



NACC

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National Association of Counsel for Children

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# Recommendations *for* Legal Representation of Children and Youth IN NEGLECT AND ABUSE PROCEEDINGS

Promoting Excellence

Building Community

Advancing Justice

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## Introduction

The National Association of Counsel for Children was founded to ensure all children in dependency court are provided high-quality legal representation by specialized attorneys. In 2001, NACC adopted *Recommendations for Representation of Children in Abuse and Neglect Cases*<sup>1</sup> (2001 Recommendations). For two decades, this document has served as a best practice resource for legal services delivery for children in neglect and abuse proceedings. It has been cited extensively in courts, legislatures, and executive agencies across local, state, and federal government.

Since publishing the 2001 Recommendations, NACC has also published the *Child Welfare Law Office Guidebook*, three editions of *Child Welfare Law and Practice* (the “Red Book”) and filed numerous amicus briefs asserting the right to counsel for children and parents. Over the last two decades, the field has continued to recognize the importance of well-trained and resourced lawyers for children. The American Bar Association recognized child welfare as a legal specialty in 2004, and in 2011 adopted the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*,<sup>2</sup> a statutory framework for state policy that NACC endorsed in 2019. Additionally, the National Quality Improvement Center on the Representation of Children in the Child Welfare System conducted a seven-year, federally funded initiative to develop the QIC-ChildRep Best Practice Model of Representation<sup>3</sup> and policy recommendations.

Today, the child welfare field continues to evolve. It is informed by evidence of the trauma of family separation, harmful foster care experiences and outcomes, and a growing public acknowledgment of the ways poverty, bias, and structural racism perpetuate injustice and disproportionality. Practitioners and policymakers are also increasingly educated on child and adolescent brain development research, the importance of engaging youth and parents with lived experience,<sup>4</sup> and the proven impact of high-quality legal representation for children, parents, and families.<sup>5</sup> Recent reforms — such as the passage of the *Family First Prevention Services Act*<sup>6</sup> and the U.S. Children’s Bureau’s expansion of Title IV-E funding for children’s and parents’ counsel<sup>7</sup> — have begun to embed this research into policy and practice on the federal and state levels.

These changes have sparked and reinvigorated attention to children’s legal representation from practitioners, stakeholders, and policymakers nationwide. Given this changing landscape, and the opportunity to expand<sup>8</sup> and finance<sup>9</sup> the right to counsel for children, the timing is ripe to revisit NACC’s 2001 Recommendations. NACC’s goal in this 2021 revision is to continue developing a

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1 National Association of Counsel for Children. (2001). *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*. [https://cdn.maws.com/www.naccchildlaw.org/resource/resmgr/standards/nacc\\_standards\\_and\\_recommend.pdf](https://cdn.maws.com/www.naccchildlaw.org/resource/resmgr/standards/nacc_standards_and_recommend.pdf)

2 American Bar Association. (2011, August). *Resolution: Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*. [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba\\_model\\_act\\_2011.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf)

3 QIC ChildRep. (n.d.) *Home page*. <http://www.improvechildrep.org>

4 U.S. Department of Health and Human Services, Administration of Children and Families. (2019, August 1). *Engaging, Empowering, and Utilizing Family and Youth Voice in All Aspects of Child Welfare to Drive Case Planning and System Improvement*, Log No: ACYF-CB-IM-19-03. <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1903.pdf>

5 U.S. Department of Health and Human Services, Administration of Children and Families. (2017, January 17). *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, Log No: ACYF-CB-IM-17-02 <https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf>; Washington State Center for Court Research. (2021). *Evaluation of the Washington State Dependent Child Legal Representation Program*. Administrative Office of the Courts. <https://counselforkids.org/wp-content/uploads/2021/11/DCLR-Report-2021.pdf>

6 National Association of Counsel for Children. (n.d.) *Family First Act & Related Tools*. <https://www.naccchildlaw.org/page/FamilyFirst>

7 U.S. Department of Health and Human Services, Administration of Children and Families. (2021, January). *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being*, Log No: ACYF-CB-IM-21-06. <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>

8 Counsel for Kids (2021, October). <https://counselforkids.org>

9 National Association of Counsel for Children. (n.d.) *Title IV-E Funding for Legal Representation*. <https://www.naccchildlaw.org/page/TitleIVforLegalRepresentation>

child and youth-centered legal profession, advance the highest quality of legal representation in neglect and abuse proceedings, and assist jurisdictions seeking to establish and improve attorney representation.

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## Purpose & Scope

From the moment the child welfare system intervenes, everything in a child’s life is at stake — their home, their belongings, their bonds with parents and siblings, their education, their community, their future. To journey through this system — which spans across branches of government and agency bureaucracies and is governed by federal, state, and local law — can be complicated, protracted, and deeply traumatic. High-quality legal representation is essential to help children and youth navigate these complex processes, advance their legal rights, ensure their voices are heard, and reach better outcomes.

Children and youth possess legal rights and entitlements which must be honored, even when doing so is inconvenient or uncomfortable. When it comes to constitutional due process, the benefits of procedural justice<sup>10</sup>, and the need to be fully seen and heard, children and youth require at least the same procedural rights as adults. Although their requests may not always carry the day in the courtroom, they should not be dismissed or devalued at the outset by virtue of their age.

Too many children and youth do not feel a sense of belonging or inclusion in the courtroom proceedings that shape their families and their lives; children’s lawyers are duty-bound to address this. To do so, the legal field must give special consideration to unique facets of children’s legal representation, especially their developing brains and dependence on adults and systems for material support. Because children have specialized and unique needs, they deserve someone well-trained and well-resourced on their side. That individual must be a lawyer because the child welfare system implicates children’s liberty and involves substantive and procedural rights.

Through trauma-informed, culturally responsive legal representation, children’s lawyers can foster healing<sup>11</sup>, agency, and resilience<sup>12</sup>. They are uniquely positioned to zealously advocate for the services and outcomes children and families need to thrive. These Recommendations reflect the urgency to uplift the voices of young people with lived experience, implement antiracist strategies, and focus resources on prevention and family strengthening.

Herein is a practical framework for legal advocacy, not a summary of child welfare law. Neither is it a guide for lay advocacy, as the functions of the attorney and lay volunteer are distinct; the latter cannot and should not perform the functions of legal representation on behalf of the child. We hope and intend that these recommendations shape and formalize attorney standards of practice, training protocols, and other policies nationwide.

These Recommendations replace NACC’s 2001 Recommendations for Representation of Children in Abuse and Neglect Cases. They also rescind the NACC Revised ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases (adopted 1996, amended 1999). They were unanimously approved and adopted by NACC’s Board of Directors on December 13, 2021.

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10 As affirmed by the U.S. Children’s Bureau, procedural justice is the “feeling of fairness or trust in court proceedings” and includes four main elements: “1) voice — having one’s viewpoint heard; 2) neutrality — unbiased decision-makers and transparency of process; 3) respectful treatment — individuals are treated with dignity; 4) trustworthy authorities — the view that the authority is benevolent, caring, and genuinely trying to help.” See footnote 5.

11 Alia Innovations and Anu Family Services. (2018). *Healing Guidebook*. <https://www.aliainnovations.org/healing-guidebook>

12 Vandervort, F. E., Henry, J., & Sloane, M. A. (2021, January). *Building Resilience in Foster Care: The Role of the Child’s Advocate*. University of Michigan Law Scholarship Repository. <https://repository.law.umich.edu/articles/1505/>

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## Co-Design Process

NACC's 2001 Recommendations were drafted largely by lawyers. NACC Board and staff agreed that the input of constituents with lived experience would be essential to its next iteration. A modest revision strategy would have been to re-write the Recommendations and ask people with lived experience for comment. Instead, NACC entered a co-design partnership with our National Advisory Council on Children's Legal Representation (NACCLR)<sup>13</sup> to devote the necessary time, meaningful resources, and intentional discussion to truly embed constituent voice into the process and product. We engaged a Liberatory Design<sup>14</sup> facilitator who supported a six-month process of exploration, deliberation, and co-design between staff and NACCLR members.

NACC saw great value in this process, which centered the priorities of youth with lived experience in the child welfare system while weaving together the expertise of staff, key resources and publications, and feedback from the practitioner community, board members, interdisciplinary experts, and more. As state and local jurisdictions review these Recommendations, NACC encourages the same active listening and co-design partnership. Whether using this document to develop policy, case law, or court rules, there is no substitute for authentic youth engagement<sup>15</sup> at every stage.

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13 Formerly known as NACC's Youth Advisory Board, this group adopted a name change in August 2021 while these Recommendations were pending. For more information, visit [https://www.naccchildlaw.org/page/youth\\_board](https://www.naccchildlaw.org/page/youth_board)

14 Liberatory Design is an evolution of the human-centered design (HCD) approach that has successfully been used in other industries to design solutions for complex problems by and with those most directly impacted. Liberatory Design builds on HCD principles by centering equity at every stage of the process. For more information, see: Anaissie, T., Cary, V., Clifford, D., Malarkey, T. & Wise, S. (2021). *Liberatory Design*. <http://www.liberatorydesign.com>

15 National Association of Counsel for Children. (2021). *So You Want to Include a Lived Experience Expert*. [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc\\_recommendations\\_2021/nacc-lived-experience-expert.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc_recommendations_2021/nacc-lived-experience-expert.pdf)

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## Definitions

NACC uses the following terminology for the purposes of this document:

- **Child / Youth:** a person who has either 1) not reached the age of legal majority or 2) who has reached the age of legal majority but remains under the jurisdiction of the dependency court under extended foster care. Within this document, the terms “child” and “youth” are used to mean the same thing.
- **Child / Youth’s Attorney / Expressed Interest / Direct Representation:** used interchangeably, these terms describe a legal professional, duly licensed by a bar association or state supreme court,

who advocates for the child or youth's expressed wishes. The attorney owes the same duties of professional responsibility (ex. loyalty, confidentiality, etc.) to the child client as would be due to an adult client. Expressed interest representation involves active client counseling and investigation. This model may also be described as "stated interest" or "client directed" legal representation.

