS

Lynn Vogelstein*
NYU School of Law, Family
Defense Clinic

Jay Wade
Fordham University,
Deparment of Psychology

Charles Walker
Voices of Youth

Nakea Walker
Staten Island, NY

Karen Walker-Bryce
Lawyers for Children

Harriet Weinberger*
Law Guardian Program,
Appellate Division,
2nd Department

Marcia Werchol*
Family Court Mental
Health Services

Anne Williams Isom
ACS, External Affairs

Barbara Winter

Carole Zabar

Aimee Zeltzer
Fordham University

Brian Zimmerman
18-B Panel Attorney
New York County
Lawyers' Association

Judge Ruth Jane Zuckerman

* Member of Conference Planning Committee

Rule 1.1 Competence - Comment

Share:

Client-Lawyer Relationship

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a

lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed

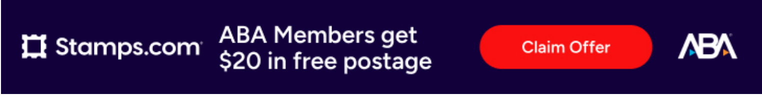
consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Back to Rule | Table of Contents | Next Comment



TOP LEGAL NEWS OF THE WEEK

ABA issues guidance focusing on client language differences

Share:

With estimates that more than 67 million U.S. residents speak a language other than English at home, the American Bar Association has issued a formal opinion to guide lawyers in situations when they and their clients do not share a common language.

> ABA Formal Opinion 500 guides lawyers with clients who do not share their language or have a physical condition that might impede communications.

Formal Opinion 500, released Oct. 6 by the ABA Standing Committee on Ethics and Professional Responsibility, also covers when the client has a physical condition, such as a hearing, speech or vision disability, that might impede communications. For either situation, the opinion explores a lawyer's duty for communication under Model Rule 1.4 and competence under Model Rule 1.1 of the ABA Model Rules of Professional Conduct.

The opinion outlines steps lawyers should consider when faced with these types of communication challenges, including the use of an impartial, qualified interpreter or translator capable of explaining legal concepts. It also makes clear that "it is the lawyer's affirmative

responsibility” to ensure the client understands the lawyer’s communications, and that the lawyer understands the client’s communications.

“Communication between a lawyer and a client is both the means by which a client is provided with the advice and explanations needed to make informed decisions, and the vehicle through which the lawyer obtains information required to address the client’s legal matter appropriately,” the opinion said.

When the lawyer seeks the services of an interpreter or translator due to either language proficiency or noncognitive disability, the lawyer must “make reasonable efforts” to ensure that client confidentiality is protected.

“When there are language considerations affecting the reciprocal exchange of information, a lawyer must ensure that the client understands the legal significance of translated or interpreted communications, and that the lawyer understands the client’s communications,” the opinion said, including understanding that potential differences in cultural and social assumptions might impact the meaning of the communications.

Through the standing committee, the ABA periodically issues ethics opinions to guide lawyers, courts and the public in interpreting and applying its model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior. The formal opinion marks the 500th issued by the ABA since 1924.

Related links:

- ABA Standing Committee on Ethics and Professional Responsibility
- ABA Model Rules of Professional Conduct
- Recent ABA ethics opinions
- Center for Immigration Studies:
    - 67.3 million in the United States spoke a foreign language at home in 2018"
- ABA Journal:
    - "New ABA ethics opinion

clarifies obligations for language access in lawyer-client relationships"

ABA American Bar Association
/content/aba-cms-dotorg/en/news/abanews/aba-news-archives/2021/10/model-rule-formal-opinion

Rule 1.3 Diligence - Comment

Share:

Client-Lawyer Relationship

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and

respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may

assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of

a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Back to Rule | Table of Contents | Next Comment

Rule 1.4: Communications

Share:

Client-Lawyer Relationship

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

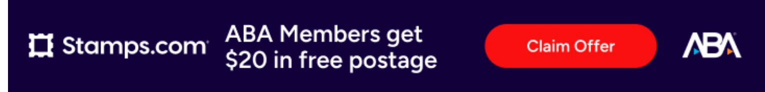
(4) promptly comply with reasonable

requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment | Table of Contents | Next Rule



ABA American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications

Rule 1.14 Client With Diminished Capacity - Comment

Share:

Client-Lawyer Relationship

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot

be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. 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, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] 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 and ability to appreciate consequences of a decision; the substantive fairness of a decision; and 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.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction

may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Back to Rule | Table of Contents | Next Comment

ABA American Bar Association
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14

Model Rules of Professional Conduct: Preamble & Scope

Share:

Preamble: A Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result

advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only

for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles

underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested

concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to

the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the

lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act

upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general

orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Preface | Chairperson's Introduction | Ethics 2000 Chair's Introduction
Table of Contents | Order Publication

American Bar Association
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope

VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

What It Means to Be a Zealous Advocate: A Behavioral Approach

4 JUN 2024 | JON MAY

POSTED IN: LAW PRACTICE

This chapter is presented in advance of publication by the ABA to encourage review and comment on the author's thesis so that he can identify any errors of fact or thought that ought to be corrected.

There is a small but growing movement to remove any reference to zealous advocacy from ethical codes. Those objecting to this language citing its use by lawyers in disciplinary proceedings trying to justify unethical conduct. There is also a movement in academia to convince law students that zealous advocacy

on behalf of certain businesses and industries is wrong, and that they should dedicate themselves to the common good and not to the bests interests of their clients.

I believe that both movements are wrong, that zealous advocacy is an ethic that lawyers must subscribe to, and that zealous advocacy advances the public welfare in ways that advocacy solely on behalf of causes does not.

The first part of this chapter discusses what it means to be a zealous advocate; the second part, what motivates lawyers to practice law the way that they do; and the third part, why zealous advocacy is an essential component of our system of justice.

Part I: What Is a Zealous Advocate?

Examples of zealous advocacy are found throughout fiction and real life. In the movie *12 Angry Men* 11 jurors voted to convict a young man of first-degree murder until Juror #8 convinced them that the evidence proved that the defendant was innocent. In real life, Clarence Darrow epitomized the zealous advocate. Darrow is remembered for his defense of John Scopes, who was prosecuted for teaching the theory of evolution; for saving the lives of Nathan Leopold and Richard Loeb, who had murdered fourteen-year-old Bobby Frank in their pursuit of committing the perfect crime; and for his successful defense of eleven Black men in Detroit who were prosecuted for killing a white neighbor during a confrontation with a mob after one of the defendants, Henry Sweet, moved into a white neighborhood.

Many people know that Darrow represented Leopold and Loeb and that he

saved them from execution. But not everyone knows that Darrow pled these young men guilty and convinced Judge John Caverly to spare their lives at sentencing. Fewer still that the sentencing proceedings lasted a month, that the state put on 80 witnesses, and that Darrow decided not to dispute the state's evidence because nothing about the crime was in dispute, only why it happened.

Darrow's defense was that Leopold and Loeb murdered Frank because they suffered from a diseased mind. In making his case to the court, the defense had to defeat the prosecution's effort to convince Judge Caverly that the court should exclude psychiatric testimony because Darrow had not raised an insanity defense. Darrow went on to present as modern a defense as any found in a courtroom today, calling to the stand two psychiatrists, an endocrinologist, and a neurologist.

Darrow is also the archetypal example of zealous advocacy gone too far; Darrow was prosecuted twice for attempting to bribe two jurors while defending John and James McNamara, who were accused of bombing the Los Angeles Times in 1910. Darrow's first trial ended in a not guilty verdict, the second in a hung jury—8 to 4 for conviction.

There is substantial evidence today that Darrow was guilty of attempting to bribe both jurors. In the first trial, Darrow did not quite come out and admit his guilt but argued that if he had bribed the juror, he would have been justified. In fact, he argued, he was not being prosecuted because he attempted to bribe a juror, but because he was "a lover of the poor, a friend of the oppressed because I have stood by labor for all these years" and because the true criminals, the ones who had amassed their power through bribery, were

the business groups arrayed against him.

In the Leopold and Loeb case, Darrow was a zealous advocate, providing his clients with the most vigorous representation possible: making brilliant tactical decisions, presenting the best scientific evidence available, and arguing a defense of mental disease without raising the more difficult and often unsuccessful defense of insanity.

But in the McNamara prosecution, Darrow acted as a zealot. Rather than risk a conviction and the certainty of execution, he chose bribery. And when he was prosecuted for bribery, Darrow presented a political defense—that he was being prosecuted because he had stood up for the poor, the oppressed, and labor against a business establishment bent on crushing him.

A federal circuit judge recently told me that our system of justice, civil and criminal, cannot work, and certainly cannot work well, unless there is a contest between advocates representing the interests of their clients with zeal. But what does zeal mean? It's easy to see that Clarence Darrow provided zealous advocacy in defending Leopold and Loeb, but not when he defended the McNamara brothers. Our adversarial system of justice does not tolerate lawyers who violate rules of professional conduct or break the law. As the lawsuits to overturn the 2020 election have shown, any lawyer who believes that their client's cause justifies filing lawsuits with no basis in fact soon realizes that there is a price to be paid for abusing the judicial system—a price that may cost them their freedom, the loss of their reputation, and the privilege of practicing law.

A federal district judge who was previously a state judge and before that a

federal prosecutor said to me recently that the level of incivility between civil lawyers is at times disheartening, whereas dealings between defense attornes and prosecutors are generally cordial. Conduct that is far more often exhibited in civil litigation than in criminal, such as maliciously accusing opposing counsel of misconduct, obstructive behavior during depositions, or willfully disobeying court orders (the list goes on and on) is not advocacy at all. Such conduct too is sanctionable, and when uncovered, no one is fooled by the claim that counsel was justified in their actions by the obligation of zealous advocacy.

Any discussion of what it means to be a zealous advocate should begin with an acknowledgment that, with the exception of the District of Columbia and Massachusetts, no jurisdiction expressly requires that a lawyer be a zealous advocate on behalf of their client.

The ABA Model Rules of Professional Conduct, which has been adopted in some form by every state uses the words zeal, zealous, or zealous advocacy only in the preamble and in the comment to Rule 1.3, neither of which impose a binding obligation on lawyers. Indeed, thirteen states, have had these words removed from their ethical rules. Florida is considering whether to join them.

In criminal cases, lawyers and law professors have anchored the obligation of zealous advocacy in the right to counsel guaranteed by the Sixth Amendment and in the right to due process of law provided for by the Fifth and Fourteenth Amendments. Although the Supreme Court has opined on what zealous advocacy means, the Court has set a very low bar for the kind of representation defense counsel is constitutionally required to provide—a bar far lower than zealousness.

The Supreme Court discussed zealous advocacy in *McCoy v. Ct. of Appeals of Wisconsin*, observing:

> The attorney must … provide his or her client precisely the services that an affluent defendant could obtain from paid counsel….the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client.

However, the Court has not held that the Constitution requires that a defendant receive the assistance of a zealous advocate. The Sixth Amendment requires only that a defendant receive "effective assistance of counsel." In Strickland v. Washington, the Supreme Court held that in order to establish that a defendant did not receive effective assistance of counsel the defendant must demonstrate that counsel "made errors so serious that counsel was not functioning as 'counsel,'" and that counsel's lapses rendered the trial so unfair as to "undermine confidence of the outcome." What this means is that a lawyer need only be "reasonably effective," and that in considering a claim that defense counsel did not do all that counsel should have on behalf of a defendant courts, were to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." To make it perfectly clear that the measure of professional competence was not to be defined by ethical provisions which might place a higher burden on counsel, such as one of zealousness, the Court stated that ABA Standards and the like are merely "guides."

There is as big a difference between "effective assistance of counsel" and "zealous advocacy," as there is between a not-guilty verdict and life behind bars. Where a lawyer has failed to live up to their obligations under the very low standard of "effective assistance" there are consequences: a new trial for

the defendant, potential sanctions against the lawyer by the bar, and in rare cases a malpractice suit. Where a lawyer fails to provide the most effective representation they are capable of, who is not zealous in their representation of the defendant, the defendant has no remedy—even in instances where they are actually innocent.

The same situation applies in civil practice as well. There is no requirement that an attorney provide zealous advocacy in their representation of a client. But, unlike criminal practice (except in rare cases) civil counsel faces the very real threat of a malpractice suit if counsel is negligent in their representation. That provides some impetus for counsel to provide careful if not exactly zealous representation.

Part II: What Motivates Lawyers to Practice as They Do?

So why should we even care about being zealous advocates? I will try to provide an answer to that question before the end of this essay, but first, we need to address what motivates us to be enthusiastic advocates on behalf of our clients. Whether or not we are committed to being zealous advocates in the practice of law, that is not something we think about when we file a lawsuit or make an opening statement to a jury. When we first meet with a client, and they tell us their story, and they ask us our advice what to do, or tell us what they want to do, we may become emotionally involved in the wrong they have suffered. We may hear how they acted in self-defense, or how they trusted a partner in their business, or lost a child in an accident. The more time we spend with our client and their family, and the more evidence we uncover that supports their claims, the more committed we become to righting the wrong or making them as

whole as possible.

Or we may have no sympathy for the client at all. We may represent a company in a commercial dispute and the rightness or wrongness of their cause is completely irrelevant to us. The only thing that is important is prevailing in the lawsuit. Here we are motivated in part by the money we will earn for our efforts. But only in part, because we will be compensated whether we win or lose (unless it is a contingency case). What causes us to be enthusiastic in our efforts is pride in our work and if we are litigators, an overwhelming desire to win and to be regarded by our peers and the public as the best (or most feared) trial lawyer around. This is equally true for lawyers who are not litigators but want to be known as the "go to" lawyer for every aspect of practice, from administrative law to zoning.

We are also motivated by the client's expectations.

Civil and criminal clients may have different motivations, the former—redress for alleged harm or insult or defeating liability for the alleged harm or insult; the latter—the defendant's freedom, livelihood, and reputation. But lawyers generally believe that prospective clients are looking for a fighter, that clients want someone who will be just as angry as they are and will "fight like hell" for their cause. And their idea of a fighter is someone who will act aggressively on their behalf. And therein lies the root of the problem when lawyers are faced with disciplinary action. It is also the root of the problem when acting aggressively is not in the client's interests. I believe that much of the bad behavior we see in our practices is caused by the impetus to satisfy our clien's actual or perceived expectations.

Sometimes the task requires that we act aggressively. I once had to cross-examine a middle-aged woman who had accused my client, the president of a medical records review company, of instructing her physician employees what life expectancy determinations to issue for each policyholder. The witness was assuredly viewed positively by the jury after the government's direct was completed. But she had lied several times in the past, and as I took her through her lies, I became more confrontational, more accusatory, and by the time I became cruel, the jury didn't hold it against me; she had betrayed their initial trust and they were angry.

On other occasions, when you have an important government witness (often an expert) whom you believe can provide testimony that will support your defense, you might treat them with kid gloves. I once cross-examined the president of the New York Mercantile Exchange about hedging precious commodities. I was able to lay much of the foundation for my defense through his testimony. When he got off the stand, he walked up to me, held out his hand, and said he appreciated how much of a gentleman I had been. I was flabbergasted. And my client was none too happy by my failure to destroy this witness in cross (his anger was somewhat assuaged when the jury came back with a hung verdict).

Part III: Why Zealous Advocacy Is an Essential Component of our System of Justice

If there are various motivations driving us to do our best for our clients, why do we even need to consider whether there is an obligation to be zealous

advocates, whatever the limitations of such advocacy are in a particular case?

I suggest that zealous advocacy is critical to our identity as members of a profession engaged in the practice of law, not just people engaged in a business. Admittedly, this runs counter to both public perception and the actions of some lawyers who only view their work in terms of the wealth it can generate. And that perception could become reality if we as individuals do not commit ourselves to a calling that is greater than just a way to generate invoices.

Zealous advocacy should have as powerful a hold on the practice of lawyering as the so-called "Protestant Work Ethic" has had on the exceptionally driven American work force. It impels us to do the best for our clients even when we detest them, be they serial killers or corporate polluters. Those are extreme examples, but in the run of cases, our clients rarely inspire us or pay us so much that we are more motivated to win their case than we are for a client paying us much less. And for those who represent persons accused of crimes, often for much less money than they could make in civil practice. For those like myself who practice criminal law, the commitment to being zealous advocates is what keeps us from burning out even though 90+ percent of our clients are convicted and go to prison. It is what causes us to forge ahead when the only thing we can do is convince the judge to impose a lower sentence than that sought by the prosecutor.

Some believe that eliminating zeal from ethical codes will reduce ethical violations or lapses. As I have tried to show, it is not zealous advocacy that is responsible for lawyers engaging in improper conduct. The causes of misbehavior will not suddenly evaporate with the elimination of language from

an ethical code. Moreover, when individual lawyers abuse the legal system, there already are remedies that judges and bar associations can employ to sanction their misconduct. Indeed, the lines that lawyers must not cross are clearly identified in all ethical codes. For instance, the Model Rules specify:

> The duty of adhering to strict truthfulness and avoiding deception (Rule 3.3), using the legal forum and process for legitimate means (Rule 3.1), respecting the forum as an officer of the court (Rule 3.5), duty not to abet fraud and misconduct (Rule 3.3(a)(2), 3.3(c), and 3.4(b)), duty not to engage in conspiracy or collusive conduct that benefits the lawyer or the client (Rule 3.3, 3.4, and 3.5), duty not to assert frivolous claims or defenses (Rule 3.1), duty to expedite litigation (Rule 3.2), a duty of fairness to opposing counsel and not to make untruthful statements to third parties (Rule 3.4 and 4.1), a duty not to use false and misleading evidence and misinformation (Rule 3.4), and to show candor to the tribunal (Rule 3.3(a))

Where lawyers engage in practices that undermine the balance of power between parties, either through the filing of frivolous pleadings or unnecessary depositions, or boorish behavior, these provisions provide ample grounds for discipline by bar associations.

Where these provisions have failed to ensure that counsel acts within the bounds set by ethical rules, the demands of constitutional rights, or even the prevailing moral values, courts and legislatures have enacted rules and statutes to address abuses. For instance, when the practice of withholding exculpatory information from defense counsel in violation of the Supreme Court's decision in *Brady v. Maryland*, had become widespread among federal prosecutors, Congress enacted legislation to give the courts greater authority to sanction

prosecutors who failed to follow the law. When prosecutors were striking jurors based on race, the Supreme Court stepped in to stop the practice. But that does not mean prosecutors will suddenly become less zealous in their pursuit of justice.

