



## Client-Directed Representation Memorandum & Considerations

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September 2021

The OCR believes it is time to introduce legislation that transitions the GAL (best-interests) role to client-directed counsel when a youth in a D&N proceeding becomes 12 years of age and clarifies that children are parties to D&N proceedings. The legislation would allow courts to appoint a GAL for youth 12 and older in addition to counsel in limited circumstances consistent with Colorado Rule of Professional Conduct 1.14.

This transition to client-directed representation will ensure Colorado stays at the forefront of child welfare practice, further elevate youth voice in legal proceedings, promote due process, and advance equity for youth. The legislation would allow courts to appoint a GAL for youth 12 and older in addition to counsel in limited circumstances consistent with Colorado Rule of Professional Conduct 1.14.<sup>1</sup>

### **Reasons for Client-Directed Representation**

This section briefly summarizes the literature and caselaw supporting right to counsel for children, highlighting themes that emerge.

- **Children's Rights:** LaShanda Taylor's 2009 Family Court Review article frames the right to counsel for a child as a due process right pursuant to the analysis set forth in *Matthews v. Eldridge*.<sup>2</sup> This analysis identifies the child's liberty interests to include safety, health, well-being, maintaining the integrity of the family relationship, and having a relationship with biological parents, and it also highlights the actual restrictions on liberty that may result from some out-of-home placements.<sup>3</sup> In this analysis, counsel is characterized as consistent with the state's interest and as substantially decreasing the likelihood of error. Many other supporters emphasize the interests at stake and the procedural rights advanced by counsel.<sup>4</sup> The interests of children in safety, family integrity, and sound judicial decisions have been articulated by the OCR in its *J.G.* amicus brief and by federal court decisions.<sup>5</sup> Linda Elrod notes that the Supreme Court has recognized that constitutional rights "do not mature and come into being magically only when one attains the state-identified age of majority" and since 1954 has "increasingly applied equal protection, due process, and other constitutional provisions to children's claims."<sup>6</sup>

Framing client-directed representation as an evolution from the "child saving" approach to child welfare, Ann Haralambie states, "[b]ecause attorneys for children do not know what is best for children, the child client deserves the respect of having an attorney who will consider his or her positions and the reasons for those positions, who will provide independent counsel to the child to inform those positions, who will attempt to settle the disputes with the other parties, and failing that, who will be an honest broker of the child's positions to the court, and who will marshal the evidence and legal arguments that support those positions."<sup>7</sup> Elrod notes that compounding a system that minimizes children's power and standing with no right to counsel results in not only failure to indicate rights but failure to create rights.<sup>8</sup>

Several court decisions have held that children in custody or dependency proceedings have a constitutional right to counsel.<sup>9</sup>

- **Strong Youth Voice Improves Quality of Decisions:** Many supporters view client-directed representation as necessary for the child "to have a truly meaningful voice in proceedings."<sup>10</sup> This is attributed to the trust inherent in the relationship as well as the importance of the attorney role.

“Attorneys largely control the flow of information to the judge. Attorneys decide what witnesses, evidence, and arguments to present... Without complete relevant information, judges’ decisions may be ill-informed or even tragically mistaken.”<sup>11</sup>

As Ann Haralambie notes, “[c]hildren have their own worldview. They alone know what is of greatest subjective importance to them... what relationships matter... what activities with which they want to remain involved... can often provide valuable info on family interactions and resources. If we really listen to them, we may be surprised at the insights they have about what does and does not work in their families.”<sup>12</sup> The reasons why children express certain interests may be as relevant as the expressed interests themselves, and counsel plays a critical role in understanding those reasons: “We need to go beyond finding out what children want and explore their reasons for what they want, which may lead to the attorney-client partnership in an entirely different direction.”<sup>13</sup>

“No decision by a judge, any more than any conclusion by a scientist, can be better than the data upon which it is based, and adding the child’s own perspective can only help inform a better decision-making process.”<sup>14</sup>

Supporters note that the right to be heard does not equate to giving children the ultimate decision-making power and urge that the court process be considered in its entirety, with the judge as the ultimate decision maker.<sup>15</sup>

- **Children’s “Buy-In” and Sense of Procedural Justice:** Supporters assert that when children believe their positions have been effectively advocated, their resultant feelings of procedural justice and fairness enhance their acceptance of the proceedings and the decisions made.<sup>16</sup> Children’s acceptance of court orders is important because they can prevent decisions from being effectively implemented if they don’t feel included.<sup>17</sup>

In one national study analyzing attorney perspective on six domains defined by youth as important aspects of legal representation (impact, quality, communication, contact, relationship, and competence), attorneys who worked in best interests jurisdictions scored all domains other than competence significantly lower than attorneys in client-directed or hybrid states.<sup>18</sup>

- **Parity:** Supporters assert that children should receive representation in order to place their interests on a level playing field with other parties to the proceeding and that children in D&N proceedings will equally benefit from the entitlement to counsel that exists in delinquency proceedings.<sup>19</sup>
- **Capacity:** Emily Buss asserts that children’s judgment of their best interests often proves sound.<sup>20</sup> It has been asserted that children as young as seven or eight have competence to choose custodians.<sup>21</sup> Commentary to Colorado Rule of Professional Conduct 1.14 states that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”
- **Outcomes:** It is anticipated that a client-directed lawyer will have the ability to establish a trusting relationship with the child client, and that the child will provide their attorney with more candid information regarding long-term placement goals, safety issues, internal desires, and other information that would otherwise be difficult to discover.<sup>22</sup> It has been demonstrated that youth who were provided the opportunity to give their input throughout their case were better able to accept the ultimate outcome of the case, even if the outcome is not what they had hoped for.<sup>23</sup>