- **Culturally Responsive / Cultural Humility:** an ongoing approach to lawyering that seeks to understand and center the culture of the client and other parties involved in the legal action, including intersectional aspects of identity such as race, ethnicity, sex, sexual orientation, gender identity, religion, class, worldview, and values. A culturally responsive and humble approach to lawyering requires continual self-reflection about the practitioner's own identity and seeks to mitigate personal and systemic bias and impact.
- **Dependency Court:** an arm of the judicial branch that oversees neglect, abuse, and often related court proceedings such as guardianship, adoption, paternity, and custody actions. Jurisdictions may use differing terms such as "child protection," "abuse & neglect," "family court," or "juvenile court."
- **Diminished Capacity:** the state of being unable to direct legal counsel because the client lacks the sufficient ability to communicate or the attorney is unable to reasonably ascertain their position, as explicated by ABA Model Rule 1.14. A child's age alone is not dispositive of diminished capacity, which must also take into consideration their developmental, cognitive, and communicative abilities.
- **Guardian ad Litem (GAL)/ Best Interest Representation:** used interchangeably, these terms describe a legal professional, duly licensed by a bar association or state supreme court, who is appointed by the court to advocate for the child or youth's best interest, based upon the attorney's own assessment after conducting an independent investigation. Although advocates for a child's best interests are not bound by the expressed wishes or litigation objectives of the child, in most jurisdictions they have a concomitant responsibility to inform the court of the child's wishes. While some jurisdictions use the term "GAL" to describe a lay advocate, that is not how the term is used in this document.
- **GAL Hybrid Model:** a legal professional, duly licensed by a bar association or state supreme court, who is appointed by the court to advocate for both the child or youth's expressed wishes and also the child or youth's best interest, when there is no conflict between those two positions. If such a conflict develops, the roles are bifurcated.
- **Lay Advocate:** an individual appointed by the court to make recommendations informed by their assessment of the child or youth's best interest. Lay advocates typically serve in a volunteer capacity and are not licensed to give legal advice or otherwise engage in the practice of law. In some jurisdictions, the lay volunteer is known as a Court Appointed Special Advocate (CASA). While some jurisdictions allow for the appointment of counsel to represent lay advocates, this should not be confused with independent legal representation of a child who is a party to the case and has unique legal considerations.
- **Substituted Judgment:** method of legal representation for clients of diminished capacity, guided by the lawyer's understanding of what the client would request if they were able to verbalize their goals. Attorneys should make firsthand observations of the client, conduct an independent investigation, and seek guidance from collateral sources (family, supports, child development experts, and other professionals) to develop a substituted judgment position. For further information on this approach, see Recommendation I, below, and the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings.<sup>16</sup>

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16 American Bar Association. (2011, August). *Resolution: Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*. [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba\\_model\\_act\\_2011.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf)

# I. Establish an Attorney–Client Relationship:

*Attorneys for children and youth should adhere to an expressed interest model of legal representation.*

**COMMENT:** Children and youth with lived experience in the child welfare system have consistently called for earlier and more frequent opportunities to be heard in the decisions that impact their lives. Meaningful and effective engagement of child clients can occur across different models of legal representation, including best interest representation and hybrid models. Client-directed representation, however, provides the greatest assurance of maximizing youth voice and minimizing attorney bias that too often exacerbates racial and ethnic disparities in the child welfare system. Consistent with past policy endorsements and amicus work, NACC supports expressed interest representation as the preferred model of children’s legal representation.<sup>17</sup> This is consistent with the ABA Model Act and the ABA Model Rules of Professional Conduct 1.2, which calls for clients to set the goals of legal representation.

*“Best interest is always a tricky term. We fall into muddy waters in the child welfare realm when we look at that. Everyone will say something different: the judge, the attorney, CASA, caseworkers, birth parents, foster parents, youth, therapist. All have different opinions, but the judge makes the final decision.”*

**NACC ADVISORY COUNCIL MEMBER**

The 1967 *In Re Gault*<sup>18</sup> Supreme Court decision guaranteed children and youth in delinquency proceedings a right to counsel at the adjudicatory hearing. In the years that followed, youth involved in the delinquency system gained access to client-directed counsel which remains the constitutional, due process baseline today. Children and youth in child welfare proceedings experience deprivations of liberty in state custody similar to their peers in the juvenile justice system, such as separation from family and institutionalization. They are similarly situated to require the protections that constitutional due process and the rules of ethics and professional conduct provide.

Many states utilize a best interest model of legal representation. While this is preferred over no legal representation, equity and judicial consideration of youth voice are better achieved under a client-directed model. Determining what is in the best interest of the child is ultimately in the purview of the judicial officer. Counsel for each party will introduce evidence and advance arguments to inform this finding. As experts about their own lives, children

and youth are well-situated to provide comprehensive and accurate information to shape this analysis. Attorneys should avoid opining in the course of legal proceedings, a role carved out for qualified expert witnesses. Instead — whether practicing under an expressed interest or best interest model — counsel should utilize expert testimony as needed to offer opinion evidence to the court.

When guardians *ad litem* are appointed to represent the child, they should always be attorneys, not lay volunteers. In some jurisdictions, guardians *ad litem* are appointed for clients of dimin-

<sup>17</sup> See, National Association of Counsel for Children (1996). *NACC Revised ABA Standards of Practice*. [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/Standards/ABA\\_Standards\\_NACC\\_Revised.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/Standards/ABA_Standards_NACC_Revised.pdf); NACC amicus briefs: *In re M.S.R. and T.S.R.* (Washington 2011), *In re M.C.D.P.* (Washington 2013), *In re Felicity S.* (California 2014), *In re K.P.T.* (Washington 2015), *In re L.B.M.* (Pennsylvania 2016), *In re T.S. and E.S.* (Pennsylvania 2017), *In re S.K.-P.* (Washington 2018), *In re S.B.* (Nevada 2020); National Association of Counsel for Children. (2019). *NACC endorsement of the ABA Model Act, Standards of Practice*. <https://www.naccchildlaw.org/general/custom.asp?page=StandardsOfPractice>. In the 2001 Recommendations, NACC chose not to recommend a model of representation to focus attention on the activities of counsel. Herein, NACC again focuses on the activities of counsel and includes the recommendation that states adopt an expressed interest or, in certain cases of diminished capacity, a substituted judgment model of legal representation.

<sup>18</sup> *In re Gault*, 387 U.S. 1 (1967).

ished capacity — for example, an older sibling or other relative charged with approximating the client’s needs or wishes. In these specific situations, a lay guardian *ad litem* is acceptable if they are appointed to direct the representation of the attorney until such time that the client can direct their own legal representation.

Some states utilize a hybrid model of representation, which requires the attorney to alert the court if there is a conflict between the client’s expressed wishes and the attorney’s best interest position (or, alternatively, to refrain from advocacy if the attorney believes that the outcome would be unsafe). When such a conflict of interest emerges and bifurcation of the roles is necessary, the attorney with the conflict should remain on the matter as the youth’s expressed interest counsel rather than the best interest attorney, to ensure that confidential information obtained under the prior appointment remains protected by attorney-client privilege.<sup>19</sup>

In many places, youth may remain in extended foster care after they reach the age of legal majority. In such situations, it is especially important for the young adult to have access to expressed interest legal counsel. In such situations, even a GAL/ best interest attorney should shift to an expressed interest model of legal representation, since the client is a legal adult for most purposes.

Direct representation poses unique challenges for attorneys representing clients with diminished capacity, such as infants and pre-verbal children. In these situations, jurisdictions have adopted different models of representations to accomplish the goal of high-quality legal representation including the best interest, substituted judgment, and legal interest<sup>20</sup> models. Although there are important distinctions between these frameworks, there is also much intersection. For example, a rigorous best interest analysis for an infant necessarily requires the attorney to step outside of their own personal inclinations and attempt to put themselves “in the shoes” of their client. Likewise, it demands review and consideration of all available legal rights and remedies. Importantly, none of these three approaches are immune from subjectivity and bias. Attorneys representing clients with diminished capacity can achieve positive outcomes when they use appropriate resources — training, supervision, multidisciplinary partnership — to address the unique developmental needs of infants and help mitigate implicit and explicit bias. Under any of these models, trauma-informed engagement with the extended family members, consultation with a multidisciplinary legal team, and high-quality supervision and peer consultation are critical tools for attorneys representing clients of diminished capacity.

With these considerations in mind, NACC recommends substituted judgment as the preferred approach to legal representation for children of diminished capacity (such as infants). As with adult clients, when a child client is not able to communicate their requests, an attorney should proceed under the diminished capacity guidance provided under the Model Rule of Professional Responsibility 1.14. Substituted judgment requires the attorney to evaluate what the child client’s requests would be if they were able to articulate them (note: this is distinct from the attorney’s own best interest opinion, which may or may not differ from substituted judgment).