Lawyers will occasionally confront hard questions that test their judgment in determining the best course of action. In 1966, Professor Monroe Freedman posited three such questions that he believed had to be resolved in favor of the defendant. They were: (1) is it ethical to discredit a truthful witness; (2) is it proper to knowingly put a witness on the stand who will commit perjury; and (3) may a lawyer provide a client with legal advice when the lawyer suspects the client may use that advice to commit perjury? (His answers so angered Chief Justice Warren Burger, that Burger sought to have Freedman disbarred.) Fifty years later, Professor Todd Berger offered three more hard questions:

> (1) What is the ethically appropriate response when a victim of a crime who does not wish to pursue prosecution asks a criminal defense attorney, “So, what happens if I don’t come to court?”
>
> (2) What should defense counsel say to a judge who directly asks counsel about incriminating information that is protected by attorney-client confidentiality when the judge can easily infer that defense counsel’s refusal to answer such a question is an indication of the client’s culpability?
>
> (3) Can defense counsel zealously advocate for an individual client if doing so would potentially anger a prosecutor who is likely to retaliate by punishing the attorney’s other clients?

Professor Berger demonstrated that counsel can find the answer to these questions, or at least meaningful guidance, in the rules of ethics. Zealous advocacy only comes into play when counsel must make a judgment call. In that case the Supreme Court's decision in *McCoy* tells lawyers that, "the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client."

There are also some in academia who argue that law students should be taught that the public good comes before the interests of the client. Of course, the academics who espouse this philosophy believe that what is in the public interest is not subject to debate. Most of them have spent the greater part of their careers teaching and little time actually representing clients. A full discussion of their ideas is beyond the scope of this chapter but I will make a few observations.

With rare exceptions, such as where a lawyer is appointed by a judge to represent an indigent defendant, a lawyer is never required to represent any particular individual or cause. If a law firm or public office orders a lawyer to represent a client in a matter that the lawyer cannot in good conscience handle, the lawyer can and should resign. In other words, the ethic of zealous advocacy suggests that if you cannot be a zealous advocate, don't be an advocate at all.

For lawyers who believe that they should dedicate themselves to some public interest, representing parties in litigation they hope will change society gives them plenty of opportunities to serve the public interest. For example, those who believe that the administrative state has harmed small businesses and stifled competition can represent businesses to limit the reach of regulations; those who believe that school boards have limited the First Amendment rights

of students by banning books from school libraries can file suit on behalf of the American Civil Liberties Union. Indeed, it is difficult to conceive of a mechanism that can bring more issues to the consciousness of the American public or more vividly illustrate the differences in values expressed by those issues than litigation instituted by zealous advocates.

This brings us to the final avenue available to lawyers who seek to change the status quo. Like any citizen, they can lobby for legislation that promotes their vision of the public good. And they can vote for those who share their vision.

Some of these behaviors are hardwired. Our relationships with others arise in part from empathy, which can be traced to certain areas of the brain. Knowing right from wrong is something children learn from their caregivers. Being a zealous advocate is something we do in part because of who we are but also because of what we aspire to be. No one will be punished for being diligent but not zealous, but being zealous advocates is what makes our work a profession and why our profession is better for it.

When we begin the practice of law, at least those of us who do civil and criminal litigation, we are determined to obtain the results our clients have hired us for.

Now, we may be motivated by our desire to become great trial lawyers, or our desire to become wealthy, or maybe fear of losing our jobs or not making partner if clients are unhappy with our performance. But singularly or in combination, these cause us to do the best work we are capable of.

But the vast majority of us do not become great trial lawyers. We become

competent which is enough for us to be effective. We become well-off but not wealthy (at least not like our friends from college who became corporate executives or managed funds) and we don't make partner at an AmLaw 100 law firm; instead, we become partners in small or midsize firms or sole practitioners.

Not everyone, for sure, but many lawyers begin to rely more and more on what has worked in the past and become less committed to the desire to win. Criminal defense attorneys who now plead up to 98% of their clients and rarely go to trial, begin to lose their enthusiasm for their work and come to think of themselves as cogs in the system. Eventually, these lawyers become less effective and enthusiastic advocates.

Throughout this evolution, the one thing that stays the same is the client's expectation that they are hiring a lawyer who is going to do the best job the lawyer is capable of. Whether express or implied, lawyers agree to do just that. Based upon that commitment, counsel is ethically obligated to provide the kind of representation the client has paid for.

The ethic or culture of zealous advocacy is the commitment we make to ourselves to counter all the things that happen in life that get in the way of our obligations to our clients. That is what makes our work a profession and not just a job.

POSTED IN: LAW PRACTICE, PHILOSOPHY AND ETHICS
TAGS: LAWYER ETHICS, PROFESSIONAL RESPONSIBILITY

JON MAY

Jon May is a criminal defense attorney and former federal prosecutor.

Comments are closed.

JUSTIA

The opinions expressed in Verdict are those of the individual columnists and do not represent the opinions of Justia.

© 2025 Justia

December 18, 2019

Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners

By Krista Ellis

Share this:

This article was adapted from a presentation on Bias in Child Welfare by Krista Ellis, Amelia Watson, and Shrounda Selivanoff at the ABA Center on Children and the Law's National Conference on Parent Representation, April 2019 in Tyson's Corner, VA. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and accordingly, should not be construed as representing the policy of the American Bar Association.

Note: Bias harms families of color and low socioeconomic status involved in the child welfare system. While other biases must be addressed, such as those related to religion, sexual orientation, gender identity, and more, this article selectively discusses race and poverty bias.

- National studies by the U.S. Department of Health and Human Services reported "minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children."[1]

- According to January 2017 reports from the state of Washington, "African American children were 2.2 times and Native American children were 2.9 times more likely to be placed in out-of-home care compared to white children"[2]

These statistics and similar reports from around the country indicate race and poverty-related disparities and disproportionality in the child welfare system. Race and socioeconomic status often impact decisions in every stage of the child welfare system from reporting, to foster care placements, to termination of parental rights decisions.

Many factors may explain the evidence of disproportionality and disparity surrounding racial groups and low-income families in the child welfare system:

- correlation between poverty and maltreatment;
- visibility or exposure bias;
- limited access to services;
- geographic restrictions; and
- child welfare professionals knowingly or unknowingly letting personal biases impact their actions or decisions.

Understanding Bias

Child welfare professionals must address their own biases when working with families. Many biases develop from the schema in our brain that lets us quickly analyze people, places, and situations.[3] Schema may be gathered through learned stereotypes and stored in the recesses of our brains. Our schema operates as the lens through which we interpret and predict the world. Schema often results in a fixed oversimplification of groups. Because schema assists our brains with processing, it can create preferences for particular groups, negative or positive.

Biases may come in two forms:

(1) Explicit biases include overt acts of discrimination, racism, and prejudice. Explicit bias is easier to identify. People are typically aware of the explicit biases they may possess because it is a conscious bias.

(2) Implicit biases can be more difficult to assess because they include unconscious attitudes and beliefs. We are typically unaware that we have these biases. However, while not as obvious, implicit biases can produce discriminatory behaviors. A common example used to describe implicit bias is racial profiling by law enforcement – implicit bias may lead police officers to be more suspicious of male minorities. In the child welfare realm, a study from a Philadelphia hospital suggested African American and Latino toddlers hospitalized for injuries such as bone fractures "were more than five times more likely to be evaluated for child abuse, and more than three times more likely to be reported to child protective services, than white children with comparable injuries."[4]

Everyone has implicit biases. The presence of implicit biases does not necessarily lead to explicitly biased decisions or behaviors; however, bias may predict subtle discriminatory behaviors.[5] By definition, implicit biases appear without awareness or direction. Research suggests that one way to reduce or prevent implicit bias in our decision-making process requires recognizing our biases. Since implicit biases are unconscious, using tools and self-reflection are the means through which we must discover these biases.

Harvard University created the Implicit Association Test (IAT) to help identify implicit biases.[6] The IAT uses a methodology relating reaction time to words and categories to elicit unconscious opinions. There are IATs to test biases for race, gender, disability, and much more. Strategies also focus on identifying and addressing bias in systems that work with children and families.[7]

Why Does Bias Matter?

Our implicit biases affect our daily decisions. For many of us, implicit biases may control who we sit beside on the bus or train on our morning commute or in a room with other people. Biases can impact our work with families in the child welfare system. Bias that goes unchecked can impact the trajectory of a child welfare case for many families. While implicit bias is not always negative, it can lead to discriminatory actions.

Addressing Bias

"Addressing the overrepresentation of children and families of color in our juvenile courts requires careful consideration and reform of the policies and practices that drive bias and structural racism."[8]

Child welfare system leaders should actively address concerns about bias.

1. Become aware of your own biases
2. Raise consciousness
3. Deliberate, reflect, and educate
4. Change perspectives
5. Welcome and embrace diversity among practitioners

Regardless of your role in the child welfare system, whether attorney, judge, social worker, or other professional there are opportunities to address your own and others' biases to ensure they do not drive decisions in child welfare cases. Often our biases lead us to believe all families should be just like our families. We may think, "Well, if that was my child I would not do that." We must break down this method of evaluating families and focus on safety and what is truly in the best interest of the child. Because this

mode of thinking is not the most natural for our brains to process, we must make conscious decisions after reflecting during each step of the child welfare proceeding.

Become aware of your own bias.

As mentioned above, a first step to addressing bias is knowing your own biases, whether positive or negative. Being aware of the bias enables you to flag and remove that bias when making decisions so a fair, individualized assessment can be made. Becoming aware of bias may require completing tests such as the IAT to identify your biases. Practicing ongoing self-reflection of your beliefs, presumptions, and opinions can assist with checking on pre-existing and newly formed biases. Our biases typically derive from our personal experiences. Therefore, by educating ourselves through reading books, listening to podcasts, participating in trainings, and having productive discussions that disrupt bias, child welfare providers can gain new perspectives that help them understand their decisions.

Raise consciousness.

Child welfare advocates must raise consciousness of bias in practice. For attorneys, bias can impact representation. Zealously representing clients may require attorneys to assess their own biases and ensure other professionals' biases are not driving decisions or recommendations. Judges should also reduce or eliminate bias in child welfare cases by assessing their biases about families of color or poor families. Judges should also acknowledge and properly assess cases when biases from other practitioners lead to improper case determinations.[9] For social workers this may require acknowledging biases during referrals, recommendations, and home visits.

A major area in which child welfare practitioners may raise consciousness of cultural bias is language barriers between families and practitioners. Language barriers often further cultural biases for child welfare professionals. Due to the difficulty of communicating, professionals may act unreasonably due to misunderstandings. Practitioners must advocate for access to tools and resources, such as language services, interpreters, or colleagues with language and culture fluency to foster meaningful communications with clients. Never let language barriers inhibit effective representation.

Deliberate, reflect, and educate.

To reduce or eliminate our own biases, we should take time to reflect on reasoning and facts before making decisions. Due to high caseloads and the need for triaging, child welfare practitioners often make quick, in-the-moment, decisions. These off-the-cuff decisions are usually biased because individual facts may not be considered.[10] Our brains often fill the gaps with stereotypes or prior cases we have encountered.

Some tips:

- *Write it down* – writing typically induces further deliberation and causes you to consider the justification of the decision made.
- *Explain your reasoning to another person* (e.g., colleague or intern). This alternative may provide an opportunity for deliberation. Taking the time to reflect, write down your perspective, or discuss resolutions with a colleague can uncover when and how a bias is impacting decisions.

Change perspectives.

Working directly with clients can foster an "in their shoes" approach. This means imagining you are the client, considering all factors you may know about the client (race, socioeconomic status, and more), and understanding the client's perspective. Meet your clients "where they are" and understand what they want and need. Exercise cultural empathy to understand how clients with varying

backgrounds may differ. Cultural empathy is simply appreciating and considering the differences and similarities of another culture compared to one's own.

In addition to personal steps we may take to change perspective, we can work together for structural and systematic changes of perspective. Examples include:

- *Supporting Parent Advocates.* Parent mentoring programs provide additional support for parents involved in the child welfare system. Supporting parent mentoring programs encourages parents to have a voice in the child welfare system to say what they need and how the system can do a better job to serve parents and families.
- *Reunification Day Celebrations*. These local events celebrate parents who have reunited with their children following child welfare intervention. They are an opportunity for localities to reflect and celebrate the preferred goal of child welfare intervention. For state examples of reunification day events, see the ABA's National Reunification Month web page.
- *"Blind Removals."* Blind removals require a panel of practitioners to look at a case file with all identifications of race removed before assessing whether a child should be removed from their home or receive services. In one jurisdiction, implementing blind removals resulted in fewer children of color being placed in out-of-home care than under previous methods.[11]

Welcome and embrace diversity among practitioners.

Research suggests exposure to varied groups may reduce bias. One mechanism for change may be the "social contact hypothesis." This hypothesis "suggests that prejudice and stereotypes can be reduced by face-to-face interaction between groups."[12] This means meeting and working with individuals from other communities can actually reduce our biases. More specifically, contact with "positive exemplars" can shape and possibly even reduce how we associate stereotypes to particular groups. A great way to introduce positive exemplars may be embracing a more diverse staff and/or peer mentors. Other examples of positive exemplars include reunification heroes, parent allies meeting with legislators, and parent allies employed by the child welfare system.

Conclusion

Addressing implicit bias is an ongoing process that individuals need to commit to addressing to have a child welfare system that our families truly deserve, one that does not treat them differently because of their race or income. As child welfare providers, attorneys, judges, and social workers, it is our job to take steps to combat our own biases affecting our cases and to work together to make systemic changes that benefit families. Take a step toward addressing bias today whether that means taking an IAT, starting a conversation in your office, setting up a bias training for peers, educating yourself with books or podcasts, or engaging in a new event or practice directed at disrupting bias in the child welfare system.

Krista Ellis, JD, graduated from American University's Washington College of Law. She interned at the ABA Center on Children and the Law from May 2018 – December 2018 where she focused on legal representation and family reunification.

The author thanks her co-presenters Amelia Watson, managing attorney and Shrounda Selivanoff, social services worker, both with the Washington State Office of Public Defense's Parent Representation Program, for their invaluable insights, and review and refinements to the article.

Endnotes

[1] Dorothy Roberts. *PBS Frontline Essay: Race and Class in the Child Welfare System.* <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html>

[2] Partners for Our Children. "Child Welfare Data at a Glance. <https://partnersforourchildren.org/data/quickfacts>

[3] We use schemata to provide a frame of reference for new information. Schemata helps our brains predict likely outcomes and make sense of experiences. Because it plays a role in how we understand certain information, it can often guide or impact our behaviors. *See* InThinking.net. *Schema Theory: Definitions.* (last updated July 2018). <https://www.thinkib.net/psychology/page/1458/schema-theory>

[4] *See* Dorothy Roberts. *PBS Frontline Essay: Race and Class in the Child Welfare System* <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html
>

[5]ABA Section of Litigation, Implicit Bias Initiative. <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/>

[6] Take a test here: https://implicit.harvard.edu/implicit/takeatest.html.

[7] *See* ABA Section of Litigation, Committee on Children's Rights. "Five Ways to Address Implicit Bias Within Our Systems," October 31, 2018. < https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2018/five-ways-to-address-implicit-bias-within-our-systems/>

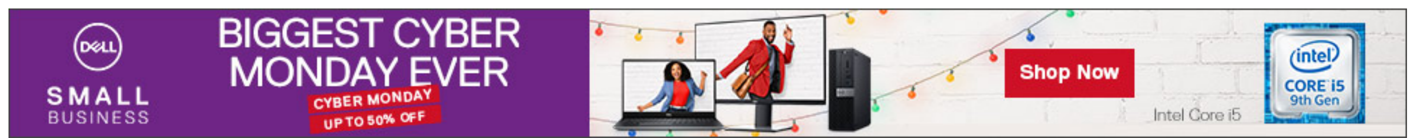
[8] National Council of Juvenile and Family Court Judges. *Addressing Bias in Delinquency and Child Welfare Systems Bench Card.* <http://www.ncjfcj.org/Addressing-Bias-Benchcard#:~:targetText=The%20National%20Council%20of,of%20justice%20for%20all%20youth.%E2%80%9D>

[9] *See*, National Council of Juvenile and Family Court Judges. *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, 2016, 15, 21, 41, & 66. <https://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf>

[10] *See e.g.*, Goff, Phillip Atiba. *Implicit Racial Bias in Public Defender Triage*, *Yale Law Journal* 122, 2013, 2626.

[11] American Bar Association. *Hidden Injustice: Toward a Better Defense*, November 19, 2017. <https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/hidden_injusticet/>

[12] ABA Section of Litigation, Implicit Bias Initiative. (citing Kang & Banaji, Fiske & Gilbers, Asgari, Dasgupta & Asgari). <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/>



ADOPTED

AMERICAN BAR ASSOCIATION

COMMISSION ON YOUTH AT RISK
SECTION OF LITIGATION
COALITION ON RACIAL AND ETHNIC JUSTICE
CRIMINAL JUSTICE SECTION
JUDICIAL DIVISION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION
COMMISSION ON DISABILITY RIGHTS
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
COMMISSION ON LAW AND AGING

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges all federal state, local, territorial,
2 and tribal Bar Associations to educate attorneys and other legal professionals about anti-
3 Black systemic racism within the child welfare system, stemming from the history of
4 slavery in the United States and perpetuated by over-surveillance of and under-
5 investment in Black families in America, which is pervasive, ongoing, and a root cause of
6 the disproportionate involvement of Black parents and children within the system; and
7
8 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
9 territorial, and tribal governments and courts, as well as attorneys, judges, legislatures,
10 governmental agencies, and policymakers to:
11
12 (1) Recognize implicit and explicit bias and acknowledge collective responsibility for
13 challenging laws, policies, and practices that devalue Black families and normalize
14 systemic racism and family separation;
15
16 (2) Ensure all legal decisions, policies, and practices regarding children's wellbeing
17 respect the value of Black children and families' racial, cultural, and ethnic
18 identities and the connections, needs, and strengths that arise from those
19 identities; and
20
21 (3) Consult, listen to, and be led by Black parents, children, and kin with lived
22 experience in child welfare to learn how to support constructive steps to end the
23 legacy of Black family separation under the law.

REPORT

I. Introduction

Examining and acknowledging America's history of anti-Black racism and how it has impacted families since times of slavery and into the modern-day child welfare field is necessary. This historical recognition does not suggest that every child removal from the home is wrong. And it is not designed to support a full repeal of all child welfare laws. With this call to reflect on and recognize the connection between our collective history of under-investment in Black families and over-surveilling Black communities, however, the ABA can contribute to an important national conversation about what child welfare means for Black children and parents to ensure any system designed to meet family needs is grounded in understanding those needs directly.

In June 2020, the murder of George Floyd by a police officer spurred national outrage and a renewed call to action to stand up to systemic racism committed under authority of law against Black Americans. The ABA called on the legal community to recognize the special responsibility lawyers have to address these injustices and work to end systemic racism.[1] This Resolution follows that call by focusing on the responsibilities legal professionals have to challenge anti-Black racism in the child welfare system, one of the most complex and wide-reaching legal systems in our country today.