Advocates cite to the Palm Beach study as evidence of improved outcomes due to client-directed representation.<sup>24</sup> This study compared case outcomes for children who received expressed interests

legal representation to children who were screened out of receiving such representation due to office conflicts of interest. Children represented by an expressed interest attorney were found to exit to permanency via legal guardianship, adoption, and long-term custody at a higher rate than comparison children, without a statistically significant difference in the rates of reunification. While this study analyzed younger children, a study in Washington state is currently examining the impact of client-directed representation on outcomes for older youth. Preliminary findings indicate that children who receive client-directed legal representation experience more timely permanency, fewer placement changes, greater rates of relative placement and guardianship, and lower rates of involvement in the delinquency system; some of these differences are more pronounced for children deemed “minority” children in the study.<sup>25</sup> While these studies do not compare client-directed representation to best interests representation models, it is notable that the available research demonstrating improved outcomes resulting from children’s attorney services pertain to client-directed rather than best interests models of representation.

- **Shortcomings of Best Interests Model of Representation:** Supporters of client-directed representation note significant shortcomings with the best interests model. They are concerned with the possibility that best interest attorneys are arguing their own view of what is best based on their own biases and perspectives and that best interests representation usurps the role of the judge.<sup>26</sup> They view client-directed representation as more compatible with the attorney role, noting that lawyers are not trained in what is best interests of child but instead as advocates who can “empower the child client and speak for them.”<sup>27</sup> They cite to the difficulties associated with determining best interests and the lack of attorney knowledge and expertise to determine the child’s best interest. The function of an attorney is not to act as a judge before the case is presented to the judge but rather to represent the client.<sup>28</sup> The proper role of an attorney is not to act as a judge but to provide information to judge that will allow judge to make best interest determination.<sup>29</sup> They note that the interests of a child should be at the center of any decision-making and that “the client-directed lawyer can ensure that the best interests standard does not forget the child as its center”.<sup>30</sup> Finally, best interests representation is redundant or irrelevant if it merely echoes what court is charged with doing.<sup>31</sup>
- **Mitigates Potential Bias Risks Associated with Best Interests/Discretionary Decisions:** The decisions in D&N cases—whether a child should remain/return home, the extent and type of family time/visits a child should have, whether a child should see family and siblings—are difficult decisions. The “correct” answers to these questions vary widely among professionals; when attorneys are given wide discretion to determine what position to take with regard to such decisions, both implicit and explicit bias can significantly impact the positions they take.<sup>32</sup>
- **Consistent with National Organizations’ Policies and a Growing National Trend:** The American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases “express a clear preference for client-directed representation,” and the American Bar Association Model Act provides for the appointment of a client-directed “child’s lawyer” in all abuse and neglect proceedings.<sup>33</sup> Proposed Revised NACC Recommendations on Legal Representation of Children, currently under consideration by the NACC’s Board of Directors, will also endorse a client-directed model of representation if promulgated in their current form.<sup>34</sup>

Consistent with these state standards and a growing national trend, recent state reforms providing lawyer services for children have enacted client-directed models of representation.<sup>35</sup>

Just this July, the New Mexico Family Representation Task Force recommended expanding its current model of client-directed representation at the age of 14 to client-directed representation for all children in dependency proceedings.<sup>36</sup> Notably, this Task Force consisted of a multidisciplinary team, including legislators, attorneys, parents, and youth with direct experience working under a

client-directed representation model for older youth.. The recommended expansion of client-directed representation for all children was based on research as well as stakeholders' positive experiences working with a client-directed model for older youth.

- **Support for Bright Line Test/Age of 12:** In support of a bright line test for transitioning to client-directed representation at a set age, Don Duquette notes that such bright line tests exist for other activities and rights, such as voting and driving; asserting that a case by case approach has been determined to be too onerous for these activities and would also be so for the transition to client-directed representation.<sup>37</sup> In Colorado, the age of 12 is recognized as the age at which a youth must consent to their own adoption and provides a logical age for transitioning to client-directed representation. Other states that rely on the age of 12 for the appointment of counsel in D&N proceedings include Idaho and Wisconsin. In Colorado, the age of 12 is also an age at which children can begin to consent to some psychotherapy services.<sup>38</sup>

### Considerations Against and Responses

This section outlines OCR responses to the concerns about client-directed representation expressed in the literature.

- **Developments in understanding of adolescent brain development showing that the brain is not fully mature until after age 18.**<sup>39</sup> Note that while these developments have supported reform in juvenile justice, such as limits on charging children as adults and some of the long-term consequences associated with juvenile adjudications, children in Colorado continue to be eligible for juvenile charges at age 10 and receive client-directed representation in those proceedings. Additionally, a recent article points to the characteristics of youth, such as their still-developing brain structures, decision-making deficits, and likelihood to yield to authority figures' decisions, as characteristics that greatly heighten the need to appoint counsel.<sup>40</sup>
- **Conflict with parental authority/family autonomy.**<sup>41</sup> Best interests representation also raises similar concerns, the threshold for filing a D&N case ensures that attorneys are not appointed to resolve routine family disputes, and the staff of the Colorado's Office of Respondent Parents' Counsel has expressed support for a client-directed model of representation.
- **Children face pressures and influence from others, making client-directed possibly not directed by the child, and client-directed representation may also place psychological burden on children.**<sup>42</sup> This concern points to the need for effective training on child client counseling and communication. A client-directed attorney continues to serve as a support, can assist in decisions, and in most cases establish a relationship that ensures direction is coming from the child client. Independent investigative responsibilities also support the child client in making informed and independent decisions. The legal representation of children is recognized as a specialized area of law, and numerous states and national organizations have training resources to support effective communication and counseling with child clients.
- **Best interests lawyers may be better able to forge communications with social workers, counselors, teachers, etc.**<sup>43</sup> Attorneys' ability to effectively engage in negotiations and collaborative processes is more related to individual attorney skills at communication and relationship-building than the model of representation. Training on effective advocacy in the client-directed role and elevating youth voice will support attorneys in effectively elevating youth voice and advancing youth's positions in negotiations and meetings.