Importantly, a child’s age, in and of itself, is not sufficient to make a diminished capacity determination that triggers a substituted judgment approach. Analysis of whether the child is capable of

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19 See, ex., Formal Advisory Opinion 16-2, Supreme Court of Georgia Case No. S17U0553 (Dec. 11, 2017).

20 Kelly, L., LeVezu, A. (2016). *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*. Family Law Quarterly via University of Washington School of Law Digital Commons. <https://digitalcommons.law.uw.edu/faculty-articles/317/>



directing representation<sup>21</sup> should include consideration of their developmental stage, cognitive and emotional development, trauma history, expert opinion, and any observed or articulated formulation of the client’s position. Multidisciplinary partners, such as social workers, may be helpful collaborators in this analysis. Since this is a subjective assessment, attorneys should be especially cognizant of cultural, racial, ethnic, gender, or economic differences between the attorney and the client that may inappropriately influence the diminished capacity determination.

In situations when the child is not able to communicate or the attorney is otherwise reasonably unable to ascertain their position, the attorney should utilize the substituted judgment approach to guide legal representation. To execute such, attorneys should make firsthand, trauma-informed, and culturally responsive observations of the client and seek guidance from collateral sources (family, supports, experts, and other professionals) to develop a substituted judgment position. Legal scholarship<sup>22</sup> and social science research around attachment both point to family integrity as the presumptive starting point for this analysis. Reasonable efforts<sup>23</sup> and least restrictive environment<sup>24</sup> mandates in federal law underscore the importance of these foundational principles. From there, attorneys should further investigate and consider<sup>25</sup> the child’s present and future rights, interests in safety, permanency, and wellbeing, and factors such as family preservation, attachment, identity and cultural connection, sibling relationships, health, etc.<sup>26</sup> Commentary to the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings<sup>27</sup> provides further explication of the substituted judgment framework. As they develop, child clients will gain increasing capacity to meaningfully participate in the litigation, in which case the attorney should continue assessment and move from a substituted judgment to an expressed interest model.

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21 Massachusetts Committee for Public Counsel Services. (n.d.) *Mass Rules of Professional Conduct 1.14, Comment [7] and CPCS Performance Standard 1.6 Determining the Child Client’s Position in Care and Protection Cases Table*. [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc\\_recommendations\\_2021/role-of-childs-counsel-2-det.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc_recommendations_2021/role-of-childs-counsel-2-det.pdf)

22 Trivedi, Shanta. (2019). *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3436080](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436080)

23 42 U.S.C. 671(a)(15); 45 C.F.R. §1356.21(b).

24 42 U.S.C. 675(5).

25 Massachusetts Committee for Public Counsel Services. (n.d.). *Substituted Judgement Worksheet*. [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc\\_recommendations\\_2021/Role-of-Childs-Counsel-5-Sub.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/nacc_recommendations_2021/Role-of-Childs-Counsel-5-Sub.pdf)

26 Jean Koh Peters’ scholarship on legal representation for children includes seven key questions “to double check the lawyer’s actions and their harmony with Rule 1.14.” They are: “(1) *In making decisions about the representation, am I seeing the case, as much as I can, from my client’s point of view, rather than from an adult’s point of view?*; (2) *Does the child understand as much as I can explain about what is happening in his case?*; (3) *If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?*; (4) *If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?*; (5) *Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?*; (6) *Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?*; (7) *Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child.*” For further information, see Peters, J. K. (2007). *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*. *American Law*. 25. <https://digitalcommons.law.yale.edu/amlaw/25> Similarly, the Six Core Skills Model developed by the Quality Improvement Center on the Representation of Children calls for attorneys to “Enter the Child’s World: Engage with the child, learn their needs, guide them, counsel them and advocate for their needs while accommodating their stated interests consistent with state law.” See, QIC ChildRep. (n.d.) *Six Core Skills*. <http://improvechildrep.org/QICModelSixCoreSkills/SixCoreSkills.aspx>

27 American Bar Association. (2011, August). *Resolution: Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*. [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba\\_model\\_act\\_2011.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf)

*“I knew that I could establish a positive relationship with my social workers and attorneys because they gave me autonomy and opportunities to make decisions and be involved in my case.”*

**NACC ADVISORY COUNCIL MEMBER**

Regardless of model, children and youth should have party status in their own cases and enjoy access to effective assistance of counsel at all stages of child welfare proceedings, from initiation through final appeal. In certain situations, youth may also benefit from access to preventive legal services, even if a child welfare agency has not initiated an investigation or court proceeding. For example, a child or youth who experiences abuse may benefit from an attorney to confidentially consult about their options. Even if a dependency petition is not filed, attorneys may assist children in avoiding unnecessary separation from their homes and families, identifying kinship supports or placement options, and advising youth to refrain from self-incrimination (especially in situations when the youth’s alleged actions are part of the investigation). Representation outside of court proceedings is also an important resource in jurisdictions where young adults have the option to “re-enter” foster care and may benefit from advice and counsel about that decision.

## II. Support the Attorney–Client Relationship:

*Attorneys for children and youth should maintain frequent contact and intentional communication, tailored to the client’s individual circumstances.*

**COMMENT:** The attorney-client relationship is the bedrock of legal representation. It is the foundation for effective advocacy and the gateway for children and youth to access their legal rights. Without time, trauma-informed resources<sup>28</sup>, and attention devoted to building and maintaining this relationship, it is impossible for an attorney to fulfill the other duties and ethical obligations inherent to their role.

*“I knew who my attorney was and what their role was; I was very involved in my case and they strongly encouraged that.”*

NACC ADVISORY COUNCIL MEMBER

Attorneys for children should be appointed at the time a dependency petition is filed with the court or in advance of the first court hearing in the matter, whichever is earlier. Appointment in advance of the first court hearing allows the attorney time to meet the client, conduct an initial investigation, and prepare for meaningful participation in the first hearing. Attorneys should make initial client contact as soon as possible, and no later than 48 hours after appointment as counsel (preferably in-person, but by phone or video chat if necessary). At the beginning of the relationship, counsel should provide the client and their caregiver with the attorney’s contact information in both paper and electronic format and offer clear information about expected timelines for the attorney to respond.

*“I think it would have been helpful to make [attorney’s] language more youth friendly and not use so much jargon. I felt stupid for not always understanding what they were saying.”*

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As a preliminary matter, attorneys for children and youth have a duty to advise their clients of the attorney’s role, responsibilities, and limitations — and to check for the client’s clear understanding of each.<sup>29</sup> This conversation should be revisited throughout the course of representation, as the child’s developmental understanding may change, or the nature of representation may evolve. Routine reminders about the attorney’s role help the youth to meaningfully utilize the attorney’s services, maintain healthy client boundaries, and avoid the attorney’s function blurring with other assigned professionals.

Consistent contact and trauma-informed<sup>30</sup>, culturally responsive<sup>31</sup> communication are necessary predicates to a sound attorney-client relationship. Research supports<sup>32</sup> the importance of contact

28 American Bar Association. (2020, January). *Trauma Caused by Separation of Children from Parents*. <https://www.americanbar.org/groups/litigation/committees/childrens-rights/trauma-caused-by-separation-of-children-from-parents/>

29 This conversation should include explanation and context of the term “attorney-client relationship.” NACC is aware of debate regarding use of the word “client” in the child welfare sector (see Milner, J. (2019, June). *Becoming a Community for Strengthening Families: The Words We Use*. Children’s Bureau Express. <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=207&sectionid=2&articleid=5340>). We use that term because of the special nature of the attorney-client relationship. Furthermore, when attorneys for children and youth utilize the word “client,” it reinforces the core principle that children and youth are entitled to legal services, due process, and access to justice, in equipoise with all other parties in dependency court actions.

30 The National Child Traumatic Stress Network. (2017). *Trauma: What Child Welfare Attorneys Should Know*. <https://www.nctsn.org/resources/trauma-what-child-welfare-attorneys-should-know>

31 CW360, Center for Advanced Studies in Child Welfare, School of Social Work, University of Minnesota. (2015, Winter). *Culturally Responsive Child Welfare Practice*. <https://cascw.umn.edu/wp-content/uploads/2015/03/CW360-Winter2015.pdf>

32 Miller, J. J., Duron, J., Washington, E., & Donohue-Dioh, J. (2017, July) *Exploring the Legal Representation of Individuals in Foster Care: What Say Youth and Alumni?* Children and Youth Services Review. <https://www.sciencedirect.com/science/article/pii/S0190740917302505?via%3Dihub>

and communication<sup>33</sup> as priorities for youth in that relationship. Attorneys should remain flexible and open to communicating in a manner that reflects each client's unique preferences. This may include face-to-face meetings, phone calls, video chats, or text messages. Attorneys should ask their clients how and when they prefer to communicate. They should be prepared to modify the plan for contact to adapt to changing circumstances (level of privacy in the home, case activity, etc.). An attorney should not construe a youth's lack of communication as a reason to decrease or halt communication, nor should they assume that the youth is not interested in their case.

When considering communication techniques, attorneys should also be alert to the significance of non-verbal contact. For example, the client's cultural and religious identities may inform their dress, eye contact, salutations, and other forms of non-verbal communication. While some physical contact — for example, a pat on the back or a hug — may seem normative to the attorney, it may be unexpected or even traumatic to the child or youth depending on their personal experiences and background. As such, attorneys should not initiate physical contact absent explicit consent from the client.