Racial disparity occurs at every decision point along the child welfare continuum.[2]

- Black families are overrepresented in reports of suspected maltreatment and experience child protective services (CPS) investigations at higher rates.[3] These reports are so common that more than half of all Black children in America will experience a child welfare investigation by age 18.[4]
- Black children are at greater risk than white children of being separated from their families following an investigation, even when alleged maltreatment is the same.[5]

---

[1] *ABA President Martinez decries violence against George Floyd, Black community. Pledges action*, (June 5, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-martinez-decries-violence-against-george-floyd--bl/.

[2] This inequitable treatment is compounded at the intersection of race and disability. *See* Loe et al., *Disproportionate Representation of Children of Color and Parents with Disabilities in the Child Welfare System: The Intersection of Race/Ethnicity, Immigration Status, and Disability*, 42(6) J DEVELOPMENT & BEHAVIORAL PEDIATRICS 512-514 (Aug. 2021), https://pubmed.ncbi.nlm.nih.gov/34232145/.

[3] *See* K.S. Krase, Differences in racially disproportionate reporting of child maltreatment across report sources. 7 JOURNAL OF PUBLIC CHILD WELFARE 351–369 (2013) https://doi.org/10.1080/15548732.2013.79876; Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 274-280 (2017), https://doi.org/10.2105/AJPH.2016.303545.

[4] *See* Kim, et al., *supra* note 3, at 274-280.

[5] *See Youngmin Yi* et al., *Cumulative prevalence of confirmed maltreatment and foster care placements for US children by race/ethnicity, 2011-2016*. 110 AMERICAN JOURNAL OF PUBLIC HEALTH 704–709 (2020), https://www.doi.org/10.2105/AJPH.2019.305554.

- Once in CPS custody, Black children have longer placements in foster care, receive fewer services, and are less likely to reunify with families. [6]
- Finally, Black children are 2.4 times more likely than white children in foster care to experience parental loss through a court-ordered termination of parental rights.[7]

This Resolution seeks to ground these numbers in an understanding of how we arrived here. Specifically, this Resolution begins by calling on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country.[8] With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children through the child welfare system. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in child welfare in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

In addition to calling on other Bar Associations to provide this education, the ABA also has a responsibility to recognize its own role contributing to racism in the legal field. For example, the ABA's refusal to permit Black attorneys as members until 1943 is a part of our organizational decision-making and structure that was consistent with other exclusions toward Black Americans that existed and harmed families for decades.[9] Within the child welfare legal field in particular, the ABA has also traditionally supported and helped design pieces of legislation that have disproportionately affected and caused harm to Black children, parents, and families.[10] Recognizing the discriminatory effect of these laws requires that the legal profession stand up and do something to change them. Even if those results arose from well-intended laws, no profession should turn a blind eye once the consequences are clear. More importantly, the ABA can support and implement a vision for child welfare emerging from the most important leaders in this space – Black children, parents, and family members whose lives have been affected by child welfare.

II. Prior ABA Policy

[6] Children's Bureau Bulletin*, Child Welfare Practice to Address Racial Disproportionality and Disparity* (April 2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf.
[7] Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children*, 2000-2016; 25(1) CHILD MALTREAT. 32–42 (Feb. 2020).
[8] *See e.g.*, New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).
[9] American Bar Association, *ABA Timeline*, https://www.americanbar.org/about_the_aba/timeline/.
[10] *See, e.g.,* Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2001), (Referencing the ABA's project Termination Barriers and active support for provisions in the Adoption and Safe Families Act that facilitated parental and child termination of family rights).

In 2008, the ABA passed Resolution 107, which urged Congress to review and collect data on the disproportionate representation of racial and ethnic minority children in the child welfare system.[11] Resolution 107 also called on judges, attorneys, and other legal professionals to help racial and ethnic minority families access services to prevent child removal into foster care and provide greater supports for kin caregivers. Finally, Resolution 107 encouraged legal professionals to seek bias training to improve cultural competence when working with racial and ethnic minority families. The ABA has passed several additional policies focused on bias training for all legal professionals, including judges, lawyers and law students in the ensuing years.[12]

Resolution 107 was an important starting point in recognizing and researching the issue of disproportionality for racial and ethnic minorities in the child welfare system. But it did not address the roots of that disproportionality, including longstanding systemic oppression perpetrated on Black families since before the nation's founding. Nor did it address the intersection of poverty and race that contribute to inequities Black families have often experienced when resources and public services are unevenly distributed.

This resolution goes beyond Resolution 107's examination of disproportionality in foster care to focus on understanding how the history of government surveillance of and deliberate underinvestment in Black families has led to and continues to impact decisions to separate Black children from their parents. Additionally, in contrast with Resolution 107, which focused broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. This does not imply that other areas of child welfare disproportionality and family separation are not also important areas of focus for the Association, including those that affect Native American children, LGBTQ children, and Latino and immigrant children and youth. The ABA has recent policies that focus on rights for each of those groups.[13] Like those resolutions, this resolution focuses on calling for change in the treatment of one particular group – Black families.

III. Education on the Roots of Anti-Black Systemic Racism in Child Welfare

To understand how child welfare laws, policies, and practices have perpetuated and normalized anti-Black racism and Black family separation in America, it is important to look at the context in which those laws developed. This report examines two categories of legal history: (1) laws that have facilitated surveillance and separation of Black children and parents; and (2) laws that have facilitated underinvestment in Black families and incentivized caring for children apart from their parents. Both categories have shaped current child welfare laws and practices. The Commission on Youth at Risk will be

[11] ABA RESOLUTION 08A107 (2008).
[12] ABA RESOLUTION 21A102 (2021); ABA RESOLUTION 20A117 (2020); ABA RESOLUTION 20A116G (2020); ABA RESOLUTION 91A10D (1991).
[13] *See generally*, ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy); ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy); ABA RESOLUTION 07A104B (2007), (LGBT Youth in Foster Care Policy); ABA RESOLUTION 18A119 (2018), (Rights of Immigrant Children); ABA RESOLUTION 19A115C (2019), (Constitutionality of the Indian Child Welfare Act Policy); ABA RESOLUTION 11A103D (2011), (Protection of Unaccompanied and Undocumented Immigrant Children).

producing a more complete historical White Paper on these categories as an additional resource. The history provided below is abbreviated for the Report structure.

A. Laws that Facilitated Surveillance and Separation of Black Children and Parents

"*But the child was torn from the arms of its mother amid the most heart-rending shrieks from the mother and child on the one hand, and the bitter oaths and cruel lashes from the tyrants on the other*."[14]

For the more than 200 years when slavery was permitted by law in this country, the dehumanizing and violent act of taking children from their families was intentional and served enslavers' economic interests.[15] For example, the threat of family separation was used as a tool to keep enslaved mothers, fathers, and children compliant – no threat was more horrifying than the fear of being sold away from one's family. As archival recordings from formerly enslaved people make clear, parents and "[c]hildren, even from a young age, were well aware that their sale could occur at any moment."[16] Family separation was also often a form of business development because children born to enslaved mothers were automatically deemed to be property of the enslaver and as such could be sold. While some supporters of slavery sought to normalize these breaks in family bonds by suggesting that Black parents and children did not experience personal emotions and family attachment in the same way as a white family member would, the majority recognized the cruelty involved.[17] In fact, the known cruelty of taking children from their parents became a key focus of abolitionists who highlighted the pain of family separation to shame the system out of existence.

After the Civil War, Black leaders and their allies fought to secure a constitutional right to family integrity in recognition of the widespread destruction Black families had

---

[14] DeNeen L. Brown, *'Barbaric': America's cruel history of separating children from their parents*, WASH. POST. May 31, 2018, https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/ (quote taken from a 1849 narrative, Henry Bibb, a former enslaved person in an exhibit at the Smithsonian's Museum of African American History and Culture, which documents the history of enslaved children being separated from their enslaved parents).

[15] Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, University of Georgia School of Social Work, (April 7, 2017) https://doi.org/10.1177/0021934717702134; As Frederick Douglass noted "[i]t is a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age." *Narrative of the Life of Frederick Douglass.*

[16] *See* Vanessa M. Holden, *Slavery and America's Legacy of Family Separation*, AAIHS (July 25, 2018) https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/; Brown, *supra* note 14; Elizabeth Ofosuah Johnson, *The disturbing history of enslaved mothers forced to breastfeed white babies in the 1600s*, FACE2FACE IN AFRICA (Aug. 20, 2018), https://face2faceafrica.com/article/the-disturbing-history-of-enslaved-mothers-forced-to-breastfeed-white-babies-in-the-1600s.

[17] Thomas R.R. Cobb, a proponent of slavery was quoted in 1858 as proclaiming that the Black family "suffers little by separation". *See* Nicholas Kristof, *Trump Wasn't First to Separate Families, but Policy Was Still Evil*, NEW YORK TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/opinion/trump-family-separation-executive-order.html.

experienced during slavery.[18] Despite these efforts, family separations between Black children and parents continued with frequency under the color of new laws. For example, vagrancy laws criminalized unemployment, and often led to Black family separation when parents were imprisoned and forced to perform labor through chain gangs or in direct service to former enslavers on plantations. Another legal basis for separation arose from "apprenticeship" laws, through which Black children were "hired out" to former enslavers through an agreement, often certified by a court, where unpaid labor was exchanged for a promise of "training."[19] In some cases, children were considered orphans when apprenticed. In others, children were required to enter labor agreements when their parents had been arrested or found to be destitute.[20] Courts and landowners rationalized the agreements with rhetoric that it served the "child's best interests" to be apprenticed because their families could not support them financially.[21]

Though slavery, vagrancy laws, and forced apprenticeships no longer provide legal contexts for separating Black children from their parents and other kin, aspects of these laws influence practices today. For example, poverty and parental arrest continue to serve as two of the most prominent causes of child removal into foster care.[22]

B. Laws that Facilitated Underinvestment in Black Families and Incentivized Caring for Children Apart from Their Parents

America has a long history of excluding Black parents from public support. For example, during the Depression, when mothers' pensions were provided to help women care for children in their own homes after losing a male breadwinner to death, abandonment, or poor health, restrictions limited these supports to only white children of widows, and excluded children of Black mothers.[23] Likewise, in 1935 when the federal government established Aid to Dependent Children (ADC), Congress permitted state and local officials to set eligibility criteria and many states took steps to exclude Black parents.[24]

---

[18] Brief for Law Professors as *Amici Curiae* in Support of Plaintiffs' Opposition to the Motion to Dismiss, *D.J.C.V. v. U.S.*, Civil Action No. 1:20-CV-05747-PAE (S.D.N.Y. Dec. 22, 2020).

[19] *See The History of Slave Patrols, Black Codes, and Vagrancy Laws*, available at https://www.facinghistory.org/educator-resources/current-events/policing-legacy-racial-injustice/history-slave-patrols-black-codes-vagrancy-laws.

[20] At the same time, state laws severely limited Black property ownership as well as participation in certain businesses and skilled trades. *See Black Codes*, (June 1, 2010), available at https://www.history.com/topics/black-history/black-codes.

[21] Constitutional Rights Foundation, *The Southern "Black Codes" of 1865-66*, https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html.

[22] National data released by the U.S. Department of Health and Human Services for FY20 indicates parental incarceration and neglect comprised 70% of all foster care entries that year. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU, *The AFCARS Report: Preliminary FY 2020 Estimates as of October 04,2021,* No.28 https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf.

[23] Ife Floyd et al., *TANF Policies Reflect Racist Legacy of Cash Assistance: Reimagined Program Should Center Black Mothers,* CENTER ON BUDGET AND POLICY PRIORITIES (Aug. 4, 2021), https://www.cbpp.org/research/family-income-support/tanf-policies-reflect-racist-legacy-of-cash-assistance.

[24] *See, e.g.*, Taryn Lindhorst & Leslie Leighninger, "*Ending Welfare as We Know It" in 1960: Louisiana's*

i. Unsuitability Provisions

In the second half of the 20th Century, underinvestment in Black families became especially intertwined with concepts of parental fitness and "unsuitability" that continue to have implications in the child welfare system today. Specifically, in the 1950s, as court-ordered public school desegregation processes began throughout the country, states passed new laws to exclude "unsuitable homes" from public aid eligibility based on parental fitness determinations. As one state legislator openly acknowledged, these exclusions were not based on actual fitness determinations, but were instead designed to push Black families out of the community to limit their children's school enrollment.[25]

The impact was extraordinary. In the span of just a few years, tens of thousands of children were cut from public aid, almost all of them Black, for being "illegitimate" or because their parents were "unfit."[26] Laws in Florida and Tennessee went a step further. These states not only denied public benefits, they also encouraged caseworkers to ask mothers "unfit" for receiving aid to voluntarily release their children to a relative or risk referral to juvenile court for "child neglect."[27]

ii. The Flemming Rule – A Faulty Foundation for Child Welfare Law

Following significant domestic and international pressure, the federal government challenged these state suitability laws in 1961, when Arthur Flemming, the Secretary of Health, Education and Welfare, issued an administrative ruling prohibiting states from excluding children from ADC eligibility based on parental "suitability."[28]

"*A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere."*[29]

As a result of the carveout language in the rule, however, although states could no longer deny aid to children based on parental unsuitability, they could continue to deny public

---

Suitable Home Law, SOCIAL SERVICE REVIEW, (December 2003) (Congress explicitly excluded "farm workers and domestic workers" from coverage, two areas of employment for Black women at the time).

[25] *See* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 36 (2021) (quoting a Mississippi state legislator who declared "when the cutting starts, [Negroes will] head for Chicago"). *See also* Kelly Condit-Shrestha, *Racialized Borders within the United States: A History of Foster Care, Adoption, and Child Removal in African American Communities*, US HISTORY SCENE, https://ushistoryscene.com/article/racializedborders (last visited April 26, 2022).

[26] BRIGGS, at 39.

[27] Id. at 38.

[28] State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare; The Federal Role in the Federal System: The Dynamics of Growth ..., Volumes 1-4, United States. Advisory Commission on Intergovernmental Relations page 48.

[29] In 1968, the Supreme Court reaffirmed the message of the Flemming Rule when it held that a parent's welfare application could justify taking children from their families. *King v. Smith*, 392 U.S. 309 (1968).

support if the child resided elsewhere.[30] Using this exception, and building on examples from Tennessee and Florida, states began removing children from Black parents seeking public aid and placing them in foster care, another "arrangement," at rapid rates. Congress unintentionally incentivized this approach when it adopted the Flemming Rule into law, and simultaneously made Social Security Act funds available to support children in foster care away from their families.[31] Before then, foster care had not received federal funding, had been largely used as a temporary support for families seeking voluntary help, and had excluded many non-white children. After 1961, the racial identity of children in foster care transformed. Tens of thousands of Black parents lost their children and Black children lost their parents, kin and communities. The total number of children in foster care nationally increased by 67% in a year, from 163,000 in 1961 to 272,000 by 1962.[32]

Organizations, such as the Child Welfare League of America pushed for judicial oversight as a safeguard to "ensure that rogue caseworkers would not remove children from their homes simply to punish poor mothers for applying for [ADC benefits] in the first place."[33] In response, Congress amended the Social Security Act in 1962 to provide that states are permitted to remove a child from a home that is *judicially determined* to be so unsuitable as to "be contrary to the welfare of such child."[34] Unfortunately, judicial oversight did not provide the sought check on the system and often led to higher levels of public authority approving child removals into foster care.[35] Parents and children lacked counsel to challenge such decisions, and after court review it became even harder for Black parents and children to reunify. Today, sixty-one years later, the federal child welfare architecture established in 1961 remains largely unchanged.

IV. Recognize Bias and Acknowledge Collective Responsibility for Challenging Laws that Devalue Black Families

Although many laws passed since 1961 do not have the same explicitly discriminatory underpinnings, they cannot be understood in isolation from the centuries of foundation upon which they were developed. Looking forward, legal professionals have a responsibility to untangle the child welfare field from this foundation rooted in racism by challenging laws, policies and practices that have the impact of devaluing Black parent

---

[30] *See* CATHERINE RYMPH, RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE 168 (2017).
[31] 42 U.S.C. § 604(b) (1961).
[32] *See* C. Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule,* 76(1) CHILD WELFARE (Jan-Feb 1997) 9-30 (referred to as the "Browning of child welfare in America"). *See also* W. Robert Johnston, *Historical statistics on adoption in the United States, plus statistics on child population and welfare (*Aug. 5, 2017) https://www.johnstonsarchive.net/policy/adoptionstats.html.
[33] RYMPH, *supra* note 29, at 168.
[34] 42 U.S.C. § 608(a)(1); see also 42 U.S.C. § 604(b); S.Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962). Under the 1962 amendments, Congress also clarified that states can terminate AFDC assistance to a child living in an unsuitable home if they provide other adequate care and assistance for the child.
[35] *See generally*, Edward V. Sparer, *AFDC Eligibility Requirements Unrelated to Need: The Impact of* King v. Smith, 1219 U. PENN L. REV. (1970), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9425&context=penn_law_review.

and child bonds. Areas where historical impact should be addressed in future discussions about legislative change, include:

- Linking Foster Care Funding with Aid Eligibility;
- Definitions of Abuse and Neglect;
- Mandatory Reporting;
- Child Removals Based on Parental Incarceration;
- Prioritizing Cultural Identity;
- Terminations of Parental Rights

Each of these areas of law are complex and require careful consideration when proposing changes. Each area also requires an understanding of the historical underpinnings, outcomes produced, and calls for change from Black children, parents, and communities. With this Resolution, the ABA calls for all consideration of changes in these areas to be grounded in those core tenets.

i. Linking Foster Care Funding with Aid Eligibility

Federal maintenance payments, which cover partial costs of children's placement in foster care, continue to be linked to AFDC eligibility criteria. Building on the Flemming Rule, maintenance payments support only children who have been "voluntarily" placed in foster care or for whom a judge has found it is "contrary to welfare" to remain at home and "efforts" have been made to support the family.[36] These problematic thresholds for removing a child from their family require re-examination in light of the original intentions surrounding their creation as an alternative to supporting families through public aid.

ii. Definitions of Abuse and Neglect

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) – as "a campaign against the national problem of child abuse."[37] Although CAPTA was non-discriminatory on its face, its passage, just thirteen years after the unsuitability rules were prohibited and federal funding became available for child removals, reinforced discriminatory impact for Black families. For example, several CAPTA provisions revived themes of saving children from poor families based on expansive definitions of abuse and neglect that continued to invite subjective assessments about parental fitness much like the suitability laws.[38] In some states, definitions of neglect included basic concepts of poverty, such as a lack of adequate clothing, housing, or food. These laws did not address a parent's ability to afford such things or provide guidance on what "adequate" means.