- **Confusion for children as role transitions from GAL to counsel.**<sup>44</sup> As a result of HB 21-1094, the OCR has already begun to develop trainings and practice materials to support attorneys in explaining this transition to children. Explaining this role transition to children is an empowering conversation, and attorneys in states that transition to client-directed representation at some age have not identified child confusion as an issue. The OCR believes that youth will have an easier time understanding a traditional attorney-client relationship than the nuances of the GAL role and unique ethical responsibilities associated with that role.

### **Issues/Questions for Colorado Practitioners**

From its own analysis, three listening forums held with OCR attorneys, a meeting with its appellate litigation support team, and two meetings with Court Improvement Program judges, the OCR has identified the following questions and issues that may need to be addressed as Colorado transitions to client-directed representation.

- **Do youth have capacity to direct counsel? Is client directed advocacy consistent with safety and well-being goals of Children’s Code and child welfare proceedings in general?**

*Related questions from OCR’s listening forums: Some attorneys expressed concerns about whether they would have to advocate for an objective the client wants that the attorney believes is clearly not in the child’s best interests. Given the confidential nature of the attorney-client relationship, attorneys also wondered what they could do if a child/youth tells the attorney something that makes the attorney believe the child/youth is at risk of harm. Additionally, some attorneys asked how client-directed representation will work for children and youth with developmental disabilities.*

Client-directed representation is consistent with the safety and well-being goals of Colorado’s Children’s Code. While the OCR anticipates that client-directed representation will elevate children’s voice in proceedings, the OCR is not proposing legislation that will change the findings courts must make in D&N cases in Colorado. Court orders will continue to be based in findings regarding children’s need for safety, permanency, and family connections. Attorneys’ counseling and communication with children will be grounded in the purpose and provisions of the Children’s Code—attorneys under a client-directed model will help children take tenable positions that also feel safe and acceptable to the child. Children’s positions will not always prevail, and parents, departments, placement providers, and CASAs also present evidence and information to the court. The court as the ultimate decision-maker serves as the safeguard to ensure that placement, contact, or other orders do not place children as a position of harm.

Commentary to C.R.P.C. 1.14 states that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” C.R.C.P. 1.14 requires that a lawyer maintain a normal attorney-client relationship as far as reasonably possible with a client with diminished capacity, including minority, but allows a lawyer to take protective action when the lawyer reasonably believes client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client’s own interests. The lawyer may take reasonably necessary protective action, which includes in appropriate cases the appointment of a GAL. The rule also provides implicit authorization under 1.6(a) to reveal information to the extent reasonably necessary to protect the client’s interests.

As an additional protection to C.R.P.C. 1.14, the OCR can explore legislation that would provide additional guidance for courts in considering whether to appoint a GAL for a youth age 12 and older.<sup>45</sup> As the age of minority alone should not impair a normal attorney-client relationship according to the Rules of Professional Conduct and the purpose of client-directed representation is to empower youth in legal proceedings, any statutory guidance regarding the appointment of a GAL should be carefully constructed to limit the appointment of a GAL to circumstances in which the court may appoint a GAL for an adult.<sup>46</sup>

Examples of states that allow appointment of GAL in addition to counsel include:

- **Arizona:** Upon the effective date of 2021 Ariz. Legis. Serv. Ch. 228 (SB 1391), AZ ST § 8-221(G) will allow courts in dependency proceedings involving allegations that a child is abused or neglected to appoint a GAL to protect the juvenile's best interests. The statute makes clear that the GAL is not the child's attorney.
- **Connecticut:** The court may appoint separate GAL if the court or counsel believes that the child cannot adequately act in his or her own best interests and the child's wishes could lead to substantial physical, financial, or other harm. Conn. Gen. Stat. Ann. § 46b-129a(2)(D).

➤ **Will client-directed representation impact attorneys' credibility with the court? Are the positions of attorneys representing the objectives of a child less likely to prevail in court than the positions of attorneys representing children as their GALs?**

Preliminary conversations with some other states indicate that judges want to hear the position of children and that counsel's obligation to represent the child's position is exactly what gives counsel credibility with the court. The OCR recognizes that a shift from a client-directed role that will give children true voice and standing in dependency proceedings will be in some ways a cultural shift in Colorado, and the OCR will not only train and support attorneys in providing effective advocacy in this model of representation but will also train judicial officers and other stakeholders on the expectations of this role. The OCR believes that a clear understanding of the counsel role will promote attorneys' credibility.

The OCR does not know whether attorneys are more or less likely to prevail in their advocacy under a client-directed model of representation. At the end of the day, it is the attorney's job not to win but to provide their client with diligent and competent representation that advances the client's objectives. Procedural justice is important, and feeling that their position has been effectively represented is likely equally or more important to children/youth than having an attorney whose position doesn't align with theirs "win" at a contested hearing or trial.