*"If [a youth] is in constant stable placement, [attorney-client contact] once a month is doable. But if a young person is being moved, more frequent communication is more important."*

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While the frequency of ongoing contact may be calibrated to the individual, attorneys for children should ensure contact at least prior to and after each court hearing, after any placement change, and no less than monthly by a member of the legal team until the conclusion of the case. This monthly contact may consist of a phone call, video visit, in-person visit, or other meaningful correspondence. Even if there is no legal update to share, the young client may have information to provide or questions to ask. In-person visits with the client should occur at least quarterly, either in the home, placement, or community settings based on the client's individualized needs and requests. The decision to visit a client at their school or elsewhere in the community (at an afterschool activity, etc.) should be made only after consul-

tation with the client about their comfort level, a discussion of the pros and cons of a visit in this setting, and consideration of confidentiality.

It is the attorney's responsibility to ensure the judicial officer and all parties in the case understand the client's individuality and the unique context for their needs and requests. To effectively do so, they should seek to understand their client as a whole person, including not only the needs and concerns that prompted the initiation of the court proceeding but also their unique strengths, family story and protective factors<sup>34</sup>, hobbies, support systems, aspirations, and cultural identity. For an attorney representing children and youth, the best

*"Celebrate them and their accomplishments whether it's big or small."*

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source of information about the case is usually the client (including observation for clients of diminished capacity). A lawyer's ability to obtain that information from the client will depend on factors such as age, emotional state, cognitive abilities, and developmental level. It will also depend on the client's trust in their attorney and other actors in the system.

Attorneys can build trust through thoughtful preparation for client interactions. They should devote intentional, unhurried time to communicating with clients in comfortable, confidential,

33 Miller, J. J., Duron, J. F., Donohue-Dioh, J. & Geiger, J. M. (2018, August). *Conceptualizing Effective Legal Representation for Foster Youth: A Group Concept Mapping Study*. Children and Youth Services Review. <https://www.sciencedirect.com/science/article/abs/pii/S0190740918304341>

34 Merrick, J. S., Narayan, A. J., DePasquale, C. E. & Masten, A. S. (2019). *Benevolent Childhood Experiences (BCEs) in Homeless Parents: A Validation and Replication Study*. Journal of Family Psychology. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6640130/>; See also Herman, K. A., Walls, M. L. and Healing Pathways Team. (n.d.) *The Long Term Resonance of Benevolent Childhood Experiences among Indigenous Young Adults*. Johns Hopkins Center for American Indian Health. <https://www.nihb.org/aces-resource-basket/bce%20NCRE%20poster%20FINAL.PDF>

environments. They must be trained in child interviewing and engagement and tailor their communication strategies to be trauma-informed, culturally responsive, and consistent with the client’s developmental level. Every client interaction is an opportunity to deepen the attorney’s understanding of the client’s unique strengths, needs, desires, and requests. It is a time to make inquiries with compassion and humility.

Trust is built through nurturing the relationship over time. Attorneys for children and youth can build trusting client relationships through activities that are not “traditional” lawyer’s tasks. For younger children, this might include using puzzles and games, coloring, or playing with toys to

*“Never tell a youth about (attorney’s) workload, children can feel like a burden. This has a negative impact on the relationship and the case.”*

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build rapport. For adolescents and teens, other activities such as a shared meal, crafts, or playing basketball may be a better way to engage. Attorneys should affirmatively inquire about the client’s interests and consider these activities as rapport-building tools, while simultaneously managing client expectations and establishing healthy boundaries. Ultimately, an attorney’s job is to harness the law to ensure youth have supportive, enduring, interpersonal relationships within their family and community — not to fill that role themselves. Overall, due to a child’s developmental continuum, it may take significantly more time to build rapport with child clients than adults; attorney compensation must equally incentivize in and out of court work. Compensation should also cover travel time and mileage. Jurisdictions should utilize an hourly rate (rather than a flat case rate) and avoid inflexible caps on case hours, which may disincentivize robust and uniform fulfillment of all attorney duties.<sup>35</sup>

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If the attorney has lapsed in communication or contact, they should guard against blaming the busy nature of their practice or caseload. Some youth with lived experience have shared that they already feel like a burden on their families, resource parents, or case professionals. Comments like this may exacerbate this sentiment and do not comport with a trauma-informed approach. Attorneys must ensure that clients do not feel obligated or indebted to make the attorney happy or their job easier.

Multidisciplinary models<sup>36</sup> are a critical strategy to enhance legal representation for children and youth, especially client communication. The following professionals may strengthen meaningful client inclusion in the attorney’s representation:

*Multidisciplinary representation “is wonderful. If one person can’t fill a need, another person can.”*

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- **Peer Partners:** Assisting with client engagement and communication, supporting the youth through various case events such as meetings and court hearings
- **Investigators:** Collecting relevant case records, interviewing witnesses, searching for possible kinship supports
- **Social Workers:** Identifying relevant community resources, providing clinical insight for case planning, offering relevant psychoeducation, assisting with client engagement and communication.

Multidisciplinary members should be considered part of the child’s legal team pursuant to ABA Model Rule of Professional Conduct 5.3, and thus covered by attorney-client privilege. While this

35 For further information about compensation trends, see American Bar Association National Alliance on Parent Representation. (2017). *Child Welfare Attorneys National Compensation & Support Survey – 2017*. <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2019/12/2017-Survey-of-Parents.pdf>

36 Family Justice Initiative. (n.d.). *Attribute 2: Interdisciplinary Practice Model*. <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-implementation-guide-attribute2-2.pdf>

*"I have experienced attorneys having a peer partner and I think it's great. It shows the youth that there is more support for them (in and out of the courtroom)."*

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is the practice in many jurisdictions, there are others where it is not well-defined or where state statute on mandatory reporting or related social work ethical codes may provide differing direction. In developing a multidisciplinary team, attorneys should explore these nuances and set up appropriate protocols to protect client confidentiality (such as advising client of any differences in role, seeking informed consent, creating conflict walls, etc.). The work of the attorney's multidisciplinary team members is never a substitute for the child welfare agency's obligations, including its reasonable efforts requirement.<sup>37</sup> Professionals assigned to the case should collaborate

to ensure a streamlined delegation of tasks that do not overwhelm the client and family. During court reviews, attorneys should ensure the court understands that tasks accomplished by the multidisciplinary legal team are distinguishable from agency efforts.

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<sup>37</sup> Child Information Gateway, U. S. Department of Health and Human Services. (2020). *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*. <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/reunify/>

### III. Offer Legal Counsel and Advice: Attorneys for children and youth have an ongoing, affirmative duty to advise clients of their rights, educate them about the legal process, inform them of their options, and counsel their decision-making.

**COMMENT:** Children and youth have a right to make informed and counseled choices so that they are well-positioned to be involved in all decisions impacting their lives. Rendering prudent legal advice is one of the most valuable functions an attorney can provide, which no other professional assigned to the case (caseworker, lay volunteer/CASA, mentor) can fulfill.

*“It would have been helpful if my rights as a child were explained to me...I did not believe that I had any say in what happened to me, which was not true.”*

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Youth with lived experience in the child welfare system have shared a common complaint of not being informed or educated about their rights. Likewise, research has demonstrated their desire for recognition, supportive communication, and involvement<sup>38</sup> in their case. Attorneys can fulfill this through robust and ongoing client counseling. The following list is illustrative, though not exhaustive, of some of the topics included under the duty to render client counseling and advice:

- Advise clients of the attorney’s specific scope of representation, responsibilities, and applicable privileges
- Discuss the client’s right to safety, inquire about their physical and emotional safety, and help formulate safety plans
- Inform clients of all applicable rights pertaining to their custody status under state and federal law, including any relevant foster youth bill of rights, and options that may be pursued if their rights are violated<sup>39</sup>
- Present clients with clear information about their case status, legal rights, options, and the likely consequences of their choices
- Offer the client the attorney’s best judgment as to how the judge is likely to rule and the attorney’s opinion, if any, of the best course of action
- Elicit the client’s preferred options if the court does not accept the client’s first choice
- Describe the purpose of each hearing, who may or may not attend, information likely to be shared, and likely outcome
- Educate clients about the option to bring a motion to exclude the public, press, or others from court hearings;
- Educate clients seek accommodated methods of communicating their wishes to the court (ex. in writing, closed-circuit video testimony, or other accommodations permitted by state law and practice)

38 Cody, A. M. (2020). *Children’s Participation Rights in Child Welfare Systems: Identifying Opportunities for Implementation*. Scholar’s Compass, Virginia Commonwealth University. <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=7617&context=etd>

39 Federal law requires child welfare agencies to provide children and youth with a statement of their rights, explain those rights in an age-appropriate manner, and obtain the child/youth’s signature to acknowledge receipt of this information. See 42 U.S.C. 675(a). This mandate to agencies is not, however, a substitute for the attorney’s responsibility to review this material with their client, provide additional information, and answer questions.

- Advise clients about all possible permanency options, including potential social and emotional impact, changes to legal rights, or variations in access to resources (clothing, educational funding, housing assistance, etc.)
- Apprise expectant and parenting clients of their parental rights and available services and supports, and ensure they have access to counsel in any situation where their parental rights may be impacted
- Notify clients of their right to take other legal actions or file an appeal

*“Attorneys need to ask youth if they know their rights, but not using that phrase. For a youth not allowed to go on a field trip across a state border, ask “do you know you have a right to go on that trip? Do you know you have a right to see your siblings? Not using legal jargon.”*

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Attorneys should provide client counseling in developmentally-appropriate and trauma-informed ways. Effective client counseling will look different for every child. When relaying information, attorneys should use accessible language and provide information multiple times or in multiple formats, including the use of visual aids, “Know Your Rights” pamphlets, videos, or other mediums. It may be helpful to prepare a document with the information an attorney wants to provide so the youth can review it privately and ask further questions later.