[36] 42 U.S.C. § 672.
[37] *See* Kathy Barbell & Madelyn Freundlich, *Foster Care Today*, CASEY FAMILY PROGRAMS NATIONAL CENTER FOR RESOURCE FAMILY SUPPORT (2001), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf.
[38] CAPTA, P.L. 93-247 defined those categories broadly as "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation…or [a]n act or failure to act which presents an imminent risk of serious harm."

iii. Mandatory Reporting

As passed in 1974, CAPTA also triggered an expansion of the number of professionals mandated to report abuse and neglect.[39] Again the outcomes have not been even. Black children are more likely to be reported for suspected maltreatment than white children, particularly by mandated reporters in the education and medical fields.[40] The data demonstrate a false assumption among reporters that Black children are at a higher risk of abuse at home than white children.[41] For reports related to neglect, this may also suggest an ongoing correlation with poverty rates that are addressed through child removal rather than support to the family.[42] Black women are also more likely than white women to be screened for drug use during pregnancy and to face legal consequences for prenatal substance exposure, including incarceration and child removal.[43] Under CAPTA, courts also saw an increase in allegations of "failure to protect" against mothers who experienced domestic violence.[44]

iv. Parental Incarceration

In a recurrent theme from the past, parental incarceration also led to increased foster care entry in the 1970s, 80s and 90s. CAPTA called for active communication between child welfare caseworkers and local law enforcement authorities conducting criminal investigations. This call for collaboration coincided with the national launch of the "war on drugs" in the late 1970s and early 1980s, when rates of incarceration for Black men and women increased disproportionately despite evidence of no difference in the use or distribution of drugs when compared with white people in America.[45] Rates of female

---

[39] After CAPTA, reports of child maltreatment increased from 60,000 in 1974 to one million in 1980 and 2 million in 1990. Recent estimates indicate that this figure has since doubled to roughly 4.4 million annual reports. JOHN E. B. MYERS, A SHORT HISTORY OF CHILD PROTECTION IN AMERICA, 456; *Child Maltreatment 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (2021), at 7.

[40] Alan J. Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 THE ANNALS OF THE AM. ACAD. 253, 254 (2020) (citing Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33 (2013)).

[41] Elizabeth Hlavinka, *Racial Disparity Seen in Child Abuse Reporting,* MEDPAGE TODAY (2020).

[42] *See* New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law, RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, at 11 (April 2, 2022), https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (CAPTA's inclusion of neglect encapsulates poverty and has perpetuated surveillance and separation of Black families based on ability to provide basic needs).

[43] Kathi L H Harp and Amanda M Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 (2) SOC POLIT. 258–281 (Jun. 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7372952/

[44] *See generally*, Debra Whitcomb, *Children and Domestic Violence: The Prosecutor's Res*ponse, (2004), https://www.ojp.gov/pdffiles1/nij/199721.pdf; Debra Whitcomb, *Prosecutors, Kids, and Domestic Violence Cases,* 248 NATIONAL INSTITUTE OF JUSTICE JOURNAL 2-9 (March 2002). *See also* Dorothy Roberts, *How the Child Welfare System Polices Black Mothers*, 15 BARNARD CENTER FOR RESEARCH ON WOMEN 3, (2019) https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/.

[45] *See* The Sentencing Project: *Criminal Justice Facts,* https://www.sentencingproject.org/criminal-justice-facts/ (last visited April 16, 2022) (During the first 15 years of the war on drugs the U.S. prison population

incarceration in particular tripled during the 1980s, and 80% of all Black women who were incarcerated during that time had children living with them at the time of their arrest.[46] Although some children were able to live with their fathers or other kin, many were referred to child welfare and entered foster care when their mothers were arrested. Law enforcement referrals to child welfare remain a leading cause of foster care entry today, accounting for nearly 20% of all referrals to child protection services.[47]

v. Racial Identity

Throughout the early history of federally funded foster care, social workers often prioritized children's placements in the communities where they had roots. This could include family roots, cultural roots, and ethnic or racial identities. In 1994, Congress changed this landscape in the Multi-Ethnic Placement Act (MEPA), which allows foster and adoptive parents to retain rights to express a preference for children based on race while prohibiting racial preferences on behalf of the child or birth parents in finding a foster care placement for their child. Proponents of the law advocated for it as a "color blind" approach to child placements that would prioritize timeliness of a child's placement over cultural and racial heritage considerations. In juxtaposing those two interests as an either/or, without reconciling both as important, MEPA diminished the importance of the Black child's identity and the families' rights to family integrity.[48]

Overrepresentation of Black children in foster care awaiting adoption remains and MEPA's focus on diminishing the importance of racial and cultural identity in placements has led to a gap in recognizing the unique identity that Black children have or respecting their need for community and culture that is connected to their identity.[49] This contradicts well-established best practice standards for adoption.[50]

---

tripled from 200,000 to 600,000). *See also* Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility* (Sept. 30, 2014) https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/ (Although white people have been statistically found to be more likely than Black people to sell drugs, and equally likely to consume them, Black people are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possession).

[46] Roberts, *supra* note 44.

[47] Dana Weiner et al., *Chapin Hall Issue Brief: COVID-19 and Child Welfare: Using Data to Understand Trends in Maltreatment,* CHAPIN HALL AT UNIVERSITY OF CHICAGO, https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf.

[48] Specifically, the law prohibits states from making placement decisions on the basis of race, color, or national origin, and mandates the "diligent recruitment" of racially and ethnically diverse pools of prospective foster and adoptive families.

[49] *See* Lorelei B. Mitchell et al., *Child Welfare Reform in the United States: Findings from a Local Agency Survey*, 84 CHILD WELFARE 5, 15 (2005) (only 8% of the 97 agencies included in the 1999-2000 Local Agency Survey created new recruitment efforts following the passage of MEPA); Evan B. Donaldson *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, ADOPTION INST. (2008), at 35-36, 40; *Child and Family Services Reviews Aggregate Report, Round 3: Fiscal Years 2015-2018*, ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (June 5, 2020), at 46, (reporting that only seventeen states received a 'strength' rating for diligently recruiting diverse foster and adoptive families).

[50] *A Stronger Foundation for America's Families: Transition 2021*, CHILD WELFARE LEAGUE OF AM. (Dec. 2020), at 61, https://www.cwla.org/wp-content/uploads/2021/01/Transition-2021-Final.pdf ("All children deserve to be raised in a family that respects their cultural heritage.").

In 2022, the ABA adopted Resolution M22613, establishing a presumption of child presence in all dependency proceedings.[51] Hearing from court-involved children informs legal decisions and practices that respect and value a child's unique identity, including their racial, cultural, and ethnic, linguistic, disability, sexual orientation, and gender identities. Consistent with federal law, efforts should always be made to place children with kinship relatives as the first placement option. When that is not an option, priority placements with foster parents who provide a nurturing home where a child's identity can be affirmed are critical to supporting children's well-being.

vi. Terminations of Parental Rights

Welfare reform in the 1990s further cut assistance to Black families and contributed to increased use of foster care. By 1999, just a few years after welfare reform, the number of children in foster care in the United States reached an all-time high at 567,000 – an increase of more than 570% since 1950. Child welfare professionals who believed many children were already lingering in foster care for too long, instead of achieving permanency, raised concerns about the impact of welfare reform early on. Congress responded by accelerating the timeline for terminating parental rights through the Adoption and Safe Families Act of 1997 ("ASFA"). Rather than incentivize supports for families staying together or reunifying, Congress funded adoption incentives only.

Since 1997, the number of parental terminations has exceeded the number of adoptions annually, resulting in a new legal concept known as the "legal orphan" who lacks legal birth parents and adoptive parents.[52] A majority of these "legal orphans" are Black children. The number of children who experience a termination of parental rights, many of whom are not adopted, has exploded nationally. Researchers at the National Institutes of Health recently found 1 of every 100 children living in the U.S. is likely to experience a TPR by age 18.[53] The rate of TPR is closer to 2 of every 100 Black children.

Many people with lived experience in foster care note that even in situations where they could not remain with their birth parents, a termination of parental rights carries greater consequences than the law recognizes. A TPR not only ends the relationship with birth parents, but often results in cutting connections to other family members, grandparents, cousins, aunts, uncles, even siblings. The premise that not all families should be kept together, and the racially disparate outcomes of the law itself reflect an undermining of

[51] ABA RESOLUTION 22M613 (2022), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-resolution-613.pdf (Presumption of Youth Presence in Court).
[52] *ASFA, "Aging Out" and the Growth in Legal Orphans*, NAT'L COALITION FOR CHILD PROTECTION REFORM (Sept. 9, 2020), at 2, available at https://drive.google.com/file/d/1X3X9a4H6LFfKWRnSDolDxuZb6Dm4yUdA/view; *See also Information Memorandum Log No: ACYF-CB-IM-20-09*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 5, 2021), at 9, http://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf ("[c]hildren who enter care and have their parents' parental rights terminated more frequently fail to discharge and stay in care longer than children whose parent's parental rights are not terminated . . .").
[53] *See* Wildeman, *supra* note 7.

the constitutionally protected right to family integrity for Black families that continues to reverberate throughout all the communities where TPR has grown so common.

V. Valuing Race, Culture and Identity as Part of Child and Parent Rights to Family Integrity

Addressing anti-Black systemic racism in the child welfare system, just as slavery abolitionist and Black leaders called for 150 years ago, also involves renewing our nation's commitment to upholding the integrity of Black families. Today family integrity is a well-established fundamental liberty interest under the Fourteenth Amendment. It protects the interests of parents in directing the upbringing of their children and maintaining their families free from unwarranted government intrusion.[54] The Supreme Court has referred to parental rights to family integrity as "perhaps the oldest of the fundamental liberty interests recognized."[55] As acknowledged in ABA Resolution 19A118, rights to family integrity also extends to children."[56]

The Supreme Court's framing of the right to family integrity underscores the contours of the basic rights guaranteed to all families under the Constitution. In *Meyer v. Nebraska*, the Court explained that the Fourteenth Amendment protects the right to "establish a home and bring up children," upholding the right of parents to control the education of their children.[57] The Court later reaffirmed the "fundamental liberty interest of natural parents in the care, custody, and management of their child" in *Santosky v. Kramer*.[58] Specifically, the *Santosky* Court held that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[59] Recent immigration cases in lower courts have expounded on family integrity as

---

[54] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . ."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reaffirming the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *Troxel v. Granville*, 530 U.S. 57, 77 (2000) ("We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.").

[55] *Troxel* 530 U.S. at 77. While the *Troxel* Court recognized family integrity as a fundamental liberty interest, it did not clearly articulate the level of scrutiny it applied in rendering its decision. Lower courts have applied varying levels of scrutiny. For example, the Ninth Circuit has applied both strict scrutiny and rational basis review in cases asserting a family integrity claim, and the Seventh Circuit has applied the Fourth Amendment's "reasonableness test," in recognition that some heightened level of scrutiny is warranted.

[56] ABA RESOLUTION 19A118 (2019).

[57] *Meyer*, 262 U.S. at 399. *See also Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (holding that laws compelling children to attend public school unreasonably interfered with the liberty interests of parents in directing their children's education).

[58] *Santosky*, 455 U.S. at 745.

[59] *Id.* at 753.

an independent liberty interest of children, holding that forced separations at the border "deprived the children of their family integrity."[60]

Despite our highest Court recognizing this fundamental right, it remains illusory in the face of laws and policies that perpetuate systemic injustice towards Black families. Whether by design or from disparate outcomes, child welfare legislation has regularly failed to uphold the constitutional right to family integrity for Black families. Allowing the status quo to persist without such a challenge ignores the role of existing laws in the destruction and devaluation of the Black family within the child welfare system. System impacted people emphasize that the right to family integrity implicates more than the immediate nuclear family. Indeed, entire bloodlines have been impacted by this system. For example, termination of parental rights, cuts a child off from more than just their biological parents. Frequently, their connection to grandparents, aunts, uncles, cousins, and even siblings is also terminated. Too often generations of families are negatively impacted by this system. A former system-impacted youth shared that, now as a parent, she grieves her own daughter's loss of great-grandparents, aunts, and uncles.

To address anti-Black systemic racism in child welfare, policymakers must evaluate where laws run afoul of the right to maintain one's family and, where necessary, revise or repeal legislation with a discriminatory impact. This call has been accepted in one state already – in April 2022, the New York State Bar Association (NYSBA) passed a resolution with accompanying report recognizing systemic racism resulting from the history of slavery exists within the state's child welfare system, impacting Black families disparately, and acknowledging the collective responsibility of "legislators, policymakers, judges and attorneys for creating, promulgating, maintaining, implementing and/or enforcing laws, policies, rulings and practices that have not adequately valued Black families and have often resulted in their unnecessary investigation and separation of families." [61]

VI. Following the Lead of Black Parents, Children and Kin

No one understands the impact of the child welfare system better than those who have lived experience within this system. Accordingly, to confront the legacy of anti-Black systemic racism in child welfare, we must ground our goals by following the lead of Black families—children, parents, and kin—directly impacted by this system.[62] We cannot expect to have meaningful changes surrounding the child welfare system without stepping aside and allowing those closest to the problem—and therefore closest to the solution—to lead in implementing change. Despite the disparate impact child welfare laws have had on Black families, Black families with lived expertise historically have not been invited to

---

[60] *S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731 (D. Conn. 2018); *See also W.S.R. v. Sessions*, 318 F. Supp. 3d 1116 (N.D. Ill., 2018) (stating that the constitutional interest at issue was the "child's right to remain in the custody of his parent").

[61] New York State Bar, *supra* note 8.

[62] *See* ABA RESOLUTION 20A115 (calling for all legal system reform efforts that affect children and youth to be led by or conducted in partnership with individuals who had experienced those systems as children and youth). *See also* Zoe Livengood, *Strategies for Engaging Youth and Families with Lived Experiences*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2020), https://www.ncjfcj.org/wp-content/uploads/2020/09/NCJFCJ_Strategies_for_Engaging_PWLE_Final.pdf

the table where decisions are being made. Black families with lived experience should be encouraged and supported in taking a leading role in drafting, creating, and implementing federal child welfare legislation. This change is necessary for Black families to truly experience their right to family integrity.[63]

Black leaders with lived experience as parents, children, and kin around the country have already established organizations to facilitate this leadership. Organizations such as Rise,[64] Movement for Family Power, [65] and Think of Us[66] are excellent examples. Each focus on the concept "nothing about us without us." Individuals with lived experience have a wide range of perspectives and include not only parents and children, but also Black kin, foster parents, and adoptive parents. It is important to acknowledge there are conflicting perspectives on the continued viability of the child welfare system. Many people, both those with lived experience and those who work within the system, are asking, "Should we advocate for reforms or tear the child welfare system down?" Listening to the voices of those with lived experience will reaffirm that change is needed. Opinions vary as to what that change looks like, with some advocating for the elimination of all forms of foster care, and others seeking to make improvements to the system rather than dismantle it.[67]

Judges and attorneys who are obligated to represent, defend, and decide the outcome for a family, no matter how egalitarian their belief system, bring bias to the courtroom. Here too, legal professionals must follow the lead of Black leaders in the child welfare system, to achieve better outcomes for children. Resources on bias correction are available, but to truly address anti-Black systemic racism, listening to and following the lead of Black leaders, is essential. An analysis of discrimination and bias in the child welfare system requires acknowledging the correlation of poverty and child welfare that is frequently discussed by Black leaders. Diversity of the bench and the legal profession

---

[63] This call for Black family leadership is not new. In 1972, two scholars released a book on racism in child welfare that concluded by calling explicitly for Black family leadership as the key to addressing disproportionality. *See* ANDREW BILLINGSLEY AND JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972).

[64] *About Rise*, https://www.risemagazine.org/about/, (last visited April 26, 2022).

[65] *Movement for Family Power,* https://www.movementforfamilypower.org/ (last visited April 26, 2022).

[66] *Think of Us*, https://www.thinkof-us.org/

[67] *Compare* Center for the Study of Social Policy, *What Does it Mean to Abolish the Child Welfare System as We Know It?* (Jun. 29, 2020) available at https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it/ (Upend the system) vs AJ Ortiz, *Abolishing the Child Welfare System Would Harm Victims of Child Abuse*, CHILD USA (Jun 21, 2021) available at https://childusa.org/abolishing-the-child-welfare-system-would-harm-victims-of-child-abuse/. See also, Alan Dettlaff et al., *What It Means to Abolish Child Welfare as We Know it,* IMPRINT NEWS (OCT. 14, 2020) https://imprintnews.org/race/what-means-abolish-child-welfare/48257; Michael Fitzgerald, *Rising Voices For 'Family Power' Seek to Abolish the Child Welfare System,* IMPRINT NEWS (JUL. 8, 2020), https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141; Molly Schwartz, *Do We Need to Abolish Child Protective Services? Inside one parent's five-year battle with the "family destruction system,"* MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/; Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System,* THE NEWS REPUBLIC (Aug. 18, 2021), https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system.

is also an important tool in reducing anti-black systemic racism as it helps to incorporate a variety of approaches and experiences when interpreting and applying the law.[68].[69]

So much of the history of denying real needs stems from public narratives that distinguish Black families from the parenting ideal embodied in the white, middle-class model traditionally supported by state and federal law.[70] By following the lead of Black families with lived experience, judges, attorneys, policy makers, and other professionals in the child welfare system can learn to help change the narrative and view the strengths of the Black family, community, and support system for what they have always been.

VII. Conclusion

Like other legal systems, child welfare has a long history of over-surveillance of and underinvestment in the lives of Black families. This Resolution urges the ABA and the legal profession to examine that history, acknowledge our role in shaping it, and begin to untangle it by following the lead of Black children, parents, and kin who have experienced child welfare and know both the potential for harm and the importance of investing in the strength of Black families as foundational to our country.

Respectfully submitted,

Ernestine Gray, Chair
Commission on Youth at Risk - August 2022

---

[68] *Addressing Bias in Delinquency and Child Welfare Systems*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, (2018) https://www.ncjfcj.org/publications/addressing-bias-in-delinquency-and-child-welfare-systems; ENHANCING JUSTICE: REDUCING BIAS, (Sarah E Redfield, ed., American Bar Association Judicial Division 2017); JUDGES' JOURNAL: BLUEPRINT FOR DIVERSITY (American Bar Association 2016); MARY-MARGARET ANDERSON, UNDERSTANDING IMPLICIT BIAS: AN ATTAINABLE GOAL (2015). https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/understanding_implicit_bias_an_attainable_goal/

[70] Dorothy Roberts, *Race and Class in the Child Welfare System*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html.

GENERAL INFORMATION FORM

Submitting Entity: COMMISSION ON YOUTH AT RISK
SECTION OF LITIGATION
COALITION ON RACIAL AND ETHNIC JUSTICE
CRIMINAL JUSTICE SECTION
JUDICIAL DIVISION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION
COMMISSION ON DISABILITY RIGHTS
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
COMMISSION ON LAW AND AGING

Submitted By: Ernestine Gray, Chair, Commission on Youth at Risk

1. Summary of the Resolution(s).

   This resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.[71] With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

   This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   This resolution seeks to improve our profession (Goal 2) by encouraging attorneys and judges to recognize ongoing anti-Black systemic racism in the child welfare

[71] *See e.g.*, New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

system and ensure all legal decisions, policies, and practices, regarding child well-being are not informed by racist goals or assumptions. The resolution also seeks to eliminate bias (Goal 3) by urging courts, attorneys, judges, legislators, governmental agencies, and other policy makers to recognize Black children, parents, and kin as unique individuals with unique racial, cultural, and ethnic identities that have important strengths and needs that should be valued rather than devalued in the child welfare system.