➤ **How will attorneys ensure that the child's stated position is truly the position of the child and not the result of undue influence by others? How will attorneys advocate for a child's position when the child doesn't want their parents to know their position?**

In a client-directed model of representation, the relationship between the attorney and child is essential to ensuring that the child understands their choices and is making an informed and independent decision. Numerous national and state trainings exist on this skill,<sup>47</sup> and the OCR will survey those trainings to develop a training that specifically meets the needs of Colorado attorneys. Additionally, practice standards in some states, such as Massachusetts's Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases (Standard 1.6), outline specific actions that an attorney must and may take to effectively elicit the child's preferences. When a child's position does not align with the position of their parents, advocacy grounded legal standards and facts will effectively advance the child's position without making the child's preferences the subject of the litigation.

- **How will client-directed representation impact the assessment of the psychotherapist-patient privilege holder in a D&N case?** While the Colorado Supreme Court’s decision in *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013), begins its analysis of the privilege holder in a D&N proceeding with the question of whether the child is able to exercise their privilege, it does not provide guidance as to how courts should determine whether the child is of sufficient age or competence to hold the privilege. The OCR believes that providing counsel to children at age 12 will provide additional guidance as to when children should hold their own privilege, as a child receiving client-directed representation should be able to direct important decisions about their privacy in the proceeding. The age of 12 for exercising the privilege is consistent with the age at which children can begin to consent to some psychotherapy services in Colorado.<sup>48</sup>
  
- **Will more children need to come to court under a client-directed model of representation?** While not all states that have client-directed representation appear to have high rates of youth court attendance, the OCR believes that providing client-directed counsel will continue to build on Colorado’s efforts to include and empower children and youth in court proceedings. For children and youth who do not want to appear in court, practice standards and training can serve to ensure that counsel appropriately represents the child’s current position in court hearings and explaining the court process and decisions to children.
  
- **How will appeals be handled for youth 12 and older? Will a separate attorney be required due to potential conflict of interests/ineffective assistance of counsel claims? What happens if a child turns 12 during the pendency of an appeal? What happens if a child changes their mind about their objective during the appellate process?** Youth 12 and older will also receive client-directed representation on all D&N appellate matters. To assess the potential appellate impact, the OCR is requesting data from State Judicial to assess the number of D&N appeals involving youth 12 and older as well as the number of adjudication and termination orders involving youth 12 and older. As at the trial level, the parameters of attorneys’ appellate advocacy will be defined not only by the child’s wishes but also by appellate procedure and substantive law. Attorneys will consult with their child clients about the appellate process to explain available options and to support youth in determining whether to file an appeal and the position to take on appeal. Offices that provide appellate representation in other client-directed states can provide support and training on this, and the OCR has attended a training at the August 2021 NACC conference on this topic. The OCR has reached out to those presenters requesting their materials, and the OCR is asking other states in its outreach about whether and how they have addressed the legal, practical, and ethical implications of client-directed representation on appeals. The OCR will consult with Colorado offices such as the Office of the Public Defender and Alternative Defense Counsel in determining what, if any, practice standards or protocols should exist regarding the requirement for substitution of counsel on appeal.
  
- **Does the child and/or GAL’s party status need to change? YES**  
 § 19-1-111(3) currently provides that the GAL shall have the right to participate in all proceedings as a party. While children are given some rights to notice and to be consulted, *see, e.g.*, 1§ 19-3-502(7), children are not clearly defined as parties to the proceeding by Title 19 or the Colorado Rules of Juvenile Procedure. Children do not have specified rights of parties, such as right to demand jury trial. *See* § 19-3-202(2).

To fully effectuate representation by counsel, Title 19 and the Rules of Juvenile Procedure should be amended to make clear that the child is a party to the proceeding. A number of states, including

*California, Hawaii, Iowa, Kansas, Louisiana, Minnesota, North Carolina, Oklahoma, Oregon, Rhode Island, Vermont, and Wyoming* identify the child as a party in statute. Other states, including *Arizona, Florida, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Mexico, Ohio, and West Virginia* define party status of child in their court rules. While not all of these states provide for client-directed representation for the child, the number of states defining the child as a party to the case is notable and these statutes and rules serve as models for potential legislation. As Colorado Children's Code addresses party status of GALs, party status of children should also be addressed through legislation rather than rule alone.

- **How do we protect against some of the potential implications of granting children party status? Will children more often be put in the middle of litigation, face onerous and traumatizing discovery processes, be more likely to be called as witnesses?** From preliminary conversations with a small number of other states, this does not appear to be an issue. Practitioners note that rules of discovery protect against discovery abuse, and courts are particularly willing to enforce those protections in matters concerning children. The OCR will continue to explore this question as it expands its state and national outreach efforts. As a member of the Colorado Juvenile Rules Committee, the OCR will continue to advocate for discovery rules that appropriately protect children and that are consistent with due process. As for being called as a witness, the OCR does not believe that party status will increase that possibility; in fact, as client-directed representation requires an attorney to pursue the objective of the child, the OCR believes that a shift to client-directed representation should reduce the number of cases in which children's preferences are in question and the need to call a child as a witness exists.
  
- **What, if any, amendments to CJD 04-06 would be necessary to effectuate this representation?** CJD 04-06 makes clear that the OCR has oversight and payment authority for counsel in D&N proceedings. The OCR, however, should propose practice standards for client-directed representation. The OCR is already working on developing youth counsel practice standards pursuant to House Bill 21-1094, and this work will inform practice standards for counsel for youth in D&N proceedings.