Attorneys should remain attuned not only to what information they believe they conveyed, but what information was actually understood by the client, checking for any possible misunderstandings. As culturally responsive practitioners, attorneys should be mindful that clients may have reasons to distrust the legal system and its actors. Attorneys should remain reflective

about their own biases and subjectivity. When rendering client counseling, attorneys should bear in mind that youth needs have often been dismissed or diminished as “wants” by the legal system. Youth should experience the attorney-client relationship as a space of trust, where they can expect the attorney will believe and respect them.

*“Youth should always feel prepared and know what is going to happen.”*

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Attorneys should plan to review information in multiple settings so that the client has an adequate opportunity for counseled decision-making. Similarly, attorneys should be conscious of their own anxieties around client counseling, and any inclinations to shield the client from certain information. Youth with lived experience in the child welfare system have expressed a desire to be informed of the full breadth of case information, noting that the absence

of that information can be harmful in deep and unpredictable ways. Attorneys for children and youth have a duty of candor to their clients, which should be mediated only by the attorney’s trained assessment of the child’s developmental level of understanding. An attorney should not seek to “protect” the client by omitting information; indeed, providing full information in a trauma-informed manner<sup>40</sup> is one important strategy to alleviate the uncertainties and ambiguities of child welfare system involvement. While communicating with candor, attorneys should convey information objectively and factually, and should not disparage the client’s parents, family members or others. To build strong attorney-client bonds, attorneys should honor the complexities of familial relationships and their client’s feelings about those relationships. Expressing negative opinions runs the risk of alienating a client or demonstrating a lack of loyalty that could damage client trust.

40 Feierman, J. & Fine, L. (2014, April). *Trauma and Resilience: A new look at legal advocacy for youth in the juvenile justice and child welfare systems*. Juvenile Law Center. [https://jlc.org/sites/default/files/publication\\_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf](https://jlc.org/sites/default/files/publication_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf)



## IV. Ensure Opportunity for Full Participation: Attorneys for children and youth should proactively ensure opportunity for meaningful participation in court hearings and other case events.

**COMMENT:** Children and youth in dependency proceedings should have the opportunity to personally express their wishes to the court and to fully participate in legal proceedings, meetings, and other case events. Likewise, they should have the option to refrain from expressing themselves in court, or to choose to have their position relayed through counsel. Attorneys should ensure the court provides notice and opportunity to be heard at every stage of the process, including the opportunity to attend each hearing and case event.<sup>41</sup>

*“My attorney would ask me where I’d like to sit in court. In a system where you have very little power or choices, I should at least be able to choose where I sit.”*

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Attorneys have an affirmative duty to prepare clients well before each hearing and to debrief them afterward. Counsel should discuss with their clients who is likely to attend each hearing (parent, sibling) and the impact of seeing (or not seeing) that individual. They should also preview case details that are likely to be shared during the proceedings and review together any reports or relevant pleadings that have been filed so that clients are fully informed and up-to-date before the hearing begins. As noted above, counsel should also advise the client of the option to move the court to close the hearing to the public.

*“An attorney told me when I wasn’t attending court as regularly because of volleyball ‘I haven’t seen you in a while, I thought you didn’t care,’ and of course I cared, it’s my life. But I had things going like volleyball and I didn’t want to miss practice which would lead to missing games.”*

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Furthermore, attorneys should advocate to ensure that hearings and case events are scheduled at dates and times conducive for the client to attend. Scheduling that conflicts with a client’s events — such as school, athletic activities, musical recitals, and peer activities — should be treated with the same caution as conflicts with the court’s own calendar. Attorneys should also proactively ensure that there is a transportation plan in place for the client to travel to and from the hearing, requesting court orders for such if necessary.

Attorneys for children and youth should only make requests to waive the youth’s presence upon express direction from their client. In considering whether to attend, a client may benefit from legal counseling regarding the purpose and content of the hearing, timing of the hearing, possibility of virtual participation, and likelihood of attendance by other parties. If a

child or youth prefers not to attend a court or case event, they should not be mandated to do so; however, they should also be offered alternative means (such as letters or written statements) to express their preferences and requests. An attorney should never assume that a client’s decision not to attend is a statement of disinterest.

Although a youth (after thorough client counseling) may choose not to attend court, attorneys should not encourage their absence because of custom, practice, or convenience. Likewise, a

<sup>41</sup> Although it is ultimately the court’s duty to ensure notice and opportunity to be heard, the attorney is responsible for ensuring that such notice is timely relayed and explained to their client and, if not, requesting postponements so that the child or youth can participate.

proffer or judicial determination that the child or youth will be harmed by attendance at a hearing or court event should be interrogated and tied to legally sufficient evidence — such as independent expert testimony — specific to the case at hand, supporting the child’s exclusion against their wishes. Working within the confines of state law, the attorney should advocate that their client’s presence is only to be waived in exceptional circumstances (if the court finds that the youth has been given adequate notice of a court hearing at a conducive time, offered transportation, and still chooses not to attend, or after the court has received expert testimony and makes a finding that attending would be unduly harmful).

*“Knowing how to have conversations. [Ask youth] ‘what are your pronouns?’”*

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The responsibility to elevate the client’s requests to the court and parties applies to all attorneys, regardless of a state’s model of practice. The obligation, in practice, is two-fold: attorneys have both the responsibility to convey the client’s position and requests and also the simultaneous duty to prepare the youth to advocate on their own behalf, depending on the client’s comfort level.

During the hearing, the attorney should endeavor to make sure that the client understands what is being said and request recesses as needed to confer with their client. The attorney should refer to the client by their preferred name and preferred pronouns (not as “the child”); likewise, other parties should be referred to by their names rather than depersonalized terms (“Ms. Smith” rather than “the mother”).

Courts are unpredictable forums. For families in the child welfare system, the adversarial process may exacerbate stressors or damage relationships. Although court reviews are important, and court intervention is sometimes needed, out-of-court advocacy can lead to greater predictability and lessen tensions. Lawyers who represent children and youth should strategically use informal advocacy to achieve the client’s goals. Attorneys should utilize all available opportunities to advocate for the client’s interests between court hearings (mediation, negotiation, emails, phone, virtual and in-person meetings, etc.). They should meaningfully engage their clients in these opportunities as well through advanced notice and preparation, the opportunity to contribute to meeting agendas, and debriefing afterward to ensure understanding and discuss next steps. For both court and non-court events, attorneys must take all possible measures to ensure language translation or other accessibility measures for the client.

## V. Provide Competent Legal Representation: *Attorneys for children and youth should provide competent legal representation.*

**COMMENT:** Child welfare law and practice is a highly specialized field in which lawyers greatly impact the rights and futures of their clients. Like many areas of law, relevant social science is constantly informed by new research. Therefore, attorneys have a duty to engage in foundational training before their first court appointment, and frequent, ongoing learning throughout their practice of child welfare law.

*“Be aware of sex trafficking signs and language, a lot of youth are caught up in that. And know [the client] to notice signs of abuse or concern.”*

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Before representing a child or youth in a dependency proceeding, an attorney should understand applicable federal and state laws and regulations, court rules, ethical duties, trial skills, interviewing skills, and relevant social science, including trauma and child and adolescent development. Attorneys should receive initial and ongoing training on cultural humility, the impact of systemic racism, and disproportionate and disparate outcomes experienced by Black and Indigenous children as well as LGBTQIA+ youth. The following list is illustrative, though not exhaustive, of topics in which attorneys should be current:

### **Sources of law (federal, state, local)**

- | Statutes
- | Case law
- | Regulations
- | Court rules
- | Agency policy
- | Rules of Professional Conduct & relevant ethics opinions

### **Legal Topics**

- | Dependency
- | Delinquency/criminal law & crossover youth
- | Appellate
- | Family law (Custody, Paternity, etc.)
- | Education/special education
- | Public benefits (SSI, SSDI, TANF, SNAP)
- | Disability waivers
- | Indian Child Welfare Act
- | Immigration
- | Housing
- | Mental health law/privilege

### **Cultural Humility**

- | Implicit bias
- | Cultural identity concepts and practices
- | White supremacy and racism
- | LGBTQIA+ considerations
- | Culturally responsive lawyering

### **Social Science**

- | Child development/attachment
- | Harms of family separation
- | Protective factors
- | Poverty
- | Mental health
- | Trauma
- | Substance use/misuse/abuse
- | Commercial sexual exploitation
- | Intrafamily violence
- | Secondary traumatic stress/compassion fatigue

### **Skills**

- | Independent investigation
- | Safety assessment
- | Client interviewing
- | Client counseling
- | Trauma-informed approaches
- | Case planning
- | Alternative dispute resolution
- | Trial skills
- | Legal writing
- | Appellate practice

Competent representation can only occur if the attorney has adequate time for zealous advocacy. Since NACC last published its Recommendations in 2001, research has demonstrated the importance of quality court hearings<sup>42</sup>, robust out-of-court attorney<sup>43</sup> activities, and overall high-quality legal representation.<sup>44</sup> Feedback from youth likewise affirms the desire for more frequent — at least monthly — contact with their attorneys (see Section II, above).