3. Approval by Submitting Entity.

    Commission on Youth at Risk – April 25, 2022
    Commission on Disability Rights – May 3, 2022
    Commission on Domestic & Sexual Violence – April 28, 2022
    Commission on Law and Aging – May 3, 2022
    Criminal Justice Section – May 2, 20221
    Section of Civil Rights and Social Justice – May 4, 2022
    Section of Litigation – May 7, 2022
    Solo, Small Firm and General Practice Division – May 17, 2022

4. Has this or a similar resolution been submitted to the House or Board previously?

    Yes. We submitted a prior version of this resolution on November 16, 2021. We withdrew the prior version from consideration at Midyear upon learning it would not be calendared. Since that date, we have made extensive changes based on feedback from the Drafting Team, Rules and Calendar, and other ABA entities. We have also cut the length of the accompanying Report as requested. Following those changes, we attach the revised Resolution and Report with a request that it be calendared at Annual.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

    This Resolution builds on the existing policies and standards identified below. Existing policies examine the disproportionate representation of racial and ethnic minority children in the child welfare system, addressing bias to improve cultural competence, engaging youth in legal system reform, preserving a right to family integrity, and supporting immigrant and other minority groups. This policy focuses solely on Black families, thus goes beyond existing policies or expands upon them. This Resolution does not contradict or undermine any existing ABA policies.

    See:

    - ABA RESOLUTION 08A107 (2008) (Racial and Ethnic Disproportionality in Child Welfare);
    - ABA RESOLUTION 03A101B (2003) (Disparate Treatment by Race and Ethnicity);
    - ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy);

- ABA RESOLUTION 18A119 (2018) (Rights of Immigrant Children and Standards for Custody, Placement and Care);
- ABA RESOLUTION 11A103D (2011) (Protection of Unaccompanied and Undocumented Immigrant Children);
- ABA RESOLUTION 19A115C (2019) (Constitutionality of the Indian Child Welfare Act);
- ABA RESOLUTION 22M613 (2022) (Presumption of Youth Presence in Court);
- ABA RESOLUTION 20A115 (2020) (Engagement in Youth Legal System Reform);
- ABA RESOLUTION 19A118 (2019) (Family Integrity and Family Unity);
- ABA RESOLUTION 07A104B (2007) (LGBT Youth in Foster Care Policy);
- ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy);
- ABA RESOLUTION 21A102 (2021) (Bias Training for Legal Professionals);
- ABA RESOLUTION 20A117 (2020) (Guidelines on Remote Technology in Proceedings);
- ABA RESOLUTION 20A116G (2020) (Training on Implicit Bias);
- ABA RESOLUTION 91A10D (1991) (Examining Bias in Federal Judicial System).

6. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

7. Status of Legislation. (If applicable) N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   If adopted, this ABA Resolution with Report will be shared with federal, state, local, territorial, and tribal Bar Associations and courts, as well as attorneys, judges, legislators, governmental agencies, and policymakers with connection to or involved in the child welfare system to support and engage in eliminating anti-Black systemic racism that continues to impact Black families who come into contact with the system. We will encourage courts and judges to use this policy when helping to create relevant court rules, policies and procedures.

9. Cost to the Association. (Both direct and indirect costs)

   Adoption of this proposed resolution would result in only minor indirect costs associated with Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

10. Disclosure of Interest. (If applicable) None

11. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:
    - Center for Human Rights
    - Coalition on Racial and Ethnic Justice

- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Commission on Immigration
- Commission on Race and Ethnicity in the Profession
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Council for Diversity in the Educational Pipeline
- Criminal Justice Section
- Division for Legal Services
- Family Law Section
- Health Law Section
- Judicial Division
- Litigation Section
- Section of Civil Rights and Social Justice
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Special Committee on Hispanic Legal Rights and Responsibilities
- Standing Committee on Legal Aid and Indigent Defense
- Standing Committee on Gun Violence
- Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

Prudence Beidler Carr
Director, Center on Children and the Law and Commission on Youth at Risk
1050 Connecticut Avenue, Suite 400
Washington, DC 20036
202-662-1740
Prudence.BeidlerCarr@americanbar.org

Nadia Seeratan,
Deputy Director, Center on Children and the Law
1050 Connecticut Avenue, Suite 400
Washington, DC 20036
202-662-1759
Nadia.Seeratan@americanbar.org

13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting.

606

Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Ernestine Gray
Chair, Commission on Youth at Risk
1050 Connecticut Ave., Suite 400
Washington DC 20036
504-957-1963
egsteward1@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.[72] With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future. This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

2. Summary of the issue that the resolution addresses.

As described above this Resolution builds on existing ABA law policies that examine disproportionality in the child welfare system, with a directed focus on recognizing how anti-Black systemic racism has resulted in the disparate treatment and involvement of Black parents, children, and kin in the system. More specifically, the Resolution calls for recognition that the history of governmental control, surveillance, under-investment, and interference in the lives of Black families since times of slavery, has led to and continues to impact decisions to separate Black children from their families as well as decisions about what happens once a child has been removed. Without that greater context it is impossible to avoid reinforcing the same structures. Instead of focusing broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. Additionally, the Resolution articulates specific guidance for Bar Associations, courts, attorneys, judges, legislators, governmental agencies, and policy makers to consult, listen to, and be led by Black parents, children, and kin with lived experience to end the legacy of Black family separation that has been embedded in the child welfare system.

3. Please explain how the proposed policy position will address the issue.

[72] *See e.g.*, New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

This Resolution identifies actions needed to acknowledge and take constructive steps to correct for anti-Black systemic racism. By recognizing how specific laws and policies have devalued Black families and normalized systemic racism, we can begin to actively re-evaluate and assess laws that have been informed by racist goals or assumptions, undermining Black family integrity. We can also learn from Black people with lived experience to support constructive steps to end Black family separation, which implicates the constitutional rights of parents and children to family integrity.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None have been identified.

Determining the Best Interests of the Child

To access the statutes for a specific State or Territory, visit the State Statutes Search.

Courts make various decisions affecting children, including placement and custody determinations, safety and permanency planning, and proceedings for the termination of parental rights. Whenever a court makes such a determination, judges must weigh whether the decision will be in the "best interests" of the child.

A review of State laws indicates that all States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes describing the factors that must be considered to ensure that decisions regarding a child's custody or placement serve that child's best interests.

WHAT'S INSIDE

Defining "best interests of the child"

Guiding principles of best interests determinations

Best interests factors

Other considerations

DEFINING "BEST INTERESTS OF THE CHILD"

Most States have no standard definition of "best interests of the child." The only exceptions are Montana and Puerto Rico. In Montana, "best interests of the child" means the child's physical, mental, and psychological conditions and needs and any other factor the court considers to be relevant to the child. In Puerto Rico, the term "best interests of the child" is defined as the balance of different factors that may affect the safety; health; physical, mental, emotional, educational, and social well-being; or any other factor aimed at achieving the optimum development of the minor.

In other States, the term "best interests of the child" does not have a specific definition but is generally understood as a legal concept. It is used in laws and policies as a standard for making decisions regarding the placement and care of a child. A child's best interests guide the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve the needs of a child as well as who is best suited to care for the child. "Best interests" determinations are generally made by considering many factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being as the paramount concern.

GUIDING PRINCIPLES OF BEST INTERESTS DETERMINATIONS

State statutes frequently reference overarching goals, purposes, and objectives that shape the analysis in making best interests determinations. The following are among the most frequently stated guiding principles:

- The importance of family integrity and preference for avoiding removal of the child from their home (in approximately[1] 32 States, American Samoa, Guam, Puerto Rico, and the Virgin Islands)[2]
- The health, safety, and/or protection of the child (in 31 States and the Northern Mariana Islands)[3]
- Preserving and strengthening the child's ties to their family (in 20 States and American Samoa)[4]
- The importance of timely permanency decisions (in 22 States and the Virgin Islands)[5]
- The assurance that a child removed from their home will be placed in the least restrictive setting possible that will meet the child's needs (in 14 States and the Virgin Islands)[6]

---

[1] The word "approximately" is used to stress the fact that States frequently amend their laws and applies to all data in this publication. The information in this publication is current only through September 2023.

[2] Alabama, Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, Wisconsin, and Wyoming

[3] Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming

[4] Alabama, Alaska, Arkansas, California, Colorado, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Utah, Vermont, West Virginia, and Wyoming

[5] Alabama, Alaska, Arkansas, California, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Texas, Vermont, Washington, and Wyoming

[6] Alabama, California, Georgia, Illinois, Indiana, Iowa, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia

- The provision of services, treatment, and guidance that will assist the child in developing into a self-sufficient adult (in 18 States, American Samoa, and Guam)[7]

In New Mexico, agencies are required to provide children with services that are sensitive to their cultural needs and work to reduce the overrepresentation of minority children and families in the juvenile justice, family services, and abuse and neglect systems through early intervention, linkages to community support services, and the elimination of discrimination.

BEST INTERESTS FACTORS

Approximately 31 States and the District of Columbia list in their statutes specific factors for courts to consider in making determinations regarding the best interests of the child.[8] While the factors vary considerably from State to State, some factors commonly required include the following:

- The emotional ties and relationships between the child and their parents, siblings, family, household members, or other caregivers (in 22 States and the District of Columbia)[9]
- The capacity of the parents to provide a safe home and adequate food, clothing, and medical care (in 12 States and Guam)[10]
- The mental and physical health needs of the child (in 15 States and the District of Columbia)[11]
- The mental and physical health of the parents (in 12 States and the District of Columbia)[12]
- The presence of domestic violence in the home (in 12 States)[13]

Six States and Puerto Rico list factors that cannot be considered in best interests analyses, as follows:

- Connecticut law states that the determination of the best interests of the child shall not be based on the consideration of the socioeconomic status of the birth parent or caregiver.
- Delaware prohibits courts from assuming that one parent, because of gender, is better qualified than the other parent to act as a custodian or primary residential parent.
- Idaho does not permit discrimination based on a parent's disability.
- California laws state that the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative cannot be considered in determining the best interests of the child.

---

7 Alabama, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Kansas, Minnesota, Mississippi, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming

8 Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin

9 Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Washington

10 Florida, Georgia, Hawaii, Illinois, Maryland, Michigan, New Mexico, North Dakota, South Carolina, Texas, Vermont, and Wisconsin

11 Connecticut, Delaware, Florida, Georgia, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, Pennsylvania, South Carolina, Utah, and Virginia

12 Delaware, Georgia, Kentucky, Michigan, Nevada, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas, and Virginia

13 Delaware, Georgia, Idaho, Kentucky, Michigan, Nevada, North Dakota, Oregon, South Carolina, Tennessee, Texas, and Virginia

- Iowa and Minnesota prohibit the consideration of race, color, or national origin when making placement decisions.
- Puerto Rico requires that consideration of a child's best interests be free from any discrimination motivated by origin, race, color, birth, political or religious beliefs, disabilities, sex, or socioeconomic or cultural status.

OTHER CONSIDERATIONS

Other factors courts commonly take into consideration in making best interests determinations include the following:

- **Federal and/or State constitution protections.** Laws in 17 States and Puerto Rico affirm that child protective responses, the provision of services, and custody decisions must be carried out within a judicial framework that recognizes a person's parental rights and other constitutional and legal rights.[14]
- **The importance of maintaining sibling and other close family bonds.** Laws in 32 States, the District of Columbia, and the Virgin Islands recognize the importance of frequent, regular, and reasonable visitation with parents and family members when a child has been removed from the home.[15]
- **The child's wishes.** Laws in 22 States and the District of Columbia require courts to consider the child's wishes when deciding their best interests.[16] In making this determination, the court determines whether the child is of an age and level of maturity to express a reasonable preference.

In 11 States,[17] a determination of best interests for an American Indian/Alaska Native child must include steps to maintain Tribal relationships and preserve the child's unique Tribal culture and values. When out-of-home care is needed, the child must be placed, whenever possible, with a member of the child's Tribe or a family that can help the child maintain these connections, as required by the Federal Indian Child Welfare Act (P.L. 95-608).

This publication is a product of the State Statutes Series prepared by Child Welfare Information Gateway. While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code as well as agency regulations, case law, and informal practices and procedures.

[14] California, Georgia, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin

[15] Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, West Virginia, Washington, and Wisconsin as well at the District of Columbia and the U.S. Virgin Islands.

[16] Alaska, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Maine, Massachusetts (when the child is age 12 or older), Michigan, Minnesota, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, and Wisconsin

[17] California, Iowa, Michigan, Minnesota, Montana, Nebraska, New Mexico, Oregon, Washington, Wisconsin, and Wyoming

SUGGESTED CITATION:

Child Welfare Information Gateway. (2024). *Determining the best interests of the child.* U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. https://www.childwelfare.gov/resources/determining-best-interests-child/

U.S. Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway. This publication is available online at https://www.childwelfare.gov/resources/determining-best-interests-child/.

Helpful tools for Engagement working with Parents in Dependency ADA Conference 2023

- Empathize, do not pretend to understand their circumstance
- Advocate for Court style that makes sense for your client, disrupt status quo, challenge traditional thought (ask for breaks in court)
- When a client says “no” to everything, remember they are trying to take back control, give them the language “I need to speak to my lawyer about that”
- Coach client on how to deal with their worker “they are there to help, tell them what would be helpful for you”
- Hold your own meetings, invite service providers, DHS, Clients, Set the Agenda-take notes, create action steps, provide updates
- Ask and dispel preconceived notions of public defenders “What have you heard about public defenders?” “What are you worried about having a public defender?”
- Coach them towards their own strengths and away from embedded history, rewrite the narrative “we see on paper your worst moments, tell us who you are as a whole person”
- Create a defense report, attach exhibits, paper the case
- Legal Needs Assessment (42 Questions)
- Being Honest with Parents Upfront about what you can and will do in communication (“I am better with email then phone calls” etc.)
- Be An active listener/friendly (Parents are pros at reading their environments, we must create a welcoming one)
- Recognize that the little things matter most (provide basic needs for clients during in person meetings, water, snacks, hygiene products)
- Lead with kindness and Honesty (“this is extremely difficult, thank you for showing up to this meeting/court hearing, there will be things that are hard to hear today, and I will sit with you throughout the entire meeting.”)
- Use meetings as problem solving opportunities (“my client is experiencing a barrier; how can we address this as a system?”)
- Ask for updated contact information each time you see your client
- Reassure client at each court hearing that you are there to advocate for their expressed interest. (“I’ve got you”)
- Construct a weekly Email for client to send to Dependency team (inform on services, provide weekly schedule, barriers, self-praise, insight on kid’s needs, talk about visitation, ask for more time with kids and give ideas on how that can be increased, “We have a family friend who could help supervise”, “The kids have a school play, I would like to attend”, “I would like to take the kids to church with me”
- Buy Calendars for clients and create weekly schedules (include services, visitation)
- Ask the Department SW “What is your top priority on this case” “What needs to be addressed first on the case?”
- Prep with Client Prior to CFT “What are your strengths? What are your worries going into this? What are some solutions you can offer if asked?”
- Debrief with Client CFT

PRINCIPLES OF HARM REDUCTION

Harm reduction is a set of practical strategies and ideas aimed at reducing negative consequences associated with drug use. Harm Reduction is also a movement for social justice built on a belief in, and respect for, the rights of people who use drugs.

FOUNDATIO PRINCIPLE CENTRAL TO HARM REDUCTIO

Harm reduction incorporates a spectrum of strategies that includes safer use, managed use, abstinence, meeting people who use drugs "where they're at," and addressing conditions of use along with the use itself. Because harm reduction demands that interventions and policies designed to serve people who use drugs reflect specific individual and community needs, there is no universal definition of or formula for implementing harm reduction.

However, National Harm Reduction Coalition considers the following principles central to harm reduction practice:

1

Accepts, for better or worse, that licit and illicit drug use is part of our world and chooses to work to minimize its harm

2

Understands drug use as a complex, multi-faceted phenomenon that encompasses a continuum of behaviors from

ful effects rather than simply ignore or condemn them

severe use to total abstinence, and acknowledges that some ways of using drugs are clearly safer than others

3

Establish

es quali ty of indivi dual and com muni ty life and well-being — not nece ssaril y cess ation of all drug use — as the criter ia for succ essfu l inter venti ons and

4

Calls for the non-judg ment al, non-coerc ive provi sion of servi ces and reso urces to peopl e who use drug s and the com muni

policies

ties in which they live in order to assist them in reducing attendant harm

5

Ensures that people who

Affirms

use drugs and those with a history of drug use routinely have a real voice in the creation of programs and policies designed to serve them

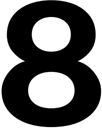
people who use drugs (PWUD) themselves as the primary agents of reducing the harms of their drug use and seeks to empower PWUD to share

information and support each other in strategies which meet their actual conditions of use

7

Recognizes that the realities of

poverty, class, racism, social isolation, past trauma, sex-based discrimination, and other social inequalities affect both people's vulnerabili



Does not attempt to minimize or ignore the real and tragic harm and danger that can be associated with illicit drug use

ty to and capa city for effec tively deali ng with drug - relat ed harm

DOWNLOAD THE PRINCIPLES

We use cookies on our website to give you the most relevant experience by remembering your preferences and repeat visits. By clicking "Accept", you consent to the use of ALL the cookies. Cookie settings ACCEPT

How Trauma-Informed Lawyering Can Help Clients Heal

By **Daniel Connolly** | December 1, 2023, 9:34 PM EST · Listen to article

Olympic gymnast-turned-corporate attorney Tasha Schwikert Moser departs an October 2018 news conference to announce she was suing USA Gymnastics over sexual abuse by team physician Larry Nassar. (AP Photo/Jae C. Hong, File)

When Houston-based attorney Tasha Schwikert Moser talks to her colleagues about the importance of exercising patience and empathy when working with clients who have experienced severe trauma, she speaks from a place of personal experience.

That's because years before she became a corporate attorney with Munck Wilson Mandala LLP, Schwikert Moser experienced sexual abuse as an Olympic-level gymnast and later took part in years of litigation against USA Gymnastics.

> In my experience, justice is not about money. ... So, as a lawyer, I think we should always be looking for opportunity for nonmonetary reform.

Megan Bonanni

Pitt McGehee

During a panel on trauma-informed lawyering during the Federal Bar Association's annual conference in September, Schwikert Moser and other participants stressed the need for lawyers in sexual abuse cases to invest time to communicate with their clients, to listen to them and to give them the space needed to process their experiences.

For Schwikert Moser, the process of coming to terms with her abuse has involved speaking about it publicly.

"The more I spoke about it, the more I was able to cope with my own trauma," Schwikert Moser said during the panel.

Some panelists, meanwhile, criticized what they described as an impersonal, one-size-fits-all approach they've seen some attorneys adopt in representing sexual abuse clients in mass tort litigation. And they also encouraged attorneys to consider seeking not only money for their clients, but "noneconomic" remedies, especially reforms that can make an organization better and prevent abuse from happening again.