The promulgation of standards is consistent with the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings and NACC Recommendations for Representation of Children in Abuse and Neglect Cases. In addition to the ABA example, the OCR can look to examples from a number of other states, including but not limited to *Arizona, California, Connecticut, Louisiana, Massachusetts, New Mexico, New York, Oklahoma, Texas, and Vermont*. The following state examples set forth particularly detailed responsibilities that the OCR should consider in recommending practice standards to the Chief Justice.

- **Arizona** – Attorneys and guardians ad litem shall participate in discovery and file pleadings when appropriate and attorneys must develop the child's position for each hearing. The attorney and guardian ad litem shall meet in person with the child before the preliminary protective hearing, if possible, or within fourteen (14) days after the preliminary protective hearing. Thereafter, the attorney and guardian ad litem for the child shall meet in person with the child and have meaningful communication before every substantive hearing. Attorneys and guardians ad litem shall also maintain contact with caretakers, child safety investigators and workers, service providers, childcare providers, CASAs, relatives and any other significant person in the child's life as appropriate in order to meet the obligations of informed representation of the child. To the extent possible, attorneys and guardians ad litem should attend or provide input to Department of Child Safety staffings, Foster Care Review Board reviews and Child and Family Team meetings. AZ ST JUV CT Rule 40.1(C–F)



- **Louisiana** Supreme Court Rule XXXIII Subpart II, available at <http://www.lasc.org/rules/supreme/RuleXXXIII.asp>, contains standards for attorneys. Standards define ethical responsibilities of lawyer (same duties as for adult), require counsel to “ensure client-based direction by structuring all communications to account for the child’s age, level of education, developmental level, cultural context, and degree of language acquisition,” set forth advocacy and investigation responsibilities; meeting with child no later than 15 days after appointment, prior to all court hearings, and when advised of any change of circumstances; investigating , defined to include review of records, contact with parents, guardians and caretakers, interviewing other individuals, and attending treatment placement and administrative hearings; filing pleadings; request for services consistent with child’s witnesses; participating in mediation and settlement agreements and hearings; continuing duties, and appellate review.
- **Massachusetts** has [Performance Standards Concerning the Representation of Parents and Children in Child Welfare Cases](#). These standards contain a detailed description of duty to maintain contact with child and value independent investigation in the context of counsel being aware of and understanding the factors that influence the child’s decision-making process. Requirements for preparing for hearings are also enumerated in standards. Standard 3 defines investigation and discovery obligations in terms of obligation to develop and support client’s position. Areas of advocacy are specifically set forth in Standard 4 (Seeking Client Objectives) and relate to services, visits, pleadings, and experts.
- **New Mexico:** Standards for GALs, youth attorneys, and RPC are attached to relevant chapters of [NM Child Welfare Handbook](#). Youth attorney standards set forth minimum training requirements and provide for zealous representation of expressed interests and expressed cultural needs, representation of youth in accordance with Code of Professional Responsibility and confidentiality requirements, consultation with youth, accessibility to youth, attendance at various meetings, gathering and reviewing information (including review of written information, interviews with various folks, and personal observation of youth’s interaction with parents when reunification is anticipated), consultation with professionals involved in youth’s service plan and requests for services (after consultation with youth), courtroom performance, and appellate representation.
- **New York** – The New York State Bar Association periodically approves Standards for Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings (Jan. 2015). The Standards are developed by the Committee on Children & the Law and are intended to define what constitutes effective representation of children (<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55894>). The Standards include general duties, confidentiality, sibling conflicts, child participation and substituted judgment.
- **Texas:** Texas Family Code provides performance requirements for attorneys ad litem, including advising the child, representing the child’s expressed objectives, interviewing the child (4 and older) and persons with significant knowledge about the child’s history, seek to elicit in a developmentally appropriate manner the child’s expressed objectives, consider the impact on the child in formatting the attorney’s presentation of the child’s expressed objectives of representation to the court, investigate the facts of the case to the extent the attorney considers appropriate, obtain and review copies of relevant records. Tex. Fam. Code Ann. § 107.003(1). The attorney ad litem shall meet before each court hearing with the child if the child is at least age 4 or the person with whom the child ordinarily resides if the child is younger than age 4. If the child is not present at the court hearing, the attorney must file a written statement with the court indicating that the attorney has met with the child as required. Tex. Fam. Code Ann. § 107.004(d).

➤ ***Will attorneys face more conflicts of interest in a client-directed representation model than in a best interests model? Can CJD 04-06 address conflict issues as do some state standards?***

The transition to client-directed representation alone will not automatically create a conflict of interest, as the client-directed role has more expansive protections (i.e., confidentiality) than a client-directed role. However, attorneys who are also appointed as GAL on a delinquency or direct file case will not be able to simultaneously represent the youth as counsel in the D&N and GAL in the delinquency case due to conflicting ethical obligations associated with each role. Similarly, it is possible that attorneys may face more conflicts among sibling groups as one sibling's objective and the strategy necessary to advance that objective may be in conflict with another sibling's objective or best interests.

The OCR is in the process of pulling data to assess the number of youth age 12 and older in sibling groups and the number of youth in D&N cases who also have at least one crossover delinquency case. The OCR intends to work with the Office of Attorney Regulation Counsel in considering whether to propose any specific practice standards in CJD 04-06 that would inform attorneys' conflict analysis.