Informed by this research and input, NACC recommends that an attorney providing full-time legal representation to children and youth in dependency proceedings should represent no more than 40–60 individual clients, assuming one case = one client (not an entire sibling set), at a time. Generally, a caseload of this size will allow for the frequent, high-quality client communication, out-of-court and in-court advocacy, and other core functions of children’s legal representation described herein. NACC chooses to recommend this range, rather than a specific, uniform number, to recognize that numerous factors, such as travel time in rural areas, access to multi-disciplinary team members, supervisory support, and local court system protocols will impact the attorney’s caseload capacity.<sup>45</sup> This range assumes that a typical caseload includes matters at various stages of the legal process and that some cases will be in active litigation, while others will not (ex. cases pending appeal), and that the attorney will also be expected to respond to the changing, urgent, or unforeseen case circumstances which are inherent to the practice. Furthermore, as detailed below, caseloads should be adjusted when attorneys provide holistic representation to the same client in multiple legal matters. Attorneys should not accept more clients or cases than can be competently handled.

Legal service delivery systems must provide a mechanism for clients to raise concerns about an attorney’s engagement or performance. These oversight and accountability structures should be developed in partnership with individuals with lived experience. In developing these protocols, attorneys should be particularly attuned to, and account for, youth’s worries they may be dismissed or retaliated against for voicing concerns about the work of professionals assigned to their case. Potential channels for feedback and oversight may include the use of online portals, review boards, surveys with incentivized participation, supervisory review, and/or systemic oversight (court offices, bar associations, ombudspersons).

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42 Summers, A., Gatowski, S. I. & Gueller, M. (2017). *Examining Hearing Quality in Child Abuse and Neglect Cases: The Relationship Between Breadth of Discussion and Case Outcomes*. IDEAS. <https://ideas.repec.org/a/eee/cysrev/v82y2017icp490-498.html>

43 Family Justice Initiative. (2021, May 17). *Out-of-Court Advocacy Guide*. <https://familyjusticeinitiative.org/blog/out-of-court-advocacy-guide/>

44 Zinn, A. E. & Slowriver, J. (2008). *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chapin Hall Center for Children at the University of Chicago. <https://www.issuelab.org/resources/1070/1070.pdf>

45 For samples of tools that may assist in conducting caseload calculations, see Commonwealth of Pennsylvania. (2015). *Pennsylvania’s 2015 State Roundtable Report: Educational Success & Truancy Prevention Workgroup*. <https://ocfcpacourts.us/wp-content/uploads/2020/06/2015-Truancy-Report21.pdf> and Legal Representation Workgroup. (2011). *Standards of Practice for Parents’ Lawyers, Guardians Ad Litem & Legal Counsel Practicing Child Welfare Dependency Cases in Pennsylvania*. <http://ocfcpacourts.us/wp-content/uploads/2020/06/Final-Standards-Of-Practice-Letter-Size-001686.pdf>

## VI. Provide Loyal and Independent Legal Representation: Attorneys for children and youth should guarantee loyalty and independence throughout their legal representation.

**COMMENT:** Attorneys should be champions for their clients. In expressed interest jurisdictions, attorneys maintain an obligation to zealously advance the client's position, even if the attorney disagrees with it. Regardless of model of representation, attorneys should uphold the client's dignity and only speak about the client in strengths-based, respectful terms when communicating with other parties or to the court. This may be challenging when various individuals (family, caseworker, resource parent, clinician, etc.) maintain different opinions or challenge counsel's loyalty. The attorney must advise their client about their duty of loyalty to the client and make that explicit to others throughout the course of the proceeding.

*"Mak[e] them feel like they're somebody and worth the fight."*

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As with adult clients, attorneys should zealously act to advance their child client's goals with reasonable promptness, bearing in mind the child's sense of time and the negative outcomes associated with lengthy stays in foster care.<sup>46</sup> Indeed, the urgent needs of children and youth in dependency matters, the gravity of issues at stake in these cases, and the unique potential of the attorney to create a positive impact, all heighten the level of diligence demanded of attorneys in this profession.

In best interest representation jurisdictions, if an attorney identifies a potential difference between their "best interest" position and the client's articulated request, this signals an opportunity to further investigate the case, deepen client contact and communication, and engage others from the multidisciplinary legal team. Practitioners in the field have cited these as effective strategies to reconciling positions that may be seemingly divergent at first impression. For further information about exceptions to attorney-client privilege, see Section VII, below.

*"If I could change one thing, it would be that attorneys develop more of a relationship with the youth and work with other people on the youth's team (social worker, etc.) to help get a better understanding of what the youth wants."*

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Loyalty also necessitates attention to potential or realized conflicts of interest between parties. Specifically, when a conflict is discovered between two (or more) represented clients, the Rules of Professional Responsibility<sup>47</sup> generally require the attorney to withdraw from representation of both clients or obtain consent from each client before proceeding. For this reason, joint representation of sibling sets should be approached with great caution. If an attorney is appointed to represent a sibling set, it is critical to meet separately with each client to establish and nurture an individual attorney-client relationship.

Dependency and related family law matters are unique in the legal system in that there are typically at least three or more parties to the legal action. Even if aligned with another party, an attorney for a child or youth has the obligation to independently investigate and litigate the client's position. This duty

46 Courtney, M. E., Dworsky, A., Brown, A., Cary, C., Love, K., & Vorhies, V. (2011) *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*. Chapin Hall at the University of Chicago. <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf>

47 Pursuant to ABA Rule of Professional Responsibility 1.7, a conflict of interest exists where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." See also Rule 1.7, Comment 29.

extends from the initiation of representation to its conclusion. To conduct a comprehensive investigation, attorneys cannot simply rely on the agency's representations. They must independently gather information from multiple sources (while diligently protecting client confidentiality), verify all information, and assess for bias. In addition to routinely inquiring with the client regarding their safety and well-being, attorneys should collect information from other parties, witnesses, case professionals, and collateral contacts (such as parents, kin, teachers, resource parents, caseworker, service providers, medical providers, and faith community). They should also conduct records requests to gather and verify information from relevant sources (such as schools, service providers, related court proceedings). Comprehensive investigation includes exploration of the client's cultural identity (including foods, music, dress, religious practices, family traditions, holidays, etc.).

Likewise, a child's attorney has a duty to independently litigate the legal matter, even if they are aligned with another party's position in the litigation. This includes filing motions, reports, or other pleadings to advance the client's objectives and formally requesting discovery in every matter set for trial, or as allowed by local rules. When reviewing written materials submitted by other parties, attorneys should identify places where the client has been mistakenly or incorrectly labeled (ex. misgendering a client) or characterized (ex. framing a child's trauma-response as "manipulative"), and correct the record as needed. Children's attorneys should fully participate in trials, including: making opening and closing statements, calling and questioning fact and expert witnesses, introducing evidence, making and responding to objections, preserving issues for appeal, and submitting proposed findings of fact and conclusions of law. They should also file writs and appeals (or refer them to appellate counsel) in accordance with client interests.

## VII. **Maintain Confidentiality:** *Attorneys for children and youth should adhere to the same confidentiality and privilege rules as they do for adult clients, consistent with state law.*

**COMMENT:** Confidentiality is a hallmark of the attorney-client relationship and is required by rules of professional conduct. Children deserve confidential space to discuss complex, emotional, and potentially lasting decisions. Children have many relationships with individuals who are mandated reporters, such as doctors, caseworkers, therapists, and educators. Attorneys are likely the only involved professional able to offer a space for a youth to share sensitive information, ask questions, and receive advice.

*“Confidentiality is necessary.*

*Safety should be a conversation.”*

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The development of a trusting attorney-client relationship is vital to counseling and the ability to render legal advice, especially in difficult or stressful circumstances. It allows children to feel safe sharing information with their attorneys that otherwise may go unvoiced. At the outset of representation and throughout the pendency of the case, attorneys should advise their

clients about confidentiality and privilege in a developmentally-appropriate manner. These ethical boundaries aid the attorney in investigating and developing a case with the full participation and engagement of the client. Attorneys should thus be diligent in protecting and preserving client confidentiality when collecting information and seeking guidance from collateral sources. Likewise, they should advise the client about situations that may pierce confidentiality and the impact of clients sharing information with others — on social media, for example. Where state law or ethical guidelines limit an attorney’s confidentiality or require reporting of suspected child abuse, attorneys must clearly inform the client of such at the initiation of representation and also repeatedly throughout the pendency of the case.

As with adult clients, there may be times when a child or youth articulates a position that raises safety concerns. As always, the attorney should engage in robust client counseling and communication and seek to understand the reasoning behind the client’s request. Attorneys should ensure the client understands the full impact of their decision and help them develop a plan or position that might achieve the same goals while minimizing risks. This should begin with deep and active listening to understand aspects of the client’s perspective that may have been unknown to the attorney. The attorney should also provide information and feedback to the client that may more fully inform or even modify their decision-making process. The attorney and client should develop a back-up plan that they will offer if the court rejects the client’s first position.

In direct representation jurisdictions, if a disagreement persists even after robust client counseling, attorneys are obliged to zealously pursue the client’s stated objectives while leaving the judicial officer to make the best interest determination. However, pursuant to Rule 1.14, an attorney may take reasonably necessary protective action, including seeking the appointment of a guardian *ad litem*. Intended for exceptional circumstances, this alternative should be reserved for situations when the client poses potentially substantial and imminent harm to self or others — not for speculative disagreements about potential case goals and outcomes. The attorney must explain the potential course of action to the client, their reasons, and the possible ramifications, and then consider the youth’s response and potential alternatives. Jurisdictions with a best interest model

should ensure that mechanisms exist to request the appointment of an attorney for the client in the event of a conflict between these two positions.