Schwikert Moser's case illustrates this last point in particular: Advocates pushed for USA Gymnastics to add a survivors' representative to their board of directors, and Schwikert Moser now serves in that role.

Her story also helps illustrate the emotional and psychological challenges that trauma survivors can face, how these challenges can play out in litigation, and how people who have experienced trauma can bounce back.

The panel, held at a conference in Memphis, Tennessee, was part of a larger movement within the

legal profession in recent decades to teach attorneys techniques to help clients who've been through sexual abuse, extreme violence or other trauma.

"In practice areas such as family law, immigration, child welfare, criminal law and others, by necessity, clients must share some of the most intimate and painful details of their lives," Sarah Katz of Temple University's Beasley School of Law and Deeya Haldar, then of Drexel University's Thomas R. Kline School of Law, now with Villanova University's Charles Widger School of Law, wrote in a widely cited 2015 paper.

"A trauma-informed perspective asks clients not, 'What is wrong with you?' but instead, 'What happened to you?'" the professors wrote, citing prior work by prior researchers.

They argued that law schools should teach students to recognize the effects that domestic violence, sexual abuse and other traumatic experiences can have on their clients' actions and behaviors.

For instance, a person who has experienced trauma might be withdrawn, or suspicious and angry, or highly emotional, flooding the lawyer with unnecessary information. An understanding of trauma and its effects helps attorneys recognize what's happening, build relationships, refer clients to mental health professionals when needed and develop legal strategies, they wrote.

The professors also argued that students should learn to protect themselves from vicarious trauma — becoming distressed or impaired after intense engagement with a client's trauma. For example, attorneys may want to limit their exposure to these cases and include other types of cases in their caseload, they wrote.

An Abuse of Trust

Schwikert Moser began participating in gymnastics as a young girl growing up in Las Vegas, and quickly rose to the elite level. By 2000, she had made it to the Olympics, where she was part of the group that won the bronze medal for team competition that year.

"My gymnastics career really is a highlight of my life," she told Law360. "But it all happens at such a young age, right? So it's like your childhood."

She said she came to think of the leaders of USA Gymnastics, the sport's governing body, as "guardians."

"And felt like I could trust them, and almost like in a pseudo-parental role in that sense. So the trauma of abuse is very, very personal," she said.

One person who was a central part of the USA Gymnastics experience was team physician Larry Nassar, who would go on to face sexual abuse allegations from hundreds of gymnasts and **plead**

guilty to state charges in Michigan over his conduct in 2017. He also pled guilty to federal child pornography charges.

> Clients are largely part of an assembly line in the mass tort cases. I'm shocked at how many plaintiffs attorneys don't really know their client.
>
>
>
> Robert Riley
>
> Riley & Hurley PC

Gymnasts have said Nassar frequently carried out sexual abuse during medical procedures, which he falsely presented as legitimate treatment.

Schwikert Moser said in her case, the abuse began when she was 15 when Nassar began treating her for a hamstring injury at her groin.

"And so that was for him just like easy, basically easy access, right? Because I needed treatment. Right where [the hamstring] attaches. And so that was pretty seamless for him."

She told Law360 that at the time, she didn't understand what was happening.

"I don't want to speak for every survivor, but I think a lot of our stories are the same," she said. "Larry was really creepy and what he did was confusing to us and ... I didn't really know what it was. But it was just weird."

"We were all children [and] couldn't fully comprehend. He was, like, telling us it was medical treatment. So we just kind of believed it because he was the doctor," she added.

Schwikert Moser said that, in the years after leaving the USA Gymnastics team at 19 and going on to

college gymnastics and later law school, professional life, marriage and motherhood, she didn't want to think about what Nassar had done.

"There was no room for it in my life. Because I know once you go there, then there's no there's no stopping it, right? You can't just put it back and pretend like you didn't just go down that rabbit hole," she said.

She said this experience is common, and that many people keep silent for decades. But eventually, she began to change her mind about speaking out.

In September 2016, the Indianapolis Star published an interview with Rachael Denhollander, who described being sexually abused by Nassar beginning when she was a 15-year-old club-level gymnast.

As more and more women came forward with similar stories and investigators began to take a hard look at what USA Gymnastics officials knew about Nassar's behavior and when, Schwikert Moser said she eventually decided to do the same.

Already working as a corporate lawyer, she would go on to file her own lawsuit in 2018.

Helping Clients Heal

Schwikert Moser said she quickly built a trusting relationship with her attorney, Michelle Simpson Tuegel, whose small Dallas-based firm specializes in sexual abuse and assault cases.

"So I think my first piece of advice is, find something relatable between you and the client," Schwikert Moser said.

She noted that clients in these cases often want a lot of communication and regular updates on the case, even if not much is happening.

"It's not like a transactional case," she said. "It's very, very personal to the client and the survivor."

During the FBA panel in September, panelist Megan Bonanni, a partner with Michigan-based civil rights firms Pitt McGehee Palmer Bonanni & Rivers PC, said she gives her cellphone number to clients.

"And very rarely do they abuse that privilege," she said.

> I speak about it because we need to change the culture and move forward and just protect the children that are doing [gymnastics] now and the children that will come in the future.

Tasha Schwikert Moser

Munck Wilson Mandala

But Bonanni added that it was an important part of giving clients the space to revisit past abuse and to share it on their own terms.

"Things come out," she said, "like an onion — layers and layers and layers."

Bonanni said that an attorney's ethical obligation in sensitive matters like sex abuse claims isn't just to prove the client's case, "but to help them heal."

Schwikert Moser said that while it's important for attorneys to provide empathy to clients, attorneys should also encourage their clients to seek outside treatment from a mental health professional. She said that proved vital in her own case, when she experienced periods of severe depression and anxiety and met with a therapist three times a week.

"I just feel like without my therapist, I don't think I would be OK like I am today," she said. "I don't feel like I'd be over the trauma like I am now."

Bonanni described something else she asks her clients early on in her representation: What does justice mean?

"That is one of the first questions, if the client's willing to talk to me, that I ask them," Bonnani said. "And in my experience, justice is not about money. ... So, as a lawyer, I think we should always be looking for opportunity for nonmonetary reform."

In December 2021, USA Gymnastics **announced a $380 million settlement** to address survivors' legal claims. But demands for reforms led to changes. Among them: USA Gymnastics created a board seat for a survivors' representative.

Schwikert Moser began a term as that representative in 2022. Her term runs through 2026.

She said she hopes to facilitate better communication and trust between sexual abuse survivors and USA Gymnastics.

"A lot of survivors are just really looking for an apology. And just communication with USA Gymnastics, and so I'm hoping that we can get something going to where we can get that process in place," she said.

Though Nassar preyed on girls and women, other sexual abusers target boys and men.

Panelist Victor G. Petreca, a psychiatric mental health nurse practitioner at Boston College, has written a soon-to-be-published academic paper based on interviews with 47 men who were sexually abused by a doctor at another university. He said men who've experienced trauma from sexual abuse often exhibit a particular set of effects.

Many of the men reported difficulty with professional and personal relationships after the abuse, as well as problems with sexual intimacy, including erectile dysfunction, Petreca said.

"So, long story short, what we observed is that there was a lot of silent suffering, a lot of issues in terms of interpersonal dynamics that these men were having and not disclosing, not seeking help, not seeking treatment," Petreca told Law360.

Lawyers working with men who have experienced sexual abuse should take into account the high level of shame and embarrassment about what they've been through and work extra hard to build rapport, Petreca said.

It's easy for lawyers to get caught up in the "business aspect" of legal proceedings, Petreca noted. But he said lawyers should acknowledge "that there is someone who's probably either hurting a lot underneath it all, or someone who has numbed themselves out so much to just get through it."

Like other panelists, he said the legal process can become part of the healing process.

What Not to Do

While Schwikert Moser gives her attorney enormous credit for her trauma-informed approach, not every sexual abuse claimant whose case ends up in court is represented by a sensitive, empathetic lawyer, noted panelist Robert Riley, a partner with Michigan-based Riley & Hurley PC who has acted as a mediator in major sexual abuse lawsuits.

"Clients are largely part of an assembly line in the mass tort cases," he said. "I'm shocked at how

many plaintiffs attorneys don't really know their client."

Riley pointed to a recent example where he met with 16 claimants who had appeared for interviews as part of the settlement allocation process in their case.

"And the clients were meeting their attorneys for the first time after a nine-year saga," he said. "They really had no clue. The comments they were bringing up and asking reflected fear, reflected loss, reflected anger. And the failure of the plaintiffs attorneys to treat their clients individually and thoughtfully bring them through their trauma was appalling to me."

He said that plaintiffs attorneys can do better in helping their clients understand the legal process, particularly the defendant's point of view — that the defendant's lawyers are trying to get the best economic agreement that will settle the case, and the kinds of defenses they're likely to raise.

"If that is done correctly, it is my belief that it enhances the process, gives perspective and helps individuals through what is regularly a slow, long, tedious negotiation process to bring about resolutions," Riley said.

Riley added that defense lawyers should also strive to show sensitivity to sexual abuse claimants and to understand that just because a person took a long time to come forward with claims does not mean they are faking.

"And just asserting [fraud] from the start is not the way to garner an effective settlement," Riley said.

Looking Ahead

Larry Nassar is now serving an effective life sentence on the state and federal charges.

For her part, Schwikert Moser said she's doing well. Today, much of her practice focuses on mergers and acquisitions.

She said she still has occasional flashbacks, but she's moved ahead in her life as a corporate attorney. She's married and has three young children.

In addition to work with her therapist, she said, speaking publicly about her experience has helped her move on.

"I speak about it because we need to change the culture and move forward, and just protect the children that are doing [gymnastics] now and the children that will come in the future."

--Editing by Alanna Weissman.

Update: This story has been updated to clarify where Deeya Haldar currently works.
Have a story idea for Access to Justice? Reach us at accesstojustice@law360.com.

Hello! I'm Law360's automated support bot.

How can I help you today?

For example, you can type:

- I forgot my password
- I took a free trial but didn't get a verification email
- How do I sign up for a newsletter?

Ask a question!
Ask a question!

© 2023, Portfolio Media, Inc. | About | Contact Us | Legal Jobs | Advertise with Law360 | Careers at Law360 | Terms | Privacy Policy | Cookie Settings | Ad Choices | Help | Site Map | Resource Library | Law360 Company

×

Add this article to my briefcase

How Trauma-Informed Lawyering Can Help Clients Heal

New Folder Name - Req

OR SELECT FROM

Add Now Cancel
×

Sign up for our Access to Justice newsletter

You must correct or enter the following before you can sign up:

Please provide a professional email: lsnell@planetkc.com
Select more newsletters to receive for free

Law360 takes your privacy seriously. Please see our Privacy Policy.

No Thanks Sign up now

Thank You!

The Imprint YOUTH & FAMILY NEWS NEWSLETTER SUBSCRIBE DONATE

Opinion

Let's Be Honest: "Best Interest" Is in the Eye of the Beholder

FILED 9/25/2019 4:31AM

SHARE

Subscribe Today

FOR EXCLUSIVE *YOUTH SERVICES INSIDER* CONTENT.

Cancel Anytime

BY VIVEK SANKARAN

A few weeks ago on a phone call discussing how systems can support keeping kids safely with their families, a judge abruptly interjected, "I don't like this focus on the rights of parents. We should always be focusing on the best interest of children at all times, before a kid is removed and once a court is involved!"

In my years practicing child welfare law, I've heard this refrain many, many times. It makes my head hurt.

The refrain pains me because we all know that the "best interest of the child" is not an objective standard. All of us disagree – all the time – about what we think is best for a child. What time should they go to bed? Should they co-sleep with us? How should they be disciplined? Should they be raised in a "free-range" parenting style? Or is helicoptering around them best? Gather a group of parents, chat for a few minutes, and you'll quickly realize how much we disagree about what is good for children.

This dynamic exists within the child welfare system as well. In the late 1990s, researchers at Chapin Hall brought together a group of child welfare experts and line caseworkers to discuss whether separating a child from their parent would be in their best interests. When in-home services were available, only 35 percent of experts and 37 percent of caseworkers agreed that it would be.

When no services were available, the disagreement whether to keep the family together became much more pronounced: 60 percent of experts said separate, compared with 53 percent of caseworkers. Experts and seasoned practitioners couldn't agree on what would be best for children.

Vivek Sankaran, University of Michigan Law School

Talk to any child welfare lawyer or practitioner and they will confirm this. If you go before Judge X, he'll never do this. But Judge Y will always do this because Judge X and Judge Y see the world in very different ways. Even when I toss out hypotheticals to my law students about when a child should be removed, or when parental rights should be terminated, this pattern repeats itself.

So let's own this disagreement, and do ourselves a favor by not talking about the "best interest of the child" standard as some objective measure of truth. Rather, let's acknowledge that child welfare cases are really about who gets to decide what they think is best for a child. Before a parent is found to be unfit, they get to decide. While a child is in foster care, a court or a child welfare agency might get to decide. If a child has achieved permanency with an adoptive parent, or a guardian, they get to figure this out.

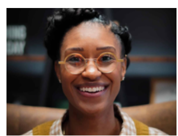
Crucial to this framework is the realization that prior to finding a parent to be unfit, judges don't get to issue orders based on what they think is best for a child. Consider a world where this standard didn't apply. Do I really want someone to second-guess my decision to allow my children to watch America Ninja Warrior this morning? Or to eat pizza for a week straight? Or to not shower for a few days?

Absolutely not. These are my calls as a parent. The constitutional jurisprudence makes clear that the state doesn't get to interfere in these decisions until they prove me to be unfit. It is a doctrine that all of us benefit from.

RECENTLY IN CHILD WELFARE

Georgia DFCS Relied on Controversial Laboratory for Drug Tests Crucial to Custody Decisions

JAKE SHORE, THE CURRENT GA



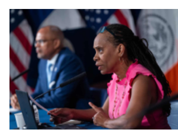
Surveillance Won't Resolve Unaddressed Poverty

DR. ASHLEY CROSS

OPINION

'A Place for Healing': A Summer Camp for Foster Youth Gets a Permanent Home

JEREMY LOUDENBACK



Top NYC Child Welfare Official Joins Wave of Resignations, As Trump's DOJ Seeks To Toss

Criminal Charges Against Mayor
MICHAEL FITZGERALD

Every day.

So let's stop pitting parental rights against some false sense of an objective best interest standard. Let's recognize that the law requires us to allow parents to make these decisions until they are proven to be incapable of doing so. As tempting as it may be, until this happens, we can't – and shouldn't – use the force of law to impose our subjective opinions on what is best for children on families.

EXPLORE THE IMPRINT

best interest child welfare family preservation foster care
judges Vivek Sankaran

ABOUT THE AUTHOR

Vivek Sankaran

Vivek Sankaran is the director of the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University Michigan Law School. Follow him on Twitter at @vivekssankaran.

VIEW ALL ARTICLES BY VIVEK

Your support allows *The Imprint* to provide independent, nonpartisan daily news covering the issues faced by vulnerable children and families.

or

The Imprint is an independent, nonprofit daily news publication dedicated to covering child welfare, juvenile justice, mental health and educational issues faced by vulnerable children and families.

GOT A TIP?

TIPS@IMPRINTNEWS.ORG

(213) 379-5359
INFO@IMPRINTNEWS.ORG

Search The Imprint

© 2025 THE IMPRINT

TERMS OF USE PRIVACY POLICY

Encouraging Motivation to Change

Am I Doing this Right?

1. ✔ **Do I listen more than I talk?**
✗ Or am I talking more than I listen?

2. ✔ **Do I keep myself sensitive and open to this person's issues, whatever they may be?**
✗ Or am I talking about what I think the problem is?

3. ✔ **Do I invite this person to talk about and explore his/her own ideas for change?**
✗ Or am I jumping to conclusions and possible solutions?

4. ✔ **Do I encourage this person to talk about his/her reasons for *not changing*?**
✗ Or am I forcing him/her to talk only about change?

5. ✔ **Do I ask permission to give my feedback?**
✗ Or am I presuming that my ideas are what he/she really needs to hear?

6. ✔ **Do I reassure this person that ambivalence to change is normal?**
✗ Or am I telling him/her to take action and push ahead for a solution?

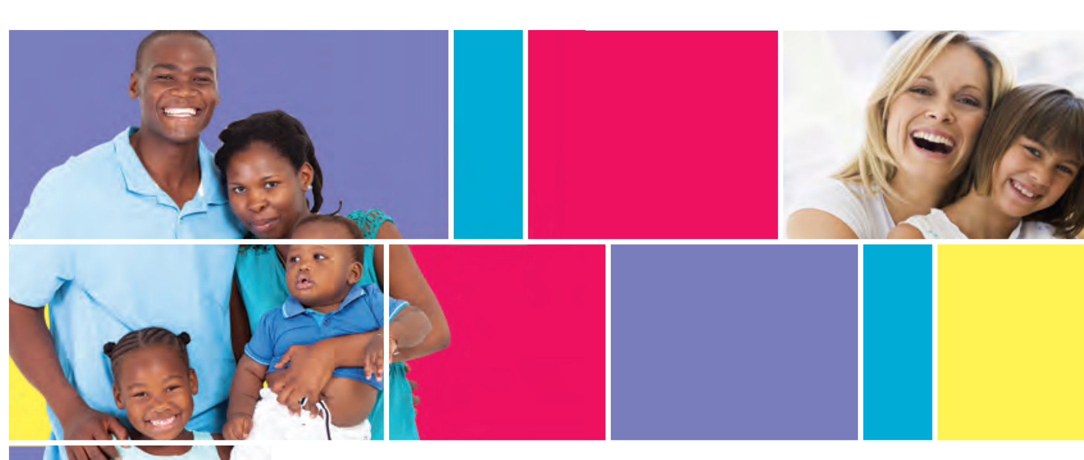
7. ✔ **Do I help this person identify successes and challenges from his/her past *and* relate them to present change efforts?**
✗ Or am I encouraging him/her to ignore or get stuck on old stories?

8. ✔ **Do I seek to understand this person?**
✗ Or am I spending a lot of time trying to convince him/her to understand me and my ideas?

9. ✔ **Do I summarize for this person what I am hearing?**
✗ Or am I just summarizing what I think?

10. ✔ **Do I value this person's opinion more than my own?**
✗ Or am I giving more value to my viewpoint?

11. ✔ **Do I remind myself that this person is capable of making his/her own choices?**
✗ Or am I assuming that he/she is not capable of making good choices?



FACTSHEET
FOR FAMILIES
November 2014

Parenting a Child Who Has Experienced Trauma

Children who have experienced traumatic events need to feel safe and loved. All parents want to provide this kind of nurturing home for their children. However, when parents do not have an understanding of the effects of trauma, they may misinterpret their child's behavior and end up feeling frustrated or resentful. Their attempts to address troubling behavior may be ineffective or, in some cases, even harmful.