Following are examples of other states' special conflict of interests rules for client-directed counsel.

- ***California*** Rules of Court set forth specific conflict of interests rules with regard to sibling representation. Counsel must decline representation on sibling group if actual conflict of interest exists or circumstances specific to the case present a reasonable likelihood of an actual conflict of interest. Once appointed, counsel must monitor for conflict but need only take action if an actual conflict exists. The rule defines specific circumstances that do not necessarily demonstrate an actual conflict or reasonable likelihood of a conflict, sets forth a procedure for withdrawal due to conflict, and provides when an attorney can continue to represent some siblings in the event of an actual conflict. *See* CA ST FAM JUV Rule 5.660 (c).
- ***Louisiana*** Supreme Court Rule XXXIII Subpart II Standard 5 states that if counsel has formerly represented another party in the case or is appointed for siblings, there may be a conflict which could require that counsel decline representation or withdraw from representing all of the children.
- According to ***Maryland*** Guideline C2(f), child's attorney must determine whether a conflict of interest requires attorney to move to withdraw from representing one or all of clients. While siblings are listed as an example in potential conflict scenarios, no other information about making determination appears in the rule. MD R JUV CAUSES Child Advocacy Guidelines, Title 11: Juvenile Causes (2001).
- ***Massachusetts*** specifically lists appointment to represent multiple siblings that have different positions as a conflict requiring counsel to withdraw from representing all or some of clients. Standards also point out that rarely will children have capacity to consent to conflict and that "counsel should be mindful of the conflict in continuing to represent any of the multiple clients when counsel holds confidences from some or all of clients." Performance Standards Concerning the Representation of Parents and Children in Child Welfare Cases, Standard 1.4.
- ***New Mexico*** Court Rule 10-313.1 provides that the court may appoint the same attorney to represent the best interests of children under age 14 in a sibling group as GAL and over age 14 as attorney. NM R. CHILD CT Rule 10-313.1. The rule provides that attorney must decline appointment if a concurrent conflict of interest exists (direct adversity or significant risk of materially limited representation) but also provides that an attorney may provide representation in a concurrent conflict of interest situation if multiple conditions are met, which includes informed consent by any sibling age 14 or older. The rule also identifies circumstances that do not constitute a conflict of interest and allows the attorney to continue

to represent one or more siblings if there is an actual conflict of interest even without consent if multiple conditions are met.

➤ **Will counsel be able to access information to the same extent as GALs? Will counsel's ability to access relevant and important information be limited by minor status of the child?**

Given the lack of clear authority children have to consent to the release of their educational, medical, behavioral health, education, and legal records, the OCR believes that the Children's Code must be amended to ensure client-directed counsel for children are able to access the information they need to effectively represent and counsel their child clients.

Following are some state examples providing counsel for children access to information:

- **Louisiana:** LSA-Ch C. Art. 607(B) provides that attorney has authority to represent the child at all stages of the proceeding and to take actions including but not limited to accompanying the child and being present for all court appearances, school hearings, and educational and other meetings and to view and copy the child's medical, dental, psychological, psychiatric, educational or counseling records. La. Child. Code Ann. art. 607(B).
- **California** –For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner, as defined in former Section 11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case that are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request. Cal. Welf. & Inst. Code § 317 (f).

➤ **What would be the guidelines/parameters for kids to request new counsel and parameters around retaining counsel off of the OCR's list?**

The OCR's statutory authority provides for OCR oversight of the legal representation of children. As the legal representation of children is a nationally-recognized specialized area of law and children in D&N proceedings are a particularly vulnerable population, the OCR's oversight serves as an important protection to ensure that only trained and conflict-free attorneys subject to specialized practice standards represent children in these proceedings. While choice in counsel advances the goal of youth empowerment, court-appointed counsel is not an unlimited resource. The area of criminal law provides a helpful framework for analyzing the circumstances under which youth should be able to request new counsel in their D&N cases.

➤ **Does the OCR need to consider proposing any kind of statutory immunity for client-directed attorneys, similar to the quasi-judicial immunity currently applicable to GALs? Will client-directed attorneys be grieved more frequently than GALs?**

The reasoning in the caselaw providing for GAL's qualified immunity rests on the GAL's relationship with the court, analyzing the GAL as the court's investigative arm. While qualified immunity serves as a protection for attorneys, it is regarded by some child advocates as undermining the rights of the child. *See, e.g.*, First Star Report (deducting points from states that provide for immunity for child's attorney). For states that use a contract-based system of providing legal representation instead of government employees, such as Colorado, qualified immunity provides an important protection to contractors performing an essential governmental function. Colorado should

consider enacting an immunity statute for counsel for youth that provides similar protections to attorneys performing work under contracts with the Office of Alternate Defense Counsel.<sup>49</sup>

### **Overview of Other State Provisions/Leading State Examples**

While not all states provide a right to counsel for children/youth, there are currently **28** states that provide for client-directed counsel in some form. The table in Appendix A (see attachment) details state statutes providing for client-directed representation in some manner. In summary, **13** states are identified as client-directed (Arizona, Connecticut, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, North Dakota, Oklahoma, Vermont, West Virginia); **two** states mandate the appointment of counsel due to GAL conflict or GAL non-attorney status (Mississippi, and South Carolina); **eight** states define a dual or hybrid role in which the attorney serves as both counsel for the child and the GAL (California, Georgia, Illinois, Iowa, Nebraska, Ohio, Pennsylvania, Texas.); and **five** states provide for the appointment of counsel at a specified age (Idaho, Minnesota, New Mexico, Washington, and Wisconsin). Just last legislative session, **three** states enacted client-directed legislation (Arizona, Washington, and North Dakota), demonstrating a growing national trend to adopt client-directed models of representation rather than best interests models that is consistent with the American Bar Association and National Association of Counsel for Children endorsements and standards.