In addition to protecting attorney-client privilege, attorneys also have a responsibility to protect the integrity of the client's therapeutic relationships. Mental health services are an important resource for healing trauma that children may have experienced before or while in foster care. While some communication among professionals about the mental health of the client may be necessary and beneficial to coordinating treatment, mental health care without confidentiality may fail to establish the trust needed for meaningful therapeutic progress. Where the right to waive privilege rests with the client, counsel should inform and support the client, while respecting their autonomy and history of trauma. At all applicable times, counsel should remind others of the presumption that therapist-patient communications are privileged and that the burden to overcome privilege is on the proponent of the disclosure. In addition, counsel should rigorously redact disclosures in written documentation. Where it is the responsibility of counsel to decide whether to release such information, counsel should only do so conservatively and in consultation with the client and mental health care provider, respecting the client's autonomy, history of trauma, and therapeutic relationship with the provider.<sup>48</sup> Likewise, the client should be informed if local rule or practice dictates that another individual (parent, GAL) holds a certain privilege, if others (child welfare agency, CASA, resource parent, therapist, etc.) are able to access their information, or how such disclosures might be used within the context of the court proceeding for others to review.<sup>49</sup>

On the systemic level, attorneys in some jurisdictions report data regarding their representation to oversight agencies, funders, or contract administrators. While data sharing agreements can be helpful tools to ensure quality legal representation and develop further empirical research in the child welfare field, they should be approached with nuance and precision and center the voice of youth, not the needs of the system. In developing these agreements, attorneys should be cognizant to protect client identity and confidences wherever possible and share information wherever possible in anonymized, aggregate form.

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48 For an examination of how states address mental health privilege for youth in foster care, see Waring, R. (2015). *Is the Privacy of Therapy a Secret to Foster Children?* NACC Children's Law Manual Series. [https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/2015\\_Conference/Children%27s\\_Law\\_Manual\\_2015.pdf](https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/2015_Conference/Children%27s_Law_Manual_2015.pdf)

49 For example, the Family First Prevention Services Act (Pub. L. No. 115-123) contains provisions for court review of certain institutional/ congregate care placements that include disclosure of a clinical assessment and ongoing treatment updates to the court and parties throughout the course of the placement.



## VIII. Advance Equity in Legal Representation: *Attorneys for children and youth should engage in culturally humble representation and actively challenge inequitable treatment.*

**COMMENT:** The American foster care system is rife with bias and discrimination based on race, ethnicity, religion, disability status, socioeconomic status, immigration status, sexual orientation, gender identity, worldview, and values. Inequity, systemic racism, implicit bias, and explicit bias shape and perpetuate the system where practitioners operate.<sup>50</sup>

*“[Attorneys] should know the youth’s religion, ethnicity, cultural background, gender identity and sexual orientation, language barriers, how youth of color and those who have immigration status navigate through the world. Without this information, their care plan will cause more harm than good; without taking these things into consideration, how are they setting up youth for success?”*

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Attorneys for children and youth are obliged<sup>51</sup> to educate themselves about the impact of race, ableism, disability status, cultural identity, gender identity and expression, and LGBTQIA+ status on child welfare outcomes<sup>52</sup>, to practice cultural humility, and to continually reflect on and work to mitigate their own biases. This inquiry is ongoing and requires restraint from the attorney to avoid inserting personal desires, values, and beliefs into their advocacy. Attorneys should endeavor to uncover what triggers their biases and develop a process that uses objective criteria to guide their advocacy recommendations and decision-making. Given the expansive evidence about the harms of removal<sup>53</sup> into foster care, recommendations in favor of initial or continued family separation require particular scrutiny.

Case consultation with supervisors and colleagues may be one helpful strategy for testing assumptions and ensuring high-quality legal representation. A supervisor helps to ensure adequate training and support, to mitigate bias, to advance equity, and to assist with continuity of representation for coverage and transitions. Attorneys should also consult with experts who can provide culturally informed recommendations. Supervision, peer feedback, and

multidisciplinary expert consultation is particularly salient when utilizing a substituted judgment or best interest model of representation.

Cultural humility<sup>54</sup> is a fundamental aspect of attorney competency. This begins with ongoing research and exploration about the client’s culture and other identities. Understanding a youth’s identities elevates the quality of the attorney’s advocacy across all realms – adjudication, disposition (including placement decisions), services, permanency options, and “normalcy” activities.

50 Columbia Law School. (2021, July). Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well Being. *Columbia Journal of Race and Law*, 11(3). <https://journals.library.columbia.edu/index.php/cjrl/issue/view/789/188>

51 National Association of Counsel for Children. (2020, September 11). *Leaning Into Discomfort and Disruption: A Call to Action for Children’s Attorneys*. <https://www.naccchildlaw.org/news/news.asp?id=525791>

52 For example, the American Academy of Pediatrics has linked the impact of racism to child and adolescent health outcomes: American Academy of Pediatrics. (2019, August). *The Impact of Racism on Child and Adolescent Health*. <https://publications.aap.org/pediatrics/article/144/2/e20191765/38466/The-Impact-of-Racism-on-Child-and-Adolescent>

53 Sankaran, V., Church, C. & Mitchell, M. (2019, July). *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*. University of Michigan Law Scholarship Repository. <https://repository.law.umich.edu/articles/2055/>

54 Family Justice Initiative. (n.d.) *Attribute 3: Diversity and Inclusion/Cultural Humility*. <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-implementation-guide-attribute3-1.pdf>

*“Youth come from somewhere, they don’t just land somewhere. Just because the people they’re living with [have a] culture that may be different doesn’t mean theirs should be cut out.”*

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Attorneys should challenge white supremacy culture and implicit and explicit biases when they occur during casework, including values and beliefs held by case professionals and the court about what is in the best interest of children. This may include raising and litigating evidence of bias or discrimination that impacts the case or the client.

As noted above, attorneys should also take steps to ensure equitable access to the court system for their clients, including language translation or other accessibility measures. On the systemic level, attorneys are encouraged to participate in policy and practice reform that seeks to dismantle inequities, which may include data collection, committee work, training initiatives, or legislative reform.

## IX. Provide “360°” Advocacy: Attorneys for children and youth should seek to understand their clients as whole people, inside and outside the context of the legal proceedings, and provide holistic advocacy.

**COMMENT:** A neglect or abuse court proceeding can generate a ripple effect across all parts of a child or youth’s ecosystem: their home, relationships, school, community, and more. An attorney cannot fulfill their ethical obligations by merely focusing on the allegations in the immediate legal matter. Instead, they should endeavor to develop a “360°” understanding of their client’s life (“enter the child’s world”)<sup>55</sup>, rigorously test and refresh that understanding to avoid assumptions, and then promote a case theory and holistic case plan tailored to meet the client’s individualized needs.

*“Attorneys should always ask, ‘do you feel safe? Do you have the things you need?’”*

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This duty requires balanced attention to safety, permanency, and well-being at all stages of the legal representation. Although safety assessments are more common at the initiation of representation, youth have commonly reported experiences of fear and danger once in foster care, both in family homes and especially in congregate care or institutional settings.<sup>56</sup> Regardless of the client’s placement or the stage of their case, the attorney should

routinely query the client about their physical and emotional safety. After consultation with their client, and if so directed, attorneys should report harmful and unlawful conditions in foster homes or congregate care settings to the relevant licensing authority, the contracting agency, the court, or ombudsperson. Where the youth directs the expressed interest attorney not to take action, the attorney should continue to counsel their client and help the client develop a safety plan.

A client’s case plan should similarly reflect a “360°” understanding of the youth’s current circumstances and goals for the future. Attorneys should collaborate with the client to develop safety plans, permanency plans, and a case theory to present to the court, cognizant that reasonable efforts<sup>57</sup> and least restrictive environment<sup>58</sup> are touchstone best practices. This may include services to support or restore familial connections, requests for placement, or access to frequent, high-quality family time. Just as requests for family separation at the initiation of the case should be scrutinized<sup>59</sup>, attorneys should also advocate for return home as soon as safely feasible,<sup>60</sup> consistent with client requests.

The case plan should be centered around the youth and driven by the needs and requests of the youth and family (when consistent with client goals), with input from the multidisciplinary team. Youth may have unique insight into what is needed to ensure safety at home; requests should not

55 QIC ChildRep. (n.d.) *Six Core Skills*. <http://improvechildrep.org/QICModelSixCoreSkills/SixCoreSkills.aspx>

56 Fathallah, S. & Sullivan, S. (n.d.) *Away From Home: Youth Experiences of Institutional Placements in Foster Care*. Think of Us. <https://www.thinkof-us.org/awayfromhome>

57 Edwards, L. (2014). *Reasonable Efforts: A Judicial Perspective*. <http://judgeleonardedwards.com/docs/reasonableefforts.pdf>

58 National Center for State Courts. (n.d.) *Every Kid Needs a Family*. <https://www.ncsc.org/everykid>

59 Children’s Bureau, Administration on Children, Youth, and Families, Administration for Children & Families, U.S. Department of Health and Human Services. (2021, January). *CFSR Round 3 Report for Legal and Judicial Communities*, 22. [https://www.naccchildlaw.org/resource/resmgr/nacc\\_recommendations\\_2021/CFSR-Legal-Judicial-Report\\_2.pdf](https://www.naccchildlaw.org/resource/resmgr/nacc_recommendations_2021/CFSR-Legal-Judicial-Report_2.pdf)

60 American Bar Association. (2009, September 11). *Child Safety: A Guide for Judges and Attorneys*. <https://www.americanbar.org/products/inv/book/215601/>

be confined or limited to “cookie-cutter” services or systemic limitations. Depending on age and jurisdiction, children and youth have the right to obtain copies of their court reports and copies of their case plan and may even be required to sign such. Attorneys are obliged to ensure this information is received and reviewed, where applicable.