This factsheet discusses the nature of trauma, its effects on children and youth, and ways to help your child. By increasing your understanding of trauma, you can help support your child's healing, your relationship with him or her, and your family as a whole.

WHAT'S INSIDE

What is trauma?

The impact of untreated trauma

Understanding your child's behavior

Helping your child

Conclusion

Resources

Child Welfare Information Gateway

Children's Bureau/ACYF/ACF/HHS
800.394.3366 | Email: info@childwelfare.gov | https://www.childwelfare.gov

What Is Trauma?

Trauma is an emotional response to an intense event that threatens or causes harm. The harm can be physical or emotional, real or perceived, and it can threaten the child or someone close to him or her. Trauma can be the result of a single event, or it can result from exposure to multiple events over time.

Potentially traumatic events may include:

- Abuse (physical, sexual, or emotional)
- Neglect
- Effects of poverty (such as homelessness or not having enough to eat)
- Being separated from loved ones
- Bullying
- Witnessing harm to a loved one or pet (e.g., domestic or community violence)
- Natural disasters or accidents
- Unpredictable parental behavior due to addiction or mental illness

For many children, being in the child welfare system becomes another traumatic event. This is true of the child's first separation from his or her home and family, as well as any additional placements.

The Impact of Untreated Trauma

Children are resilient. Some stress in their lives (e.g., leaving caregivers for a day at school, riding a bike for the first time, feeling nervous before a game or performance) helps their brains to grow and new skills to develop. However, by definition, trauma occurs when a stressful experience (such as being abused, neglected, or bullied) overwhelms the child's natural ability to cope. These events cause a "fight, flight, or freeze" response, resulting in changes in the body—such as faster heart rate and higher blood pressure—as well as changes in how the brain perceives and responds to the world.

In many cases, a child's body and brain recover quickly from a potentially traumatic experience with no lasting harm. However, for other children, trauma interferes with normal development and can have long-lasting effects.

Table 1. Effects of Trauma on Children

Trauma may affect children's ...	In the following ways
Bodies	• Inability to control physical responses to stress • Chronic illness, even into adulthood (heart disease, obesity)
Brains (thinking)	• Difficulty thinking, learning, and concentrating • Impaired memory • Difficulty switching from one thought or activity to another
Emotions (feeling)	• Low self-esteem • Feeling unsafe • Inability to regulate emotions • Difficulty forming attachments to caregivers • Trouble with friendships • Trust issues • Depression, anxiety
Behavior	• Lack of impulse control • Fighting, aggression, running away • Substance abuse • Suicide

Factors that determine the impact of traumatic events include the following:

- **Age.** Younger children are more vulnerable. Even infants and toddlers who are too young to talk about what happened retain lasting "sense memories" of traumatic events that can affect their well-being into adulthood.
- **Frequency.** Experiencing the same type of traumatic event multiple times, or multiple types of traumatic events, is more harmful than a single event.
- **Relationships.** Children with positive relationships with healthy caregivers are more likely to recover.
- **Coping skills.** Intelligence, physical health, and self-esteem help children cope.

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway.
Available online at https://www.childwelfare.gov/pubs/factsheets/child-trauma

- **Perception.** How much danger the child thinks he or she is in, or the amount of fear the child feels at the time, is a significant factor.
- **Sensitivity.** Every child is different—some are naturally more sensitive than others.

The effects of trauma vary depending on the child and type of traumatic events experienced. Table 1 shows some of the ways that trauma can affect children.

This list of potential consequences shows why it is so important for parents to understand trauma. The right kind of help can reduce or even eliminate many of these negative consequences.

Understanding Your Child's Behavior

When children have experienced trauma, particularly multiple traumatic events over an extended period of time, their bodies, brains, and nervous systems adapt in an effort to protect them. This might result in behaviors such as increased aggression, distrusting or disobeying adults, or even dissociation (feeling disconnected from reality). When children are in danger, these behaviors may be important for their survival. However, once children are moved to a safer environment, their brains and bodies may not recognize that the danger has passed. These protective behaviors, or habits, have grown strong from frequent use (just as a muscle that is used regularly grows bigger and stronger). It takes time and retraining to help those "survival muscles" learn that they are not needed in their new situation (your home), and that they can relax.

It might be helpful to remember that your child's troublesome behavior may be a learned response to stress—it may even be what kept your child alive in a very unsafe situation. It will take time and patience for your child's body and brain to learn to respond in ways that are more appropriate for his or her current, safe environment.

Parenting a traumatized child may require a shift from seeing a "bad kid" to seeing a kid who has had bad things happen.

Trauma Triggers

When your child is behaving in a way that is unexpected and seems irrational or extreme, he or she may be experiencing a trauma trigger. A trigger is some aspect of a traumatic event that occurs in a completely different situation but reminds the child of the original event. Examples may be sounds, smells, feelings, places, postures, tones of voice, or even emotions.

Youth who have experienced traumatic events may reenact past patterns when they feel unsafe or encounter a trigger. Depending on whether the child has a "fight," "flight," or "freeze" response, the child may appear to be throwing a tantrum, willfully not listening, or defying you. However, responses to triggers are best thought of as reflexes—they are not deliberate or planned. When children's bodies and brains are overwhelmed by a traumatic memory, they are not able to consider the consequences of their behavior or its effect on others.

Symptoms by Age

Table 2 shows symptoms and behaviors that children who have experienced trauma might exhibit at different stages of development. The age ranges are merely guidelines. For many children who have experienced trauma, their development lags behind their age in calendar years. It may be normal for your child to exhibit behaviors that are more common in younger children.

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway.
Available online at https://www.childwelfare.gov/pubs/factsheets/child-trauma

Table 2. Signs of Trauma in Children of Different Ages[1]

Young Children (Ages 0–5)	School-Age Children (Ages 6–12)	Teens (Ages 13–18)
• Irritability, "fussiness" • Startling easily or being difficult to calm • Frequent tantrums • Clinginess, reluctance to explore the world • Activity levels that are much higher or lower than peers • Repeating traumatic events over and over in dramatic play or conversation • Delays in reaching physical, language, or other milestones	• Difficulty paying attention • Being quiet or withdrawn • Frequent tears or sadness • Talking often about scary feelings and ideas • Difficulty transitioning from one activity to the next • Fighting with peers or adults • Changes in school performance • Wanting to be left alone • Eating much more or less than peers • Getting into trouble at home or school • Frequent headaches or stomachaches with no apparent cause • Behaviors common to younger children (thumb sucking, bed wetting, fear of the dark)	• Talking about the trauma constantly, or denying that it happened • Refusal to follow rules, or talking back frequently • Being tired all the time, sleeping much more (or less) than peers, nightmares • Risky behaviors • Fighting • Not wanting to spend time with friends • Using drugs or alcohol, running away from home, or getting into trouble with the law

[1] Content in the table is adapted from Safe Start Center. (n.d.). Tips for Staff and Advocates Working With Children: Polyvictimization. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, available at http://ojjdp.gov/programs/safestart/TipSheetFor_Polyvictimization.pdf.

These signs alone do not necessarily indicate that your child has experienced trauma. However, if symptoms are more severe or longer lasting than is typical for children the same age, or if they interfere with your child's ability to succeed at home or in school, it is important to seek help. (See the Helping Your Child section below.)

Trauma and Mental Health

Trauma symptoms that are more severe or disruptive to a child's ability to function at home or at school may overlap with specific mental health diagnoses. This may be one reason why nearly 80 percent of children aging out of foster care have received a mental health diagnosis.[2] For example:[3]

- Children who have difficulty concentrating may be diagnosed with ADHD (attention deficit hyperactivity disorder).
- Children who appear anxious or easily overwhelmed by emotions may be diagnosed with anxiety or depression.
- Children who have trouble with the unexpected may respond by trying to control every situation or by showing extreme reactions to change. In some cases, these behaviors may be labeled ODD (oppositional defiant disorder) or intermittent explosive disorder (IED).
- Dissociation in response to a trauma trigger may be viewed as defiance of authority, or it may be diagnosed as depression, ADHD (inattentive type), or even a developmental delay.

It may be necessary to treat these diagnoses with traditional mental health approaches (including the use of medications, where indicated) in the short term. However, treating the underlying cause by addressing the child's experience of trauma will be more effective in the long run.

[2] American Academy of Pediatrics. (2013). Helping Foster and Adoptive Families Cope With Trauma. Elk Grove Village, IL: AAP and Dave Thomas Foundation for Adoption. Retrieved from http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Documents/Guide.pdf

[3] Examples adapted from American Academy of Pediatrics. (2013). Parenting After Trauma: Understanding Your Child's Needs. A Guide for Foster and Adoptive Parents. Elk Grove Village, IL: AAP and Dave Thomas Foundation for Adoption. Retrieved from http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Documents/FamilyHandout.pdf

Posttraumatic Stress Disorder

About one in four children and youth in foster care will experience a specific set of symptoms known as posttraumatic stress disorder (PTSD).[4] It includes four types of symptoms:[5]

- Reexperiencing/remembering (flashbacks or nightmares)
- Avoidance (distressing memories and reminders about the event)
- Negative cognitions and mood (feeling alienated, persistent negative beliefs)
- Alterations in arousal (reckless behavior, persistent sleep disturbance)

It is important to realize that if your child does not exhibit all of the symptoms of PTSD, it does not mean that he or she has not been affected by trauma.

[4] AAP, *Helping Foster and Adoptive Families Cope With Trauma.* Retrieved from http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Documents/Guide.pdf

[5] American Psychiatric Association, *Posttraumatic Stress Disorder.* (2013). Retrieved from http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf

Helping Your Child

Although childhood trauma can have serious, lasting effects, there is hope. With the help of supportive, caring adults, children *can and do* recover. Consider the following tips:

- **Identify trauma triggers.** Something you are doing or saying, or something harmless in your home, may be triggering your child without either of you realizing it. It is important to watch for patterns of behavior and reactions that do not seem to "fit" the situation. What distracts your child, makes him or her anxious, or results in a tantrum or outburst? Help your child avoid situations that trigger traumatic memories, at least until more healing has occurred.
- **Be emotionally and physically available.** Some traumatized children act in ways that keep adults at a distance (whether they mean to or not). Provide attention, comfort, and encouragement in ways your child will accept. Younger children may want extra hugs or cuddling; for older youth, this might just mean spending time together as a family. Follow their lead and be patient if children seem needy.
- **Respond, don't react.** Your reactions may trigger a child or youth who is already feeling overwhelmed. (Some children are even uncomfortable being looked at directly for too long.) When your child is upset, do what you can to keep calm: Lower your voice, acknowledge your child's feelings, and be reassuring and honest.
- **Avoid physical punishment.** This may make an abused child's stress or feeling of panic even worse. Parents need to set reasonable and consistent limits and expectations and use praise for desirable behaviors.
- **Don't take behavior personally.** Allow the child to feel his or her feelings without judgment. Help him or her find words and other acceptable ways of expressing feelings, and offer praise when these are used.
- **Listen.** Don't avoid difficult topics or uncomfortable conversations. (But don't force children to talk before they are ready.) Let children know that it's normal to have many feelings after a traumatic experience. Take their reactions seriously, correct any misinformation about the traumatic event, and reassure them that what happened was not their fault.
- **Help your child learn to relax.** Encourage your child to practice slow breathing, listen to calming music, or say positive things ("I am safe now.").
- **Be consistent and predictable.** Develop a regular routine for meals, play time, and bedtime. Prepare your child in advance for changes or new experiences.
- **Be patient.** Everyone heals differently from trauma, and trust does not develop overnight. Respecting each child's own course of recovery is important.
- **Allow some control.** Reasonable, age-appropriate choices encourage a child or youth's sense of having control of his or her own life.
- **Encourage self-esteem.** Positive experiences can help children recover from trauma and increase resilience.

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway.
Available online at https://www.childwelfare.gov/pubs/factsheets/child-trauma

Examples include mastering a new skill; feeling a sense of belonging to a community, group, or cause; setting and achieving goals; and being of service to others.

Seeking Treatment

If your child's symptoms last more than a few weeks, or if they are getting worse rather than better, it is time to ask for help. Mental health counseling or therapy by a professional trained to recognize and treat trauma in children can help address the root cause of your child's behavior and promote healing. A therapist or behavioral specialist might be able to help you understand your child and respond more effectively. At times, medications may be necessary to control symptoms and improve your child's ability to learn new skills.

Begin by asking your caseworker or agency whether your child has been screened for trauma. If you know that your child experienced trauma, ask whether he or she has had a formal mental health assessment by a professional who is aware of trauma's effects. Ideally, this assessment (including both strengths and needs) should be repeated periodically to help you and your child's therapist monitor progress.

Once your child has been assessed and it has been determined that treatment is needed, ask about treatment options. A number of effective trauma treatments have been developed.[6] However, they are not all available in every community. Consult with your child's caseworker about the availability of trauma-focused treatment where you live.

Timely, effective mental and behavioral health interventions may help in the following ways:

- Increase your child's feelings of safety
- Teach your child how to manage emotions, particularly when faced with trauma triggers
- Help your child develop a positive view of him- or herself
- Give your child a greater sense of control over his/her own life
- Improve your child's relationships—with family members and others

It is important to look for a provider who understands and has specific training in trauma (see box). Most providers will agree to a brief interview in their office or over the phone, to determine whether they are a good fit for your needs.

Questions to ask a mental health provider before starting treatment:

- Are you familiar with research about the effects of trauma on children?
- Can you tell me about your experience working with children and youth who have experienced trauma?
- How do you determine whether a child's symptoms may be caused by trauma?
- How does a child's trauma history influence your treatment approach?

Helping Yourself and Your Family

Parenting a child or youth who has experienced trauma can be difficult. Families can sometimes feel isolated, as if no one else understands what they are going through. This can put a strain not only on your relationship with your child, but with other family members, as well (including your spouse or partner).

Learning about what your child experienced may even act as a trigger for you, if you have your own trauma history that is not fully healed. Being affected by someone else's trauma is sometimes called "secondary trauma." Table 3 lists signs that you may be experiencing secondary trauma.

[6] See for example the National Child Traumatic Stress Network's list, Empirically Supported Treatments and Promising Practices, at http://www.nctsnet.org/resources/topics/treatments-that-work/promising-practices.

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway.
Available online at https://www.childwelfare.gov/pubs/factsheets/child-trauma

Table 3. Signs of Secondary Trauma

Physical Symptoms	• Headaches • Stomach problems • Sleep problems • Weight gain or loss • Lack of energy
Behavioral Symptoms	• Increased drinking or smoking • Procrastination • Feeling overly critical • Avoiding other people
Emotional Symtoms	• Anxiety • Frequent crying • Irritability • Loneliness • Depression
Cognitive symptoms	• Inability to concentrate • Forgetfulness • Loss of humor/fun • Inability to make decisions

The best cure for secondary trauma is prevention. In order to take good care of your child, you must take good care of yourself. Here are some things you can do:

- **Be honest about your expectations for your child and your relationship.** Having realistic expectations about parenting a child with a history of trauma increases the chances for a healthy relationship.
- **Celebrate small victories.** Take note of the improvements your child has made.
- **Don't take your child's difficulties personally.** Your child's struggles are a result of the trauma he or she experienced; they are not a sign of your failure as a parent.
- **Take care of yourself.** Make time for things you enjoy doing that support your physical, emotional, and spiritual health.
- **Focus on your own healing.** If you have experienced trauma, it will be important for you to pursue your own healing, separate from your child.
- **Seek support.** Your circle of support may include friends, family, and professional support if needed. Don't be afraid to ask about resources available from the child welfare system, such as a caseworker or support groups.

In order to take good care of your child, you must take good care of yourself.

Conclusion

Trauma can affect children's behavior in ways that may be confusing or distressing for caregivers. It can impact the long-term health and well-being of the child and his or her family members. However, with understanding, care, and proper treatment (when necessary), all members of the family can heal and thrive after a traumatic event.

Resources

American Academy of Pediatrics. (2013). *Parenting after trauma: Understanding your child's needs. A guide for foster and adoptive parents.* Elk Grove Village, IL: AAP and Dave Thomas Foundation for Adoption. Retrieved from http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Documents/FamilyHandout.pdf

Child Welfare Information Gateway. Resources on Trauma for Caregivers and Families [Webpage]: https://www.childwelfare.gov/topics/responding/trauma/caregivers.

Children's Bureau. (2012). *Making healthy choices: A guide on psychotropic medications for youth in foster care.* Retrieved from the Child Welfare Information Gateway website at https://www.childwelfare.gov/pubPDFs/makinghealthychoices.pdf

Children's Bureau. (coming in 2015). *Supporting youth in foster care in making healthy choices: A guide for caregivers and caseworkers on trauma, treatment, and psychotropic medications.* Find this on the Child Welfare Information Gateway website in 2015.

National Child Traumatic Stress Network. Resources for Parents and Caregivers [Webpage]: http://www.nctsn.org/resources/audiences/parents-caregivers

This material may be freely reproduced and distributed. However, when doing so, please credit Child Welfare Information Gateway.
Available online at https://www.childwelfare.gov/pubs/factsheets/child-trauma

National Child Traumatic Stress Network. (2014). *Complex trauma: Facts for caregivers*. Retrieved from http://www.nctsn.org/sites/default/files/assets/pdfs/complex_trauma_caregivers_final.pdf

National Technical Assistance Center for Children's Mental Health. (2014). Trauma-informed care: Perspectives and resources [Web-based tool]. Retrieved from http://gucchdtacenter.georgetown.edu/TraumaInformedCare/index.html

Schooler, J., Smalley, B. K., & Callahan, T. (2010). *Wounded children, healing homes: How traumatized children impact adoptive and foster families*. Carol Stream, IL: NavPress.

Acknowledgments:

This factsheet was developed by Child Welfare Information Gateway based on interviews with Children's Bureau grantees funded through the **Integrating Trauma-Informed and Trauma-Focused Practice in Child Protective Service Delivery (HHS-2011-ACF-ACYF-CO-0169), Initiative to Improve Access to Needs-Driven, Evidence-Based/Evidence-Informed Mental and Behavioral Health Services in Child Welfare (HHS-2012-ACF-ACYF-CO-0279), and Promoting Well-Being and Adoption After Trauma (HHS-2013-ACF-ACYF-CO-0637)**. Information Gateway wishes to acknowledge the valuable input of Becci Akin, Chad Anderson, Linda Bass, Sharri Black, James Caringi, Marilyn Cloud, Pamela Cornwell, James Henry, Kevin Kelley, Alice Lieberman, Patricia Long, Susana Mariscal, Kelly McCauley, Vickie McArthur, Kathryne O'Grady, Sherry Peters, Jeanne Preisler, Cheryl Rathbun, and Jim Wotring. The conclusions discussed here are solely the responsibility of the authors and do not represent the official views or policies of the funding agency.