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<sup>1</sup> See §§ 13-91-102, 105, C.R.S.

<sup>2</sup> 424 U.S. 319 (1976)

<sup>3</sup> LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, FAMILY COURT REVIEW (October 2009).

<sup>4</sup> Andrea Khoury, *Why A Lawyer? – The Importance of Client-Directed Legal Representation for Youth*, 48 FAMILY COURT REVIEW 277-83 (2010); Ira Lustbader and Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from Kenny A*, 36 NOVA L. REV. 407 (2012); Linda Elrod, *Client-Directed Lawyers for Children: Is it the Right Thing to Do*, 27 PACE LAW REVIEW Issue 4 Article 12 (2007); *Quality Improvement Center on the Representation of Children in the Child Welfare System: Needs Assessment Literature Review*, UNIVERSITY OF MICHIGAN LAW SCHOOL, (Sep. 2010).

<sup>5</sup> See *Duchesne v. Sugarman* 566 F.2d 817, 825 (2d Cir. 1977); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5<sup>th</sup> Cir. 2000).

<sup>6</sup> Elrod, *supra* note 4 at 883.

<sup>7</sup> Ann Haralambie, *Humility and Autonomy In Child Welfare and Custody Representation of Children*, 28 HAMLINE J. PUB. L. & POL'Y 177, 196-97 (2006).

<sup>8</sup> Elrod, *supra* note 4, at 880 (quoting A.J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L. Q. 320, 324 (1970).

<sup>9</sup> *Kenny A. v. Perdue*, 356 F.Supp. 2d 1353, 1359 (N.D. Ga 2005) – Georgia Constitution provides right to counsel for children in deprivation cases and proceedings even if there is not a statutory right to counsel. See also *Roe v. Conn*, 417 F.Supp 769, 780 (M.D. Ala 1976) (Alabama child custody procedure violates due process clause of federal Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding...); *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993) (holding in addition to a statutory right the Due Process Clauses of the Federal and State Constitutions mandate that there be some form of legal representation of the child's interests in the proceedings...because the child's liberty interests are clearly at stake). *In re H.R.C.*, 781 N.W.2d 105, 115 (Mich Ct App 2009) – Children have a right to be

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appointed counsel and that the child's attorney has the same duties that any other client's attorney would fulfill when necessary); *N.J. Div. of Youth & Family Servs. v. Wandell*, 382 A.2d 711, 713-14 (N.J. Cumberland County Ct. 1978) (Surely if due process required that a mature adult subjected to these proceedings requires the assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself); *In re T.M.H.*, 613 P.2d 468, 470-71 (Okla. 1980) ("We are convinced that in all termination proceedings there are potential conflicts between the interests of the children and those of both the state and the parents as contemplated by [statute] which are general statutes not necessarily covering only termination. Thus we hold under the above quoted statutes, independent counsel must be appointed to represent the children if termination of parental rights is sought."); *Matter of Guardianship of S.A.W.* 856 P.2d 286, 289 (Okla. 1993) (extending *T.M.H.* to private parental termination actions where counsel for child could have presented evidence regarding child's desire to maintain parental ties).

<sup>10</sup> See Khoury, *supra* note 4 at 279.

<sup>11</sup> Taylor, *supra* note 3 at 609 (citing Mark Hardin testimony before the Subcommittee On Income Security and Family Support of the House Committee on Ways and Means (Apr. 8, 2003)).

<sup>12</sup> Ann Haralambie, *Recognizing the Expertise of Children and Families*, 6 NEV. L. J. 1277, 1282 (2006).

<sup>13</sup> *Id.* at 1282.

<sup>14</sup> Haralambie, *supra* note 7 at 195.

<sup>15</sup> Elrod, *supra* note 4 at 875; Donald Duquette, *Two Distinct Roles/Bright Line Test* 6 Nev. L.J. 1240, 1247 (2006). See also Haralambie, *supra* note 6 at 195 ("The fact that some judges routinely rubber stamp what the child's attorney or GAL advocates is most appropriately remedied by greater training for judges, not by depriving the child of a real voice at the table and real advocacy.").

<sup>16</sup> See Khoury, *supra* note 3 at 279; Taylor, *supra* note 2 at 619.

<sup>17</sup> Emily Buss, *You're My What? – The Problem of Children's Misperceptions of Their Lawyer's Roles*, 64 FORDHAM LAW REVIEW 1699 (1996).

<sup>18</sup> Kerease Epps and Allison Green, *Statistically Speaking: youth in Foster Care Articulate What They Need from Legal Counsel; Will Attorneys Respond?* 41 CHILD.'S LEGAL RTS. J. 51 (2021); J.Jay Miller, Jessica Donahue-Dioh, Larry Owens, *Examining the Legal Representation of Youth in Foster Care: Perspectives of Attorneys and Attorney Guardians ad Litem*, CHILDREN AND YOUTH SERVICES REVIEW 115 (2020).

<sup>19</sup> Khoury, *supra* note 3 at 278; Taylor, *supra* note 3 at 612. Note that while similar interests may exist in D&N proceedings as in JD proceedings, the presumption of alignment of interests with parents, availability of parents to support and assist child in making decisions may be different in JD than in D&N cases, and that C.R.S. § 19-1-111 provides for discretionary appointment of GAL in circumstances in which parents are not available or aligned.