*“It’s about building [youth] up! Not treating them like broken china or a tragedy or a sob story. Someone that will walk the walk with them.”*

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Legal representation in pursuit of permanency should likewise take into account a 360° view of the client’s life. Attorneys for children and youth should provide robust, developmentally- appropriate advice about the potential effects of all legal permanency options. This should include, at minimum, the impact on the child’s family relationships (with parents, siblings, and kin), the distinction between legal and relational permanency, any possible change in access to government entitlements (subsidies, educational funding), continuity with primary language and culture, and avenues to

access legal and social service support after the conclusion of the court matter. Without a full understanding of these options, traditional steps towards legal “permanency” may produce unintended consequences<sup>61</sup> and additional, unnecessary trauma.

Because facts and circumstances can change rapidly, concurrent planning is critical. To deliver trauma-informed, culturally responsive legal representation, an attorney should investigate and develop plans to account for as many contingencies as are reasonable and foreseeable – and should encourage the agency to do the same. Attorneys should regularly consult with clients about available kin or fictive kin who may serve as supports or possible placement options. Attorneys should assist clients in contacting those individuals and advocating for services and placement.

Youth with lived experience in foster care have articulated that many aspects of their mental and physical well-being were not addressed while they were in foster care. Although attorneys are not clinicians, they can help elevate youth voice in the therapeutic process (ex. by advocating for a change of provider if a youth does not have trust or rapport with current provider), provide legal advice that may help the client engage with providers, ask astute questions, and bring challenges before the court when sound clinical recommendations and best practices are not followed. This obligation is especially salient for youth who are prescribed psychotropic medications.

In consultation with the client, and making every effort to protect client confidentiality, attorneys should assess and advocate for education services and opportunities suited to the client’s age and request (ex. school stability, early intervention services, school discipline protections). Under federal law, parents typically hold the right to access special education services for their child. Attorneys for children can still be helpful collaborators in this process – by attending meetings, facilitating information-sharing where appropriate between systems, and ensuring that clients are aware of the process and have the opportunity to meaningfully participate. Similarly, attorneys should advocate for opportunities for youth to engage in normative childhood activities both within and outside of school settings (ex. sports, arts, peer gatherings, faith traditions, cultural practices, and hobbies).

For older youth, transition-related services such as housing support, independent living services, and driving training are important. Attorneys should make clients aware of the benefits of extended foster care where offered and provide robust advocacy as directed by the client to access the full panoply of related benefits. They should also ensure that high-quality transition plans are

61 Children’s Bureau, U. S. Department of Health and Human Services. (2021, January 5). *Achieving Permanency for the Well-being of Children and Youth*. <https://www.acf.hhs.gov/cb/policy-guidance/im-21-01>

developed before a youth is discharged from court jurisdiction; federal law requires this process to begin at age fourteen.<sup>62</sup> Attorneys for children and youth should be well-positioned to bridge gaps and optimize services that clients may be receiving through multiple government agencies.

*“If I could change one thing, it would be that attorneys develop more of a relationship with youth and work with other people on the youth’s team (social worker, case manager, etc.) to help get a better understanding of what the youth wants. Attorneys should be open, acknowledge your own bias, be willing to learn, be wrong, and unlearn in order to develop more cultural humility.”*

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The scope of the attorney’s appointment should be holistic, to include representation in ancillary matters that impact the client’s safety, well-being, and permanency. This may include related family matters where the child has a legal interest (paternity, child support), educational advocacy, public benefits (SSI, SSDI), criminal legal matters (delinquency proceedings, summary level criminal cases, expungement), victim-witness advocacy, immigration issues, financial or credit concerns, etc. Caseloads should be adjusted commensurate to the scope of holistic representation; an attorney providing legal representation for the client in multiple forums will likely have a smaller caseload than an attorney assigned solely to the dependency case. If an attorney is not competent to represent the child or youth in ancillary proceedings, they should, at minimum, be able to issue-spot and make referrals to appropriate legal services providers. Agencies, organizations, and legal service delivery systems writ large should pursue opportunities for trainings, partnerships, and funding to provide competent legal representation in these matters.

Special attention is warranted for youth who have contact with the juvenile or criminal legal system. Even when counsel’s appointment is limited to representing youth within the neglect or abuse case, their active communication with defense counsel in delinquency matters may help establish context around the allegations, bridge silos between agencies, and streamline access to services. Dependency and defense practitioners should strive for collaboration but stay aware of differing areas of expertise. For example, dependency counsel should never waive a youth’s Miranda rights or any other rights during a criminal investigation or police interrogation. Counsel in both cases should vigilantly consult about confidentiality prior to sharing information with outside parties or agencies. Dependent on state law, dependency counsel should also be cognizant not to make themselves a potential witness in the client’s delinquency case. Dependency counsel should strive to participate in all case events and hearings for dual-status or crossover youth. They should communicate and partner with defense counsel to achieve the best possible outcome for the child client.

62 See 42 U.S.C. 675.

## X. Preserve Continuity of Legal Representation: *Attorneys for children and youth should endeavor to provide uninterrupted legal representation.*

**COMMENT:** Consistent legal representation strengthens the attorney-client relationship, fosters client trust, enhances the attorney's knowledge of the case history, and improves the attorney's advocacy strategies. Attorneys should therefore strive to maintain continuity of representation at all times and avoid unnecessary case transfers. This begins with attention to self-care practices that will enrich the quality of attorney work and sustain their longevity in the field. Secondary traumatic stress can diminish zealous advocacy and attorney efficacy, contribute to biased and inconsistent decision-making, and cause case turnover that is harmful to clients. Addressing compassion fatigue<sup>63</sup> is critical for attorneys to offer enduring, high-quality legal representation to children and youth.

Continuity of representation is not always possible. Therefore, attorneys must engage in proactive planning to minimize the negative impact that turnover has on the timeliness and quality of representation. For example:

*"My attorney made the difference with where I am today. Had they not engaged with me the way they did, my placement and outcome would have been very different. Five minutes before a court hearing is not enough."*

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- **Attorney Unavailability:** Attorneys must plan for possible unavailability (ex. due to sickness, vacation, or family leave). If unable to attend a court hearing or important case event, they should ensure that a trained attorney is available to provide case coverage during their absence. This includes ensuring that the covering attorney has access to case files, electronic information, and other systems necessary to effectively advocate for the client. The attorney should communicate directly with their client to advise them of the need for case coverage and, if there are other members of the legal team who have worked directly with the client (ex. a social worker, investigator or peer partner), endeavor to have that person attend the hearing with the covering attorney.
- **Disaster/ Pandemic Preparedness:** Attorneys should plan for potential disasters that would impact their daily practice, consistent with the Rules of Professional Responsibility and relevant ethics opinions. In an emergency, and as circumstances permit, making early and ongoing contact is critical to assess the client's immediate or emerging needs, apprise the client of how their case may be affected, and reassure them of the attorney's continued diligence and efforts.
- **Case Transfers:** If an attorney must withdraw from a case prior to its resolution, the attorney should plan and adhere to a thoughtful transition. This includes, at minimum, informing the client of the impending change, introducing the client to incoming counsel, and ensuring that the incoming counsel is provided a full, organized file that includes information about immediate needs and next steps.

63 Family Justice Initiative. (n.d.). *Trauma Exposure Response: A Resource for Child Welfare Attorneys*. [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/trauma-exposure-response.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/trauma-exposure-response.pdf); Children's Rights Litigation Committee, American Bar Association. (2020). Addressing Compassion Fatigue: An Ethical Mandate. In *ABA Litigation Section*. Sound Cloud. <https://soundcloud.com/user-15352895/addressing-compassion-fatigue-an-ethical-mandate/s-9QOevqBgKyO>

- **Termination of Representation:** Upon the conclusion of a case, termination of the attorney-client relationship requires clear and honest communication from the attorney to the client. While some clients will not be affected by the end of the relationship, others may experience it as a loss. Attorneys should be mindful to carefully manage expectations as to their future role (future legal questions that the client can or should contact the attorney about). The attorney should also ensure that clients have all pertinent case information as well as clear instructions about how to access case files in the future.
- **Records Retention:** Children and youth should have full access to the court record and agency files from their case. Youth with lived experience have reported that reviewing their case records helped them understand information about their own personal or medical history or identify gaps in services provided to their families. In consultation with the client and when developmentally appropriate, the attorney should assist the client in developing a method to store confidential legal files provided during the pendency of the case. Because foster care is an inherently transient experience, it may be challenging for clients to maintain records of their own case.

*“It’s important for an attorney to build professional partnership [with the youth]. They are not the youth’s friend.”*

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Many children and youth will exit care while they are under the age of legal majority; others may have various reasons for choosing to delay requests to review files. As such, attorneys should securely and confidentially retain copies of court records and agency documents at least until the client’s 30<sup>th</sup> birthday, unless transferred to the client before that time. Whether clients may access all or only elements of the attorney’s legal file is subject to state protocol, but generally attorneys should make sure that information is available to current and former clients.

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