Suggested citation:

Child Welfare Information Gateway. (2014). *Parenting a child who has experienced trauma*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

U.S. Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

COMMENTARY

Structural racism’s toll on Black families in court

by **Special to the AFRO**
April 3, 2024

Nancy Grimm, Esq. is a family law attorney with Maryland Volunteer Lawyers Service. Photo: Courtesy photo

By Nancy Grimm

Race and poverty directly affect access to financial resources, healthcare, education and employment – and often will influence the chance for fair legal representation and successful outcomes. Unfortunately, family court, which is responsible for crucial decisions affecting a family’s well-being, is not immune to the impact of structural racism in our judicial system.

Privacy - Ter

Black individuals and families often face barriers to equal justice in court due to limited access, racial bias and difficulties representing themselves when legal representation is unavailable or unaffordable.

Racial disparities persist throughout the family law system with courts making assumptions about people of color's legal knowledge, parenting abilities and commitment to their children. While some judges and members of the court treat Black individuals and other people of color fairly, others in the court system exhibit implicit or explicit bias – making decisions simply based on race.

The shortage of Black attorneys and judges exacerbates the issue. The American Bar Association reports minimal growth in the percentage of Black attorneys over the past decade. Of the 1.3 million attorneys nationwide, Black attorneys account for less than 5 percent – hardly enough to adequately serve Black individuals with legal needs across the U.S. Diverse representation is key to improving the justice system and fostering better understanding and respect of the client's life challenges and legal situation. This can lead to stronger attorney-client relationships and significantly better legal outcomes.

The child welfare systems in this country often harm families by failing to address structural and cultural causes for the family's challenges. Reports and investigations disproportionately target Black families, resulting in children being removed from their homes and, in some cases, the loss of parental rights. In fact, most allegations that result in removal of Black children from their homes stem from neglect due to poverty or discrimination rather than abuse. Empty refrigerators and pantries, children left alone during work hours due to the inability to afford childcare, or the finding of a room shared among multiple family members can trigger citations that attack the family's stability. Still, Black families are more likely to be reported and investigated for abuse or neglect than their White counterparts.

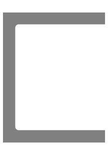
Shockingly, 53 percent of Black children face child welfare investigations before the age of 18, often leading to Black children being separated from their families and placed in foster homes or other institutions, which continues to break down the Black family structure and endanger the health and well-being of the children. Once in foster care, Black children typically receive inferior services and funding, are kept from their families for longer periods of time and are less likely to be adopted compared to White children.

Black parents often face unrealistic employment standards for making reliable child support payments. Child support agencies frequently overlook racial challenges and biases in employment, labeling people of color as "deadbeats" and "failures" because of their inability to find work. These biases often lead to fines and incarceration, perpetuating the separation of families and the cycle of poverty.

Limited access to the court system also hinders low-income Black communities, which was evident during the pandemic. Despite efforts to enhance accessibility through such things as virtual platforms for remote hearings and electronic filings, individuals with limited means, particularly Black individuals, often lack access to broadband services, phones or computers. Even those with technological access may not understand how to use it or how the court system works.

How do we improve racial equity and fairness and eliminate racial bias in the family law court system?

To ensure fairness, our judicial system must change. Court standards and practices must be critically examined through the lens of historical structural racism. Implementing training, guidelines and protocols for all judges, attorneys and court personnel to address implicit and explicit bias and their impact on Black families is critical for improving outcomes in family court. Increasing diversity among judges and attorneys is paramount in affording Black families improved representation and outcomes.



Additional solutions involve examining how racial bias impacts the judges who hear and decide cases, addressing economic disparities that leave far too many Black families navigating court on their own, and evaluating whether virtual hearings

disproportionately favor White families.

Courts also can partner with community stakeholders, such as libraries and churches, to provide self-represented individuals access to virtual hearings at these community locations using court-issued computers and technology.

© 2024 The Black Media Authority.
Powered by Newspack

Rethinking Foster Care

Revisiting prevailing assumptions to better serve children and their families.

Best Interest Is In the Eye Of The Beholder

Written by Vivek Sankaran - September 30, 2019

A few weeks ago on a phone call discussing how systems can support keeping kids safely with their families, a judge abruptly interjected, “I don’t like this focus on the rights of parents. We should always be focusing on the best interest of children at all times, before a kid is removed and once a court is involved!”

In my years practicing child welfare law, I’ve heard this refrain many, many times. It makes my head hurt.

The refrain pains me because we all know that the “best interest of the child” is not an objective standard. All of us disagree – all the time – about what we think is best for a child. What time should they go to bed? Should they co-sleep with us? How should they be disciplined? Should they be raised in a “free-range” parenting style? Or is helicoptering around them best? Gather a group of parents, chat for a few minutes, and you’ll quickly realize how much we disagree about what is good for children.

This dynamic exists within the child welfare system as well. In the late 1990s, researchers at Chapin Hall brought together a group of child welfare experts and line caseworkers to discuss whether separating a child from their parent would be in their best interests. When in-home services were available, only 35 percent of experts and 37 percent of caseworkers agreed that it would be.

When no services were available, the disagreement whether to keep the family together became much more pronounced: 60 percent of experts said separate, compared with 53 percent of caseworkers. Experts and seasoned practitioners couldn’t agree on what would be best for children.

Talk to any child welfare lawyer or practitioner and they will confirm this. If you go before Judge X, he'll never do this. But Judge Y will always do this because Judge X and Judge Y see the world in very different ways. Even when I toss out hypotheticals to my law students about when a child should be removed, or when parental rights should be terminated, this pattern repeats itself.

So let's own this disagreement, and do ourselves a favor by not talking about the "best interest of the child" standard as some objective measure of truth. Rather, let's acknowledge that child welfare cases are really about who gets to decide what they think is best for a child. Before a parent is found to be unfit, they get to decide. While a child is in foster care, a court or a child welfare agency might get to decide. If a child has achieved permanency with an adoptive parent, or a guardian, they get to figure this out.

Crucial to this framework is the realization that prior to finding a parent to be unfit, judges don't get to issue orders based on what they think is best for a child. Consider a world where this standard didn't apply. Do I really want someone to second-guess my decision to allow my children to watch America Ninja Warrior this morning? Or to eat pizza for a week straight? Or to not shower for a few days?

Absolutely not. These are my calls as a parent. The constitutional jurisprudence makes clear that the state doesn't get to interfere in these decisions until they prove me to be unfit. It is a doctrine that all of us benefit from. Every day.

So let's stop pitting parental rights against some false sense of an objective best interest standard. Let's recognize that the law requires us to allow parents to make these decisions until they are proven to be incapable of doing so. As tempting as it may be, until this happens, we can't – and shouldn't – use the force of law to impose our subjective opinions on what is best for children on families.

Vickie Suarez *October 1, 2019 at 3:07 AM*

Vivek, Thank you. The term "best" is supercharged with vague interpretation, arbitrary feelings, whim. The UK court ruled it was "best" that Charlie Gard and Alfie Evans die, against the parent's wishes, and when there were doctors willing to take them in transfer. The use of the term "best" abuses rule of law and liberty. It assumes some elite knows better than parents. CPS is encouraged to use gut feeling in child abuse investigations, suspicion, not evidence. The state and courts do interfere in parenting decisions. Reigning in the rogue courts and the power-hungry state is essential. Tie down government power by the chains of the Constitution, ratify the Parental Rights Amendment, and the interim remedy, state statutes, like HB 508 in PA. What is protected by jurisprudence, needs protecting in statutory law, safe from the whims of the courts.

Unknown *October 2, 2019 at 2:03 PM*

No CPS worker nor the courts should have jurisdiction to kidnap someone's child....what's best for the child is thier home with thier own parent.....because facts are facts most children get abused and molested in foster care..so where is that better CPS put the parent under a microscope...well what about the foster care parents??? How do they not know that Chester the molester is the head of household???? They receive complaints from kids as well as parents that bad things Are going on in foster care...And no body wants to hear it, nobody cares ...As long as we protect that child from that pot smoking mom.....where does marijuana do more harm then Some gross nasty pig having sex with babies???? Even worst yet ...that where placed by our so called CPS workers and some judge????? I'm sorry but this kind of legal kidnapping is wrong and this is unamerican , people have the right to be protected against such blastamy...I personally have never had a child in fostercare but have known a couple of people that have,, ànd both cases the very first thing that happened to both set of children was they were raped beaten ..what kind of protection is this????? It almost seems that a criteria for being a foster parent includes being a molester..because tell me how or why in the world in the name of a so called safe place are children being raped?? Then they all turn a blind eye and the complaints have fallen upon def ears??. And children's innocense ripped away and thier security of a home does not exist, nor are they allowed back home with thier own family....these children now suffering from years of abuse and molestation are totally messed up in the head.....and this is better??? CPS is not a good thing it's bad. These people haven't protected nobody they just destroy the family unit, they tell lies to get the children taken from thier homes and they get bonuses for adopting other people's kids to molesters...wow , This whole fostercare system needs a total overhaul..this program is evil and shouldn't exsist...so why are all these people sitting thier with closed lips speak up and really protect the children of foster care, if

you really care

REPLY

Anonymous *October 1, 2019 at 1:45 PM*

Good luck. Most people taking children from their parents don't have children or they have an agenda (giving children with heterosexual parents to gay & lesbian parents).

REPLY

Lydia Hubbell *October 1, 2019 at 7:26 PM*

"The constitutional jurisprudence makes clear that the state doesn't get to interfere in these decisions until they prove me to be unfit." In theory, but not in practice.

"It is a doctrine that all of us benefit from. Every day." We wish.

FixFamilyCourts *October 3, 2019 at 10:48 AM*

Well put Lydia!

REPLY

targetedmom *October 2, 2019 at 8:13 AM*

I'm not sure how directly this applies but, if you practice child welfare law, then you should be on the cutting edge of the explosion of scientific evidence around the need for every child to have a safe, stable, and secure environment. As should everyone who touches the lives of these fragile, vulnerable children. We also know that to recover from the trauma of the family dysfunction, a child needs at least one healthy relationship with an adult, preferably a parent. We also have a much deeper understanding of the harm and damage that occurs to the child when safety and security are compromised. Once professionals understand psychological trauma and child development, I believe that their are factors that are clear "in" or "not in" the best interests of the child.

REPLY

FixFamilyCourts *October 3, 2019 at 10:38 AM*

This comment has been removed by the author.

REPLY

REPLY

FixFamilyCourts *October 3, 2019 at 10:45 AM*

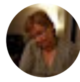
So it appears, and please correct us if we're wrong, that you would agree with the argument made by us at Fix Family Courts . com that best interest of the child is viewpoint discrimination based on matters of conscience in child rearing. And as the supreme court held in Reno v. Flores the government must not violate the rights of the child when making this policy choice. And also that it cannot be in any child's best interest for a sole government official to violate that child's constitutional rights absent constitutional safeguards. This doctrine you speak of therefore also applies to two fit parents in disagreement in divorce. Judge X and Judge Y however are denying this to these parents. So the nightmare that you speak of is happening to parents throughout this country every day. Afterall even divorced parents have a First amendment right to disagree on matters of conscience. Ron B Palmer and Sherry Palmer with Fix Family Courts . com

REPLY

Rinkevichjm *October 14, 2019 at 2:21 PM*

Attorney Professor Sankaran, the problem is that judges think they determine by themselves best interest. However that is not the legal standard as it is subjective and not objective. We have at least 3 different major studies done on medium to large state foster care system in the US. Essentially these studies have determined that it is not in the best interest of children to be placed in foster care except for moderate or higher abuse

REPLY



Jane Morrison *October 21, 2019 at 8:38 AM*

Good day !!
We are Christian Organization formed to help people in need of help,such as financial assistance, Do you need a loan to pay your bills? Do you need Personal Business Car or Student loans? Need a loan for various other purposes? If yes contact us.

Note: These offer is for serious minded and God fearing People Only.

Email: jacksonwaltonloancompany@gmail.com

Text or call: +1-205-5882-592.

Address is 68 Fremont Ave Penrose CO, 81240.

Website: jacksonwaltonloancompany.blogspot.com

REPLY

Digital Marketing Expert *October 22, 2019 at 8:36 AM*

Packers and Movers
Best Packers and Movers in Bangalore
Movers and Packers
Packers and Movers Delhi
Packers and Movers Noida
Packers and Movers Pune
Packers and Movers Bangalore
Packers and Movers Kolkata
Packers and Movers Chennai
Agarwal Packers Movers

REPLY

Enter your comment...

Popular posts from this blog

A Song for Families

Written by David Kelly - July 22, 2019

A Song for Families An episode of NPR's all-songs-considered has been stuck in my head for the past week or so. I listened to it on the drive back to DC from the holiday weekend. The theme was anthems. It was fascinating. The hosts discussed the conte ...

READ MORE

The Road Less Traveled

Written by Jerry Milner - March 09, 2021

Two roads diverged in a wood, and I – I took the one less traveled by, And that has made all the difference. The poetry of Robert Frost has been a lifelong source of inspiration for me, since I first read him in high school, although I've never been sure that he …

READ MORE

Redesigning The Delivery Of Legal Services To Prevent Children From Entering Foster Care

Written by Vivek Sankaran - July 10, 2018

Imagine, for a moment, that we redesigned the delivery of legal services to prevent children from unnecessarily entering foster care. What would that look like? How would we allocate resources? Would it be effective? Four fundamental principles infor …

READ MORE

Powered by Blogger

Theme images by Veronica Olson

Contributors

AMY MULZER

CATHY KREBS

CHRISTOPHER CHURCH

DAVID KELLY

DIANE REDLEAF

EMMA BROWN-BERNSTEIN

HOPE LYZETTE NEWTON

JERRY MILNER

UNKNOWN

VIVEK SANKARAN

Rethinking Foster Care

Posts
Comments

Total Pageviews

79,716

Archive

Search This Blog

Search this blog

Archive

Report Abuse

Understanding Historical Trauma

Historical trauma is the collective trauma experienced by specific racial, ethnic, or cultural groups. It often stems from major events and has lasting, multigenerational impacts. Examples include the enslavement of Black and African American people, the Holocaust, discrimination against LGBTQIA2S+ individuals, and the U.S. Indian boarding school policy.

These traumatic events have caused multigenerational disparities and inequities among affected families and communities, including higher rates of mental and physical illness, substance use, incarceration, poverty, homelessness, and contact with child welfare. These individuals and families are also more likely to experience systemic barriers and discrimination related to race, ethnicity, and culture.

It is essential to understand how historical trauma continues to affect families' socioeconomic status, their interactions with child welfare, and other experiences of bias and inequity. Establishing trauma-informed, equitable, and culturally responsive policies and practices are key steps in addressing historical trauma. This requires organizations and professionals to be willing to learn, address their personal biases and privileges, advocate for family and cultural connections, incorporate lived experience at all levels of their work, and implement strategies to improve diversity, equity, and inclusion. These philosophies are foundational to culturally responsive practice.

Adjust the filters below to refine your list of resources.

Can't find what you need in the filtered results? Try searching our Library catalog to access a large selection of peer-reviewed journal articles, evaluation reports, Children's Bureau grant materials, research studies, and more.

Featured

Resource Guide to Trauma-Informed Services

Learn about trauma, including historical trauma, and why it is important for human services programs to understand and address it. The guide describes six key concepts associated with trauma-informed care: trauma, toxic stress, resilience, historical ...Read More

The Things They Carried: The Complex Legacy of Indian Boarding Schools & Contemporary Child Welfare Systems

Read about the history of Indian boarding schools and their continued effects on disproportionality in child welfare.

Healing Historical Trauma: The Vital Role of Family Integrity in Restoring Health and Wellness for People of African Descent

Watch this webinar to learn how family integrity and autonomy influence African Americans' health and well-being. Listen as a panel of experts discuss historical trauma, poverty, systemic racism, and more.

Historical Trauma Among African Americans

[Podcast] Friends National Center for Community-Based Child Abuse Prevention Explores historical trauma among African Americans and discusses topics such as adverse childhood experiences, hope, racial healing, and resilience.

Addressing Historical Trauma and Preparing the Child Welfare Workforce

Watch a video that features an elder from the Eastern Band of Cherokee Indians discussing historical grief and trauma and the importance of preparing the child welfare workforce to more effectively work with American Indian/Alaska Native families.

Remembering Resilience Podcast Series

Listen to this podcast on American Indian/Alaska Native resilience. It discusses the science, history, culture, stories, and practices that have played roles in the community's response to trauma.

Filter Your Results

Clear All Filters

Search

Sort By Relevance

Displaying 10 of 143 results

Applied Filters: UNDERSTANDING HISTORICAL TRAUMA

Topics

Key Terms - Foundational Areas

Program Funding

Resources For

Format

Resource Type

Author - Source

States, Territories & Tribes

National Initiatives

A Child Welfare Practitioner's Guide for Meeting the Wisconsin Indian Child Welfare Act's Active Efforts Requirement

Learn about the importance of and find guidance on the Wisconsin Indian Child Welfare Act (ICWA). Find information about the expectations around active efforts requirements for serving Native American families in the State.

Services to Native American Children and Families

Read about how Montana works collaboratively with Tribes and learn about the State's implementation of all aspects of the Indian Child Welfare Act.

Helping Young Children Who Have Experienced Trauma: Policies and Strategies for Early Care and Education Child Trends (2017)

Explains the impact of early childhood trauma and promising strategies for meeting the needs of trauma-impacted children, including expanding early care and education programs that connect families with community supports and services.

Your Guide to Raising a Child of Another Race

American Adoptions Provides information for families parenting a child of a different race, which may impact parents' understanding of their children.

Exploring the Rich Traditions of American Indian Culture

Learn about the trauma American Indian/Alaska Native people have faced and how Tribes are working to revive their traditions and cultures through language, ceremony, and education programs for Native youth.

Native Youth and Suicide Prevention

Examine the issue of suicide in American Indian and Alaska Native communities and browse statistics, prevention resources, and reports and recommendations for ways to address depression and suicide.

Government Boarding Schools Once Separated Native American Children From Families

Explore how thousands of Native American children were forcibly separated from their families in order to tear them away from their

history, religion, and culture.

Indian Child Welfare: Indian Child Welfare Act

Learn about specific district issues affecting the Cherokee Nation in child welfare cases.

Measuring Cultural Factors Associated with Substance Misuse and Mental Health in American Indian and Alaska Native Populations

Learn measures that prevention practitioners and evaluators can use when evaluating substance misuse prevention programs that include cultural elements associated with mental health in American Indian/Alaska Native communities and families.

Alaska: Indian Child Welfare

Explore resources, guidelines, and trainings to equip Alaskan child welfare agencies in their work with American Indian and Alaska Native families.

1 2 3 4 5 ... 15 Next ›

1-800-394-3366 info@childwelfare.gov

childwelfare.gov
An official website of the Children's Bureau and Child Welfare Information Gateway

About Children's Bureau
Accessibility
FOIA requests
No FEAR Act data
Report Fraud
Performance reports
Disclaimer and Policies
HHS Vulnerability Disclosure Policy

Looking for U.S. government information and services? **Visit USA.gov**