<sup>20</sup> Buss, *supra* note 17 at 1704.

<sup>21</sup> Randy Frances Kande, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 363 (1994) available at <http://repositorylaw.miami.edu/umlr.vol49/iss2/3>.

<sup>22</sup> See Khoury *supra* note 3 at 179.

<sup>23</sup> *Id.* citing HOME AT LAST: MY VOICE, MY LIFE, MY FUTURE (2008) available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Foster\\_care\\_reform/foster\\_care\\_MyVoiceMyLife.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Foster_care_reform/foster_care_MyVoiceMyLife.pdf).

<sup>24</sup> Andrew Zinn and Clark Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children's Permanency Outcomes*, 53 FAMILY COURT REVIEW, 589 (2015); Andrew E. Zinn and Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO (2008).

<sup>25</sup> OCR currently has a paper by Carl McCurley, Washington State Center for Court Research on file and anticipates an official report to be released in the upcoming months.

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- <sup>26</sup> *Quality Improvement Center on the Representation of Children in the Child Welfare System: Needs Assessment Literature Review*, UNIVERSITY OF MICHIGAN LAW SCHOOL, (Sep. 2010); Andrea Khoury, *Why A Lawyer? – The Importance of Client-Directed Legal Representation for Youth*, 48 FAMILY COURT REVIEW 277, 278-79 (2010); MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005); Martin Guggenheim, *Reconsidering the Need for Counsel in Child Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998).
- <sup>27</sup> Elrod *supra* note 4 at 911.
- <sup>28</sup> Haralambie *supra* note 7 at 196.
- <sup>29</sup> See Taylor, *supra* note 3 at 618.
- <sup>30</sup> Elrod *supra* note 4 at 905.
- <sup>31</sup> Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441 (2000).
- <sup>32</sup> Vivek Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, THE IMPRINT (June 21, 2020) (last visited 9/14/21 at <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616>). See also Vivek Sankaran, *Let’s Be Honest: “Best Interest” Is in the Eye of the Beholder*, THE IMPRINT (September 25, 2019) (last visited 9/14/21 at <https://imprintnews.org/opinion/lets-be-honest-best-interest-is-in-the-eye-of-the-beholder/37784>).
- <sup>33</sup> ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES A-2 Commentary.
- <sup>34</sup> See <https://www.naccchildlaw.org/news/575407/Call-for-Comments-Revised-NACC-Recommendations-on-Legal-Representation-of-Children.htm>; ABA Model Act Governing the Representation of Children Section 3 (available at [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)).
- <sup>35</sup> See, e.g., Ariz. Rev. Stat. § 8-221(A), (G) (SB 1391)(requiring courts to “appoint an attorney for a child in all delinquency, dependency or termination of parental rights proceedings that are conducted pursuant to this title,” and clarifying that “[t]he guardian ad litem is not the child’s attorney.”); ([WA LEGIS 210 \(2021\), 2021 Wash. Legis. Serv. Ch. 210 \(S.S.H.B. 1219\) \(1\)\(a\)](#)) (amending Wash. Rev. Code § 13.34 to require the appointment of counsel upon the filing of the dependency petition for children age eight and older).
- <sup>36</sup> Family Representation Task Force Report and Recommendations at 7, Attachment at 7 (July 15, 2020) (available at <https://www.nmcourts.gov/wp-content/uploads/2021/02/Family-Representation-TF-Report-to-Legislature.pdf>).
- <sup>37</sup> Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006).
- <sup>38</sup> See § 12-245-203.5(2), C.R.S. (allowing a mental health professional to provide psychotherapy services to a minor age 12 or older if certain conditions are met).
- <sup>39</sup> Barbara Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer at All?* 53 ARIZONA LAW REVIEW 381, 408 (2011).
- <sup>40</sup> Kevin Lapp, *A Child Litigant’s Right to Counsel*, 52 LOYOLA OF LOS ANGELES LAW REVIEW 463, 473-74 (2019).
- <sup>41</sup> Elrod *supra* note 4 at 889
- <sup>42</sup> University of Michigan *supra* note 24.
- <sup>43</sup> *Id.*
- <sup>44</sup> Barry J. Berenberg, *Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases*, 36 N.M. L. REV. 533, 549 (2006).
- <sup>45</sup> While § 19-1-105(2), C.R.S. currently provides that “if the court finds that it is in the best interest and welfare of the child, the court may appoint both counsel and a guardian ad litem,” this language is surrounded by reference to truancy proceedings and hence somewhat ambiguous authority for appointment of a GAL in addition to counsel.

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<sup>46</sup> See, e.g., § 19-1-111(2)(c), C.R.S.

<sup>47</sup> See, e.g., *Attorneys for Children Guide to Interviewing Clients: Integrating trauma Informed Care and Solution Focused Strategies (2011)* (available at <https://ocla.wa.gov/wp-content/uploads/2017/07/Attorneys-for-Children-Guide-to-Interviewing-Clients-Trauma-and-Solution-Focused.pdf>); American Bar Association Children's Rights Litigation Committee, *Interviewing the Child Client: Approaches and Techniques for a Successful Interview* (video available at <https://www.youtube.com/watch?v=OYLWkVHvgOM>).

<sup>48</sup> See § 12-245-203.5(2), C.R.S. (allowing a mental health professional to provide psychotherapy services to a minor age 12 or older if certain conditions are met).

<sup>49</sup> See § 22-2-107, C.R.S.